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The 2014 Arrest Warrant for *Abdallah Banda*

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In preparation of the trial against Abdallah Banda, the ICC's Trail Chamber IV recently issued a warrant for arrest. This decision is flawed, as pointed out by the dissenting judge. The Chamber misinterprets art. 58 ICC-Statute.

I Introduction

1 *Abdallah Banda* is Commander-in-Chief of the Justice and Equality Movement-Collectiv Leadership. Jointly with *Saleh Jerbo*, he is allegedly responsible for the 2007 attack on peacekeepers in Haskanita, South Darfur. *Banda* is allegedly criminally responsible as co-perpetrator for war crimes under article 25(3)(a) of the Rome Statute. While *Jerbo* is supposedly dead, the trial against *Banda* had been prepared during the last years.

2 In August 2009, Pre-Trial Chamber I issued a summons to appear. Subsequently, *Banda* appeared before the Pre-Trial Chamber in June 2010 where he was informed about the crimes which he is alleged to have committed. On this occasion, he waived his right to be present at the confirmation of charges hearing which took place in December 2010. In March 2011, Pre-Trial Chamber I unanimously confirmed the charges against *Banda* and committed him to trial.

3 A first starting date had been set for May 2014. Due to organizational difficulties, however, Trial Chamber IV vacated the date after consulting with prosecution and defence and set a new date. According to the Chamber's schedule, the trial was to begin on 18 November 2014.

4 The decision presently under review vacated this date, suspended preparatory measures for the trial and issued an arrest warrant.

II The legal base for the decision

5 When the charges against *Banda* were confirmed, the Presidency established Trial Chamber IV which succeeded in the powers held by the Pre-Trial Chamber. According to art. 61 (11) ICC-Statute, the new Trial Chamber became responsible for the conduct of subsequent proceedings.

6 In order to prepare the trial against *Banda*, Trial Chamber IV was concerned about the appearance of the accused before the ICC. Also, the Prosecutor requested the Chamber to issue an order requiring an undertaken from the accused that he will

appear for trial. After a status conference was held, Trial Chamber IV found it necessary to review the summons to appear from 2009.

7 The Trial Chamber is competent to do so. After all, the power to review a decision has already been claimed by the Pre-Trial Chamber which reserved "its right to review this finding either *propio motu* or at the request of the Prosecutor, however, particularly if the suspects fail to appear on the date specified in the summons or fail to comply with the orders contained therein." As already stated, this review-power was by art. 61 (11) and 64 (6) (a) ICC-Statute transferred to the Trial Chamber when the charges were confirmed

8 Given the envisaged timeframe, the Chamber in 2014 seized the opportunity to review the summon to appear and revisited the facts.

III Voluntary appearance or need for arrest?

9 Due to "latest developments" (para. 20), the Trial Chamber finds it better suited to issue a warrant of arrest. Its reasoning is based on art. 58 (8) ICC-Statute, which is understood by the judges as to require the accused to be personally willing to appear and to be in a position to do so (para. 22).

10 Troubling, however, the Chamber does not care about the first requirement. The majority explicitly states "regardless of whether Mr Banda wishes or not to be present at trial" (para. 21), an arrest warrant is the smarter way to procede. This approach may be due to the defence's announcement that the accused was in fact willing to appear before the ICC. The Chamber seems to look for something else to justify a warrant of arrest and is not prepared to let the summon to appear stand.

11 It finds a solution in earlier jurisprudence. Referrencing the decision regarding the warrant of arrest for *Ali Kushayb* from 2007, the chamber notes that an individual needs to be in a position to voluntarily appear in The Hague. *Ali Kushayb* was imprisoned at the time, hence his appearance did not depend on his willingness. This lead the chamber to issue an warrant of arrest. Even then, this reasoning was not overall convincing, it is even less convincing in the *Banda*-case.

12 The aforementioned "latest developments" refer to the Sudanese Government's behavior. Its standpoint on the ICC is well known, the outright rejection of the ICC and the government's refusal to cooperate have paralyzed the ICC's work during the last years. As of now, the government has developed an attitude that is hallmarked by arrogance: When the Registry submitted a cooperation request to the Sudanese

embassy in The Hague on 31 July 2014, this letter was returned unopened to the ICC on 15 August 2014.

13 The approach choosen by the Trial Chamber is flawed. The Chamber's construction of the decision on the behavior of Sudan and not on the behavior of the accused is ignoring the fundamentals of international criminal law. As pointed out by Judge *Eboe-Osuji* in his dissenting opinion, one needs to keep in mind that international criminal law is about individual criminal responsibility. Decisive for the choice between a summon to appear and an arrest warrant is consequently the behavior of the accused. The Trial Chamber is effectively sanctioning *Banda* for the government's failure to cooperate.

14 Furthermore, the reference to the *Ali Kushayb*-decision goes astray. While in this case, the accused was known to be in prison, in the present case the accused's whereabouts are unknown. It is, however, not for the ICC to always know where the accused is present. As long as there is no record of non-appearance or of an unwillingness to appear, the chamber should not assume that an accused will not appear. *Banda's* appearance record has been good, as stated by the dissenting judge.

15 Moreover, to issue a warrant of arrest against an individual that is under protection by the Sudanese government trivializes the arrest warrants issued by the ICC. There exists one additional warrant which will not be executed by the Sudanese government.

16 Judge *Eboe-Osuji* is also correct when he asserts that the Trial Chamber has no power to suspend all preparatory measures (para. 25, dissenting opinion para. 26). It shows a lack of interest to trial the case by the majority in addition to there not being a base for that in the Rome-Statute.

IV Conculsion

17 The Trial Chamber's majority bases its decision on a flawed approach to art. 58 ICC-Statute. There was no need to issue a warrant of arrest. The dissenting opinion by Judge *Eboe-Osuji* is to be followed. It would be advisable if the Chamber revisited its own decision in the future.

Documents

ICC, Pre-Trial Chamber I, Second Decision on the Prosecutor's Application under Article 58, 27 August 2009, ICC-02/05-03/09-1

ICC, Office of the Prosecutor, Public redacted version of "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

ICC, Trial Chamber IV, Warrant of arrest for Abdallah Banda Abakaer Nourain, 11 September 2014

ICC, Trial Chamber IV, Dissenting Opinion of Judge Eboe-Osuji in the Decision on 'Warrant of arrest for Abdallah Banda Abakaer Nourain', 11 September 2014

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