

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-03/09
Date: 19 December 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 redacted version

Decision on defence application for leave to appeal the decision on ‘Warrant of arrest for Abdallah Banda Abakaer Nourain’ and, in the alternative, request for reconsideration

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

The Office of the Prosecutor

Ms Fatou Bensouda

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Counsel for the Defence

Mr Karim A.A. Khan

Mr David Hooper

Legal Representatives of Victims

Ms Hélène Cissé

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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

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 64(2)-(3) and 82(1)(d) of the Rome Statute (“Statute”), issues, by Majority, Judge Eboe-Osuji partly dissenting,¹ the following “Decision on defence application for leave to appeal the decision on ‘Warrant of arrest for Abdallah Banda Abakaer Nourain’ and, in the alternative, request for reconsideration”.

A. Procedural background and relief sought

1. On 20 November 2008, the Office of the Prosecutor (“prosecution”) requested an arrest warrant for Mr Banda, or in the alternative a summons to appear.² On 27 August 2009, Pre-Trial Chamber I (“Pre-Trial Chamber”) issued a summons, deeming it to be sufficient at that time, but noting it retained the power to review this decision at a later date.³ On 7 March 2011, the Pre-Trial Chamber confirmed the charges.⁴
2. 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 2014.⁵
3. On 11 March 2014 and 3 April 2014, the Registry filed confidential redacted versions available to the defence for Mr Abdallah Banda Abakaer Nourain (“Mr Banda”) of its “Submissions on trial preparations pursuant to regulation 24bis of the

¹ Judge Eboe-Osuji concurs only in the outcome as to leave to appeal the arrest warrant issued against Mr Banda.

² Prosecutor's Application under Article 58, 20 November 2008, ICC-02/05-02/09-21-Conf.

³ SUMMONS TO APPEAR FOR ABDALLAH BANDA ABAKAER NOURAIN, 27 August 2009, ICC-02/05-03/09-3, paragraph 20; see the accompanying Second Decision on the Prosecutor's Application under Article 58, 27 August 2009, ICC-02/05-03/09-1-RSC.

⁴ Corrigendum of the “Decision on the Confirmation of Charges”, 7 March 2011, ICC-02/05-03/09-121-Conf-Corr.

⁵ 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.

Regulations of the Court on the trial preparation”.⁶ These submissions were preceded by a meeting between the Registry and the defence, held on 31 July 2013, followed by an exchange of correspondence.⁷ [REDACTED]. [REDACTED].⁸ [REDACTED],⁹ [REDACTED]. [REDACTED].¹⁰

4. On 7 April 2014, the Chamber held, *inter alia*, a confidential status conference, at which the parties and the Registry were requested to make observations.¹¹ The defence submitted that, while Mr Banda remained willing to comply with the summons to appear, his willingness was dependent upon the various “caveats” communicated to the Registry.¹² The possibility of a warrant of arrest was discussed during the status conference.¹³ [REDACTED].¹⁴ [REDACTED].¹⁵ [REDACTED].¹⁶ [REDACTED].¹⁷
5. On 14 April 2014, the defence informed the Chamber that Mr Banda reiterated his willingness to “appear for trial in order to be provided an opportunity to clear his name”. [REDACTED]. [REDACTED].¹⁸
6. On 16 April 2014, the Chamber vacated the trial date and requested submissions as to the next steps,¹⁹ [REDACTED].²⁰

⁶ Submission of the Registry pursuant to regulation 24*bis* of the Regulations of the Court on the trial preparation, 4 March 2014, ICC-02/05-03/09-543-Conf, *ex parte* only available to the Registry, and the 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.

⁷ ICC-02/05-03/09-543-Conf, paragraphs 2 and 3.

⁸ ICC-02/05-03/09-543-Conf, paragraphs 3 and 4.

⁹ ICC-02/05-03/09-543-Conf, paragraph 8.

¹⁰ ICC-02/05-03/09-543-Conf-Exp-Anx1, page 3.

¹¹ 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 and transcript of public hearing on 7 April 2014, ICC-02/05-03/09-T-24 and transcript of confidential hearing on 7 April 2014, ICC-02/05-03/09-T-25-CONF-ENG.

¹² ICC-02/05-03/09-T-25-CONF-ENG, page 3, lines 3 to 15.

¹³ ICC-02/05-03/09-T-25-CONF-ENG.

¹⁴ Decision subsequent to the status conference of 7 April 2014, 10 April 2014, ICC-02/05-03/09-553-Conf, paragraph 9.

¹⁵ ICC-02/05-03/09-553-Conf, paragraph 10.

¹⁶ ICC-02/05-03/09-553-Conf, paragraph 12.

¹⁷ ICC-02/05-03/09-553-Conf, paragraph 14.

¹⁸ Defence Submissions pursuant to “Decision subsequent to the status conference on 7 April 2014” (ICC-02/05-03/09-553-Conf), 14 April 2014, ICC-02/05-03/09-560-Conf, paragraph 4.

7. On 6 May 2014, the prosecution and the Registry filed their submissions.²¹
[REDACTED].²² [REDACTED]. [REDACTED],²³ [REDACTED].²⁴
8. On 23 May 2014, the defence filed a consolidated response addressing the submissions of the prosecution and the Registry.²⁵
9. On 14 July 2014, the Chamber issued the "Decision as to the Further Steps for the Trial Proceedings" ("14 July 2014 Decision"). [REDACTED].²⁶ [REDACTED]. [REDACTED].²⁷
10. In light of the above, the Chamber considered that [REDACTED], it was necessary to obtain the cooperation of Sudan. Therefore, in its 14 July Decision, the Chamber instructed 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.²⁸ Finally, the Chamber decided that the trial should commence on the 18 November 2014.²⁹

¹⁹ Decision vacating the trial date of 5 May 2014, 16 April 2014, ICC-02/05-03/09-564-Conf (with partly dissenting opinion of Judge Eboe-Osui; confidential version of decision filed on the same date).

²⁰ ICC-02/05-03/09-564-Conf, paragraph 12.

²¹ Prosecution submissions pursuant to Trial Chamber's "Decision vacating the trial date of 5 May 2014", 6 May 2014, ICC-02/05-03/09-576-Conf; Observations of the Registry pursuant to the "Decision vacating the trial date of 5 May 2014" (ICC-02/05-03/09-564-Conf) dated 16 April 2014, 6 May 2014, ICC-02/05-03/09-577-Conf.

²² ICC-02/05-03/09-576-Conf, paragraphs 5, 12-19; ICC-02/05-03/09-577-Conf, paragraph 11.

²³ ICC-02/05-03/09-577-Conf-Anx1, page 6.

²⁴ ICC-02/05-03/09-577-Conf-Anx1, page 6.

²⁵ Consolidated Defence Response to the Submissions of the Prosecution (ICC-02/05-03/09-576-Conf) and the Registry (ICC-02/05-03/09-577-Conf) pursuant to the "Decision vacating the trial date of 5 May 2014" (ICC-02/05-03/09-564-Conf), 23 May 2014, ICC-02/05-03/09-583-Conf.

²⁶ Decision as to the Further Steps for the Trial Proceedings, 14 July 2014, ICC-02/05-03/09-590-Conf, paragraph 30 (with partly dissenting opinion of Judge Eboe-Osui; confidential versions notified same day).

²⁷ ICC-02/05-03/09-590-Conf, paragraph 32.

²⁸ ICC-02/05-03/09-590-Red, paragraph 36.

²⁹ ICC-02/05-03/09-590-Red, paragraph 37.

11. On 31 July 2014, the Registry notified this cooperation request to the GoS.³⁰ 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.³¹
12. On 9 September 2014, the prosecution, the Common Legal Representative ("CLR") and the defence filed their submissions, addressing the consequences of the failed cooperation request. The prosecution requested an unequivocal undertaking from the accused that he would appear for trial and suggested that if such unequivocal undertaking was not provided, an arrest warrant would need to be issued.³²
13. The CLR observed that means should be put in place to alleviate the difficulties in ensuring the presence of the accused, but that failing those measures, the legal conclusion should be to issue an arrest warrant.³³
14. On the same date, the defence submitted that Mr Banda remained willing to appear before the Court, but was unable to do so, [REDACTED].³⁴
15. On 11 September 2014, the Chamber issued, by majority, a warrant of arrest against Mr Banda ("Arrest Warrant").³⁵ It noted that, regardless of whether or not Mr Banda wished to be present at trial, there were no guarantees that in the current circumstances he would be in an objective position to appear voluntarily.³⁶ For these same reasons, it did not consider it appropriate to make a further request for an

³⁰ 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).

³¹ 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), paragraph 2.

³² Prosecution application for an order requiring an undertaking from the Accused that he will appear for trial on 18 November 2014, 9 September 2014, ICC-02/05-03/09-603-Conf, paragraph 4.

³³ 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, paragraph 54.

³⁴ [REDACTED], ICC-02/05-03/09-605-Conf, paragraph 29.

³⁵ Warrant of arrest for Abdallah Banda Abakaer Nourain, 11 September 2014, ICC-02/05-03/09-606 (with dissenting opinion of Judge Eboe-Osuji).

³⁶ ICC-02/05-03/09-606, paragraph 21.

undertaking from the accused.³⁷ In addition, the Chamber vacated by majority the trial date of 18 November 2014 and suspended preparatory measures for the trial until Mr Banda's arrest or voluntary appearance. It also decided that until such date, no currently pending applications would be ruled upon unless good cause was provided to the Chamber by a party or participant.³⁸

16. On 17 September 2014, the defence filed an application for leave to appeal the Arrest Warrant and, in the alternative, requested its reconsideration ("the Application").³⁹

17. On 22 September 2014, the prosecution filed its response to the Application ("Prosecution Response").⁴⁰ The prosecution did not support the leave to appeal but supported the request for reconsideration, [REDACTED].⁴¹

18. On 23 September 2014, the CLR filed her observations on the Application.⁴² The CLR supported the leave to appeal only in relation to the suspension of preparatory measures and requested an opportunity to make observations thereon.⁴³

19. On 24 September 2014, the defence applied for leave to reply to the Prosecution Response.⁴⁴ On 26 September 2014, the Chamber granted the defence leave to reply⁴⁵ and asked the defence, to confirm, in a straightforward and unequivocal way,

³⁷ ICC-02/05-03/09-606, paragraph 21.

³⁸ ICC-02/05-03/09-606, page 12.

³⁹ Defence Application for Leave to Appeal the Decision on "Warrant of arrest for Abdallah Banda Abakaer Nourain" and in the alternative Request for Reconsideration, 17 September 2014, ICC-02/05-03/09-608-Conf-Exp.

⁴⁰ Prosecution response to the Defence application for leave to appeal the 11 September 2014 arrest warrant decision or for reconsideration of the same, 22 September 2014, ICC-02/05-03/09-609-Conf-Exp.

⁴¹ ICC-02/05-03/09-609-Conf-Exp, paragraphs 8-11.

⁴² Observations des Représentants légaux Communs sur la Version Confidentielle Expurgée de la « Requête de la Défense aux fins d'être autorisée à faire appel de la Décision concernant le mandat d'arrêt contre Abdallah Banda Abakaer Nourain, et dans l'alternative, requête demandant la reconsidération de la décision », 23 September 2014, ICC-02/05-03/09-610-Conf.

⁴³ ICC-02/05-03/09-610-Conf.

⁴⁴ 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.

⁴⁵ 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.

whether Mr Banda would or would not appear for his trial in circumstances in which the cooperation of the GoS was not forthcoming and the Court was not in a position [REDACTED].⁴⁶

20. On 6 October 2014, the defence filed its reply to the Prosecution Response ("Reply"),⁴⁷ in which, *inter alia*, it addressed the Chamber's question pursuant to Regulation 28 of the Regulations, by confirming that Mr Banda would not appear for the trial unless his conditions were met.⁴⁸

21. In light of this response from the accused, on 9 October 2014, the prosecution changed its previous support for the reconsideration (outlined above) and instead affirmed that the Chamber should maintain the arrest warrant.⁴⁹

B. Preliminary issue - standing

22. At the outset, the Chamber needs to determine whether Mr Banda, who no longer appears voluntarily pursuant to a summons but is now subject to a warrant of arrest, can request leave to appeal his warrant and continue to exercise his procedural rights before the Court through legal counsel while remaining at large.

23. The Chamber notes that there are no legal provisions or precedents dealing with an appeal by the defence of arrest warrants issued by this Court. It appears that it is upon surrender of a person, and as part of the initial proceedings before the Court, that procedural steps can be taken against their detention, for example, by requests for interim release pursuant to Article 60 of the Statute. With relation to other procedural rights, Rule 121(1) of the Rules suggests that a person at large does not enjoy all the rights set forth in Article 67 of the Statute. Certain pre-trial decisions

⁴⁶ ICC-02/05-03/09-612-Conf, paragraph 6.

⁴⁷ 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", 6 October 2014, ICC-02/05-03/09-614-Conf-Exp.

⁴⁸ ICC-02/05-03/09-614-Conf-Exp, paragraph 14.

⁴⁹ [REDACTED], ICC-02/05-03/09-616-Conf, paragraph 8.

tend to confirm that the procedural rights of the defence are limited when the person sought by the Court is at large.⁵⁰

24. The Chamber considers that, in the circumstances of the case at hand, the right to appeal the Arrest Warrant is justified, in particular considering that the person, while currently at large, has until now been subject to a summons to appear and has participated in the proceedings through counsel. The decision in relation to which Mr Banda seeks leave to appeal or reconsideration is precisely the one which changes his standing before the Court and by which his procedural rights may be restricted.

25. Therefore, the Chamber believes it is fair to accord him the right to request leave to appeal and reconsideration in this instance.

C. Reconsideration

26. The defence submits that, in the event leave to appeal the Arrest Warrant is not granted, this decision should be reconsidered.⁵¹ The Chamber is of the view that in light of the practical consequences that the decision entails, it is more appropriate to deal with the request for reconsideration first. The reconsideration of the decision would provide an immediate remedy to the defence and would avoid unnecessary actions to implement the warrant of arrest.

⁵⁰ Pre-Trial Chamber II, *The Prosecutor v. Joseph Kony et al.*, Decision on Defence Counsel's "Request for conditional stay of proceedings", 31 October 2008, ICC-02/04-01/05-328, pages 4-5, 8. See also Pre-Trial Chamber I, *The Prosecutor v. Callixte Mbarushimana*, Decision on the Defence Request for Disclosure, 27 January 2011, ICC-01/04-01/10-47, paragraphs 10-11; Pre-Trial Chamber I, *The Prosecutor v. Saif al-Islam Gaddafi*, Decision on the Conduct of the Proceedings Following the "Application on behalf of the Government of Libya pursuant to Article 19 of the Statute", 04 May 2012, ICC-01/11-01/11-134, paragraph 11 and Corrigendum to Decision on the "Defence request for an order of disclosure", 01 August 2013, ICC-01/11-01/11-392-Red-Corr, paragraphs 6, 34-35.

⁵¹ Defence Application for Leave to Appeal the Decision on 'Warrant of arrest for Abdallah Banda Abakaer Nourain' and in the alternative Request for Reconsideration, 17 September 2014, ICC-02/05-03/09-608-Conf-Exp, paragraphs 38-39.

1. *The submission by the defence*

27. The defence submits that the reconsideration of a decision may be appropriate where the applying party shows “*new facts or circumstances that may influence that decision*”, or when decisions “*are manifestly unsound and their consequences are manifestly unsatisfactory*”.⁵²

28. The defence [REDACTED] puts forward an expert report [REDACTED].⁵³ The defence submits that this report constitutes “*new facts or circumstances that may influence*” the Arrest Warrant and would therefore justify reconsideration.⁵⁴ [REDACTED].⁵⁵

29. The defence also argues that the Chamber issued the Arrest Warrant and suspended all trial preparations without having granted the defence, the prosecution and the Legal Representative an opportunity to be heard.⁵⁶ The defence argues that 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.”⁵⁷ A lack of any opportunity to be heard on these matters fundamentally calls into question the validity of the Arrest Warrant.⁵⁸

30. Finally, in the view of the defence, the results of the Impugned Decision are likewise “*manifestly unsatisfactory*”,⁵⁹ as it effectively suspends proceedings in the case and

⁵² ICC-02/05-03/09-608-Conf-Exp, paragraph 17.

⁵³ Annex A to Defence Application for Leave to Appeal the Decision on “Warrant of arrest for Abdallah Banda Abakaer Nourain” and in the alternative Request for Reconsideration, 17 September 2014, ICC-02/05-03/09-608-Conf-Exp-AnxA.

⁵⁴ ICC-02/05-03/09-608-Conf-Exp, paragraph 28.

⁵⁵ Confidential *ex parte* Annex A, ICC-02/05-03/09-608-Conf-Exp-AnxA, page 7.

⁵⁶ ICC-02/05-03/09-608-Conf-Exp, paragraphs 27, 29.

⁵⁷ ICC-02/05-03/09-608-Conf-Exp, paragraph 29, quoting ICC-02/05-03/09-606-Anx-Corr, paragraph 8.

⁵⁸ ICC-02/05-03/09-608-Conf-Exp, paragraph 29.

⁵⁹ ICC-02/05-03/09-608-Conf-Exp, paragraph 30.

leaves Mr Banda “with the odium of an arrest warrant hanging over his head”⁶⁰ without otherwise laying out a pathway for addressing the critical issues that must be resolved in order for proceedings to advance.

31. The defence, therefore, submits that the Chamber should re-evaluate the Arrest Warrant and offers observations “for the Chamber’s consideration on how best to move proceedings forward”, [REDACTED].⁶¹

2. Analysis by the Chamber

32. The Chamber notes that an arrest warrant is by its very nature reviewable. This is particularly the case with the present warrant of arrest, which has been issued solely for the purpose of ensuring the presence of the person at trial, in accordance with Article 58(1)(a) of the Statute. Furthermore, the Chamber has explicitly indicated that it shall review the conditions of stay in The Netherlands if Mr Banda appears voluntarily, stating: “[s]hould 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”.⁶² It is clear that the review of the Arrest Warrant and the conditions of stay in The Hague may start as soon as Mr Banda contacts the Court in order to initiate concrete arrangements for his transfer to the Netherlands.

33. Furthermore, Arrest Warrant further states that Mr Banda’s arrest or voluntary appearance would bring to an end the suspension of preparatory measures for the trial, and the condition that “no currently pending applications will be ruled upon unless good cause is provided to the Chamber by a party or participant” will cease

⁶⁰ ICC-02/05-03/09-608-Conf-Exp, paragraph 30, quoting ICC-02/05-03/09-606-Anx-Corr, paragraph 26.

⁶¹ ICC-02/05-03/09-608-Conf-Exp, paragraph 34.

⁶² ICC-02/05-03/09-606, paragraph 24.

to apply if Mr Banda is arrested or appears voluntarily.⁶³ It is clear, both for legal and practical reasons, that the Chamber must and shall reconsider the Arrest Warrant at any time if new circumstances brought to its attention make a different course of action advisable.

34. With that in mind, the Chamber shall entertain the arguments set forth by the defence for the reconsideration of the Arrest Warrant in order to reassess the Chamber's chosen course of action. As described above, the defence calls into question both the manner in which the impugned decision was taken, as well as its results. The defence also makes some observations on how best to move forward.

a. The alleged infringement of the right to be heard

35. The Chamber notes that it has been the usual practice of this Court to issue an arrest warrant without previous consultation with the person concerned. The Chamber also notes earlier decisions indicating that the Chambers retained the power to review a summons to appear at any moment,⁶⁴ and that such a summons is only justified when it is sufficient to ensure the appearance of the person for trial, in accordance with Article 58(7) of the Statute.

36. In any event, the Chamber notes that the Arrest Warrant was issued at the end of a protracted consultative process in which the parties and participants were given ample opportunity to discuss the presence of the accused for trial. As shown in the procedural history, Mr Banda's appearance and the conditions for his stay in The Netherlands were discussed in depth for almost two years by way of status

⁶³ ICC-02/05-03/09-606, paragraph 25.

⁶⁴ ICC-02/05-03/09-3 paragraph 20; ICC-02/05-03/09-606 paragraph 16. See also ICC-02/05-03/09-1-RSC, paragraph 35.

conferences,⁶⁵ written submissions from the defence,⁶⁶ prosecution⁶⁷ and the CLR,⁶⁸ as well as reports by the Registry.⁶⁹

37. As indicated above, in the 14 July 2014 Decision the Chamber noted *inter alia* that Mr Banda's willingness to comply with the summons was dependent upon [REDACTED].⁷⁰ The Chamber considered that [REDACTED], "in order to prevent any potential risks [...] it was necessary to ensure the cooperation of Sudan with the trial proceedings against Mr Banda". The Chamber set a new trial date of 18 November 2014 and ordered the Registry to provide a report about the implementation of the cooperation request.⁷¹ The Report from the Registry that followed indicated that the cooperation of Sudan was not forthcoming.⁷² At this juncture, both the prosecution and the CLR addressed the issue of the necessity of a warrant of arrest in their submissions following the report of the Registry that preceded the Arrest Warrant.

38. The Chamber notes that it rejected a proposal by the prosecution to obtain an unequivocal undertaking from the accused that he would appear voluntarily for his

⁶⁵ Transcript, 19 June 2012, ICC-02/05-03/09-T-16-CONF-EXP-ENG; Transcript, 11 July 2012 ICC-02/05-03/09-T-17-ENG; Transcript, 11 July 2012, ICC-02/05-03/09-T-18-CONF-EXP-ENG; Transcript, 12 July 2012, ICC-02/05-03/09-T-19-CONF-EXP-ENG; Transcript, 12 July 2012, ICC-02/05-03/09-T-20-CONF-EXP; Transcript, 29 January 2013, ICC-02/05-03/09-T-21-CONF-ENG; Transcript, 19 July 2013, ICC-02/05-03/09-T-22-CONF-ENG; Transcript, 7 April 2014, ICC-02/05-03/09-T-24-ENG; Transcript, 7 April 2014, ICC-02/05-03/09-T-25-CONF-ENG.

⁶⁶ Defence Request that the Registry Filing ICC-02/05-03/09-473 Be Reclassified as Confidential, 8 May 2013, ICC-02/05-03/09-474-Conf; ICC-02/05-03/09-560-Conf; [REDACTED], ICC-02/05-03/09-561-Conf; Defence Request to Vacate the Trial Commencement Date, 15 April 2014, ICC-02/05-03/09-563-Conf-Red; ICC-02/05-03/09-583-Conf; ICC-02/05-03/09-605-Conf.

⁶⁷ 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; ICC-02/05-03/09-576-Conf; ICC-02/05-03/09-603-Conf.

⁶⁸ ICC-02/05-03/09-602-Conf.

⁶⁹ Submission of the Registrar pursuant to 24 bis of the Regulation of the Court concerning the possible date for the commencement of the Trial, 20 December 2012, ICC-02/05-03/09-434-Conf-Exp; ICC-02/05-03/09-543-Conf; ICC-02/05-03/09-550-Conf-Exp; ICC-02/05-03/09-577-Conf-Anx1; ICC-02/05-03/09-593-Corr; ICC-02/05-03/09-598-Conf.

⁷⁰ ICC-02/05-03/09-590-Conf, paragraph 35.

⁷¹ ICC-02/05-03/09-590-Conf, page 16.

⁷² ICC-02/05-03/09-598-Conf.

trial on 18 November,⁷³ as it had already reached the conclusion that the objective circumstances were such that the Chamber could not rely on the personal wishes of Mr Banda.⁷⁴ However, after the Arrest Warrant, during the exchange of submissions that followed the Application,⁷⁵ the Chamber did provide an additional opportunity for the defence to clarify whether or not Mr Banda would appear for this trial in the absence of cooperation by Sudan and [REDACTED].⁷⁶ The defence confirmed that, in such circumstances, Mr Banda would not attend trial.⁷⁷ It follows that the defence has had sufficient opportunity to address the issuance of a warrant of arrest before the decision was handed down and after it was issued as part of the reconsideration process.

b. The alleged “manifestly unsatisfactory” result

39. As already said, the defence submits that Mr Banda is now left in suspended proceedings with “the odium of an arrest warrant hanging over his head” and without otherwise any “pathway” for the progress of the proceedings.⁷⁸ [REDACTED].⁷⁹

40. Nonetheless, the Chamber is of the view that maintaining the *status quo* that prevailed before the issuance of the Arrest Warrant in circumstances where the accused has made it clear that he will not appear for his trial, is not a better option. The Chamber cannot allow preparations for a trial to continue indefinitely where there is no concrete prospect that it will start in the near future. Such an exercise would neither be reasonable or fair for the parties and victims, nor would it serve

⁷³ ICC-02/05-03/09-606, paragraph 21.

⁷⁴ ICC-02/05-03/09-606, paragraphs 21 and 22, referring to ICC-02/05-01/07-1-Corr, paragraphs 118-124, 133.

⁷⁵ Prosecution response to the Defence application for leave to appeal the 11 September 2014 arrest warrant decision or for reconsideration of the same, 22 September 2014, ICC-02/05-03/09-609-Conf-Exp, paragraph 22.

⁷⁶ ICC-02/05-03/09-612-Conf, paragraph 6.

⁷⁷ ICC-02/05-03/09-614-Conf-Exp, paragraph 14.

⁷⁸ ICC-02/05-03/09-608-Conf-Exp, paragraph 30.

⁷⁹ ICC-02/05-03/09-608-Conf-Exp, paragraph 30, quoting ICC-02/05-03/09-606-Anx-Corr, paragraph 17.

the interests of justice in any way. In this regard, it must be noted that the Chamber, by majority, decided to issue a warrant of arrest on the understanding that the presence of the suspect is necessary for the trial to take place.⁸⁰

41. Furthermore, the Chamber is of the view that proceedings before this Court cannot be contingent on the willingness of particular individuals or States to cooperate. The existence of the warrant of arrest allows the Chamber to seek cooperation for the arrest not only from the GoS but also from other States and organisations.

42. With respect to the suspension of preparatory measures for the trial, including rulings on pending decisions, this is, in the view of the Chamber, the natural and necessary corollary of vacating *sine die* the date of the start of the trial. Some pending practical measures and decisions may not be necessary without any prospect of a trial, or it may be inappropriate to consider them while the person remains at large. In any event, the Chamber has already indicated that this part of the decision is also reviewable on a case-by-case basis, as it leaves open the possibility for the parties to request the Chamber to rule on specific applications, where appropriate.

c. Alleged new facts and circumstances and observations on how to move forward

43. As stated above, the defence brings to the consideration of the Chamber an expert report [REDACTED].⁸¹ [REDACTED], the Chamber notes that the report does not contradict the conclusions of the Chamber but rather reinforces them. It follows that the report submitted by the defence does not constitute a new fact that would justify the reconsideration of the Arrest Warrant.

⁸⁰ ICC-02/05-03/09-606, paragraph 16 (iii).

⁸¹ ICC-02/05-03/09-608-Conf-Exp-AnxA.

44. In addition, the Chamber is of the view that the related course suggested by the defence as to “how best to move proceedings forward”⁸² reiterates arguments previously made [REDACTED]. [REDACTED].⁸³

45. In light of the foregoing, the Chamber considers that the defence request for reconsideration must be rejected. This is without prejudice of reviewing the Arrest Warrant should Mr Banda decide to appear before this Court for his trial.

D. Leave to appeal

1. Applicable law

46. The Chamber recalls that Article 82(1)(d) of the Statute sets out the following requirements to the granting of a request for leave to appeal:

i. whether the issue at hand would significantly affect:

(i) The fair and expeditious conduct of the proceedings or

(ii) The outcome of the trial; and

ii. in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

47. With respect to the particular question of the meaning of the term “issue” in the context of the first limb of the test under Article 82(1)(d) of the Statute, the Appeals Chamber has stated:

An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. [...] An

⁸² ICC-02/05-03/09-608-Conf-Exp, paragraph 31.

⁸³ ICC-02/05-03/09-590-Conf, paragraph 32; ICC-02/05-03/09-606, paragraphs 10 and 20.

issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.⁸⁴

2. *Relevant submissions*

48. The defence requests leave to appeal the following issue (the “Proposed Issue”) which, it submits, arises from the Arrest Warrant:

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 and continues to communicate with the Court through his appointed counsel.

49. The defence argues that the Proposed Issue is an appealable issue on grounds that the Chamber in fact 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.⁸⁵

50. The defence argues that the fairness of the proceedings is significantly affected because this is a “critical” determination which, if made improperly by not giving the defence an opportunity to be heard, would “call into question both the perception and reality of the Court’s ability to conduct impartial and fair hearings as regards Mr Banda”.⁸⁶ The expeditiousness of the proceedings is significantly affected because, if the Arrest Warrant was improperly issued, its consequences (an arrest warrant, the vacating of the trial date, the suspension of all trial preparation work) will “ipso facto delay the commencement of trial”.⁸⁷

51. The defence also submits that granting leave to appeal will materially advance the proceedings because, without Appeals Chamber intervention, proceedings “will

⁸⁴ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paragraph 9.

⁸⁵ ICC-02/05-03/09-608-Red, paragraph 19.

⁸⁶ ICC-02/05-03/09-608-Red, paragraph 21.

⁸⁷ ICC-02/05-03/09-608-Red, paragraph 22.

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”.⁸⁸

52. In the Prosecution Response, the prosecution’s sole argument for rejecting leave to appeal was that it would be more efficient to reconsider the Arrest Warrant.⁸⁹ However, as indicated above, the Chamber notes that the prosecution later changed its previous support for the reconsideration and affirmed instead that the Chamber should maintain the arrest warrant.⁹⁰ As such, the prosecution advances no submissions on the Proposed Issue independently of its (now outdated) arguments for reconsideration.

53. The CLR requests the Chamber to grant leave to appeal regarding the question concerning the suspension of all preparatory measures and afford the participants an opportunity to comment on these measures.⁹¹

i. Analysis and conclusion

54. As indicated above, the Chamber needs to determine whether the Proposed Issue qualifies as an appealable issue. In this regard, the Chamber notes that the Proposed Issue as formulated does not make it clear what is the “matter” on which the defence alleges the accused was not heard. As indicated above, the defence was given ample opportunity to address the issue of the appearance of the accused before and after the issuance of the Arrest Warrant. After issuing the Arrest

⁸⁸ ICC-02/05-03/09-608-Red, paragraph 25.

⁸⁹ ICC-02/05-03/09-609-Red2, paragraphs 18-21.

⁹⁰ ICC-02/05-03/09-616-Conf-Red, paragraphs 7 and 8.

⁹¹ ICC-02/05-03/09-610-Conf.

Warrant, the Chamber specifically asked the defence whether the accused would or would not appear voluntarily for his trial in the current circumstances⁹².

55. It appears from the procedural history of the proceedings and the submissions of the defence that the issue is not whether the Chamber erred in not hearing from the defence on the matter of the appearance of the accused in general, but rather and more specifically whether it erred in not hearing further from the defence on the appropriateness of replacing the summons to appear by a warrant of arrest after being satisfied that the accused would not appear voluntarily for his trial. The Chamber recognises that once it was satisfied that the accused would not appear voluntarily, it issued the Arrest Warrant without further consulting the defence on the appropriateness of issuing such a warrant. The Chamber considers that the Proposed Issue can be certified on this understanding of the “matter” on which the accused was not heard, and that therefore the Proposed Issue may be considered as an issue that arises from the Arrest Warrant.

56. The Proposed Issue would also significantly affect the fair and expeditious conduct of the proceedings. If the Chamber erred in not consulting further with the defence prior to replacing the summons by a warrant of arrest, then a fundamental step in the process leading to the Arrest Warrant may be missing.

57. Finally, the Chamber considers that an immediate resolution of the Proposed Issue by the Appeals Chamber may materially advance the proceedings. The consequences of the Arrest Warrant are far-reaching, and the Appeals Chamber’s intervention could confirm whether the post-Arrest Warrant proceedings are following the right course.

⁹² ICC-02/05-03/09-612-Conf, paragraph 6.

58. For these reasons, the Chamber grants leave to appeal on Proposed Issue as clarified in paragraph.

E. Conclusion

59. For the foregoing reasons, the Chamber hereby:

- (i) Rejects the defence request for reconsideration of the Arrest Warrant; and
- (ii) Grants leave to appeal the Proposed Issue as formulated by the defence and clarified by the Chamber.

Judge Eboe-Osuji will append a partly 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 19 December 2014

At The Hague, The Netherlands