

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-02/05-03/09**

Date: **18 September 2014**

TRIAL CHAMBER IV

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

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

Public

Public Redacted Version of "Defence Application for Leave to Appeal the Decision on 'Warrant of arrest for Abdallah Banda Abakaer Nourain' and in the alternative Request for Reconsideration"

Sources: Defence Team of Abdallah Banda Abakaer Nourain

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

The Office of the Prosecutor

Ms. Fatou Bensouda
Mr. James Stewart
Mr. Julian Nicholls

Counsel for the Defence

Mr. Karim A. A. Khan QC
Mr. David Hooper QC

Legal Representatives of the Victims

Ms. Hélène Cissé
Mr. Jens Dieckmann

Legal Representatives of the Applicants

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

Mr. Herman von Hebel

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. On 11 September 2014, the Trial Chamber, by Majority (Judge Eboe-Osuji dissenting), issued the decision on *Warrant of arrest for Abdallah Banda Abakaer Nourain* (“Impugned Decision”).¹ In addition to replacing the summons against Mr. Banda with an arrest warrant, the Impugned Decision, *inter alia*, “[v]acate[d] the trial date of 18 November 2014 and suspend[ed] preparatory measures for the trial as well as rulings for pending filings until Mr Banda’s arrest or voluntary appearance before the Court”.² On 15 September 2014, Judge Eboe-Osuji filed his dissenting opinion to the Impugned Decision (“Dissent”).³

2. The defence for Abdallah Banda Abakaer Nourain (“Defence”) hereby applies for leave to appeal the Impugned Decision with respect to the following issue arising out of the decision:

Whether the Trial Chamber erred in issuing an arrest warrant and determining that all trial preparations should cease without providing the Accused an opportunity to be heard on these matters in circumstances where the Accused has not violated the terms of his summons nor any other order of the Court [REDACTED].

3. The Defence submits that this issue satisfies the remaining prongs of the Statutory test for seeking leave to appeal an interlocutory decision.⁴ If the Impugned Decision is materially flawed on the basis of the identified issue, the entirety of the fairness of the proceedings against Mr. Banda is called into question as these “staggering steps”,⁵ have been taken without providing Mr. Banda the opportunity to be heard on these most critical of matters.

¹ ICC-02/05-03/09-606.

² *Ibid.*, para. 26 (viii).

³ Dissenting Opinion of Judge Eboe-Osuji in the Decision on ‘Warrant of arrest for Abdallah Banda Abakaer Nourain’, ICC-02/05-03/09-606-Anx-Corr.

⁴ Rome Statute (“Statute”), Article 82(1)(d).

⁵ Dissent, para. 4.

4. The fairness of proceedings will also be significantly impacted as the Impugned Decision, if improperly rendered, will have greatly impinged on Mr. Banda's Article 67(1)(c) right to be tried without undue delay. The suspension of trial preparations including the determination of pending motions effectively results in both the Defence and the Prosecution being unable to efficiently and properly continue their trial preparations and, of course, indefinitely vacates the actual commencement of trial.
5. In view of the above-described impact on trial preparations and commencement, the significant negative impact on the expeditiousness of proceedings is, self-evidently, likewise at risk.
6. Finally, an "authoritative determination" by the Appeals Chamber regarding the identified issue will materially advance the proceedings by "ensuring that [...] [they] follow the right course"⁶ – namely, resolving the fundamental issue of whether or not proceedings in the case should come to an effective standstill.
7. In the alternative, should the Chamber determine that the test for leave to appeal the Impugned Decision is not met with respect to the identified issue, the Defence respectfully requests that the Chamber reconsider the Impugned Decision on grounds that it is manifestly unsound and its consequences manifestly unsatisfactory. As noted above, issuing an arrest warrant against Mr. Banda without providing the Defence an opportunity to be heard on the matter in circumstances where Mr. Banda has not violated the terms of his summons or any other order of the Court [REDACTED] calls into question the basic fairness and legal soundness of the Impugned Decision. Similarly, the consequences of the Impugned Decision – namely the non- achievement of the core aim of

⁶ Situation in the Democratic Republic of Congo, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006 ("Decision on Extraordinary Review Application"), para. 15.

securing Mr. Banda's attendance at trial and otherwise effectively suspending proceedings in this case are indeed manifestly unsatisfactory consequences.

II. Confidentiality

8. Pursuant to Regulation 23bis(2) of the Regulations of the Court this filing is submitted on a confidential and *ex parte* basis as it refers to information that is likewise classified. [REDACTED].⁷ The Defence will accordingly file both a confidential redacted version available to the Legal Representative of Victims and a public redacted version of this filing, both with limited redactions applied to information falling within the above-described categories.
9. [REDACTED].

III. Applicable Law

Test for leave to appeal interlocutory decisions pursuant to Article 82(1)(d)

10. A successful application for leave to appeal an interlocutory decision must satisfy the requirements of Article 82(1)(d) of the Statute, which states that a party may appeal
- [a] decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.*
11. Accordingly, the particular elements that an application must meet under Article 82(1)(d) of the Statute are:⁸

⁷ [REDACTED].

⁸ See, e.g., Decision on the Prosecution's Application for Leave to Appeal the "Decision on the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence", ICC-02/05-03/09-179, 13 July 2011 ("Decision on Leave to Appeal Disqualification of Counsel Decision"), para. 5; Decision on the Prosecution's Application for Leave to Appeal the "Reasons for the Order on translation of witness statements (ICC-02/05-

- a) Whether the matter is an “appealable issue”;
- b) Whether the issue at hand could significantly affect either the:
 - i. Fair and expeditious conduct of the proceedings, or
 - ii. The outcome of the trial; and
- c) Whether, in the opinion of the Chamber, an immediate resolution of the issue by the Appeals Chamber could materially advance the proceedings.

12. The criteria set out in subparagraphs a), b) and c) above are cumulative. Accordingly, failure to fulfil one or more of these requirements is fatal to an application for leave to appeal.⁹

13. Further to this Court’s settled jurisprudence, an appealable issue must emanate from the ruling of the impugned decision,¹⁰ must be an “identifiable subject or topic requiring a decision for its resolution” and “not merely a question over which there is disagreement or conflicting opinion”,¹¹ and its resolution must be “essential for the determination of matters arising in the judicial cause under examination”.¹²

14. The requirement set out in element (b) of the leave to appeal test consists of two disjunctive elements. In regard to the first, the Appeals Chamber has stated that “[t]he term ‘fair’ in the context of article 82 (1) (d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the

03/09-199) and additional instructions on translation”, ICC-02/05-03/09-243, 1 November 2011 (“Decision on Leave to Appeal Translation of Statements”), para. 5.

⁹ Decision on Leave to Appeal Disqualification of Counsel Decision, para. 6; Decision on Leave to Appeal Translation of Statements, para. 6.

¹⁰ See, e.g., *Prosecutor v. Lubanga*, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, ICC-01/04-01/06-915, 24 May 2007, paras. 56-59; Decision on Leave to Appeal Translation of Statements, para. 10.

¹¹ Decision on Extraordinary Review Application, para. 9.

¹² Decision on Extraordinary Review Application, para. 9.

corresponding human right, incorporated in the Statute”.¹³ Included within the attributes of a fair trial are the “expeditious conduct of the proceedings in one form or another [...], as well as the investigation of crime”.¹⁴ With respect to the element of “expeditiousness of proceedings”, this has been held “to be closely linked to the concept of judicial proceedings ‘within a reasonable time’” and to complement “the guarantees afforded to [an accused], such as the right to fair and public proceedings”.¹⁵

15. In relation to the second prong of the requirement under element (b) of the test, the Appeals Chamber has found that a Chamber considering whether a given issue would affect the outcome of the trial requires the Chamber to “ponder the possible implications of a given issue being wrongly decided on the outcome of the case”, a process which “involves a forecast of the consequences of such an occurrence”.¹⁶

16. In respect of the final requirement, the term “advance” in this prong of the leave to appeal test requires that the immediate and “authoritative determination” by the Appeals Chamber of the issue will “ensur[e] that the proceedings follow the right course” by “[r]emoving doubts about the correctness of a decision or mapping a course of action along the right lines [...]”.¹⁷

Reconsideration of decisions

17. Chambers of this Court have held that reconsideration of a decision may be appropriate where the applying party shows “*new facts or circumstances that may*

¹³ Decision on Extraordinary Review Application, para. 11.

¹⁴ Decision on Extraordinary Review Application, para. 11.

¹⁵ *Prosecutor v. Bemba*, Decision on the Prosecutor’s Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, ICC-01/05-01/08-532, 18 September 2009, para. 20.

¹⁶ Decision on Extraordinary Review Application, para. 13.

¹⁷ Decision on Extraordinary Review Application, para. 15.

influence that decision”,¹⁸ or when decisions “*are manifestly unsound and their consequences are manifestly unsatisfactory*”.¹⁹

IV. The Proposed Issue for Appeal

18. The Defence applies for leave to appeal the following issue arising from the Impugned Decision, which the Defence submits satisfies all the requirements of Article 82(1)(d) of the Statute:

Whether the Trial Chamber erred in issuing an arrest warrant and determining that all trial preparations should cease without providing the Accused an opportunity to be heard on the matter in circumstances where the Accused has not violated the terms of his summons nor any other order of the Court [REDACTED].

V. Submissions on leave to appeal the Impugned Decision

(a) *The issue constitutes an appealable issue pursuant to Article 82(1)(d)*

19. In issuing the Impugned Decision the Trial Chamber did not provide the Defence an opportunity to be heard on the legal and factual basis of replacing Mr. Banda’s summons with an arrest warrant and effectively suspending all preparations for trial. As stated in the Dissent: “*These are staggering steps that have been taken in a serious case in international law: but they have now been taken without giving an opportunity to the parties and participants to express a view.*”²⁰ Accordingly, the issue arises out of the Impugned Decision, is not merely a disagreement with the Chamber, and goes to the heart of whether the Impugned Decision was validly issued – namely respect for the fundamental principle of *audi alteram partem*.

¹⁸ *Prosecutor v. Bemba*, Trial Chamber III, Public Redacted Version of the Decision on the “Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d’accomplir ses devoirs civiques en République Démocratique du Congo” of 2 September 2011, 6 September 2011, ICC-01/05-01/08-1691-Red, para. 17.

¹⁹ *Prosecutor v. Lubanga*, Trial Chamber I, Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705, para. 18.

²⁰ Dissent, para. 4.

(b) The issue significantly affects the fair and expeditious conduct of the proceedings

20. The Defence respectfully submits that the identified issue arising from the Impugned Decision goes to the very essence of the fairness of proceedings. As noted above, the Dissent describes the results of the Impugned Decision – issuing an arrest warrant against Mr. Banda and effectively and indefinitely suspending trial preparations – as “staggering steps”, “particularly [for] the Defence that is the most affected by the decision”.²¹

21. If such critical determinations in this case were taken in improper fashion – namely without providing the Defence an opportunity to be heard on these matters – such action calls into question both the perception and reality of the Court’s ability to conduct impartial and fair hearings as regards Mr. Banda. The Defence agrees with the views expressed in the Dissent that the issuance of an arrest warrant coupled with the effective suspension of the case result in Mr. Banda being “made to bear the moral blame for” such suspension “with the odium of an arrest warrant hanging over his head”.²² Certainly such a result should arise only through decisions that are issued in accordance with basic principles of procedural fairness.

22. Additionally, if the Impugned Decision was improperly issued, Mr. Banda’s fundamental right to be tried without undue delay will have been significantly impacted. The issuance of an arrest warrant, the vacating of the trial date and the suspension of all trial preparation work by the Chamber and Registry will *ipso facto* delay the commencement of trial.

²¹ Dissent, para. 8.

²² Dissent, para. 26.

23. Even more so, given that the Impugned Decision specifically suspends “rulings for pending filings”, both the Defence and the Prosecution are left severely handicapped in their ability to efficiently and properly continue their trial preparations. Important decisions on disclosure,²³ requests for cooperation,²⁴ requests to amend the Prosecution’s lists of evidence and witnesses,²⁵ and notice of the possibility of the legal re-characterization of facts,²⁶ among others, remain outstanding and significantly impact on the ability of both parties to effectively and efficiently prepare for trial.

24. Lastly, in view of the above-described impact on trial preparations and commencement, the significant impingement on the expeditiousness of proceedings of the identified issue is, the Defence submits, self-evident. Indeed, as queried by the Dissent, the Impugned Decision neither addresses the risks identified by the Defence in the particular circumstances of this case,²⁷ nor in any way better ensures Mr. Banda’s appearance at trial.²⁸

(c) The immediate resolution of the issue will materially advance the proceedings

25. The Defence submits that an expeditious determination by the Appeals Chamber of the identified issue will materially advance the proceedings. This is because, if the Impugned Decision was improperly issued, proceedings will have unjustifiably come to a standstill with no reasonable prospect of finding resolution to the critical issues with which the Chamber and parties are faced in moving proceedings forward.

²³ Defence Request for Disclosure of Documents in the Possession of the Office of the Prosecutor, 20 October 2011, ICC-02/05-03/09-235.

²⁴ Consolidated Defence Applications pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute for an order for the preparation and transmission of cooperation requests to the Governments of Rwanda, Ghana and Nigeria, 14 January 2014, ICC-02/05-03/09-530-Conf-Exp.

²⁵ ICC-02/05-03/09-557-Conf; ICC-02/05-03/09-589-Conf-Red;

²⁶ ICC-02/05-03/09-549

²⁷ Dissent, para. 24.

²⁸ Dissent, paras. 9-12.

26. The Defence can conceive of few matters that might come before the Appeals Chamber for review, the determination of which would most readily “ensur[e] that the proceedings follow the right course” by “[r]emoving doubts about the correctness of [the] decision or mapping a course of action along the right lines”.²⁹

VI. Submissions on reconsideration of the Impugned Decision

27. In the alternative, should the Chamber determine that the test for leave to appeal the Impugned Decision has not been satisfied on the basis of the identified issue, the Defence respectfully requests that the Chamber reconsider the Impugned Decision. As alluded to above, the Defence submits that the fact that the Defence – and indeed the Prosecution and Legal Representative of Victims – was not granted an opportunity to be heard on these most fundamental of matters – the issuance of an arrest warrant and effective suspension of all trial preparations – results in a decision that is manifestly unsound and its consequences manifestly unsatisfactory.

28. [REDACTED].^{30 31}

29. With respect to the critical determinations issued in the Impugned Decision, basic and long-established principles of procedural fairness require that the parties be “given an opportunity to be heard on the wisdom, desirability, fairness, and legality of issuing an arrest warrant against the Accused and ‘suspending’ the case in the present circumstances”.³² A lack of any opportunity

²⁹ Decision on Extraordinary Review Application, para. 15.

³⁰ [REDACTED].

³¹ *Prosecutor v. Bemba*, Trial Chamber III, Public Redacted Version of the Decision on the “Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d’accomplir ses devoirs civiques en République Démocratique du Congo” of 2 September 2011, 6 September 2011, ICC-01/05-01/08-1691-Red, para. 17.

³² Dissent, para. 8.

to be heard on these matters fundamentally calls into question the legal validity of the Impugned Decision.

30. The results of the Impugned Decision are likewise ‘manifestly unsatisfactory’. The Impugned Decision effectively suspends proceedings in the case and leaves Mr. Banda “with the odium of an arrest warrant hanging over his head”³³ without otherwise laying out a pathway for addressing the critical issues that must be resolved in order for proceedings to advance. Mr. Banda does not benefit from such decision, nor does the Prosecution, the victims, or, indeed, the Court as a credible and effective institution for international justice. [REDACTED] Government of Sudan [REDACTED] “has shown remarkable success in resisting arrest warrants that this Court has issued against various functionaries within that Government, including its head of state”.³⁴

31. If the Chamber agrees that the Impugned Decision satisfies the test for reconsideration and should be so re-evaluated, the Defence offers the following succinct observations for the Chamber’s consideration on how best to move proceedings forward.

32. First, to the extent that it exists, it is a faulty premise that [REDACTED].^{35 36}

33. Second, [REDACTED].³⁷

34. Third, it is of significant note that [REDACTED],³⁸ appears to have fallen completely by the wayside, and, instead, a different path leading, unfortunately,

³³ Dissent, para. 26.

³⁴ Dissent, para. 17.

³⁵ See [REDACTED].

³⁶ [REDACTED].

³⁷ 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.

³⁸ 16 April 2014, ICC-02/05-03/09-564-Conf.

to the Impugned Decision, embarked upon. [REDACTED].³⁹ As submitted by the Defence in its response of 23 May 2014:⁴⁰

[REDACTED].

35. As far as the Defence is aware, [REDACTED]. It would further seem that the interests of justice are best served by all reasonable options being explored and diligently pursued [REDACTED] before the last unsatisfactory option of effectively suspending all trial preparations is even contemplated.

36. Fourth, and as has been previously submitted, it is patently unfair and legally unsustainable for the Impugned Decision to have replaced Mr. Banda's arrest warrant with a summons without allowing the Defence an opportunity to be heard in circumstances where the Accused has not violated the terms of his summons nor any other order of the Court [REDACTED]. The Defence respectfully submits that the Dissent's approach to evaluating whether an arrest warrant is legally and factually justified in the circumstances of this case is correct:

*[T]he ripeness of an arrest warrant decision requires the following minimum prerequisites: (a) the Accused must have failed to appear for trial on the set date or, at the barest minimum, given in advance an unequivocal indication that he will not appear for trial on that date; and (b) in the event of any of the foregoing, a proceeding must next be conducted, in which the Defence is afforded an opportunity to show cause why an arrest warrant should not be issued. None of these has occurred.*⁴¹

[...]

The correctness of that replacement must, in the further analysis, depend on the existence of a credible, substantial and bona fide basis to consider that the arrest

³⁹ *Ibid* (emphasis added).

⁴⁰ [REDACTED].

⁴¹ Dissent, para. 8.

*warrant truly has a stronger prospect (than the existing summons) to ensure 'the person's appearance at trial' on the set date. In the circumstances of this case, such a basis is wholly lacking.*⁴²

37. Fifth, and finally, the Defence shares the concern of the Dissent that in the Impugned Decision "[t]he power to 'suspend' preparatory measures for the trial is not explained".⁴³ In any event, the Defence respectfully submits that the better course of action, as outlined above, is for the Chamber, the parties and the Registry to continue working diligently and with common purpose to address and resolve the impediments to trial proceedings moving forward in this case.

VII. Relief Requested

38. Based on the foregoing submissions the Defence respectfully requests that the Trial Chamber grant leave to appeal the Impugned Decision on the basis of the issue identified in Section IV above.

39. In the alternative, the Defence requests that the Trial Chamber reconsider the Impugned Decision and take into consideration the substantive observations submitted in Section VI in determining the appropriate course of action in this case.

Respectfully Submitted,



Mr. Karim A. A. Khan QC
Lead Counsel
for Abdallah Banda Abakaer Nourain

⁴² Dissent, para. 11.

⁴³ Dissent, para. 26.

Dated this 18th Day of September 2014
At The Hague, the Netherlands