Cour Pénale Internationale

International Criminal Court

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No.: **ICC-02/05-03/09**
Date: **13 January 2015**

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

Corrigendum to 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
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

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 "Corrigendum to 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 24*bis* 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]

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[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]

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[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-Osuji; 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-Osuji; 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

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[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 reply[45] and asked the defence, to confirm, in a straightforward and unequivocal way,

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[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.

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[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] prosecution[67] 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

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[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 circumstances[92].

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 the Proposed Issue as clarified in paragraph 55.

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 13 January 2015

At The Hague, The Netherlands

Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-02/05-03/09**
Date: **8 January 2015**

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

Partly Dissenting Opinion of Judge Eboe-Osuji in the '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
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

Detention Section

Victims Participation and Reparations Section

Others

PARTLY DISSENTING OPINION OF JUDGE EBOE-OSUJI

1. Two decisions were made in the Arrest Warrant Decision of 11 September 2014. The more dramatic of the two is the decision to issue an arrest warrant against Mr Banda. But, the more prosaic decision—yet in no way less significant for the administration of criminal justice—is the decision that effectively freezes the case. In my view, it is both possible and desirable to give separate treatments to the two decisions for present purposes.

2. In the special circumstances of the Defence application for leave to appeal or for reconsideration, I would concur in the decision of the Chamber granting leave to appeal the decision issuing an arrest warrant. But I dissent as regards the correct outcome for the decision that freezes the case in effect: reconsideration is fully warranted. I also dissent as regards the reasoning and the procedural history generally described in the Majority Decision.

I. The Arrest Warrant Decision Not Justified by the Procedural History

3. I begin with a review of the procedural history, given the importance it appears to have assumed in the Majority Decision.

4. I do not accept the procedural history recited by the Majority. In both narrative and orientation it has the effect of seeking to justify—from hindsight—the decisions of the Majority to issue an arrest warrant on 11 September 2014 and to freeze the case thenceforth.

5. In many ways, what occurred in the case is very similar to crossing the chain when riding a bicycle. It results when the rider has not cared enough to select gears in a manner that keeps the chain line as straight as possible between the front and back chain rings. It causes much stress and friction in the internal dynamics of the chain-work. Forward movement may still be achieved in the end, after all the grinding noise and loss of momentum. But, it will be incorrect to insist that proper gear selection is not really necessary to bicycling, simply because nothing worse than grinding noise and momentary loss of momentum often occurs. At worst, cross-chaining can produce a break down. But the halting performance is reason enough to avoid the error.

6. The Arrest Warrant Decision of 11 September 2014 and its aftermath are very much reminiscent of cross-chaining. The proper gear selection required that before the Arrest Warrant Decision was taken, the Defence should have been required first to give a clear, unequivocal and unconditional undertaking that the Accused would voluntarily appear for trial, failing which the Chamber would consider issuing an arrest warrant. The urge for such an undertaking of voluntary appearance was correctly made by the Prosecution. As was observed in the Arrest Warrant Decision: 'On 9 September 2014, the prosecution submitted that, in its view, the [A]ccused 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 [A]ccused that he will appear *is necessary* in the case, 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")'[1] [Emphasis

[1] *The Prosecutor v Abdallah Banda Abakaer Nourain*, Majority Decision, Warrant of arrest for Abdallah Banda Abakaer Nourain ('Arrest Warrant Decision'), dated 11 September 2014, ICC-02/05-03/09-606, para 13.

added.] The Prosecution request received approval only in the dissenting opinion.[2] The Majority dismissed the Prosecution request—and issued an arrest warrant—two days after receiving the Prosecution request: the Defence was not allowed an opportunity to respond to the Prosecution request. In doing so, the Majority insisted that they did 'not consider it appropriate to request an undertaking from the accused and accordingly, it [was] also unnecessary to receive the defence response to the 9 September 2014 Request.'[3]

7. It is significant that the Majority's central reasoning for issuing the Arrest Warrant Decision was stated as follows: '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.'[4] And, in that regard, the Majority found Mr Banda's circumstances comparable in principle to those of Mr Kushayb against whom an arrest warrant was issued because 'Mr Kushayb was "reported to be in prison upon a warrant of arrest issued by the Sudanese authorities."'[5]

8. Following the Arrest Warrant Decision, the Defence applied for reconsideration or leave to appeal. The application contains the following averment, among other things:

> First, to the extent that it exists, it is a faulty premise that [REDACTED].[6] [REDACTED.]

9. In light of the foregoing averment, the Prosecutor urged the Chamber to 'revisit' the Arrest Warrant Decision, 'by ordering the Accused to state, unequivocally and without conditions or caveats, that he will appear for trial on the date set by the Chamber. If the answer is "yes", no arrest warrant should issue; if the answer is anything less, then a warrant would be appropriate.'[7] In the view of the Prosecution, the averment of the Defence quoted above constituted 'new facts' in the manner of 'representations, advanced for the first time in the Defence application for leave to appeal or reconsideration.'[8]

10. In the end, the Chamber relented and agreed to do after the fact what ought to have been done before. That is to say, in an Order of 26 September 2014, granting leave to the Defence to reply to the Prosecution submissions, the Chamber:

> [C]onsider[ed] that in order to remove any possible ambiguity or uncertainty as regards the appearance of the accused at his trial, it [was] important that ... the defence also confirms in a straight forward and unequivocal way whether Mr Banda will or not appear for his trial in circumstances in which (a) the cooperation of the Government of Sudan in facilitating Mr

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[2] *The Prosecutor v Abdallah Banda Abakaer Nourain*, Dissenting Opinion of Judge Eboe-Osuji in the Decision on 'Warrant of arrest for Abdallah Banda Abakaer Nourain' ('Arrest Warrant Dissent'), dated 15 September 2014, ICC-02/05-03/09-606-Anx-Corr (with corrigendum annex), para 4.
[3] Arrest Warrant Decision, para 21.
[4] *Ibid.*
[5] *Ibid*, para 22.
[6] See 'Defence Application for Leave to Appeal the Decision on "Warrant of arrest for Abdallah Banda Abakaer Nourain" and in the alternative Request for Reconsideration', dated 17 September 2014, ICC-02/05-03/09-608-Conf-Exp, para 32.
[7] See 'Prosecution Response to the Defence Application for Leave to Appeal the 11 September 2014 Arrest Warrant Decision or for Reconsideration of the Same', dated 22 September 2014, ICC-02/05-03/09-609-Red2, para 4.
[8] *Ibid*, para 2.

> Banda's appearance before the Court is not forthcoming; and (b) the Court is not in a position to [REDACTED].[9]

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11. One thing is clear from the foregoing chronology of the procedural events. As of the time of the Chamber's Order of 26 September 2014, the situation was not certain or unambiguous, from the positions asserted by the Defence, that the Accused would or could not be voluntarily present for his trial on a date to be set by the Chamber. The Prosecution's urge on 22 September 2014—revisiting their request of 9 September 2014—is a bona fide indication of that uncertainty. As indicated in the dissenting opinion, I, too, had laboured under the same cloud.[10]

12. That being the case, it would be incorrect to assert that it had been clear to the Chamber that—as at the time of the Arrest Warrant Decision of 11 September 2014—the Accused would or could not be voluntarily present for his trial. It would particularly not be correct to assert that the Defence response of 6 October 2014—that came in the negative—afforded confirmation of what had been all too clear to the Chamber all along. It may well be that the state of affairs had been intuitively clear to the Majority all along—something to be praised entirely. But, the fact that a judge may have had incisive intuition or reading of what may result in the outcome of a given situation is hardly a reason to not follow a correct or reasonable procedure that may well result in a different outcome. For, following the correct procedure may either confirm the initial intuition (a good thing) or prove it as mistaken (also a good thing).

13. Indeed, in their eventual answer—provided on 6 October 2014—to the specific question that the Chamber put to the Defence in the Chamber's Order of 26 September 2014, the Defence did not give an unequivocal undertaking that Mr Banda would voluntarily appear for trial. The answer of 6 October 2014 remains ambiguously as follows:

> ¶ [I]n the circumstances described above, where no assistance is to be provided [REDACTED] either by the [Government of Sudan] or the Court, [REDACTED] then Mr Banda will [REDACTED] not 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.
>
> ¶ [REDACTED] The Trial Chamber's proposed course of seeking [Government of Sudan] assistance has not yet come to fruition. However, [REDACTED].[11]

14. Now, this answer has a clear forensic value; specifically in the effect that it would have justified any arrest warrant issued after that answer was received. Indeed, the answer may, even in the circumstances of the present case, still justify maintaining the Arrest Warrant Decision of 11 September—purely as a matter of pragmatism. In the prevailing circumstances, it is more pragmatic

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[9] See 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', dated 26 September 2014, ICC-02/05-03/09-612-Conf, paras 6 and 7(ii).

[10] Arrest Warrant Dissent, para 8.

[11] See '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, ICC-02/05-03/09-614-Conf-Exp, paras 14 and 15.

to recognise the pre-existing reality presented by the Majority decision of 11 September 2014 that issued the Arrest Warrant Decision. That reality predates the Defence answer of 6 October 2014. Where the Defence answer of 6 October 2014 gives justification for the issuance of an arrest warrant, it becomes obviously inefficient to insist upon the issuance of a new warrant of arrest on the basis that the old one was legally flawed as a matter of procedure. I make no such insistence. It is enough now to ratify the arrest warrant of 11 September 2014, in light of the Defence answer of 6 October 2014 that did not produce the undertaking of voluntary appearance—a fair opportunity to do so having since been given to the Defence.

15. It would be incorrect, however, to assert that the answer of 6 October 2014 bears out—as a matter of correct procedure *ab initio*—the Arrest Warrant Decision of 11 September that was rendered without providing the opportunity for that answer to begin with.

16. In any suggestion that the Defence answer of 6 October 2014 bears out the Arrest Warrant Decision of 11 September, it should matter that the findings of the Majority are a quite prominent leg on which that answer apparently stood. Not only is this apparent from paragraph 14 of the Defence submissions of 6 October 2014 where the answer was given;[12] but also from the Majority's findings recited in paragraph 8 of the Defence submissions of 6 October 2014, upon which the Defence largely founded their answer. Specifically, those findings, as the Defence quoted them, are as follows:

i. '[REDACTED]';[13]
ii. '[REDACTED]';[14]
iii. '[REDACTED]';[15]
iv. '[REDACTED]';[16]
v. '[REDACTED]';[17]
vi. '[REDACTED]';[18] and
vii. '[REDACTED]'.[19]

17. These findings had been made in the Chamber's Further Steps Decision[20] in spite of a dissenting opinion that did not accept those findings. It cannot then be readily suggested that the Defence answer that so prominently rests on those judicially disputed findings puts beyond any question the procedural correctness of the Arrest Warrant Decision that was also largely premised on those disputed findings. Such an effort would be tantamount to an attempt to pick oneself up by one's own bootstraps.

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[12] As the Defence put it: '*[I]n the circumstances described above*, where no assistance is to be provided [REDACTED] either by the [Government of Sudan] or the Court, [REDACTED] then Mr Banda [REDACTED] not 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.' [Emphasis added.] *Ibid*, para 14.
[13] Decision as to Further Steps for the Trial Proceedings, dated 14 July 2014, ICC-02/05-03/09-590-Conf, para 28.
[14] *Ibid*, para 29.
[15] *Ibid*, para 31.
[16] *Ibid*, para 30 (emphasis received).
[17] *Ibid*, para 32 (emphasis received).
[18] *Ibid.*
[19] *Ibid*, para 33 (emphasis received).
[20] *Ibid.*

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18. Another difficulty with the procedural history narrated by the Majority lies in the suggestion that, immediately before issuing the arrest warrant decision, the Chamber had found it unnecessary to require the Defence to give the undertaking of Mr Banda's voluntarily appearance for trial—it was not necessary because the Defence, it is claimed, had been afforded ample opportunity to address the prospect of an arrest warrant.

19. There is much that is mistaken in that suggestion. First, it is a fact that the last forensic event that precipitated the issuing of the arrest warrant on 11 September 2014 was the apparent refusal of the Government of Sudan to receive the communication of the Court's request of that Government's assistance in facilitating Mr Banda's voluntary attendance for trial. It is also a fact that there was never a prior indication to the Defence that any difficulty of that nature—which was not unforeseen to the Chamber, in light of a history of similar behaviour of that Government—could result in the issuance of an arrest warrant against Mr Banda.

20. It is not insignificant that upon the Chamber and the parties being informed of the Government's refusal to receive the Court's communication, the Prosecution saw the need to file their request of 9 September 2014, urging the Chamber to require an undertaking of voluntary appearance from the Defence, failing which an arrest warrant should issue. The interpolation of that request shortly before the arrest warrant was issued is an indication that up until then, the Defence had not been given a fair opportunity to address that matter.

21. But, more than that, the apparent suggestion of the Majority that the prospect of an arrest warrant had been sufficiently raised for the Defence to address is mistakenly founded on what had occurred in a previous status conference.[21] Evidently, the suggestion is largely anchored in certain questions put to Defence counsel—by me—in the course of the status conference.[22] The trouble with such an understanding of what had occurred is that the aim of those questions to the Defence counsel had not been to require the Defence to give a clear undertaking of voluntary appearance, in the absence of which the Chamber would consider issuing an arrest warrant without further notice. Rather, [REDACTED].

22. At any rate, given the plurality of the Bench, in which the view of a non-presiding member is seldom taken as the view of the entire Chamber, it was still necessary for the Chamber as a whole to direct the Defence to give the clear undertaking of voluntary appearance or else an arrest warrant may issue.

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23. In the end, the only proper value deserving of the Defence answer of 6 October 2014 is that the Defence was finally—by virtue of the Chamber's Order of 26 September 2014—given a fair opportunity to give an undertaking of voluntary appearance, hence the answer of 6 October 2014.

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[21] Majority Decision, para 4.
[22] *The Prosecutor v Abdallah Banda Abakaer Nourain*, Transcript of Hearing, dated 7 April 2014, ICC-02/05-03/09-T-25-CONF-ENG, page 27, lines 13-16, page 28, lines 1-4 et seq.

24. The answer of 6 October 2014, as indicated earlier, does justify an arrest warrant. In the result, it now becomes proper to ratify the arrest warrant decision of 11 September 2014—because that answer would have justified, in my view, the arrest warrant of 11 September 2014 had that answer preceded that arrest warrant.

25. Since that arrest warrant is something that affects the Accused and he is entitled to take appellate issue with it, I would concur with the decision to grant leave to appeal the issuance of the arrest warrant. I agree that the tests are met for an interlocutory appeal of the arrest warrant.

II. The Case Freezing Decision

26. But the decision freezing the case is a different matter that deserves a different treatment. Perhaps, one route to an appreciation of that different treatment also takes us back to the difficult matter of the narrative of the procedural history that raises the question whether the parties and participants had been given a fair opportunity to be heard before the decision of 11 September 2014.

27. Another telling factor showing that the parties and participants—especially the Defence—had not been given a fair opportunity to address the objects of the decisions made on 11 September 2014 lies with the fact that the parties and participants had been given no opportunity *whatsoever* to address the companion decision to freeze the proceedings upon issuing the arrest warrant. The fact is that those decisions were conceived of and delivered together in one fell swoop, though the decisions served different immediate purposes.

28. I am not persuaded by the reasoning that it was also *not* necessary to call for submissions of the parties as regards the decision to freeze the case, because, as the reasoning goes, that decision was 'the natural and necessary corollary of vacating *sine die* the date of the start of trial.'[23] It is very possible that the description of the decision to freeze the case as a 'corollary', coupled as it were with the dramatic furore about issuing an arrest warrant against Mr Banda, may obscure the true significance that the case freezing decision may have to the cause of justice. It is a decision that may, in its real potential, result in the failure of justice for victims and society and frustrate the search for the truth. Those potentials must always be kept in view as strong factors of the decision's value.

29. Be that as it may, it may be attractive at a glance to suggest, as the Majority decision evidently does, that it is proper to freeze preparatory measures aimed at commencing a trial on a certain date when there has been no guarantee of the appearance of an accused. But, on closer look, the reasoning has many flaws. The matter is not that simple and straightforward. First, that the Accused did not appear voluntarily—assuming that possibility as a foregone fact—does not foreclose the need to receive submissions from the parties and participants, to be deliberated upon by the Bench, as to the next procedural step. Within the resulting views may lie, among other things, the lurking question whether it would be *legally permissible* to proceed with the trial in the absence of the accused; and if so, whether it would be appropriate to do so. It may indeed be the case that the answers to either or both questions may be in the negative in the end. But, they are proper legal questions that are in need of asking in the circumstances in which an accused has failed

[23] Majority Decision, para 42.

to appear for trial. It is judicially presumptuous to foreclose those questions so peremptorily—as was done when the Majority decided to freeze the case in effect without hearing from the parties and participants.

30. For my part, I am not convinced that the Rome Statute is clearly and absolutely impervious to the idea of trials in absentia regardless of the circumstances. This is a position that I have expressed in another decision.[24] It is to be admitted that there are many cases in which it will not be legally permissible or procedurally appropriate at the ICC to conduct a trial in the absence of the accused. But there may be some cases in which it may be both legally permissible and procedurally appropriate to do so. The matter will need to be considered on a case by case basis. It helps, in this connection, to keep in mind that the development of the law thus far at the ICC has shown that it is possible to construe the Rome Statute and develop its case law in ways that were not so obvious at first glance.[25] The specific circumstances of particular cases need to be considered.

31. Second, even to accept that it is legally impermissible (or procedurally inappropriate) to proceed with trial in the absence of the accused still leaves unexplained the logic of the proposition that 'the natural and necessary corollary of vacating *sine die* the date of the start of trial' is to freeze the case. That logic was not shown to follow from a generally accepted practice and procedure in the administration of criminal justice; nor does it follow from the particular circumstances of the present case.

32. In the particular circumstances of the present case, to freeze the case is foreseeably detrimental to not only the economics of case management, but also to the optimal impetus of morale needed to drive the case from preparation to trial. The economics of case management include the fact that the Court has expended effort and costs in the customised training of translators and interpreters in Zaghawa—a unique language necessary for the conduct of the proceedings in a language that the Accused understands. The waste of such resources is readily foreseeable as a likely consequence of the decision to freeze the case rather than keep it actively on the front burner, with efforts made unrelentingly to corral the case into the courtroom for trial, from the admittedly difficult terrain of its current circumstances in Sudan and Darfur.

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[24] *The Prosecutor v Uhuru Muigai Kenyatta*, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, Dissenting Opinion of Judge Eboe-Osuji, dated 26 November 2013, ICC-01/09-02/11-863, paras 37-189 [Trial Chamber V(B).]

[25] For instance, the ICC law has now developed to the point of accepting that an accused person may be conditionally excused from continuous presence at trial. This development occurred despite spirited opposition to the effect that the Rome Statute was clear in precluding the possibility. *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, dated 18 June 2013, ICC-01/09-01/11-777 [Trial Chamber V(A)]; *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", dated 25 October 2013, ICC-01/09-01/11-1066 [Appeals Chamber]; Rules 134 *bis*, *ter* and *quater* of the Rules; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*, dated 18 February 2014, ICC-01/09-01/11-1186 [Trial Chamber V(A)] (with separate further opinion of Judge Eboe-Osuji). Similarly, the law now recognises that there are powers in a Trial Chamber to issue subpoenas. Again, this development occurred against the view that there was no such power recognised in the Rome Statute. *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, dated 17 April 2014, ICC-01/09-01/1 1-1274-Corr2 [Trial Chamber V(A)]; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", dated 9 October 2014, ICC-01/09-01/11-1598 [Appeals Chamber.]

33. The debilitating effect that the decision to freeze can have on the case is similarly foreseeable from the perspective of the efforts that need to be continually pressed on all sides to assist in resolving (to the extent possible) any legitimate obstacles that the Defence have identified as preventing the Accused from appearing for trial. That the Court may not be in a position to satisfy all these requests—however *bona fide*—made by the Accused, is not to say that the Registry may not engage in good faith efforts, even though they are not to be considered a prerequisite obligation of the Court that may subtract from the personal obligation upon the Accused to appear for his own trial. Such good faith efforts may well produce the desired result of paving the way for the appearance of the Accused either voluntarily or on the force of the arrest warrant validly issued. The cause for optimism derives especially from the positions now clarified by the Defence in their filings since the Arrest Warrant Decision of 11 September 2014. [REDACTED] commencement of trial in the foreseeable future is not to be ruled out and is even entirely probable; provided the Registry and the Defence—and even the Prosecution—work together in good faith to achieve that purpose. Part of the efforts that may be made on the part of the Registrar, the Prosecutor, and the Presidency of the Court (if need be) would be the deployment of diplomatic pressure upon the Government of Sudan at the UN Security Council and the African Union (whose forces were the apparent victims of the events that gave rise to the case), to encourage the Government to do their part in lending the necessary assistance to Mr Banda to attend his own trial. It is better to pursue all these efforts and then to freeze the case.

34. Third, it should be noted, perhaps, that in some national jurisdictions, such as Canada, criminal practice and procedure recognise that it is possible—even quite normal—to 'set date' for trial *many* times *ad interim*, for purposes of preparation for trial. On each interim 'set date', the court is given an update on trial preparation. Eventually, the trial date proper is finally set, once the court is satisfied that there is no remaining preparatory impediment to the commencement of the trial. Clearly, such an approach is appropriate in the circumstances of the present case in which all hope of a trial is not lost, thus requiring concerted efforts to be continued to be made by the Registry and the parties to help in easing the burden of appearance for trial that may appreciably rest upon the Accused in his own circumstances.

35. Fourth, as a matter of general practice and procedure in the administration of criminal justice, there is something very odd indeed in freezing all preparatory arrangements that are appropriate in the circumstances in which an arrest warrant has been issued but remains outstanding. According to the logic of the principle suggested by the Majority—i.e. that it is appropriate to freeze a criminal case merely because a warrant of arrest has been served and a date set for trial vacated—every criminal case will have to be frozen immediately upon issuing an arrest warrant that remains outstanding with no actual date set for trial.

36. And, finally, the argument that freezing the case without hearing from the parties is 'the natural and necessary corollary of vacating *sine die* the date of the start of trial' is not supported by the sundry manner of corollary decisions that are made in the litigation process following submissions from the parties after what is considered the main decision. For instance, there are sentencing hearings after conviction; and, there are reparation hearings after conviction and sentencing. And, in civil litigation, as well as in some criminal litigation, it is necessary to hear submissions as to costs, following judgment on the merits of the case. In these examples, the decisions as to sentencing, reparation and costs may all be characterised as corollary decisions. Yet, before they are made, the dictates of fair hearing require the Court to receive submissions from the

parties and participants. There is therefore no rule known to law that a complaint of unfair or improper process is misplaced if such a complaint concerns a corollary decision made by a judge without a hearing from the parties.

37. The foregoing considerations make the argument wholly untenable that it is an entirely proper procedure to freeze the case without further hearings from the parties merely because an arrest warrant has been issued against Mr Banda and the set trial date has been vacated *sine die*.

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38. In my view, reconsideration is due to the decision freezing the case. There is an ample legal basis for reconsideration; but suffice it only to quote the dictum of Judge Shahabuddeen of the ICTR Appeals Chamber in the *Prosecutor v Barayagwiza*:

> 3. [...] Not surprisingly, in *Čelebići* the Appeals Chamber of the ICTY introduced a qualification in stating that "in the absence of particular circumstances justifying a Trial Chamber or the Appeals Chamber to reconsider one of its decisions, motions for reconsideration do not form part of the procedure of the International Tribunal". The first branch of that statement is important, including its non-reproduction of the *Kordić* words "that motions to reconsider are not provided for in the Rules": the implication of the omission seems to be that the fact that the Rules do not so provide is not by itself determinative of the issue whether or not the power of reconsideration exists in "particular circumstances". Alternatively, the omitted words were not intended to deny the inherent jurisdiction of a judicial body to reconsider its decision in "particular circumstances".
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> 4. Circumscribed as they evidently are, it is hard, and perhaps not in the interest of the policy of the law, to attempt exhaustively to define "particular circumstances" which might justify reconsideration. It is clear, however, that such circumstances include a case in which the decision, though apparently *res judicata*, is void, and therefore non-existent in law, for the reason that a procedural irregularity has caused a failure of natural justice. An aspect of that position was put this way by the presiding member of the Appellate Committee of the British House of Lords:
>
> > In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In *Cassell & Co Ltd v. Broome (No.2) [* 1972] 2 All ER 849, [1972] AC 1136 your Lordships varied an order for costs already made by the House *in circumstances where the parties had not had a fair opportunity to address argument on the point.*
> >
> > However, it should be made clear that the House will not reopen any appeal *save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure.* Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.
>
> 5. *I understand this to mean that, certainly in the case of a court of last resort, there is inherent jurisdiction to reopen an appeal if a party had been "subjected to an unfair procedure". I see no reason why the principle involved does not apply to criminal matters if a useful purpose can be*

served, particularly where, as here, the decision in question has not been acted upon.[26] [Emphasis added.]

39. The law revealed in the quote is to the effect that the Chamber may reconsider its decision where 'a party had been "subjected to an unfair procedure"' due to no fault of the party concerned. And, a particular instance of such an unfair procedure involves 'circumstances where the parties had not had a fair opportunity to address argument on the point'. That, precisely, is the trouble with the decision to freeze the case. None of the parties and participants was given an opportunity to speak to the point. And, if the House of Lords would reconsider their decision on costs in *Cassell & Co Ltd v Broome (No 2)*, because the parties had not been given a fair opportunity to address the point, surely the ICC Trial Chamber IV in *Banda* can reconsider the far more serious decision to freeze a criminal case when the parties were not given a fair opportunity to address that point.

40. It is for these reasons that I consider it more appropriate to reconsider the decision freezing the case, although I concur with the decision granting leave to appeal the issuance of the arrest warrant.

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

Chile Eboe-Osuji
Judge

Dated 8 January 2015

At The Hague, The Netherlands

[26] *Prosecutor v Barayagwiza*, (Decision on Prosecutor's Request for Review or Reconsideration), Separate Opinion of Judge Shahabuddeen, dated 31 March 2000, paras 3 and 4 [ICTR Appeals Chamber.]