

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-02/05-03/09**

Date: **11 May 2020**

**TRIAL CHAMBER IV**

**Before:** Judge Kimberly Prost, Presiding Judge  
Judge Robert Fremr  
Judge Reine Alapini-Gansou

**SITUATION IN DARFUR, THE SUDAN**

**IN THE CASE OF**

***THE PROSECUTOR v. ABDALLAH BANDA ABAKAER NOURAIN***

**Public**

**Prosecution's Response to the Legal Representatives for Victims' filing ICC-02/05-03/09-683**

**Source: Office of the Prosecutor**

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

**Victims Participation and Reparations  
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## I. INTRODUCTION

1. On 13 November 2019, in the “Order following Status Conference on 30 October 2019” (“Chamber’s Order”), Trial Chamber IV (“Trial Chamber” or “Chamber”) invited the Defence and the Prosecution “to make submissions on trials *in absentia* in light of the specific circumstances of this case by 13 December 2019.”<sup>1</sup>
2. The Prosecution<sup>2</sup> and the Defence<sup>3</sup> filed confidential *ex parte* submissions on trials *in absentia* on 13 December 2019 (“Submissions on trials *in absentia*”).
3. On 29 April 2020, the Legal Representatives for Victims (“LRV”) filed a request for leave to submit observations on the possibility of a trial *in absentia* (“LRV Request”).<sup>4</sup>
4. The LRV also requested access to the unredacted versions of the transcript of the status conference held on 30 October 2019 (“Status Conference”) and the Chamber’s Order and the Submissions on trials *in absentia* (together, the “Confidential Material”).<sup>5</sup>
5. For the reasons set out below, the Prosecution does not object to the LRV’s Request. The Prosecution defers to the Chamber on the issue of the LRV’s access to the Confidential Material and for this purpose sets out brief observations which may assist the Chamber in its determination of this issue.

## II. SUBMISSIONS

### 1) The Prosecution does not object to the LRV’s Request

6. Notwithstanding the delay in the LRV’s Request, the participation of the victims on this issue of a trial *in absentia* would be consistent with article 68(3) of the Rome Statute and

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<sup>1</sup> *The Prosecutor v. Abdallah Banda Abakaer Nourain* (“Banda”), Public redacted version of ‘Order following Status Conference on 30 October 2019’, 13 November 2019, 19 November 2019, ICC-02/05-03/09-671-Red-Eng (“Chamber’s Order”), p. 6.

<sup>2</sup> *Banda*, Prosecution’s submissions on trials *in absentia* in light of the specific circumstances of the *Banda* case, ICC-02/05-03/09-673-Conf-Exp, 13 December 2019, ICC-02/05-03/09-673-Conf-Exp (“Prosecution’s Submissions on trials *in absentia*”).

<sup>3</sup> *Banda*, Defence Submissions on *in absentia* proceedings pursuant to Trial Chamber’s Order of 13 November 2019 (ICC-02/05-03/09-673-Conf-Exp.), 13 December 2019, ICC-02/05-03/09-674-Conf-Exp.

<sup>4</sup> *Banda*, Requête aux fins d’être autorisé à soumettre des observations sur la possibilité d’un procès “*in absentia*” dans les conditions spécifiques de l’Affaire Le Procureur c/ Abdallah Banda, 28 April 2020, ICC-02/05-03/09-683 (“LRV Request”), paras. 16, 23-31.

<sup>5</sup> *Banda*, LRV Request., paras. 44-46.

rule 89 of the Rules of Procedure and Evidence, as well as the previous decisions and established practice of the Chamber in this case.

7. In its “Decision on the participation of victims in the trial proceedings” (“Victims’ Participation Decision”), the Chamber determined that, pursuant to article 68(3) and rule 89, it will examine victims’ requests to present their views and concerns, by taking into account whether: (i) the factual or legal issue in question affects the personal interests of the victim; (ii) it is appropriate for the victim to participate at the relevant stage of the proceedings; and (iii) the victim’s participation would cause any prejudice to or inconsistency with the rights of the accused and a fair and impartial trial.<sup>6</sup>

8. The issue of whether Mr Banda’s trial is held *in absentia* directly affects the personal interests of the victims participating in these proceedings. As stated by the Prosecution in its Submissions on trials *in absentia*, the absence of an accused from trial may discourage the willingness of victims and witnesses to participate in the proceedings, who may feel vulnerable to retaliation by an accused at large.<sup>7</sup> The Prosecution also noted the Appeals Chamber’s determination that the continuous absence of an accused from his trial would negatively impact the morale and participations of victims and discourage their participation out of fear of retaliation from a suspect at large.<sup>8</sup>

9. Should the Chamber permit the LRV to submit views on this issue of a trial *in absentia*, this would be consistent with the Chamber’s approach in relation to previous issues that directly affect the personal interests of victims.<sup>9</sup> The participation of the victims on this issue would be appropriate at this stage of proceedings and would not prejudice the rights of the accused and a fair and impartial trial.

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<sup>6</sup> *Banda*, Decision on the participation of victims in the trial proceedings, 20 March 2014, ICC-02/05-03/09-545, (“Victims’ Participation Decision”), para. 17.

<sup>7</sup> *Banda*, Prosecution’s Submissions on trials *in absentia*, para. 46.

<sup>8</sup> *Banda*, Prosecution’s Submissions on trials *in absentia*, para. 28, citing to *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled “Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial”, 25 October 2013, ICC-01/09-01/11-1066 OA5, para. 49.

<sup>9</sup> See, e.g., *Banda*, Version Publique Expurgée des “Observations des Représentants Légaux Communs à la Requête du Procureur, “Prosecution’s request for a finding of non-compliance against the Republic of the Sudan in the case of the Prosecutor v. Abdallah Banda Abakaer Nourain pursuant to 87(7) of the Statute”, ICC-02/05-03/09-636-Conf-16-10-2015, ICC-02/05-03/09-639-Conf-09-11-2015, 15 December 2015, ICC-02/05-03/09-639-Red and *Banda*, Observations des Représentants Légaux Communs sur la Notification de la Défense (ICC-02/05-03/09-466), 6 May 2013, ICC-02/05-03/09-472.

## 2) The Prosecution's observations on the LRV's request to access the Confidential Material

10. The Chamber has set out clear guidance on the victims' right to access confidential material in the case record and has applied this guidance on a number of occasions. The Prosecution therefore defers to the Chamber's determination of this issue and makes brief observations which may assist the Chamber.

11. In the Victims' Participation Decision the Chamber determined that "meaningful participation by the victims may require access to confidential material relevant to their views and concerns [...] to the extent that their content is relevant to the personal interests of the victims"<sup>10</sup> and that the victims' right to confidential information in the case record should be balanced with the necessary protection of "the security of individuals and organisations" or other sensitive information which might limit the documents victims have access to.<sup>11</sup>

12. To assist the Chamber in its balancing of the victims' right to confidential information against the necessary security considerations, the Prosecution makes the following observations.

13. The Chamber has decided not to include the LRV in a number of previous hearings in this case, including those pertaining to matters of Defence investigations.<sup>12</sup> On at least one occasion, the LRV specifically requested to take part in closed session/*ex parte* portions of a status conference.<sup>13</sup> After the Defence argued that the LRV's presence during this part of the proceedings was unnecessary,<sup>14</sup> the Chamber denied the LRV's request to be present due to "the specific circumstances of the Banda case".<sup>15</sup>

14. The Prosecution notes that only the Parties and the Registry were invited to the Status Conference on 30 October 2019.<sup>16</sup> The Prosecution has no doubt that the Chamber's decision to exclude the LRV was carefully considered and included balancing the personal interests of

<sup>10</sup> *Banda*, Victims' Participation Decision, paras. 35-36.

<sup>11</sup> *Banda*, Victims' Participation Decision, paras. 34-35; see also, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, paras. 105-106.

<sup>12</sup> *Banda*, 29 January 2013, ICC-02/05-03/09-T-21-Conf-Eng, pp. 7, ll. 23-24 and pp. 60-61, ll. 22-25 and 1-18.

<sup>13</sup> *Banda*, Requête des représentants légaux communs pour être autorisés à participer à la session non publique de la conférence de mise en état du 7 avril 2014 dans l'Affaire le Procureur c. Abdallah Banda Abakaer Nourain et pour solliciter une extension de délais pour soumettre à la chambre la liste des victimes pouvant être des témoins potentiels, 7 April 2014, ICC-02/05-03/09-552, paras. 11-19.

<sup>14</sup> *Banda*, 7 April 2014, ICC-02/05-03/09 T-24-Eng, pp.15-16, ll. 21-25 and ll.1-2.

<sup>15</sup> *Banda*, 7 April 2014, ICC-02/05-03/09 T-24-Eng, p. 3 ll. 4-6 and p. 20, ll. 12-15.

<sup>16</sup> *Banda*, Scheduling Order for Status Conference, 8 October 2019, ICC-02/05-03/09-666.

the victims against the need to safeguard the confidentiality of the sensitive information that was on the agenda for the hearing.

15. The Status Conference and the Chamber's Order contain similar information to that which has been previously withheld from the LRV. This information is not relevant to the interests of the victims represented by the LRV. For the same reasons, the information would be of little if any assistance to the LRV in filing observations on the issue of a trial *in absentia*.

16. Finally, the Prosecution has filed a public redacted version of the Prosecution's Submissions on trials *in absentia*. The LRV therefore now has access to the core information in this filing.

### **III. Conclusion**

17. For the foregoing reasons, the Prosecution has no objection to the LRV's request for leave to submit observations on the issue of trials *in absentia* and defers to the Chamber on the issue of the LRV's access to the Confidential Material.



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Fatou Bensouda  
Prosecutor

Dated this 11<sup>th</sup> day of May 2020  
At The Hague, The Netherlands