

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **9 November 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 Reply to ‘Prosecution response to the Defence application for leave to appeal the 11 September 2014 arrest warrant decision or for reconsideration of the same’”, dated 6 October 2014

Sources: Defence Team of Abdallah Banda Abakaer Nourain

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

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Other

I. Introduction

1. Further to the Trial Chamber's grant of leave,¹ the defence for Abdallah Banda Abakaer Nourain ("Defence") files its reply to the *Prosecution response to the Defence application for leave to appeal the 11 September 2014 arrest warrant decision or for reconsideration of the same* ("Response").² In the Response, the Prosecution incorrectly alleges that the Defence has made a "U-turn"³ in its underlying application for leave to appeal or in the alternative reconsideration⁴ of the decision issuing an arrest warrant,⁵ and has "advanced for the first time" that Mr. Banda:
 - i. "[REDACTED] and"
 - ii. "[REDACTED]".⁶

2. Additionally, pursuant to the Order, the Defence addresses the specific issue of "whether Mr Banda will or [will] not appear for his trial in circumstances in which":
 - i. "the cooperation of the Government of Sudan in facilitating Mr Banda's appearance before the Court is not forthcoming;" and
 - ii. "the Court is not in a position to [REDACTED]".⁷

¹ Order on the Defence Application for Leave to Reply to "Prosecution response to the Defence application for leave to appeal the 11 September 2014 arrest warrant decision or for reconsideration of the same", 26 September 2014, ICC-02/05-03/09-612-Conf ("Order").

² 22 September 2014, ICC-02/05-03/09-609-Conf-Exp.

³ Response, para. 3.

⁴ Defence Application for Leave to Reply to "Prosecution response to the Defence application for leave to appeal the 11 September 2014 arrest warrant decision or for reconsideration of the same", 24 September 2014, ICC-02/05-03/09-611-Conf-Exp ("Application").

⁵ Warrant of arrest for Abdallah Banda Abakaer Nourain, 11 September 2014, ICC-02/05-03/09-606. Judge Eboe-Osuji's dissent was issued on 15 September 2014 (ICC-02/05-03/09-606-Anx).

⁶ Response, para. 2 (internal citations to Application omitted).

⁷ Order, para. 6.

II. Confidentiality

3. 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.

III. Submissions

4. On 14 April 2014, in two filings, the Defence [REDACTED] Mr. Banda's [REDACTED] willingness [REDACTED] to appear before the Chamber to stand trial on the three war crimes charges preferred against him. First, and pursuant to the Trial Chamber's order,⁸ the Defence informed the Chamber as follows:⁹
 - i. *"Nothing has changed over the last four years with respect to Mr. Banda's willingness and desire to cooperate with the Court and appear for trial in order to be provided an opportunity to clear his name. [REDACTED]."*
 - ii. *"[REDACTED]:*
 - i. [REDACTED];
 - ii. [REDACTED]; *and*
 - iii. [REDACTED]."
 - iii. *"[REDACTED]."*
 - iv. *"[REDACTED]."*
5. Second, the Defence requested, "[REDACTED]."¹⁰ Importantly, the Defence submitted in conclusion that it:

[REDACTED].¹¹

⁸ Decision subsequent to the status conference of 7 April 2014, 10 April 2014, ICC-02/05-03/09-553-Conf.

⁹ 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, para. 4.

¹⁰ [REDACTED], ICC-02/05-03/09-561-Conf, para. 2.

6. Contrary to the Prosecution's submission, and as clearly indicated above, the record discloses that the Defence has made no "U-turn"¹² nor "advanced for the first time" in the Application that Mr. Banda: [REDACTED].¹³ Indeed, the Defence's submissions have been entirely consistent.

7. The Prosecution bases its unfounded allegations¹⁴ on submissions in the Defence [REDACTED]¹⁵ that:
 - i. "[REDACTED]"¹⁶ [REDACTED];¹⁷
 - ii. "[REDACTED]";¹⁸ and
 - iii. "[REDACTED]".¹⁹

8. The Defence's above quoted submissions are, self-evidently, made in the context of and following from the Further Steps Decision. In particular, the Further Steps Decision, by Majority,²⁰ found that:
 - i. "[REDACTED]";²¹
 - ii. "[REDACTED]";²²
 - iii. "[REDACTED]";²³
 - iv. "[REDACTED]";²⁴
 - v. "[REDACTED]";²⁵
 - vi. "[REDACTED]";²⁶ and

¹¹ *Ibid.*, para. 3 (emphasis added).

¹² Response, para. 3.

¹³ Response, para. 2 (emphasis added) (internal citations to Application omitted).

¹⁴ Response, paras. 3, 9.

¹⁵ [REDACTED], 9 September 2014, ICC-02/05-03/09-605-Conf.

¹⁶ 14 July 2014, ICC-02/05-03/09-590-Conf.

¹⁷ *Ibid.*, para. 24 (citing to Further Steps Decision, paras. 27(b) and 37(c)).

¹⁸ *Ibid.*, para. 27.

¹⁹ *Ibid.*, para. 29.

²⁰ Judge Eboe-Osuji issued a Partial Dissenting Opinion (ICC-02/05-03/09-590-Conf-Anx) with respect to these findings.

²¹ Further Steps Decision, para. 28.

²² *Ibid.*, para. 29.

²³ *Ibid.*, para. 31.

²⁴ *Ibid.*, para. 30 (emphasis added).

²⁵ *Ibid.*, para. 32 (emphasis added).

²⁶ *Ibid.* (citing to ICC-02/05-03/09-577-Conf, paragraph 19).

vii. “[REDACTED].”²⁷

9. In view of the above-cited findings, the Majority of the Chamber, with His Honour Judge Eboe-Osuji joining with respect to the ultimate conclusion, held that:

*[REDACTED], the Chamber considers it necessary to ensure the cooperation of Sudan with the trial proceedings against Mr Banda. Hence, this Chamber considers it appropriate to notify the GoS of the summons to appear against Mr Banda and to request its cooperation to facilitate his presence at the trial, including by providing him with all necessary travel documents and making all other necessary arrangements as may be appropriate.*²⁸

10. Accordingly, the Defence’s submissions excerpted at paragraph 7 above regarding [REDACTED] logically and directly flow from the Chamber’s determination in the Further Steps Decision [REDACTED],²⁹ [REDACTED]. There was no “U-turn” in the Defence’s submissions as the Prosecution claims.

11. In the absence of the requested GoS cooperation and assistance, Mr. Banda remains willing [REDACTED] if the Court is unable [REDACTED].³⁰

12. Hence, in the circumstances arising from the Further Steps Decision, the GoS’ cooperation to facilitate Mr. Banda’s presence at trial [REDACTED] and the GoS “making all other necessary arrangements” [REDACTED].

13. As regards the Trial Chamber’s specific query as to “*whether Mr Banda will or [will] not appear for his trial in circumstances in which: a) the cooperation of the Government of Sudan in facilitating Mr Banda’s appearance before the Court is not*

²⁷ *Ibid.*, para. 33 (emphasis added).

²⁸ *Ibid.*, para. 36 (emphasis added).

²⁹ See *supra*, paras. 4-5.

³⁰ [REDACTED].

forthcoming; and b) the Court is not in a position [REDACTED]”,³¹ the Defence submits as follows. The Defence stands by its submission of 14 April 2014 that “[REDACTED]”.³²

14. However, in the circumstances described above, where no assistance is to be provided [REDACTED] either by the GoS or the Court [REDACTED],³³ then Mr. Banda will [REDACTED] not to attend trial. That said, the Defence respectfully submits that the query posed by the Trial Chamber is premature since only part a) has been properly explored.

15. [REDACTED]. The Trial Chamber’s proposed course of seeking GoS assistance has not yet come to fruition. However, [REDACTED].³⁴

16. Finally, as previously submitted, the continued existence of an arrest warrant against Mr. Banda in the above-described circumstances does not satisfy the requisite test for the issuance of an arrest warrant³⁵ nor does it advance the cause of justice.³⁶

IV. Conclusion

17. The Defence respectfully requests the Chamber to take into consideration the above additional submissions in its deliberation and determination on the Application and the Prosecution’s response thereto.

³¹ Order, para. 6.

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ Application, para. 36.

³⁶ Application, para. 30.

Respectfully Submitted,



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for Abdallah Banda Abakaer Nourain

Dated this 9th Day of November 2014
At The Hague, the Netherlands