

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

**No. ICC-02/05-03/09 OA 5
Date: 3 March 2015**

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka
Judge Christine Van den Wyngaert

SITUATION IN DARFUR, SUDAN

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

Public redacted version

**Judgment
on the appeal of Mr Abdallah Banda Abakaer Nourain against
Trial Chamber IV's issuance of a warrant of arrest**

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

**Counsel for Mr Abdallah Banda Abakaer
Nourain**

Mr Karim A.A. Khan
Mr David Hooper

Legal Representatives of Victims

Ms Hélène Cissé
Mr Jens Dieckmann

REGISTRY

Registrar

Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Abdallah Banda Abakaer Nourain against the “Warrant of arrest for Abdallah Banda Abakaer Nourain” of 11 September 2014 (ICC-02/05-03/09-606),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The decision of Trial Chamber IV entitled “Warrant of arrest for Abdallah Banda Abakaer Nourain” of 11 September 2014 (ICC-02/05-03/09-606) is confirmed and the above-mentioned appeal is rejected.

REASONS

I. PROCEDURAL BACKGROUND

A. Proceedings before the Pre-Trial and Trial Chamber

1. On 20 November 2008, the Prosecutor requested a warrant of arrest for Mr Abdallah Banda Abakaer Nourain (hereinafter: “Mr Banda”), or, in the alternative, a summons to appear.¹ On 27 August 2009, Pre-Trial Chamber I (hereinafter: “Pre-Trial Chamber”) issued a summons to appear, without prejudice to any review of this decision at a later stage.² On 7 March 2011, the Pre-Trial Chamber confirmed the charges against Mr Banda.³

2. On 6 March 2013, Trial Chamber IV (hereinafter: “Trial Chamber”) set the trial date for 5 May 2014.⁴ The Trial Chamber vacated this date on 16 April 2014.⁵

¹ [“Prosecutor’s Application under Article 58”](#), ICC-02/05-03/09-20-Conf; a public redacted version was registered on 18 June 2010 (ICC-02/05-03/09-20-Red).

² [“Summons to appear for Abdallah Banda Abakaer Nourain”](#), ICC-02/05-03/09-3 (hereinafter: “Summons to Appear”), para. 20.

³ [“Corrigendum of the ‘Decision on the Confirmation of Charges’”](#), ICC-02/05-03/09-121-Conf-Corr; a public redacted version was registered on 8 March 2011 (ICC-02/05-03/09-121-Corr-Red).

⁴ [“Decision concerning the trial commencement date, the date for final prosecution disclosure, and summonses to appear for trial and further hearings”](#), ICC-02/05-03/09-455.

3. On 14 July 2014, after receiving submissions from the Prosecutor,⁶ the Registrar⁷ and Mr Banda,⁸ the Trial Chamber issued the “Decision as to the Further Steps for the Trial Proceedings”, in which it, *inter alia*, instructed the Registrar to inform the Government of Sudan of the summons to appear against Mr Banda and to transmit a cooperation request to take all necessary steps to facilitate Mr Banda’s presence for the trial proceedings.⁹ The Trial Chamber further decided that the trial should commence on 18 November 2014.¹⁰

4. After being informed by the Registrar that the cooperation request had not been successfully transmitted,¹¹ the Prosecutor,¹² the common legal representative of the victims,¹³ and Mr Banda¹⁴ filed submissions concerning the consequences of this failed cooperation request.

5. On 11 September 2014, the Trial Chamber, by majority, Judge Eboe-Osuji dissenting,¹⁵ issued a warrant of arrest against Mr Banda (hereinafter: “Impugned Decision”).¹⁶

6. On 17 September 2014, Mr Banda filed an application for leave to appeal the Impugned Decision or, in the alternative, reconsideration.¹⁷ On 22 September 2014,

⁵ [“Decision vacating the trial date of 5 May 2014”](#), ICC-02/05-03/09-564-Conf; a public redacted version was registered on 16 April 2014 (ICC-02/05-03/09-564-Red).

⁶ [“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; a public redacted version was registered on 12 May 2014 (ICC-02/05-03/09-576-Red).

⁷ “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.

⁸ “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.

⁹ ICC-02/05-03/09-590-Conf, para. 36; a public redacted version was registered on 14 July 2014 (ICC-02/05-03/09-590-Red) (hereinafter: [“Decision as to the Further Steps”](#)).

¹⁰ Decision as to the Further Steps, para. 37.

¹¹ “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.

¹² [“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; a public redacted version was registered on 23 September 2014 (ICC-02/05-03/09-603-Red).

¹³ “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.

¹⁴ [REDACTED] ICC-02/05-03/09-605-Conf.

¹⁵ [“Dissenting Opinion of Judge Eboe-Osuji in the Decision on ‘Warrant of arrest for Abdallah Banda Abakaer Nourain’”](#), 15 September 2014, ICC-02/05-03/09-606-Anx-Corr annexed to “Warrant of arrest for Abdallah Banda Abakaer Nourain”.

¹⁶ [“Warrant of arrest for Abdallah Banda Abakaer Nourain”](#), ICC-02/05-03/09-606.

the Prosecutor filed her response, indicating that she was opposed to the request for leave to appeal, but supported reconsideration of the Impugned Decision.¹⁸ On 23 September 2014, the common legal representative of the victims filed observations on the application.¹⁹

7. On 26 September 2014, the Trial Chamber issued the “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’”.²⁰

8. On 6 October 2014, Mr Banda filed his reply [REDACTED].²¹

9. On 19 December 2014, the Trial Chamber, by majority, Judge Eboe-Osuji dissenting in part,²² (hereinafter: “Partly Dissenting Opinion to Decision Granting Leave to Appeal”) issued 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”²³ (hereinafter: “Decision Granting Leave to Appeal”), in which it rejected the request for reconsideration and addressed the Defence request for leave to appeal the Impugned Decision. The issue as proposed by the Defence read as follows:

¹⁷ [“Defence Application for Leave to Appeal the Decision on ‘Warrant of arrest for Abdallah Banda Abakaer Nourain’ and in the alternative Request for Reconsideration”](#), ICC-02/05-03/09-608-Conf-Exp; a public redacted version was registered on 18 September 2014 (ICC-02/05-03/09-608-Red).

¹⁸ [“Prosecution response to the Defence application for leave to appeal the 11 September 2014 arrest warrant decision or for reconsideration of the same”](#), ICC-02/05-03/09-609-Conf-Exp; a public redacted version was registered on 23 September 2014 (ICC-02/05-03/09-609-Red2).

¹⁹ “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 », ICC-02/05-03/09-610-Conf.

²⁰ [ICC-02/05-03/09-612-Conf](#); a public redacted version was registered on 30 September 2014 (ICC-02/05-03/09-612-Red).

²¹ [“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’”](#), ICC-02/05-03/09-614-Conf-Exp (hereinafter: “Defence Reply of 6 October 2014”) [REDACTED]; a public redacted version was registered on 10 November 2014 (ICC-02/05-03/09-614-Red).

²² [“Partly Dissenting Opinion of Judge Eboe-Osuji in the ‘Decision on application for leave to appeal the decision of ‘Warrant of arrest for Abdallah Banda Abakaer Nourain’ and, in the alternative, request for reconsideration’”](#), 8 January 2015, ICC-02/05-03/09-619-Conf-Anx annexed to [Decision Granting Leave to Appeal](#); a public redacted version was registered on 8 January 2015 (ICC-02/05-03/09-619-Anx-Red).

²³ [ICC-02/05-03/09-619-Conf](#); a public redacted version was registered on 19 December 2014 (ICC-02/05-03/09-619-Red); a corrigendum was registered on 13 January 2015 (ICC-02/05-03/09-619-Conf-Corr); a public redacted version of the corrigendum was registered on 13 January 2015 (ICC-02/05-03/09-619-Red-Corr).

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.²⁴

10. The Trial Chamber clarified that it understood the “matter” as referred to in the proposed issue to relate to the question of 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” and certified the issue accordingly.²⁵

B. Proceedings before the Appeals Chamber

11. On 12 January 2015, having been granted an extension of time,²⁶ Mr Banda filed the “Defence’s Document in Support of Appeal against Trial Chamber IV’s Decision issuing the ‘Warrant of arrest for Abdallah Banda Abakaer Nourain’”²⁷ (hereinafter: “Document in Support of the Appeal”), requesting “that the Appeals Chamber reverse the [Impugned Decision] and direct the Trial Chamber, in the event the Chamber determines that it will proceed anew in considering whether the summons should be replaced with an arrest warrant, to institute proceedings during which the Defence is afforded an opportunity to show cause why an arrest warrant should not be issued”.²⁸

12. On 23 January 2015, the Prosecutor filed the “Prosecution’s response to Mr Banda’s appeal against the decision issuing a warrant of arrest”²⁹ (hereinafter: “Response to the Document in Support of the Appeal”), requesting that the Appeals Chamber reject Mr Banda’s appeal.³⁰

13. On 26 January 2015, Mr Banda filed the “Defence Regulation 36 Notification for ‘Defence’s Document in Support of Appeal against Trial Chamber IV’s Decision issuing the ‘Warrant of arrest for Abdallah Banda Abakaer Nourain’””, indicating the

²⁴ [Decision Granting Leave to Appeal](#), para. 48.

²⁵ [Decision Granting Leave to Appeal](#), para. 55.

²⁶ “[Decision on Mr Banda’s request for extension of time for the filing of a document in support of the appeal](#)”, 24 December 2014, ICC-02/05-03/09-624 (OA 5).

²⁷ [ICC-02/05-03/09-625-Conf \(OA 5\)](#); a public redacted version was registered on 19 January 2015 (ICC-02/05-03/09-625-Red (OA 5)).

²⁸ [Document in Support of the Appeal](#), para. 49.

²⁹ [ICC-02/05-03/09-629-Conf-Exp \(OA 5\)](#); a public redacted version was registered on 27 January 2015 (ICC-02/05-03/09-629-Red (OA 5)).

³⁰ [Response to the Document in Support of the Appeal](#), para. 37.

word count of the Document in Support of the Appeal and certifying that it complied with regulation 36 of the Regulations of the Court.³¹

II. MERITS

A. Relevant part of the Impugned Decision

14. In the Impugned Decision, the Trial Chamber found that, “regardless of whether Mr Banda wishes or not to be present at trial, there are no guarantees that in the current circumstances, he will be in an objective position to appear voluntarily”.³² The Trial Chamber “recall[ed] that the jurisprudence of the Court suggests that the summons to appear is intended for individuals that are not only personally willing to appear on a voluntary basis but are also in a position to do so”.³³ In this context, the Trial Chamber found that an individual’s willingness or ability to appear at trial could be obstructed by means other than detention and that, if the obstacles were such that there were no longer guarantees that he will appear, it may issue a warrant of arrest.³⁴

15. The Trial Chamber found that “[a]s a result of its review, [...] in accordance with Article 58(1)(b)(i) of the Statute, a warrant of arrest now appears necessary to ensure Mr Banda’s presence at trial”.³⁵

B. Submissions of the parties

1. Submissions of Mr Banda

16. Mr Banda submits that the Trial Chamber “erred when it issued the [Impugned Decision] without providing [him with] an opportunity to be heard on the legal and factual basis, as well as the propriety, of replacing the summons to appear with an arrest warrant” (footnote omitted).³⁶ Mr Banda argues that the Trial Chamber was required to invite and consider submissions from him before replacing the summons to appear with a warrant of arrest.³⁷

17. In support of his argument, Mr Banda submits that the principle of *audi alteram partem* is generally applicable within the Court’s statutory framework to matters

³¹ [ICC-02/05-03/09-630 \(OA 5\)](#).

³² [Impugned Decision](#), para. 21.

³³ [Impugned Decision](#), para. 22.

³⁴ [Impugned Decision](#), para. 23.

³⁵ [Impugned Decision](#), para. 24.

³⁶ [Document in Support of the Appeal](#), paras 1, 31.

³⁷ [Document in Support of the Appeal](#), para. 4.

affecting the substantive rights of a party,³⁸ as well as with regard to a Trial Chamber's *proprio motu* consideration of whether to replace a summons to appear with a warrant of arrest.³⁹ In the view of Mr Banda, "[t]he fact that the Trial Chamber may *proprio motu* [*sic*] review the sufficiency of a summons to appear does not mean it may dispense with the *audi alteram partem* principle or its broader obligation pursuant to Article 64(2) of the Statute to ensure fair proceedings",⁴⁰ and thus the Trial Chamber erred in failing to provide him with an opportunity to be heard on the appropriateness of replacing the summons to appear with a warrant of arrest.⁴¹

18. Mr Banda submits that there were no exceptional circumstances that justified denying him an opportunity to make further submissions⁴² and that, even if the decision to issue a warrant of arrest was correct, the Trial Chamber's error materially and fatally impacted the process by which the warrant of arrest was issued and thus requires its withdrawal.⁴³

19. Accordingly, Mr Banda "requests that the Appeals Chamber reverse the [Impugned Decision] and direct the Trial Chamber, in the event the Chamber determines that it will proceed anew in considering whether the summons should be replaced with an arrest warrant, to institute proceedings during which the Defence is afforded an opportunity to show cause why an arrest warrant should not be issued".⁴⁴

2. *Submissions of the Prosecutor*

20. The Prosecutor submits that Mr Banda's submissions are not supported by the facts of the case, given that, over a period of more than two years, "the Defence was clearly put on notice that the Chamber was contemplating the issuance of an arrest warrant and was given ample opportunity to make submissions on the legal and factual basis for, as well as the propriety of, replacing the summons to appear with an arrest warrant".⁴⁵ In the view of the Prosecutor, the Trial Chamber was correct in taking a comprehensive decision on the totality of the facts before it to conclude that the arrest of Mr Banda was necessary to ensure his appearance at trial once it was

³⁸ [Document in Support of the Appeal](#), paras 33-37.

³⁹ Document in Support of the Appeal, para. 41.

⁴⁰ Document in Support of the Appeal, para. 39.

⁴¹ Document in Support of the Appeal, para. 41.

⁴² Document in Support of the Appeal, para. 43.

⁴³ Document in Support of the Appeal, para. 44.

⁴⁴ Document in Support of the Appeal, para. 49.

⁴⁵ [Response to the Document in Support of the Appeal](#), para. 2. *See also* paras 18-22.

satisfied that he would not appear voluntarily for trial, and was not objectively able to do so.⁴⁶

21. The Prosecutor argues that the Trial Chamber “was not legally obliged to hear submissions from the Defence on matters pertaining to the issuance of an arrest warrant” because “[p]roceedings under article 58 of the [Statute] are not adversarial, and the circumstances of this case do not justify a deviation from that principle”.⁴⁷

22. The Prosecutor submits that the general applicability of the principle of *audi alteram partem* is not an issue in the appeals proceedings at hand which merely concern the question of whether Mr Banda had a right to be heard before the Trial Chamber issued a warrant of arrest pursuant to article 58 (1) (b) (i) of the Statute.⁴⁸ The Prosecutor argues that, as a matter of law, the principle of *audi alteram partem* is not applicable to the issuance of warrants of arrest under article 58 of the Statute.⁴⁹

23. Finally, the Prosecutor submits that Mr Banda fails to show that the approach of the Trial Chamber materially affected the Impugned Decision.⁵⁰ Accordingly, the Prosecutor requests that the appeal be rejected.⁵¹

C. Determination by the Appeals Chamber

24. At the outset, the Appeals Chamber notes that, after the charges are confirmed, a Trial Chamber is responsible for the conduct of subsequent proceedings and, according to article 61 (11) of the Statute, “may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings”, which is further confirmed in article 64 (6) (a) of the Statute. The Appeals Chamber considers, in this context, that the issuance of a warrant of arrest (or the replacement of a summons to appear with a warrant of arrest) is such a function “that is relevant and capable of application” in the trial proceedings in the present case. As a result, the Trial Chamber must apply the relevant provisions in the Statute and the Rules of Procedure and Evidence in the exercise of those functions.

⁴⁶ [Response to the Document in Support of the Appeal](#), para. 23.

⁴⁷ [Response to the Document in Support of the Appeal](#), para. 3. *See also* para. 25.

⁴⁸ [Response to the Document in Support of the Appeal](#), para. 26.

⁴⁹ [Response to the Document in Support of the Appeal](#), para. 27.

⁵⁰ [Response to the Document in Support of the Appeal](#), para. 4. *See also* paras 34-36.

⁵¹ [Response to the Document in Support of the Appeal](#), para. 37.

25. The Appeals Chamber also notes that article 58 (1) of the Statute sets forth the conditions for the issuance of a warrant of arrest “on the application of the Prosecutor”. The Appeals Chamber notes that the word “shall” in article 58 (1) of the Statute denotes that the issuance of a warrant of arrest is mandatory if the criterion under article 58 (1) (a) and at least one of the criteria under article 58 (1) (b) of the Statute are met.⁵² Most noteworthy in this respect is the criterion under article 58 (1) (b) (i) of the Statute, which stipulates that a warrant of arrest shall be issued if the arrest of the person appears necessary “[t]o ensure the person’s presence at trial”.

26. Article 58 (7) of the Statute describes the procedure for issuing a summons to appear as “[a]n alternative to seeking a warrant of arrest”. Pursuant to that provision, the Pre-Trial Chamber shall issue a summons if it “is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person’s appearance”. Furthermore, a summons to appear may be issued “with or without conditions restricting liberty (other than detention) if provided by national law, for the person to appear”. In this context, the Appeals Chamber observes that rule 119 (5), third sentence, of the Rules of Procedure and Evidence directs the competent Chamber to apply the procedure as laid down in rule 119 (4) of the Rules of Procedure and Evidence, which makes clear that, in case the person concerned has failed to comply with one or more of the obligations imposed, the competent Chamber may issue a warrant of arrest.⁵³ In that case, article 58 of the Statute applies.⁵⁴

27. The Appeals Chamber recalls that it is not called upon to determine whether it was appropriate for the Trial Chamber to replace the summons to appear with a warrant of arrest in the circumstances of the present case. Rather, the issue in the present appeal is limited to whether the Trial Chamber should have provided Mr Banda with a *further* opportunity to present submissions on the appropriateness of

⁵² See *Situation in the Democratic Republic of the Congo*, “[Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’](#)”, 13 July 2006, ICC-01/04-169 (OA), para. 44.

⁵³ The third sentence of rule 119 (5) of the Rules of Procedure and Evidence reads: “If the Pre-Trial Chamber receives information that the person concerned has failed to comply with conditions imposed, it shall proceed in accordance with sub-rule 4”, which in turn stipulates that “[i]f the Pre-Trial Chamber is convinced that the person concerned has failed to comply with one or more of the obligations imposed, it may, on such basis, at the request of the Prosecutor or on its own initiative, issue a warrant of arrest in respect of the person”.

⁵⁴ The Appeals Chamber notes that rule 119 (4) of the Rules of Procedure and Evidence provides a legal basis for the competent Chamber to act upon request or *proprio motu*.

replacing the summons to appear with a warrant of arrest after being satisfied that Mr Banda would not appear voluntarily for his trial.

28. In this regard, the Appeals Chamber notes that Mr Banda argues, *inter alia*, that the *audi alteram partem* principle⁵⁵ “applies in the context of a Trial Chamber’s *proprio motu* [*sic*] consideration of whether to replace a summons with an arrest warrant” and that the Chamber “erred when it failed to provide the Defence – or continue providing the Defence – an opportunity to be heard on ‘the appropriateness of replacing the summons to appear by a warrant of arrest after being satisfied that [] [Mr. Banda] would not appear voluntarily for his trial’” (footnote omitted).⁵⁶

29. The Appeals Chamber notes that Mr Banda, while generally alleging that “the issue on appeal is a procedural one”,⁵⁷ does not demonstrate that, in the absence of the alleged error, the decision would have substantially differed from the one rendered, as is required under the Appeals Chamber’s jurisprudence relevant to the appellant’s burden to substantiate the material effect of any alleged procedural error.⁵⁸ Despite this deficiency, the Appeals Chamber will nonetheless proceed to address the alleged procedural error, i.e. whether or not the Trial Chamber was required to hear *further* from the Defence on this issue before activating its powers under rules 119 (4) and (5) of the Rules of Procedure and Evidence in conjunction with article 58 of the Statute. The Appeals Chamber considers that this question falls within the Trial Chamber’s discretion as to the conduct of proceedings under article 64 of the Statute.

30. In this respect, the Appeals Chamber recalls that it

will not interfere with the Pre-Trial Chamber’s exercise of discretion [...] merely because the Appeals Chamber, if it had the power, might have made a different ruling. To do so would be to usurp powers not conferred on it and to render nugatory powers specifically vested in the Pre-Trial Chamber.

[...] [T]he Appeals Chamber’s functions extend to reviewing the exercise of discretion by the Pre-Trial Chamber to ensure that the Chamber properly

⁵⁵ The *audi alteram partem* principle is defined as “[h]ear the other side; hear both sides. No man should be condemned unheard”. See Black’s Law Dictionary Online, accessed at <http://thelawdictionary.org/audi-alteram-partem/>.

⁵⁶ [Document in Support of the Appeal](#), para. 41.

⁵⁷ [Document in Support of the Appeal](#), para. 32.

⁵⁸ See *Prosecutor v. Thomas Lubanga Dyilo*, “[Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#)”, 1 December 2014, ICC-01/04-01/06-3121-Conf (A 5) (hereinafter: “Judgment on the appeal of Mr Thomas Lubanga Dyilo”), para. 20; a public redacted version was registered on 1 December 2014 (ICC-01/04-01/06-3121-Red (A 5)).

exercised its discretion. However, the Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion [...], save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position. They identify the conditions justifying appellate interference to be: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion. [Footnotes omitted.]⁵⁹

31. The Appeals Chamber finds that Mr Banda has not established that the Trial Chamber's exercise of discretion in the case at hand was erroneous. Mr Banda appears to argue that he was *entitled* to file further submissions in the present case on whether or not it was appropriate for the Trial Chamber to resort to its powers under rule 119 (4) of the Rules of Procedure and Evidence. However, other than a general reference to the *audi alteram partem* principle, Mr Banda does not put forth any legal argument in support of the contention that the procedural step of inviting *further* submissions was required as a matter of law. In any event, the Appeals Chamber is not persuaded that, in circumstances such as the present, an internationally recognised human right to file *further* submissions exists. In the present case, the decision of whether to request further submissions falls squarely within the Trial Chamber's discretion. Accordingly, the Trial Chamber's decision was not based on an erroneous interpretation of the law.

32. Furthermore, the Appeals Chamber considers that the Trial Chamber's discretion was not exercised on the basis of a patently incorrect conclusion of fact or that its decision was so unfair and unreasonable that it constituted an abuse of discretion. Mr Banda has not identified any relevant facts that were either ignored or erroneously relied upon. In this context, the Appeals Chamber notes that a different and, in its view, more accurate account of the precise extent and number of communications between the Trial Chamber and Mr Banda is provided in the Partly

⁵⁹ *Prosecutor v. Joseph Kony et al.*, "[Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 \(1\) of the Statute' of 10 March 2009](#)", 16 September 2009, ICC-02/04-01/05-408, paras 79-80. The Appeals Chamber has found that the same standard of review applies in final and interlocutory appeals: *see Judgment on the appeal of Mr Thomas Lubanga Dyilo*, para. 17.

Dissenting Opinion to Decision Granting Leave to Appeal.⁶⁰ However, as relevant to the issue certified in this appeal, the Appeals Chamber notes that [REDACTED].⁶¹ [REDACTED].⁶²

33. The Appeals Chamber considers that, in these circumstances, it was not unreasonable for the Trial Chamber not to request *further* submissions from Mr Banda before issuing the warrant of arrest. In this context, the Appeals Chamber also notes that the Trial Chamber's decision left open the possibility to "revisit [...] the conditions of [Mr Banda's] stay in The Netherlands during trial" in the event of his voluntary appearance *after* the issuance of the warrant of arrest.⁶³

34. Finally, while not dispositive of this appeal, the Appeals Chamber takes note of the fact that Mr Banda was informed as early as August 2009 that while "the issuance of a warrant of arrest does not appear necessary for the purpose of article 58(1)(b) of the Statute", this was "without prejudice to the Chamber's power to review its determination under articles 58(1) and 58(7) of the Statute, respectively".⁶⁴

35. As Mr Banda has not identified any error on the part of the Trial Chamber, it is not necessary for the Appeals Chamber to consider whether any such error materially affected the Impugned Decision.

⁶⁰ See [Partly Dissenting Opinion to Decision Granting Leave to Appeal](#), paras 6 *et seq.*

⁶¹ [REDACTED].

⁶² [REDACTED].


⁶³ [Impugned Decision](#), para. 24. See also [Response to the Document in Support of the Appeal](#), para. 36.

⁶⁴ [Summons to Appear](#), para. 20.

III. APPROPRIATE RELIEF

36. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). For the reasons set out in the preceding section, the Appeals Chamber deems it appropriate to confirm the Impugned Decision.

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


Judge Sang-Hyun Song
Presiding Judge

Dated this 3rd day of March 2015

At The Hague, The Netherlands