Cour Pénale Internationale

International Criminal Court

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No.: **ICC-02/05-03/09**
Date: **15 September 2014**

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

Dissenting Opinion of Judge Eboe-Osuji in the Decision on 'Warrant of arrest for Abdallah Banda Abakaer Nourain'

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
Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section

Others

DISSENTING OPINION OF JUDGE EBOE-OSUJI

1. I am unable to concur with my colleagues in the Majority in their decision to issue an arrest warrant at this time against Mr Banda and 'suspend' the case. I disagree with that decision and all the ancillary measures that came with it. In my respectful view, the decision is unduly hasty[1] and founded upon the most unconvincing considerations.

2. And, in the particular circumstances of this case, the Majority's decision to suspend trial preparation is not what the course of justice would require.

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3. As a preliminary matter, I begin by noting that on 9 September 2014, the Prosecution serendipitously intervened with a filing, requesting that the Accused be required to shore up his summons, by providing an explicit and unconditional undertaking to appear for his trial on the set date of 18 November 2014. The filing was serendipitous, indeed, as I have no reason to suppose that any of the parties and participants were aware that my colleagues in the Majority were considering their decision to issue an arrest warrant against the Accused and to promptly suspend the case.

4. In my view, the Prosecution request was reasonable and correct and eminently primed by the better interests of justice in the case. It was, conversely, incorrect of my colleagues in the Majority to reject the request in the brush stroke of the unitary focus on issuing an arrest warrant and immediately packing up and stowing the case away. These are staggering steps that have been taken in a serious case in international law: but they have now been taken without giving an opportunity to the parties and participants to express a view. There is, in my humble view, no occasion to exercise judicial power in this international court with what might be viewed as such surprising indifference to the basic requirements of due process. In particular, my colleagues in the Majority must have known that the undue haste on keen display has the precise effect of depriving the Defence of an opportunity of fair hearing in the circumstances of this matter.

5. And, there is this factual matter. From my own intimate familiarity with the dynamics of this case—as I have observed them—I do not at all share the views of my colleagues in the Majority

[1] I see no need for the haste displayed by my colleagues in the Majority in issuing a decision that has such serious consequences for the Accused, the victims and the case—particularly in circumstances where unequivocal confirmation has not been sought from the Accused that he will not be present on 18 November 2014. Further, I note that following the issuing of the Majority decision, Defence Counsel requested that the five days for their application for leave to appeal be suspended until the filing of my dissenting opinion. My colleagues in the Majority rejected the request: this was in spite of the fact that the Prosecution had notified the Chamber that they did not oppose the Defence request. In my view due process does not support the rejection of the Defence request for suspension of time, pending the issuing of my dissenting opinion in the arrest warrant decision. The reasons for so much haste on the part of my colleagues in the Majority are wholly unclear to me.

that the course of action proposed by the Prosecution is a hopeless one. The barest minimum that the cause of justice required in the circumstances was to have given the proposed course of action a chance to work—even as a last resort.

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6. Paragraph 25 of the Majority decision is particularly impressive in the message that it conveys. It says this: 'As a consequence of the present decision, the Chamber vacates the trial date of 18 November 2014 and suspends preparatory measures for the trial until Mr Banda's arrest or voluntary appearance. *Until such a date, no currently pending applications will be ruled upon unless good cause is provided to the Chamber by a party or participant.*' [Emphasis added.] There is much, in my respectful view, that is wrong with this.

7. It is one thing to issue an arrest warrant against Mr Banda (a decision with which I disagree): it is one thing to vacate the date set for trial (another decision with which I disagree because of its flawed premise): it is one thing to suspend preparatory measures for the trial (a further decision with which I disagree also because of its flawed premise). But, do my colleagues in the Majority need also to go so far as to decide that 'no currently pending applications will be ruled upon' unless good cause is shown by a party or participant? The rapid sequence of these decisions—all taken without a hearing from the parties and participants—does not portray great enthusiasm to try the case. To the contrary, there is the risk that what may have been portrayed on the face of the decision is great haste to shelve the case, without trying it—on the ostensible basis of some blame placed elsewhere.

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8. In my respectful view, it is premature to issue an arrest warrant at this time. In the circumstances of the present case—which include the fact that a date known to the Accused has been set for trial—the ripeness of an arrest warrant decision requires the following minimum prerequisites: (a) the Accused must have failed to appear for trial on the set date or, at the barest minimum, given in advance an unequivocal indication that he will not appear for trial on that date; and (b) in the event of any of the foregoing, a proceeding must next be conducted, in which the Defence is afforded an opportunity to show cause why an arrest warrant should not be issued. None of these has occurred. Again, I stress, none of the parties and participants (particularly the Defence that is the most affected by the decision of my colleagues in the Majority) were, as far as the record shows, 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.

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9. The legal premise given by my colleagues in the Majority for deciding to issue an arrest warrant at this time is that the arrest warrant 'appears necessary ... to ensure that the person's appearance at trial.'[2] I am not at all convinced. Here, it must be kept in mind that the applicable statutory aim, according to article 58(1)(b), is indeed to 'ensure the person's appearance at trial'. The alternative measures indicated for that purpose are an arrest warrant and a summons to appear—one or the other. In this case, what has anchored that purpose all along has been the Pre-Trial Chamber's choice of summons to appear, which the Trial Chamber has adopted thus far. It is notable that, so far, the Accused has never failed to appear before the Court when required to do so, in accordance with the summons. This is a fact that engages a serious question of the fairness of the decision to issue a warrant of arrest against him at this time.

10. But, there is, perhaps, a further, more substantive worry implicated in the peculiar circumstances of the present case. It lies in a particular difficulty with the idea of replacing the existing summons to appear with an arrest warrant—before the existing date set for trial has come and gone—on the basis that the arrest warrant 'appears necessary... to ensure the person's appearance at trial'.[3] It may not be enough for my colleagues in the Majority to only form a view that the existing summons to appear had become insufficient to ensure the appearance of the Accused at trial: hence their need to replace it with an arrest warrant. In the particular circumstances of this case, a further analysis was required for the replacement to be correct. That further analysis is entirely absent from the decision of my colleagues in the Majority.

11. The correctness of that replacement must, in the further analysis, depend on the existence of a credible, substantial and *bona fide* basis to consider that the arrest warrant truly has a stronger prospect (than the existing summons) to ensure 'the person's appearance at trial' on the set date. In the circumstances of this case, such a basis is wholly lacking. And this is why. The Accused used to be a rebel at war with the Government of Sudan. But, he is now a functionary within that Government, owing to a peace pact between the Government and his rebel group. His newfound position presumably, if not foreseeably, puts him within the protection of the Government of Sudan—a Government that has shown remarkable success in resisting arrest warrants that this Court has issued against various functionaries within that Government, including its head of state. Specifically, the arrest warrant against Ahmad Harun has not ensured his appearance for trial for the

[2] *The Prosecutor v Abdallah Banda Abakaer Nourain*, Majority Decision, Warrant of arrest for Abdallah Banda Abakaer Nourain ('Majority Decision'), dated 11 September 2014, ICC-02/05-03/09-606, para. 16.
[3] Article 58(1)(b)(i) of the Rome Statute.

past seven years,[4] nor has that issued against Omar Bashir ensured his appearance for the past five years;[5] similarly, the arrest warrant against Abdel Hussein was issued over two years ago and he remains at large.[6]

12. With such history of failure of ICC arrest warrants to secure the appearance of Sudanese officials indicted by this Court, it becomes a quite startling supposition to consider that the substitution of Mr Banda's summons to appear with an arrest warrant, just two months shy of the date set for his trial, will have a greater prospect 'to ensure [his] appearance at trial' on any date set for trial. Or, is the idea quite simply to issue an arrest warrant, 'suspend' the case and forget the whole thing?

13. I am thus constrained to observe with regret (though with the greatest respect) that the decision to issue an arrest warrant and 'suspend' the case—in circumstances in which there is no credible, substantial and *bona fide* basis to consider that the arrest warrant has a stronger prospect of securing the appearance of the Accused—has all the hallmarks of the Pontius Pilate stratagem: specifically in terms of token actions taken in a far-fetched hope of salving the judicial conscience that something was done in the name of justice. But, in truth, justice has not been done. Justice cries out the most to be done in the difficult cases, where the risks are real and progress is mired in the interminable bog of tedious procedures and awkward circumstances. It is in those difficult cases that those who enjoy the rare privilege of high judicial office must truly earn the honour of their office. It is not in the easy cases that are just that.

14. Indeed, in the circumstances of this case, there is a greater reason to worry that the perfunctory actions of issuing an arrest warrant and 'suspending' the case come with an actual danger of doing greater harm to the cause of justice. This is because of the real possibility that Mr Banda may indeed (on the strength of his summons) have appeared for his trial on 18 November 2014. That real possibility is informed by his repeated promises to appear for his trial coupled with the absence on the record of any instance in which he had failed to appear when required. But the damage occurs, because an arrest warrant prematurely issued, carries the likelihood of driving him deeper and firmer into the embrace and protection of a regime known to have successfully defied the arrest warrants of this Court. I shall say more on this later.

15. There is a further disservice that may have been done to the processes of this Court, by issuing this arrest warrant—two months to trial date—to an accused who has been promising all

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[4] *The Prosecutor v Ahmad Muhammad Harun ('Ahmad Harun') and Ali Muhammad Al Abd-Al-Rahman ('Au Kushayb')*, warrant of arrest issued on 27 April 2007 (ICC-02/05-01/07-2).

[5] *The Prosecutor v Omar Hassan Ahmad Al Bashir ("Omar Al Bashir")*, warrant of arrest issued on 4 March 2009 (ICC-02/05-01/09-1).

[6] *The Prosecutor v Abdel Raheem Muhammad Hussein*, warrant of arrest issued on 1 March 2012 (ICC-02/05-01/12-2).

along to appear for his trial and had never failed to appear when required; and, in the process, put him in the league and circumstances of other Sudanese accused officials who *needed* to have arrest warrants issued against them—because they had never promised to appear and had never shown any inclination on the record to do so. In the circumstances in which the arrest warrants issued against those Sudanese accused have not secured their appearance for trial after so many years, to replace Mr Banda's summons to appear with an arrest warrant against him in the circumstances in which it has now been issued carries the danger of trivialising the arrest warrants of this Court. Greater circumspection is called for in the circumstances.

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16. I note that in the decision of my colleagues in the Majority, part of the motivation cited for issuing the arrest warrant are certain 'latest developments'.[7] Key among those is that the Embassy of Sudan had returned-to-sender, unopened, correspondence from the Registrar communicating the Trial Chamber's request made to the Government of Sudan to do all that was necessary to ensure the appearance of Mr Banda for his trial on the set date.

17. In my humble view, Mr Banda's criminal responsibility for the charges against him is a matter *personal* to him. In this connection, it helps to keep in mind at all times that the operative concept in international criminal law is 'individual criminal responsibility'. It would be legally wrong, in my view, to issue an arrest warrant against Mr Banda, on grounds that the Government of Sudan has failed to cooperate to ensure his appearance for trial. The 'latest developments' referred to in the Majority decision in relation to the Government of Sudan are completely separate from whether or not Mr Banda responds to the summons to appear. To treat it otherwise, and issue a warrant for arrest, may have the effect of sanctions against Mr Banda for the failings of the Government of Sudan. Indeed, the uncooperative stance of the Government of Sudan should be neither bane nor boon to Mr Banda in relation to the legal proceedings now outstanding against him in this Court. This Chamber considered not too long ago that the conduct of the Government of Sudan was not enough reason to stay proceedings in the case, when the Defence in this case applied for stay of proceedings.[8] It should not now be a reason to issue an arrest warrant against Mr Banda.

18. I am bound to stress, in this connection, that Mr Banda has not unilaterally refused to converse with the court but has repeatedly asserted—though latterly with apparent conditions—his willingness to attend trial. Those conditions may indeed be wholly unrealistic in the prospect of their achievement. As noted earlier, the Prosecution has, quite sensibly in my view, requested that

[7] Majority Decision, above n2, para 20.
[8] *The Prosecutor v Abdallah Banda Abakaer Nourain*, Decision on the Defence request for a temporary stay of proceedings, dated 26 October 2012, ICC-02/05-03/09-410.

an unequivocal undertaking be sought from the Accused that he will indeed appear on the trial date set for 18 November 2014.[9] My colleagues in the Majority chose pointedly to dismiss that request for undertaking before the Defence has had an opportunity to be heard on the matter.[10] This affords a further reason for my respectful view that issuing an arrest warrant in such circumstances was precipitous and carries a high risk of being counter-productive.

19. Further, to pre-emptively assume, as my colleagues in the Majority have done, that Mr Banda is not in a position to appear voluntarily for his trial (because of the failure of the Government of Sudan to communicate their willingness to cooperate in ensuring Mr Banda's appearance) is both potentially deleterious in the precedent it sets and truly paternalistic. It is paternalistic because it is for Mr Banda, assisted by the experienced counsel that he has in this case, to say that he is not in a position to appear voluntarily on the set date. It is not for the Trial Chamber to presume that view of the matter and foist it upon Mr Banda. And, the precedent is potentially deleterious because in future cases, accused will readily present similar conditions for their appearance, thereby requiring the Trial Chamber to make similar judgements calls as my colleagues in the Majority have made in this decision.

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20. It is also interesting that in the same breath in which my colleagues in the Majority decided to issue the arrest warrant against Mr Banda, they proceeded (in paragraph 24) to say: '*Should Mr Banda nonetheless appear voluntarily before the Court*, the Chamber will take voluntary appearance into consideration and revisit accordingly the conditions of his stay in the Netherlands during trial.' The 'arrest or *voluntary appearance*' of Mr Banda is also contemplated in paragraph 25 of the Majority decision. [Emphasis added.]

21. But, there is an unctuous ring in the suggestion by my colleagues in the Majority that they have left the door of possibilities open for Mr Banda to appear 'voluntarily' at an uncertain date in the near future—following the Majority's decision to issue an arrest warrant against him. To begin with, the unctuousness is especially striking in a decision which, to all intents and purposes, *actually* closed against him the door to appear voluntarily for trial (or unequivocally undertake to do so) just two months ahead of his trial date set for 18 November 2014. The deprivation became all the more acute when my colleagues in the Majority decided to vacate the trial date and 'suspended' the case.

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[9] *The Prosecutor v Abdallah Banda Abakaer Nourain*, Prosecution application for an order requiring an undertaking from the Accused that he will appear for trial on 18 November 2014, dated 9 September 2014, ICC-02/05-03/09-603-Conf, para 11.
[10] Majority Decision, above n2, para 26(i).

22. What is more: the serious consequence of the lip-service to an apparent open door for Mr Banda to walk in voluntarily in the near future ought to be lost on no one, in relation to the potential damage to progress in the case. Here is why. Do my colleagues in the Majority really expect Mr Banda to 'appear voluntarily' in any hurry *from Omar Bashir's Sudan,* when he knows now that the Court has, in virtue of the Majority decision, decided that he must be promptly arrested whenever found? Is Mr Banda expected to understand the Majority's subtle indication—that 'the Chamber will take voluntary appearance into consideration and revisit accordingly the conditions of his stay in the Netherlands during trial'—as possibly contemplating that Mr Banda's future voluntary appearance will be 'taken into account' in any decision of the Chamber on a future application to grant him conditional release from pre-trial detention following his arrest? Do my colleagues in the Majority really expect Mr Banda to take that vague promise seriously, when the Majority has already determined that the personal circumstances of Mr Banda (such as led him to request certain measures from the Court) are such as to deprive him of true capacity to be taken seriously if he said he is in a position to appear voluntarily, while those personal circumstances persisted? To the extent that the answers to these questions are in the negative, they do, in my respectful view, deprive real value to the Majority's contemplation of the possibility of Mr Banda's voluntary appearance any time soon after the Majority's decision to issue an arrest warrant against him.

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23. It is, of course, a mystery to me that my colleagues in the Majority had for their reasoning in this regard found reliable precedent in the refusal of the Pre-Trial Chamber to issue summons to appear to Mr Kushayb, preferring instead the option of an arrest warrant.[11] Mr Kushayb was said to be physically detained in a prison at the time. In those circumstances, the Pre-Trial Chamber held that he was not in a position to appear voluntarily for his trial, were a summons to appear to be issued. [12] Accordingly, the Pre-Trial Chamber held that his continued detention in Sudan 'prevent[ed] him from willingly and voluntarily appearing before the Court'.[13] One would have thought that there is an elementary distinction between Mr Kushayb's circumstances of physical detention in prison and those of Mr Banda who is not known to be physically detained in a prison, and has consistently promised to appear when required.

[11] *The Prosecutor v Ahmad Muhammad Harum ('Ahmad Harun') and Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, Decision on the Issuance of the Arrest Warrants in the Harun and Kushayb Case ('Harun and Kushayb Decision'), dated 27 April 2007, ICC-02/05-01/07-1-Corr (Public).
[12] Harun and Kushayb Decision, above n11, para. 133.
[13] Ibid.

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24. Also of some note in the decision of my colleagues in the Majority is their argument appearing in paragraph 20 that 'the 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'.[14] [This, of course, has to do with the requests or demands that Mr Banda made of the Court.] That argument by my colleagues in the Majority had occurred to me as unpersuasive on the first occasion that the Majority broached it in its 14 July Majority Decision.[15] The argument is even less persuasive on the occasion of invoking it as a reason to issue an arrest warrant against Mr Banda in the present circumstances. For, I fail to see how an arrest warrant issued against Mr Banda will put the Chamber in a better 'position to effectively prevent or mitigate the risks associated with particular circumstances of the case' or put the Chamber in a greater position of ability 'to find an appropriate solution to problems derived from such risks.' Assuming, for instance, that an ICC State Party is able to arrest Mr Banda (perhaps, during a visit to its territory) and transfer him immediately to the ICC; would such a development put the Court in a better position to manage or contain the risks that my colleagues in the Majority found more difficult to handle at the time when all that held the promise of Mr Banda's appearance for trial was the summons? Or, could it be that the summons dispensation remains the better measure that carries the greater prospect of appearance, considering that it allows Mr Banda relative leeway to manage those risks himself—if they really exist and to the extent that he claims that they do—when he is informed that the Court is not in a position to prevent or mitigate those risks?

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25. In relation to 'suspending' the proceedings, assuming that the Accused has indeed failed to appear on the date scheduled for trial, there remains the question as to how next to proceed. In my view the question does not truly arise for the Chamber, unless the Accused has failed to appear for trial on the scheduled date.

26. The power to 'suspend' preparatory measures for the trial is not explained. In the circumstances, it appears to all intents and purposes as something akin to a stay of proceedings—but with the difference that the Accused is made to bear the moral blame for it, with the odium of an arrest warrant hanging over his head. But as far as the ends of justice are concerned, there is little or no material difference between 'suspending' the case indefinitely (pending an event that triggers

[14] Majority decision, above n2, para 20.
[15] *The Prosecutor v Abdallah Banda Abakaer Nourain*, Decision as to further steps for the Trial Proceedings, dated 14 July 2014, ICC-02/05-03/09-590-Conf, paragraphs 26 to 35 (Judge Eboe-Osuji dissenting).

reactivation) and a conditional stay of proceedings (pending the falling away of those conditions). In both circumstances, there is the prospect of deterioration of evidence in its nature and in its human agency. It is for that reason that the Chamber must ensure that 'suspending' preparatory measures for a trial, assuming that the power exists, is an exceptional power that can only be exercised when every prospect of moving forward with the case has been completely exhausted on any view.

27. Even in the event of Mr Banda failing deliberately to appear on the date scheduled for trial, I would still not agree that it is correct to 'suspend' the proceedings indefinitely upon issuing an arrest warrant. In my view, it would amount to a virtual assurance of impunity—and a travesty of justice for victims—to send to inactive limbo a case in which an accused had promised to cooperate and appear at his trial. To 'suspend' the case in that way is nothing short of rewarding accused persons who are able to abscond, after an initial promise to cooperate and appear at their trials. To shelve the case by way of indefinite adjournment and wash the judicial hands might give fleeting clarity to conscience, but there is no justice in that approach. The better course would be to consider the option of trials *in absentia* as an instrument of justice universally accepted as such. The possibility of conducting trials *in absentia* at the ICC has been amply reviewed in an opinion issued in another decision.[16] It is not necessary to rehash the arguments here. It is enough to stress that the Chamber does not find itself yet in the position of considering that question. Mr Banda should first be given the opportunity to not appear for his trial, before the question of trial *in absentia* arises.

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28. It is for the foregoing reasons that I find myself unable to concur with the decision of my colleagues in the Majority to (a) issue an arrest warrant against Mr Banda in the particular circumstances of this case, (b) 'suspend' preparatory measures for the trial indefinitely, and, (c) cease consideration of pending applications in the case.

29. The proper course of proceeding remains these: (a) the Accused must first be given an opportunity to (i) appear for trial on the set date or (ii) unequivocally indicate in advance that he will not appear for trial on that date; (b) in the event of any of those preconditions, a proceeding must be conducted, in which the Defence is afforded an opportunity to show cause why an arrest warrant should not be issued; (c) in the event that an arrest warrant is deemed necessary after all that, then an opportunity should be given to the parties and participants to express a view about how

[16] See *Prosecutor v 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-Anx-Corr .

next to proceed; and (d) it will then be proper for the Chamber to render a decision that it deems appropriate in the circumstances.

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30. It is to be expected that the next step will be for the Chamber to refer the Government of Sudan, to the UN Security Council, on a citation of non-cooperation with the Court. It must be said now without equivocation that any such referral against the Government of Sudan would be more than amply warranted, on the basis of the conduct of that Government so far.

31. But, the contributory consequences of the decision to issue an arrest warrant against Mr Banda (and the ancillary decisions) may not be ignored, in circumstances (a) of the uncertainty that his summons to appear was insufficient to 'ensure [Mr Banda's] appearance at trial', just two months shy of the date set for trial; (b) of the uncertainty that an arrest warrant in the circumstances carried a greater prospect of securing his appearance on a trial date that the Majority vacated (two months to date) and did not re-set; (c) of the clear view that an arrest warrant would drive him deeper and firmer into the embrace of a government that has for many years effectively shielded other Sudanese officials from the arrest warrants of this Court; (d) of the clear view that in light of the proven history of the success of the Sudanese Government in shielding their indicted officials from ICC arrest warrants, the arrest warrant against Mr Banda would have the foreseeable result of discouraging him from appearing voluntarily in the near future; (e) of 'suspending' the case immediately upon issuing the arrest warrant; and, (f) of deciding that decisions will no longer be rendered on 'currently pending applications'.

32. It is eminently correct to blame the evil hand that deliberately inflicted very serious injury to a victim. But, the caregivers should not hope to escape some criticism when they inter the victim, when vital signs are still very much present. At the time of the decision of my colleagues in the Majority, vital signs were, in my view, still present in the case.

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

Chile Eboe-Osuji
Judge

Dated 15 September 2014

At The Hague, The Netherlands