

**Cour
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**International
Criminal
Court**



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Date: 19 January 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 THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

Public

Public Redacted Version of “Defence’s Document in Support of Appeal against Trial Chamber IV’s Decision issuing the ‘Warrant of arrest for Abdallah Banda Abakaer Nourain’ ”, submitted on 12 January 2015

Sources: Defence Team of Abdallah Banda Abakaer Nourain

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

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I. Introduction

1. The defence for Mr. Banda ("Defence") submits that Trial Chamber IV, by majority, Judge Eboe-Osuji dissenting, erred when it issued the *Warrant of arrest for Abdallah Banda Abakaer Nourain* ("Arrest Warrant")¹ without providing Mr. Banda an opportunity to be heard on the legal and factual basis, as well as the propriety, of replacing the summons to appear² with an arrest warrant.
2. This appeal by the defence for Mr. Banda ("Defence") raises for the first time before the Appeals Chamber the specific issue of whether the natural justice principle of *audi alteram partem* – 'to hear the other side' – continues to apply in circumstances where the Trial Chamber is considering the "appropriateness of replacing [a] summons to appear by a warrant of arrest [against a [REDACTED] accused represented by counsel] after being satisfied that the accused would not appear voluntarily for his trial".³
3. The Trial Chamber's error in denying the Defence an opportunity to be heard with respect to a decision for which the consequences are "far reaching",⁴ followed from two legal findings in the Arrest Warrant:
 - i. holding that a "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";⁵ and
 - ii. determining that once a Chamber is satisfied that an accused will not appear voluntarily for trial, the requirement under Article 58(1)(b)(i) of the Rome

¹ 11 September 2014, ICC-02/05-03/09-606.

² The summons to appear was issued on 27 August 2009 (ICC-02/05-03/09-3) ("Summons to Appear").

³ This is the issue formulated by the Defence and clarified by the Trial Chamber (Judge Eboe-Osuji partially dissenting) which was certified for appeal. See 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, ICC-02/05-03/09-619-Conf, para. 55 ("**Leave Decision**").

⁴ *Ibid.*, para. 57.

⁵ Arrest Warrant, para. 22.

Statute ("Statute") that an arrest warrant "appears necessary" is met without any further legal and factual analysis required.⁶

4. Mr. Banda should have been afforded the opportunity to make submissions on the above identified legal issues and on the broader matters concerning the legal and factual basis as well as the propriety of replacing the summons with an arrest warrant. If the Appeals Chamber finds that the Chamber did err and was required to invite and consider submissions from the Defence before replacing the summons with an arrest warrant, then the Arrest Warrant should be quashed on the basis that it was issued in violation of Mr. Banda's right to be heard.

II. Confidentiality

5. Pursuant to Regulations 23*bis* (2) of the Regulations of the Court ("Regulations"), this document is filed on a confidential basis as it refers to documents and information that are likewise classified. The Defence will also file a public redacted version.

III. Background

6. On 20 November 2008, the Office of the Prosecutor ("OTP") submitted an application pursuant to Article 58 of the Statute in which it sought an arrest warrant, or in the alternative a summons to appear, against Mr. Banda.⁷ On 27 August 2009, Pre-Trial Chamber I issued a summons, holding that an arrest warrant does not appear necessary and that "*there are reasonable grounds to believe that a summons [...] for Banda is sufficient to ensure his appearance before the Court*".⁸

7. At his 17 June 2010 initial appearance, Mr. Banda stated that he:⁹

was summoned by this Court because the Court has rights and duties, and I am with right and justice because I believe in justice. I came here voluntarily in

⁶ Arrest Warrant, para. 24.

⁷ ICC-02/05-03/09-20-Conf, para. 170.

⁸ Summons to Appear, para. 20.

⁹ ICC-02/05-03/09-T-4-ENG ET, p. 8, lines 5-11.

response to the summons [...], and I call upon everyone who [has] been summoned by this Court to come here to exonerate themselves, and I thank this Court [] for everything that they have given [] me to enable me to come here.

8. Pursuant to an agreement¹⁰ between the Defence and the OTP to expedite the confirmation of charges process, a one-day confirmation hearing was held on 8 December 2010.¹¹ On 7 March 2011, Pre-Trial Chamber I confirmed the three war crimes charges preferred against Mr. Banda.¹²
9. On 16 May 2011, the parties filed the *Joint Submission by the Office of the Prosecutor and the Defence Regarding the Contested Issues at the Trial of the Accused Persons*.¹³ The parties annexed to the filing an extensive set of agreed facts and notified the Chamber that Mr. Banda would contest only three specific issues at trial. On 28 September 2011, the Chamber determined that the trial would proceed on the basis of the contested issues and agreed facts.¹⁴
10. At a confidential and *ex parte* status conference held on 19 June 2012, the Defence [REDACTED].¹⁵
11. At the 19 June 2012 status conference His Honour Juge Eboe-Osuji also queried the Defence [REDACTED].¹⁶
12. Further to the Chamber's direction,¹⁷ on 19 November 2014, the Defence filed its *Submissions on the Possible Date for the Commencement of the Trial*,¹⁸ [REDACTED].¹⁹

¹⁰ 19 October 2010, ICC-02/05-03/09-80.

¹¹ ICC-02/05-03/09-T-9-Red.

¹² 7 March 2011, ICC-02/05-03/09-121-Conf-Corr.

¹³ ICC-02/05-03/09-148.

¹⁴ ICC-02/05-03/09-227.

¹⁵ ICC-02/05-03/09-T-16-CONF-EXP-ENG ET, p. 2, lines 1-19 and p. 3, lines 8-15. A confidential redacted version of this transcript was provided to the OTP via ICC-02/05-03/09-401-Conf-Anx.

¹⁶ *Ibid.*, p. 24, lines 3-7.

¹⁷ ICC-02/05-03/09-410, p.72, point (iii).

¹⁸ ICC-02/05-03/09-422-Conf-Exp.

¹⁹ *Ibid.*, paras. 46-51.

On 6 March 2013, the Chamber issued a decision setting a trial date for 5 May 2014.²⁰

13. On 4 March 2014, the Registry filed its *Submission of the Registry pursuant to regulation 24 bis of the Regulations of the Court on the trial preparation*,²¹ in which it, *inter alia*, [REDACTED],²² [REDACTED].

14. On 31 March 2014, the Registry submitted a second update on trial preparation,²³ in which it informed the Trial Chamber that [REDACTED].

15. At a confidential status conference convened by the Chamber on 7 April 2014, [REDACTED].²⁴ [REDACTED].²⁵ [REDACTED].²⁶ [REDACTED].²⁷ [REDACTED].²⁸

16. On 10 April 2014, in the *Decision subsequent to the status conference of 7 April 2014*,²⁹ the Chamber [REDACTED].³⁰ The Chamber [REDACTED].³¹

17. On 14 April 2014, the Defence [REDACTED] Mr. Banda:³² (i) [REDACTED] “willingness and desire to cooperate with the Court and appear for trial in order to be provided an opportunity to clear his name”; (ii) [REDACTED]; and (iii) [REDACTED].

²⁰ ICC-02/05-03/09-455, para. 21.

²¹ ICC-02/05-03/09-543-Conf.

²² Annex 2 to ICC-02/05-03/09-543-Conf.

²³ 3 April 2013, ICC-02/05-03/09-550-Conf-Red.

²⁴ ICC-02/05-03/09-T-25-CONF-ENG ET, p. 3, lines 3-15, 20-25 and p. 4, lines 1-7.

²⁵ *Ibid.*, p. 4, lines 8-15.

²⁶ *Ibid.*, p. 3, lines 16-19.

²⁷ *Ibid.*, p. 17, lines 9-12 (emphasis added).

²⁸ *Ibid.*, p. 20, lines 7-8.

²⁹ ICC-02/05-03/09-553-Conf.

³⁰ *Ibid.*, para. 9.

³¹ *Ibid.*, para. 14(i).

³² Defence Submissions pursuant to “Decision subsequent to the status conference of 7 April 2014” (ICC-02/05-03/09-553-Conf), ICC-02/05-03/09-560-Conf.

18. On the same day the Defence also submitted [REDACTED],³³ [REDACTED],³⁴ [REDACTED].³⁵ On 16 April 2014, the Chamber vacated the trial date and requested submissions from the OTP and Registry [REDACTED].³⁶
19. The OTP and Registry filed their respective submissions on 6 May 2014.³⁷ Among other matters, the Registry [REDACTED].³⁸ On 23 May 2014, the Defence filed a consolidated response to the OTP and Registry submissions with nine supporting annexes.³⁹ The Defence [REDACTED].⁴⁰
20. On 14 July 2014, the Chamber issued the *Decision as to the Further Steps for the Trial Proceedings*.⁴¹ The Chamber, by majority [REDACTED].⁴² The Chamber also [REDACTED].⁴³
21. In view of its various findings the Chamber set a trial date of 18 November 2014 and determined that
- [REDACTED] *necessary to ensure the cooperation of Sudan with the trial proceedings against Mr Banda. Hence, [...] it [is] appropriate [for the Registry] to notify the GoS of the summons to appear against Mr Banda and to request its cooperation to facilitate his presence at the trial, including by providing him with all necessary travel documents and making all other necessary arrangements as may be appropriate.*⁴⁴

³³ ICC-02/05-03/09-561-Conf [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ Decision vacating the trial date of 5 May 2014, ICC-02/05-03/09-564-Conf (Judge Eboe Osuji partly dissenting).

³⁷ 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.

³⁸ ICC-02/05-03/09-577-Conf, paras. 22-24.

³⁹ ICC-02/05-03/09-583-Conf.

⁴⁰ *Ibid.*, para. 38.

⁴¹ Decision as to the Further Steps for the Trial Proceedings, 14 July 2014, ICC-02/05-03/09-590-Conf (Judge Eboe-Osuji partly dissenting).

⁴² *Ibid.*, para. 35.

⁴³ *Ibid.*, para. 31.

⁴⁴ *Ibid.*, para. 36.

22. On 15 August 2014, the Registry informed the Chamber that the envelope containing the cooperation request sent to the GoS [REDACTED] had been returned unopened.⁴⁵ On 9 September 2014, the OTP and the Defence each submitted filings further to the Registry's notification. The OTP requested the Chamber order Mr. Banda to provide an unequivocal undertaking that he will appear for trial and implied that a negative response from Mr. Banda may necessitate the issuance of an arrest warrant.⁴⁶ The Defence [REDACTED].⁴⁷

23. Two days later, on 11 September 2014, the Chamber, by majority, issued the Arrest Warrant against Mr. Banda. The Chamber held that *"regardless of whether Mr Banda wishes or not to be present at trial, there are no guarantees that in the current circumstances [in particular the non-cooperation of the GoS], he will be in an objective position to appear voluntarily"*.⁴⁸ The Chamber additionally vacated the 18 November trial date, suspended all trial preparation measures and decided it would not rule on pending motions unless good cause was shown.

24. Judge Eboe-Osuji, in his dissenting opinion from the Arrest Warrant ("Dissenting Opinion"), stated, *inter alia*, that the results of the Arrest Warrant amounted to *"staggering steps [...] taken without giving an opportunity to the parties and participants to express a view"* and that it has *"the precise effect of depriving the Defence of an opportunity of fair hearing"*.⁴⁹ The Dissenting Opinion further explained that, in the circumstances presented by this case, Article 58 of the Statute applied in accordance with due process principles required that: (a) Mr. Banda be given an opportunity to appear for trial on a set date or "unequivocally indicate in advance that he will not appear" on said date; and (b) *"in the event of*

⁴⁵ ICC-02/05-03/09-598-Conf (notified on 18 August 2014).

⁴⁶ 18 November 2014, ICC-02/05-03/09-603-Conf.

⁴⁷ ICC-02/05-03/09-605-Conf.

⁴⁸ Arrest Warrant, para. 21.

⁴⁹ Dissenting Opinion, para. 4.

*any of those preconditions, a proceeding [] conducted, in which the Defence is afforded an opportunity to show cause why an arrest warrant should not be issued".*⁵⁰

25. On 17 September 2014, the Defence filed its application for leave to appeal the Arrest Warrant or in the alternative requested reconsideration of the decision ("Application").⁵¹ The OTP filed its response to the Application on 22 September 2014.⁵² On 26 September 2014, the Chamber granted⁵³ the Defence's application for leave to reply⁵⁴ to the OTP's response and additionally ordered the Defence to confirm "*in a straight forward and unequivocal way whether Mr Banda will [...] appear for his trial in circumstances in which*" the GoS's cooperation was not forthcoming and "*the Court is not in a position to [REDACTED]*".⁵⁵ On 6 October 2014, the Defence submitted its reply,⁵⁶ informing:

*[I]n the circumstances [...] where no assistance is to be provided [REDACTED] either by the GoS or the Court [REDACTED] then Mr. Banda will [REDACTED] not to attend trial.*⁵⁷

26. On 19 December 2014, the Chamber issued the Leave Decision, granting the Defence's application for leave to appeal the Arrest Warrant. Judge Eboe-Osuji, who concurred only in the outcome granting leave to appeal, filed a partially dissenting opinion ("Leave Dissent") on 8 January 2015.⁵⁸

⁵⁰ *Ibid.*, para. 29.

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

⁵² ICC-02/05-03/09-609-Conf-Exp.

⁵³ ICC-02/05-03/09-612-Conf.

⁵⁴ 24 September 2014, ICC-02/05-03/09-611-Conf-Exp.

⁵⁵ ICC-02/05-03/09-612-Conf, para. 6.

⁵⁶ ICC-02/05-03/09-614-Conf-Exp.

⁵⁷ *Ibid.*, para. 14 (internal citation omitted).

⁵⁸ 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', ICC-02/05-03/09-619-Conf-Anx.

IV. Applicable Law

Standard of Review on Appeal

27. The Appeals Chamber may reverse an interlocutory decision if the Trial Chamber made an error of law or fact,⁵⁹ which materially affected the impugned decision.⁶⁰

Interpretation and application of the law under the Rome Statute and the requirement of fair proceedings

28. Article 21(3) of the Statute provides that: *“The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights [...]”* The Appeals Chamber has affirmed that *“every [] article of the Statute [...] must be interpreted and applied in accordance with internationally recognized human rights, as declared in article 21 (3) of the Statute”*.⁶¹

29. Article 64(2) of the Statute states that: *“The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused [...]”*

The issuance of warrants of arrest or summonses to appear

30. Article 58 of the Statute provides in relevant part:

1. *At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that: [...]*
 - b) *The arrest of the person appears necessary: (i) To ensure the person’s appearance at trial”; [...]*

⁵⁹ *Prosecutor v. Lubanga*, Judgment on Disclosure Restriction pursuant to Rule 81 (2) and (4), 13 October 2006, ICC-01/04-01/06-568 OA3, para. 19; *Prosecutor v. Kony et al*, Judgment on Admissibility Appeal by Ad-Hoc Defence, 16 September 2009, ICC-02/04-01/05-408 OA3, para. 80.

⁶⁰ *Prosecutor v. Katanga and Ngudjolo*, Judgment on Admissibility Appeal, 25 September 2009, ICC-01/04-01/07-1497 OA8, para. 37.

⁶¹ 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, para. 38 (“Extraordinary Review Judgment”).

7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber 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, it shall issue the summons [...].

V. Ground of Appeal & Submissions

31. The Defence submits that the matters for consideration before the Appeals Chamber are straightforward. The Trial Chamber erred when it denied the Defence an opportunity to make submissions "on the appropriateness of replacing the summons to appear by a warrant of arrest" after the Chamber reached the preliminary finding that the accused would not appear voluntarily for his trial.⁶² Accordingly, the issuance of the Arrest Warrant was materially affected and the warrant must be quashed on the basis that it was promulgated in violation of Mr. Banda's due process rights.

32. The Defence emphasises that the issue on appeal is a procedural one and, therefore, to use the language of the OTP in its recent appeal in the *Bemba et. al* case, "the Appeals Chamber should [] refrain, in deciding this appeal, from ruling on the proper interpretation of"⁶³ Article 58 of the Statute on the merits in the context of the circumstances presented by this case. Nonetheless, should the Appeals Chamber determine that it is required to address the interpretation of Article 58, the Defence also provides limited submissions in this regard.

(A) The applicability of the *audi alteram partem* principle under the Rome Statute

33. The Defence submits that where the substantive rights of a party are concerned, there can be little doubt that the *audi alteram partem* principle is "acknowledged

⁶² Leave Decision, para. 55.

⁶³ Prosecution Appeal against the "Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcise Arido", 29 October 2014, ICC-01/05-01/13-727, para. 21.

by universally recognized human rights norms”⁶⁴ and therefore applicable before the ICC pursuant to Article 21(3) of the Statute. The right of response of parties under Regulation 24(1) of the Regulations as well as the requirement under Regulation 109(3) that a Chamber shall hear from a state that is the subject of Article 87(7) non-cooperation proceedings embody this principle.

34. National jurisdictions have long accepted the *audi alteram partem* principle as a fundamental precept without which justice cannot exist.⁶⁵

35. In a recent filing in the *Ruto and Sang* case, the OTP acknowledged that, unlike routine procedural decisions, where a decision impacts the substantive rights of a party it may be best to seek the views of the party before issuing such decision.⁶⁶ The Defence submits that only exceptional circumstances, which are not present in this case (see arguments below), might justify not seeking the views of an impacted party before a decision is taken.

⁶⁴ Extraordinary Review Judgment, para. 38. See also Routledge Handbook of International Human Rights Law (Routledge, 2013), S. Sheeran and Sir N. Rodely, eds., p. 696 (“[T]he natural justice principle *audi alteram partem*, according to which a person is entitled to be heard before a decision is taken which affects his or her rights or interests.”).

⁶⁵ See, e.g., Per the Lord Chief Justice in *R. v. Gaskin* (1799) 8 T.R. 209, p. 210 (“If we were to hold this return to be sufficient, we should decide contrary to one of the first principles of justice, *audi alteram partem*. [...] It is to be found at the head of our criminal law, that every man ought to have an opportunity of being heard before he is condemned [...]”); *Windsor v. McVeigh*, 93 U.S. 274 (1876), p. 274 (“A sentence of a court, pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.”); Dissenting Opinion of Justice Frankfurter, joined by Justices Douglas and Brennan, *Caritativo v. People of State of California*, 357 U.S. 549 (1958), p. 558 (“*Audi alteram partem*—hear the other side!—a demand made insistently through the centuries, is now a command, spoken with the voice of the Due Process Clause of the Fourteenth Amendment, against state governments, and every branch of them—executive, legislative, and judicial—whenever any individual, however lowly and unfortunate, asserts a legal claim.”) (“*Caritativo* Dissent”); *A. (L.L.) v. B. (A.)* [1995] 4 SCR 53, para. 27 (“The *audi alteram partem* principle, which is a rule of natural justice and one of the tenets of our legal system, requires that courts provide an opportunity to be heard to those who will be affected by the decisions.”)

⁶⁶ ICC-01/09-01/11-1613-Conf, para. 9. The Defence notes that relaying the OTP’s stated position on this issue in no way compromises the confidentiality of the underlying filing.

36. In the context of international criminal law, the Appeals Chamber of the ICTY has provided perhaps the clearest exposition of the fundamental nature and inviolability of the *audi alteram* principle in the context of *proprio motu* decisions:⁶⁷

In the view of the Appeals Chamber, the fact that a Trial Chamber has a right to decide proprio motu entitles it to make a decision whether or not invited to do so by a party; but the fact that it can do so does not relieve it of the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made. Failure to hear a party against whom the Trial Chamber is provisionally inclined is not consistent with the requirement to hold a fair trial.

37. The Defence accordingly submits that there can be little doubt as to the general applicability of the *audi alteram partem* principle under the Rome Statute to matters affecting the substantive rights of a party.

(B) The right to be heard in the context of Article 58 of the Statute

38. The Defence agrees with the Chamber “that it has been the usual practice of this Court to issue an arrest warrant without previous consultation with the person concerned”.⁶⁸ However, as far as the Defence is aware, this case presents the first instance in which an accused person (as opposed to a pre-initial appearance suspect) who has appeared on summons before the Court, has fully abided by the conditions in said summons, otherwise complied with the orders of the Court, is represented by counsel, and is prevented by matters outside his control from attending for trial,⁶⁹ has been subject to a *proprio motu* decision by a Trial Chamber to replace a long-standing summons with an arrest warrant.

⁶⁷ *Prosecutor v. Jelusic*, IT-95-10-A, Appeals Judgment, 5 July 2001, para. 27 (emphasis added), citing to *R. v. Barking and Dagenham Justices, ex parte Director of Public Prosecutions* [1995] Crim LR 953; *Director of Public Prosecution v. Cosier*, Q.B.D., 5 April 2000.

⁶⁸ Leave Decision, para. 35.

⁶⁹ “[T]he Chamber is neither in a position to effectively prevent or mitigate the risks associated with particular circumstances of the case nor is it able to find an appropriate solution to problems derived from such risks” (Arrest Warrant, para. 20).

39. The fact that the Trial Chamber may *proprio motu* 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 in the circumstances described above. In this regard, the Defence respectfully disagrees with the Majority's finding that the Defence "*has had sufficient opportunity to address the issuance of a warrant of arrest*".⁷⁰

40. As the above canvassed procedural history makes clear, the only junctures at which replacing Mr. Banda's summons with an arrest warrant were discussed – at the 19 June 2012⁷¹ [REDACTED]⁷² – were brief and cursory exchanges that can in no way be considered as providing adequate notice, let alone an opportunity to be heard, on the legal and factual basis, as well as the propriety, of replacing the summons with an arrest warrant.

(C) The issue on appeal – a 'continuing' right to be heard

41. As set out above, the Defence submits that, generally speaking, in the circumstances presented by this case – a [REDACTED] accused represented by counsel – the *audi alteram partem* principle applies in the context of a Trial Chamber's *proprio motu* consideration of whether to replace a summons with an arrest warrant. 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".⁷³

42. After the Chamber determined that "there are no guarantees that in the current circumstances, [Mr. Banda] will be in an objective position to appear

⁷⁰ Leave Decision, para. 38 (emphasis added).

⁷¹ See paragraph 11 above. See also explanation provided in Leave Dissent at paragraph 21.

⁷² [REDACTED].

⁷³ Leave Decision, para. 55.

voluntarily”⁷⁴ for his trial, the Chamber proceeded to consider and reach two legal findings based on which it determined that an arrest warrant was justified:

- i. First, the Chamber held that a “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”;⁷⁵
- ii. Second, the Chamber determined that once a Trial Chamber is satisfied that an accused will not appear voluntarily for trial, the requirement under Article 58(1)(b)(i) of the Statute that an arrest warrant “appears necessary” is met without any further legal and factual analysis required.⁷⁶

43. There are no exceptional circumstances that might justify Mr. Banda having been denied an opportunity to address the Chamber on these legal issues and make further submissions on the legal and factual basis, as well as the propriety, of replacing the summons with an arrest warrant – a decision the Chamber accepts has “far reaching” consequences.⁷⁷ The Appeals Chamber has not provided determinative guidance on these matters. Additionally, as is apparent from the background section, the legal and factual circumstances presented by this case are unique and complex.

44. Fairness dictated that before the Chamber determined whether replacing the summons with an arrest warrant was legally and factually justified “*a proceeding [...] be conducted, in which the Defence is afforded an opportunity to show cause why an arrest warrant should not be issued*”.⁷⁸ Furthermore, and importantly, even if the Chamber’s ultimate decision to issue an arrest warrant was correct – which the Defence do not concede – justice will still not have been *seen to be done*⁷⁹ due to

⁷⁴ Arrest Warrant, para. 21.

⁷⁵ Arrest Warrant, para. 22.

⁷⁶ *Ibid.*, para. 24.

⁷⁷ Leave Decision, para. 57.

⁷⁸ Dissenting Opinion, para. 8.

⁷⁹ Caritativo Dissent, p. 558 (“*Audi alteram partem—hear the other side! [...] It is beside the point that the claim may turn out not to be meritorious. It is beside the point that delay in the enforcement of the law may be entailed.*”) (emphasis added).

the fundamental breach of Mr. Banda's due process rights. The Chamber's error in denying the Defence an opportunity to be heard materially and fatally impacted the process by which the Arrest Warrant was issued and requires the withdrawal of the Arrest Warrant to preserve the fairness of the proceedings against Mr. Banda.

(D) A substantive analysis of Article 58 of the Statute

45. In the event the Appeals Chamber determines that it must consider, at least in a limited fashion, the interpretation of Article 58 of the Statute in order to decide this appeal, the Defence submits that the Chamber's finding that it was "*satisfied that the accused would not appear voluntarily for his trial*" does not mechanically result in the requirement that Mr. Banda's summons be replaced with an arrest warrant, therefore obviating the utility of further Defence submissions.
46. First, as the Chamber rightly acknowledges, "an individual can be obstructed in his willingness or freedom to appear at trial by means other than detention", which may result in a finding "that there are no longer guarantees that he will appear" for trial.⁸⁰ However, such a factual finding does not *ipso facto* require a Trial Chamber, pursuant to Article 58 of the Statute, to issue a warrant of arrest.
47. Article 58(1)(b)(i) of the Statute mandates that a Chamber may only issue an arrest warrant if it "appears necessary" to "ensure the person's appearance at trial". There may of course be circumstances in which an accused person under summons is prevented from appearing before the Court by circumstances outside both his and the Court's control – such as being located in an area of ongoing armed conflict – that an arrest warrant could not reasonably be considered to address. For example, just as it would be an injustice for the Court to hold in contempt a witness who seeks to comply with a Court-issued summons but is prevented from doing so by the non-cooperation of a state

⁸⁰ Arrest Warrant, para. 23.

obligated to cooperate with the Court, it would similarly be illogical and unjust to issue an arrest warrant against a [REDACTED] person who is unable to voluntarily appear before the Court due to the lack of cooperation by governments obligated to cooperate with the Court.

48. The Defence accordingly submits that the Chamber's finding that it was "satisfied that [Mr. Banda] would not appear voluntarily for his trial" does not foreclose the legal possibility that Mr. Banda's summons should stand. Therefore, Mr. Banda's right to be heard on the matter of replacing his summons with an arrest warrant is not without utility and accordingly should have been respected to the fullest. As submitted above, the denial of such opportunity to be heard materially and fatally impacted the process by which the Arrest Warrant was issued and requires the withdrawal of the warrant.

VI. Relief Requested

49. Based on the foregoing submissions, the Defence respectfully requests that the Appeals Chamber reverse the Arrest Warrant 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.

Respectfully Submitted,



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Dated this 19th Day of January 2015
At The Hague, the Netherlands