

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-03/09
Date: 22 September 2014

TRIAL CHAMBER IV

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

SITUATION IN DARFUR, THE SUDAN

IN THE CASE OF

THE PROSECUTOR v.

ABDALLAH BANDA ABAKAER NOURAIN

Public document

Public redacted version of the “Prosecution response to the Defence application for leave to appeal the 11 September 2014 arrest warrant decision or for reconsideration of the same” filed on 22 September 2014 (ICC-02/05-03/09-609-Conf-Exp)

Source: Office of the Prosecutor

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

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Introduction

1. The Office of the Prosecutor (“Prosecution”) supports the Defence request for reconsideration of the 11 September 2014 Arrest Warrant Decision.¹
2. Reconsideration is appropriate on the basis of new facts.² Those new facts are the representations, advanced for the first time in the Defence application for leave to appeal or reconsideration (“Application”),³ that the Accused:
 - [REDACTED],⁴ and
 - [REDACTED].⁵
3. These representations alter the factual basis underpinning the Arrest Warrant Decision – [REDACTED].⁶ Although the Defence stated on 9 September [REDACTED],⁷ the Defence has now taken the opposite position – asserting that [REDACTED].⁸ This U-turn – which the Application fails to acknowledge or explain – removes the central premise of the Arrest Warrant Decision. As a result, reconsideration is appropriate.
4. In the circumstances, the Prosecution suggests that it is appropriate for the Trial 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.

¹ ICC-02/05-03/09-606.

² *See, e.g.*, ICC-01/04-01/06-2705, paras. 14-18; ICC-01/09-02/11-863, para. 11.

³ ICC-02/05-03/09-608-Conf-Exp.

⁴ ICC-02/05-03/09-608-Conf-Exp, para. 32 (original emphasis).

⁵ [REDACTED].

⁶ [REDACTED].

⁷ [REDACTED].

⁸ ICC-02/05-03/09-608-Conf-Exp, para. 32.

5. Providing the Accused with an opportunity to give such an assurance will satisfy the due process concerns raised by the Defence in the Application and by Judge Eboe-Osuji in his dissent. It will also ensure that the Chamber's decision has a sound factual footing and accounts for the apparent changes in the Accused's position.
6. An interlocutory appeal, however, is not appropriate because the requirements of Article 82(1)(d) of the Rome Statute ("Statute") are not satisfied. In particular, the Application fails to show that the Arrest Warrant Decision impacts "the fair and expeditious conduct of the proceedings" to such a significant extent that an interlocutory appeal is required, or that an interlocutory appeal would "materially advance the proceedings". There is a quicker and more practical solution, and one that is fair to all concerned – giving the Accused a final opportunity to provide an unequivocal assurance that he will appear for trial. Once the Accused has made his intentions clear, the Chamber will be able to decide whether a warrant of arrest is necessary, or whether a summons is sufficient to ensure the Accused's appearance.

Confidentiality

7. This document is designated confidential, *ex parte* as a response to a document so designated.⁹

Submissions

- A. The Accused's representations that [REDACTED] are new facts that may influence the Arrest Warrant Decision.
8. The Arrest Warrant Decision is based upon the GoS' failure to comply with the Chamber's 14 July 2014 decision to seek assistance from the GoS ("July Decision").¹⁰ The July Decision, in turn, was premised on the understanding

⁹ Regulation 23*bis*(2) of the Regulations of the Court.

¹⁰ ICC-02/05-03/09-606, paras. 20-24.

that it was “necessary to ensure the cooperation of Sudan . . . to facilitate [the Accused’s] presence at the trial”.¹¹

9. In the two months between the July Decision and the Arrest Warrant Decision, the Defence did nothing to suggest that the July Decision rested on an incorrect premise and that [REDACTED]. On 9 September 2014, the Defence filed [REDACTED], in which the Defence asserted that:

- [REDACTED].¹²
- [REDACTED].¹³
- [REDACTED].¹⁴
- [REDACTED].¹⁵

10. The Application, filed just a week after [REDACTED], takes the opposite position. It asserts that [REDACTED] and [REDACTED].¹⁶ In essence, the Application asserts that the Arrest Warrant Decision rests upon an incorrect factual premise, [REDACTED].

11. The unfortunate result of the Defence’s changing positions is that the factual underpinning of the Arrest Warrant Decision now appears to have been removed. It appears that the Accused does not, in truth, [REDACTED]. This factual change goes to the heart of the Arrest Warrant Decision and makes reconsideration appropriate.

¹¹ ICC-02/05-03/09-590-Red, para. 36.

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

B. In reconsidering the Arrest Warrant Decision, the Chamber should require the Accused to provide an unequivocal undertaking that he will appear for trial.

12. In this case, the question of whether an arrest warrant should be issued turns on whether the Accused intends to appear for trial on the date set by the Chamber. He has not made that clear. Instead, his position has changed, making it difficult for the Chamber to reach a properly informed decision.

13. At the 7 April 2014 status conference, Defence counsel informed the Bench that [REDACTED].¹⁷ [REDACTED].¹⁸ [REDACTED].¹⁹

14. On 14 April 2014, in response to the Chamber's inquiry as to whether he would appear for trial, the Accused failed to provide a clear answer. [REDACTED],²⁰ [REDACTED]. [REDACTED]²¹ [REDACTED].²²

15. After the July Decision was issued, the Defence moved away from this position. Contrary to the 14 April representation that the Accused was prepared [REDACTED],²³ the Defence asserted on 9 September that [REDACTED].²⁴

16. In the Application, the position changed once again, with the Defence asserting that [REDACTED] and that the Accused [REDACTED].²⁵ He has still not given an unequivocal assurance that he will appear.

17. The Accused's changing and mutually inconsistent positions have made it impossible to discern whether he intends to appear for trial. It is this matter

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ [REDACTED].

²⁴ See *supra* para. 9.

²⁵ See *supra* paras. 2, 10.

that should be resolved in the reconsideration process. The Accused should be required to provide an unequivocal undertaking that he will appear for trial on the date set by the Chamber. If he provides such an undertaking, then trial preparations should proceed. If he fails to do so, an arrest warrant would be appropriate.

C. An interlocutory appeal is not warranted.

18. The Application fails to show that an interlocutory appeal is warranted because it does not satisfy Article 82(1)(d)'s "fair and expeditious" requirement.²⁶
19. Any issue of fairness can be addressed by revisiting the Arrest Warrant Decision in the manner described above. Requiring the Accused to provide an unequivocal assurance that he will appear for trial gives him an opportunity to be heard, which will alleviate the Defence's due process concerns. It will also ensure that the Chamber has the clarification it needs to reach a fully-informed decision.
20. Similarly, any issue of expeditiousness can be dealt with in the reconsideration process. That process will resolve the question of the Accused's appearance quicker and more efficiently than an interlocutory appeal and will provide the Court, the victims and the parties with the certainty they need on whether and when the trial will proceed.
21. Finally, since a simpler and more effective remedy is available before the Trial Chamber, intervention by the Appeals Chamber at this stage is unwarranted, and therefore cannot "materially advance the proceedings", within the terms of Article 82(1)(d) of the Statute.

²⁶ Since the Defence has not argued that the Arrest Warrant Decision would significantly affect "the outcome of the trial", its failure to make the necessary showing under Article 82(1)(d)'s "fair and expeditious" limb is dispositive of the Application.

Conclusion

22. For the foregoing reasons, the Chamber should reconsider the Arrest Warrant Decision by requiring the Accused to provide an unequivocal undertaking that he will appear for trial on the date set by the Chamber, and then deciding, on the basis of the Accused's answer, whether an arrest warrant is necessary.



Fatou Bensouda
Prosecutor

Dated this 22nd day of September 2014

At The Hague, The Netherlands