

Annex 1 to

Notice of Interlocutory Appeal on Behalf of Hysni GUCATI (“the Appellant”)

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International Criminal Courts
Practice,
Procedure and Evidence

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Statute. The Pre-Trial Chamber will issue a warrant of arrest under specific circumstances, this means: "if it is in the person's appearance that the Chamber will be effective as a warrant of arrest of the Court" (above, para. 21). The application of the Chamber "can and will appear to be presenting a request of arrest" and 91 of the Statute stated that the Chamber found that the Chamber's Prosecution Application witnesses that the person State's willingness to

Chamber also took into account the risk of flight or refrain from cooperating and Sang, Decision on the appeal for William Ruto, 3 March 2011, para. 56. The Chamber in the Prosecutor's Application, Uhuru Kenyatta, 3 March 2011, para. 55) witnesses that the person would be contrary to the Statute. The Pre-Trial Chamber is authorized by art.58(7) to issue a warrant of arrest (other than detention) in accordance with the Rules of Procedure intended to apply only in the case of the Prosecutor v Ahmad Harun, 3 March 2011, para. 120).

prejudice to the Pre-Trial Chamber that a summons to appear is either proprio motu or pursuant to the Statute and Sang, Decision on the appeal for William Ruto, 3 March 2011, para. 56. The Chamber in the Prosecutor's Application, Uhuru Kenyatta, 3 March 2011, para. 55) witnesses that the person would be contrary to the Statute. The Pre-Trial Chamber is authorized by art.58(7) to issue a warrant of arrest (other than detention) in accordance with the Rules of Procedure intended to apply only in the case of the Prosecutor v Ahmad Harun, 3 March 2011, para. 120).

In the case of *Abdallah Banda*, the Pre-Trial Chamber first issued a summons to appear on 27 August 2009 (*Prosecutor v Banda*, Summons to Appear for Abdallah Banda Abakaer Nourain, ICC-02/05-03/09-20, 27 August 2009). After the confirmation of the charges, the Trial Chamber confirmed the validity of the summons and ordered the Registrar to transmit a cooperation request to the Government of Sudan to take all necessary steps to facilitate Mr. Banda's presence at trial (*Prosecutor v Banda*, Decision as to the Further Steps for the Trial Proceedings, ICC-02/05-03/09-590, 14 July 2014). Based on the failure to deliver the cooperation request, and despite the compliance of the accused with the conditions of summons, a majority of the Trial Chamber, Judge Chile Eboe-Osuji dissenting, issued a warrant of arrest against him (*Prosecutor v Banda*, Warrant of Arrest for Abdallah Banda Abkaer Nourain, ICC-02/05-03/09-606, 11 September 2014). The 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" (above, para.21). On appeal, the Appeals Chamber, seized by the issue of whether the Trial Chamber should have provided Mr. Banda with a further opportunity to present submissions on the appropriateness of replacing the summons with a warrant, found that the Trial Chamber had correctly exercised its discretion and interpreted the law and facts at hand. The Appeals Chamber therefore rejected Mr Banda's appeal on procedural grounds without considering the appropriateness of the Chamber's decision (*Prosecutor v Banda*, Judgment on the Appeal of Abdallah Banda against Trial Chamber IV's issuance of a warrant of arrest, ICC-02/05-03/09-632, 3 March 2015, paras 27-35).

Once an arrest warrant or summons has been issued, the Prosecutor may continue to collect evidence in preparation of the document containing the charges (See ICC reg.52 of the Regulations of the Court). Within a timeframe set by the Pre-Trial Chamber, the Prosecutor must file the document containing the charges with the Pre-Trial Chamber for the purpose of the confirmation hearing to be held pursuant to art.61.

On the possibility for Trial Chambers to summons witnesses see Ch.4: Powers of the Courts; on ICC Charging Documents and Confirmation Proceedings, see Ch.7: Pre-Trial and Confirmation Procedure.

(3) Ad hoc tribunals' and special courts' procedure

Before the ad hoc Tribunals and special courts, the issuance of an arrest warrant may only follow the confirmation of an indictment prepared by the prosecution on the basis of their investigations. It therefore presupposes the existence of a prima facie case against the accused (see above).

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Standard of review for the issuance of warrant of arrest

ICTY/ICTR/IRMCT/SCSL/STL/KSCSPO

When investigations lead the Prosecutor to conclude that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise

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statement of the facts and the crimes with which the accused is charged (see art.18(4) ICTY Statute; art.17(4) ICTR Statute; art.16(4) IRMCT Statute; r.47(B) SCSL Rules; r.68 STL Rules; art.38(4) Law on KSCSPO). A duty or reviewing judge designated for this matter will review the indictment. If satisfied that a prima facie case has been established by the Prosecutor, the designated judge shall confirm the indictment (see art.19(1) ICTY Statute; art.18(1) ICTR Statute; art.17(1) IRMCT Statute; art.18(1) STL; r.47 ICTY/ICTR/SCSL Rules; r.68 STL Rules; art.39(2) Law on KSCSPO). Only then may the duty or reviewing judge issue a warrant of arrest (see art.19(2) ICTY Statute; art.18(2) ICTR Statute; art.17(2) IRMCT Statute; art.18(2) STL Statute; art.39(3) Law on KSCSPO).

In order to establish a prima facie case, the Prosecutor must establish there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime under the jurisdiction of the Tribunal (r.47(B) of ICTY/ICTR Rules; r.48(B) IRMCT Rules; r.68(B) STL Rules). In the context of amending the indictment at the ICTY, a prima facie case has been defined as "a credible case which would, if not contradicted by the defence, be a sufficient basis to convict the accused on the charge" (*Prosecutor v Stanišić & Simatović*, Decision on Prosecution Motion for Leave to Amend the Amended Indictment, 16 December 2005, p.3; *Prosecutor v Šešelj*, Decision on Prosecution Motion to Amend the Indictments, 8 June 2006, para.13).

The reviewing standard before the SCSL differs from that at the ICTY, ICTR and STL. Pursuant to r.47(E) of the SCSL Rules, the designated judge shall approve the indictment if he or she is satisfied that:

- (i) the indictment charges the suspect with a crime or crimes within the jurisdiction of the Special Court; and
- (ii) the allegations in the Prosecution's case summary would, if proven, amount to the crime or crimes as particularised in the indictment.

Before the KSCSPO, the Specialist Prosecutor must prepare indictments based on a well-grounded suspicion that a person is criminally liable for an offence within the jurisdiction of the Specialist Chamber (art.38(4) Law on KSCSPO).

Pursuant to r.79 of the STL Rules, the Pre-Trial Judge may issue a warrant of arrest on application by the Prosecutor (i) to ensure the person's appearance as appropriate; (ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings, for instance by posing a danger to, or intimidating, any victim or witness; or (iii) to prevent criminal conduct of a kind of which they stand accused (r.79(A) STL Rules). A Pre-Trial Judge seised with a Prosecutor's request to issue a warrant of arrest may decide to issue a summons to appear in the interest of justice if he or she is satisfied that a summons to appear is more appropriate (r.77(C) STL Rules).

The Decision of a pre-trial judge to dismiss or grant the Prosecutor's application for a warrant of arrest is generally issued *ex parte*, and accordingly, it is unknown how the pre-trial judge determines whether the requirements for issuing such order have been met. Once the suspect is in the custody of the Tribunal, the defence may file preliminary motions before the Trial Chamber challenging the indictment or alleging irregularities in

II. INDICTMENTS

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f the ad hoc Tribu- other than suspects ICTR Statute only ings are conducted regard for the pro- ates that the Extra- o always safeguard l Victims".

Before all the ad hoc Tribunals and special courts, with the noticeable exception of the ECCC, indictments are prepared by the prosecution and confirmed by a Pre-Trial Judge (a duty judge assigned to review the indictment in a particular case) upon determination that there is a prima facie case against the suspect (art.18 ICTR Statute; art.17 ICTY Statute; art.16 IRMCT Statute; r.47 ICTY/ICTR/SCSL Rules; r.48 IRMCT Rules; r.68 STL Rules; art.39 Law on KSCSPO; see more above). In the ad hoc tribunals, the preparation and review of indictment is an ex parte proceeding without any involvement of the defence or victims. Only after confirmation of the indictment may the Pre-Trial Judge issue a warrant of arrest or a summons to appear. Once the suspect is in the custody of the Tribunal, the defence may file preliminary motions before the Trial Chamber challenging the indictment or alleging irregularities in the procedure (r.72 ICTY/ICTR/SCSL Rules; r.79 IRMCT Rules; r.90 STL Rules).

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The procedure for charging suspects in the ICC is very different from the procedure set out by the ad hoc tribunals and the charging documents prepared by the ICC Prosecutor (Document Containing the Charges, or DCC) largely differ from the indictments before the ICTY, ICTR, IRMCT, SCSL and STL. Notably, DCC are only prepared by the ICC Prosecutor after the issuance of a warrant of arrest or a summons to appear by the Pre-Trial Chamber pursuant to art.58. For the sake of clarity and to follow the procedural chronology of the courts and tribunals, the present section will only address the charging procedure and charging documents developed by the ad hoc tribunals. The preparation and confirmation of charges in the ICC is addressed in Ch.7.

A. STATUTORY PROVISIONS AND RULES

(1) ICTY/ICTR/IRMCT

ICTY Statute arts 18, 19(1)

Investigation and preparation of indictment

18.—1. The Prosecutor shall initiate investigations *ex-officio* or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

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2. [...]

3. [...]

4. Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.