



Original: English

**No. ICC-02/05-03/09
Date: 19 November 2019**

TRIAL CHAMBER IV

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

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
*THE PROSECUTOR v. ABDALLAH BANDA ABAKAER NOURAIN***

Public

Public redacted version of 'Order following Status Conference on 30 October 2019',
13 November 2019

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 Charles Achaleke Taku

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Defence Support Section

Mr Esteban Peralta Losilla

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

TRIAL CHAMBER IV ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain*, issues this 'Order following Status Conference on 30 October 2019'.

1. On 11 September 2014, the Chamber in its previous constitution issued a Warrant of Arrest against Mr Banda,¹ which was confirmed by the Appeals Chamber on 3 March 2015² and remains to be executed.
2. On 30 October 2019, the Chamber held an *ex parte* status conference with the Defence, Registry and Prosecution to discuss the status of the case and the way forward to ensure Mr Banda's appearance for trial.³
3. During the status conference, the Chamber heard submissions from the Defence, Prosecution and Registry. [REDACTED].⁴ [REDACTED].⁵ [REDACTED].⁶ [REDACTED].⁷ [REDACTED].⁸
4. [REDACTED].⁹ [REDACTED].¹⁰ [REDACTED], the Prosecution brought two 2019 reports on Mr Banda's whereabouts and activities ('Reports') to the Chamber's attention,¹¹ according to which Mr Banda was involved in gold mining and combat activities outside of Sudan.¹²

¹ Warrant of arrest for Abdallah Banda Abakaer Nourain, ICC-02/05-03/09-606.

² Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain against Trial Chamber IV's issuance of a warrant of arrest, ICC-02/05-03/09-632-Conf.

³ Transcript of hearing, 30 October 2019, ICC-02/05-03/09-T-027-CONF-ENG, p. 2, lines 14-21. *See also* Scheduling Order for Status Conference, 8 October 2019, ICC-02/05-03/09-666.

⁴ ICC-02/05-03/09-T-027-CONF-ENG, for example on p. 4, lines 2-3, p. 5, lines 2-4.

⁵ ICC-02/05-03/09-T-027-CONF-ENG, p. 7, line 14 to p. 8, line 11 and p. 17, lines 8-10.

⁶ ICC-02/05-03/09-T-027-CONF-ENG, p. 13, line 15 to p. 14, line 19.

⁷ ICC-02/05-03/09-T-027-CONF-ENG, p. 19, line 14 to p. 20, line 5.

⁸ ICC-02/05-03/09-T-027-CONF-ENG, p. 21, line 17 to p. 22, line 16.

⁹ ICC-02/05-03/09-T-027-CONF-ENG, p. 9, lines 2-3.

¹⁰ ICC-02/05-03/09-T-027-CONF-ENG, p. 9, lines 2-14.

¹¹ ICC-02/05-03/09-T-027-CONF-ENG, p. 23, lines 7-14.

¹² Letter dated 10 January 2019 from the Panel of Experts on the Sudan established pursuant to resolution 1591 (2005) addressed to the President of the Security Council, 10 January 2019, S/2019/34, p. 62 (available at https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2019_34.pdf); Le site d'orpaillage d'un Soudanais poursuivi par la CPI repris par l'armée, Voice of America Afrique, 10 March 2019 (available at <https://www.voafrique.com/a/le-site-d-orpaillage-d-un-soudanais-poursuivi-par-la-cpi-repris-par-l-arm%C3%A9e/4822266.html>).

5. The Prosecution also requested access to the video in which Mr Banda appointed Lead Counsel¹³ or in the alternative, access to images thereof, in order to be informed about Mr Banda's appearance 10 years after he last appeared before the Court ('Request').¹⁴ The Defence opposed the Request on the basis that the video was produced for the limited purpose of Lead Counsel's appointment only.¹⁵
6. Furthermore, Judge Fremr and Judge Alapini-Gansou raised the issue of trials *in absentia*, with Judge Fremr raising the question as to whether such a proceeding was possible in this instance, in view of the developments in jurisprudence and amendments to the Rules of Procedure and Evidence.¹⁶
7. In light of the submissions received, the Chamber finds it appropriate to request additional information in order to determine further steps to facilitate Mr Banda's appearance, as set out below, and to rule on the Prosecution's Request.

I) Additional information

Information on [REDACTED]

8. The Chamber is of the view that at this point it would be assisted in receiving submissions from the Defence on the following matters:
 - i. [REDACTED]
 - ii. [REDACTED]
 - iii. [REDACTED]
 - iv. [REDACTED]

Information on [REDACTED]

¹³ Annex I to the Second Update to 'Associate Counsel's Request to be appointed as Lead Counsel pursuant to Regulation 76 of the Regulations of the Court', 12 September 2019, ICC-02/05-03/09-661-Conf-Exp-AnxI.

¹⁴ ICC-02/05-03/09-T-027-CONF-ENG, p. 24, line 8 to p. 25, line 1.

¹⁵ ICC-02/05-03/09-T-027-CONF-ENG, p. 30, lines 7-20.

¹⁶ ICC-02/05-03/09-T-027-CONF-ENG, p. 25, line 25 to p. 28, line 1.

9. [REDACTED]. [REDACTED].¹⁷

Information on Mr Banda's whereabouts and activities

10. [REDACTED],¹⁸ [REDACTED]¹⁹ [REDACTED],²⁰ the Chamber further orders the Defence to make submissions on the Reports raised by the Prosecution which describe different activities on his part and place him [REDACTED].

Observations on trials in absentia

11. Noting that the parties were not in a position during the status conference to make submissions on this issue, the Chamber, by majority, invites the parties to file any observations on trials *in absentia* in the specific circumstances of this case.

II) Prosecution's Request

12. With respect to the Prosecution's Request, the Chamber notes at the outset that annexes I-IV to filing ICC-02/05-03/09-661-Conf-Exp are linked (annex I: video, annex II: transcription and translation of the video, annex III and IV: screenshots of the video). It therefore considers the Prosecution's Request to encompass all four annexes.

13. Upon review of these annexes, the Chamber is of the view that it is in the interests of the Court to provide all organs who play a role in the execution of a Warrant of Arrest, including the Prosecution, with up-to-date images of an accused wanted by the Court when they become available. In addition, the Chamber notes that, in principle, the materials and filings in a case are to be available to all parties and participants. The Chamber is of the view that apart from the visual component of Mr Banda's current appearance, the annexes contain only information already available to the Prosecution through the confidential redacted version of the filing.²¹ The Defence has thus not

¹⁷ See Decision as to the Further Steps for the Trial Proceedings, 14 July 2014, ICC-02/05-03/09-590-Conf, paras 32-33. See also Registry submissions in para. 3 above.

¹⁸ ICC-02/05-03/09-T-027-CONF-ENG, p. 5, lines 3-8.

¹⁹ ICC-02/05-03/09-T-027-CONF-ENG, p. 17, lines 8-10.

²⁰ ICC-02/05-03/09-T-027-CONF-ENG, p. 9, lines 2-14.

²¹ Confidential Redacted Version of "Second Update to 'Associate Counsel's Request to be appointed as Lead Counsel pursuant to Regulation 76 of the Regulations of the Court'" filed on 12 September 2019 (ICC-02/05-03/09-661-Conf-Exp), 19 September 2019, ICC-02/05-03/09-661-Conf-Exp-Red.

sufficiently justified treating these annexes as *ex parte*. In light of the above, the Chamber sees no reason to maintain the confidentiality level and thus grants the Prosecution's Request.

FOR THESE REASONS, THE CHAMBER HEREBY

ORDERS the Defence to make submissions as set out in paragraphs 8-10 above by 29 November 2019;

GRANTS the Prosecution's Request;

ORDERS the Registry to reclassify ICC-02/05-03/09-661-Conf-Exp-AnxI, II, III and IV as confidential, *ex parte* Defence, Registry and Prosecution;

INVITES, by majority, the Defence and Prosecution to make submissions on trials *in absentia* in light of the specific circumstances of this case by 13 December 2019.

Judge Prost dissents on the invitation for submissions on trials *in absentia*. In her opinion the Rome Statute and settled jurisprudence make it clear that a trial *in absentia* is not possible before the Court in these circumstances and therefore there is no need for submissions.

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



Judge Kimberly Prost

Presiding Judge



Judge Robert Fremr



Judge Reine Alapini-Gansou

Dated this Tuesday, 19 November 2019

At The Hague, The Netherlands