

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: **5 May 2020**

**TRIAL CHAMBER IV**

**Before:**

**Judge Kimberly Prost, Presiding Judge  
Judge Robert Fremr  
Judge Reine Apalini-Gansou**

**SITUATION IN DAFUR, SUDAN**

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

**PUBLIC**

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

**Source: Defence for Abdallah Banda Abakaer Nourain**

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

**The Office of the Prosecutor**

Fatou Bensouda, Prosecutor  
James Stewart, Deputy Prosecutor  
Julian Nicholls

**Counsel for the Defence**

Chief Charles Achaleke Taku

**Legal Representatives of the Victims**

Hélène Cisse  
Jens Dieckmann

**Common Legal Representative for Victims**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for Victims**

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

Xavier-Jean Keïta

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Peter Lewis

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Other  
Section**

## I. INTRODUCTION

1. The Defence for Abdallah Banda Abakaer Nourain ('Defence') hereby responds to the Legal Representatives for Victims ('LRV') "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."<sup>1</sup>
2. The Defence states that:
  - a. It takes no position as to whether Trial Chamber IV ('Chamber') should allow the LRV to make observations about holding a trial *in absentia*;
  - b. The LRV has failed to demonstrate how its Clients' rights are affected by not having access to the unredacted transcript of 30 October 2019 and unredacted order of 13 November 2019, and thus should be rejected;
  - c. If leave is granted, the LRV should not receive the confidential observations of the Defence and Office of the Prosecutor ('Prosecution') until after the LRV submits its own observations and after the Prosecution and Defence ensure that redactions are not needed in its own observations; and
  - d. Should the Chamber grant leave to submit observations, the Defence respectfully asks for acknowledgement that it may reply to the LRV observations pursuant to Rule 91(2) of the Rules of Procedure and Evidence ('RPE').

## II. SUBMISSIONS

- A. **The request to submit observations to the Chamber on the possibility of holding a trial *in absentia* is left to the Chamber.**
3. The Defence takes no position on whether the Chamber should grant the LRV's request to submit observations.

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<sup>1</sup> Trial Chamber IV, *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*, [ICC-02/05-03/09-683](#), notified pursuant to Regulation 31 on 29 April 2020.

**B. The LRV should not receive access to unredacted versions of the transcript from 30 October 2019 and the 13 November 2019 order.**

4. On 8 October 2019, the Chamber publicly announced that it would hold a confidential, *ex parte*, Defence, Prosecution and Registry only status conference on 30 October 2019.<sup>2</sup> Two logical conclusions come from this public notification.
5. Firstly, the Chamber made a conscious decision to **exclude** the LRV from the confidential, *ex parte* hearing. Had the Chamber deemed the discussion pertinent and necessary for the LRV's representation of its clients, the Chamber would have invited the LRV to the hearing. The Chamber made this conscious decision, and the LRV failed to demonstrate why access to the unredacted transcripts impedes the LRV from making informed observations on the discrete issue of holding a trial *in absentia*.
6. Secondly, with proper due diligence, the LRVs should have known of the status conference beforehand. If it truly thought the views and concerns of its clients should have been addressed, it should have requested admission to the status conference. The LRV did not and did not even seek access to the unredacted transcripts until 182 days after the status conference. One can reasonably conclude that contents therein are not pertinent to the LRV's representation on the discrete issue of holding a trial *in absentia*.
7. On 19 November 2019, the Chamber issued the "Public redacted version of 'Order following Status Conference on 30 October 2019', 13 November 2019."<sup>3</sup> In this order, the Chamber noted:

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.<sup>4</sup>

8. The Chamber went on to write about the issue of a trial *in absentia*:

Noting that ***parties were not in a position during the status conference*** to make submission 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.<sup>5</sup>

<sup>2</sup> Trial Chamber IV, *Scheduling Order for Status Conference*, [ICC-02/05-03/09-666](#).

<sup>3</sup> Trial Chamber IV, *Public redacted version of 'Order following Status Conference on 30 October 2019', 13 November 2019*, [ICC-02/05-03/09-671-Red](#).

<sup>4</sup> *Id.*, para. 6.

<sup>5</sup> *Id.*, para. 11. [Emphasis added]

9. The LRV incorrectly assumes that additional information exists within the transcript and order,<sup>6</sup> even though the order is quite clear that no other such information exists. The LRV has access to all the substantive information which was available to the Parties when the Parties submitted observations on the possibility of holding a trial *in absentia*. No additional information is contained within the unredacted transcript of 30 October 2019 or the unredacted order of 13 November 2019 which relates to holding a trial *in absentia*.
10. By public admission, the Parties did not make any substantive submissions on the issue during the status conference. The LRV has, in public redacted form since 19 November 2019, all the knowledge that the Parties had on this topic when the respective Parties were preparing submissions. All other issues that the Chamber ordered submissions for in ICC-02/05-03/09-671-Red were ordered to the Defence only.<sup>7</sup> The LRV has no right to this information and has failed to demonstrate why any of the information is necessary to represent its clients in its request to submit observations on the discrete issue of holding a trial *in absentia*.
11. As the LRV has failed to demonstrate why access to the unredacted transcript of 30 October 2019 and order of 13 November 2019 is necessary to submit observations on holding a trial *in absentia*, the LRV's request for access to unredacted versions of these documents should be rejected.

**C. The Chamber should not grant access to the observations of the Prosecution and Defence until after it submits its own observations.**

12. The Defence notes that the LRV's request is to submit observations on holding a trial *in absentia*, not to file a response to the Defence's and Prosecution's observations. Considering that the LRV does not seek to file a response, there is absolutely no legal reason for the LRV to have access to confidential versions of the Defence's and Prosecution's observations before submitting its own observations.<sup>8</sup> To grant this request would obfuscate the requirements in Regulations 34 and 35 of the RoC, violate the Chamber's duty to ensure a fair trial proceeding pursuant to Article 64(2) of the Rome Statute and the Accused's right to a fair and impartial hearing pursuant to Article 67(1) of the Rome Statute.

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<sup>6</sup> Trial Chamber IV, *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*, [ICC-02/05-03/09-683](#), paras 44-46.

<sup>7</sup> Trial Chamber IV, *Public redacted version of 'Order following Status Conference on 30 October 2019'*, 13 November 2019, [ICC-02/05-03/09-671-Red](#), page 6.

<sup>8</sup> See Trial Chamber IV, *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*, [ICC-02/05-03/09-683](#), para. 46.

13. Regulation 34(a) of the RoC grants the Chamber the power to set time limits for the submission of initial documents to be filed in a case. Regarding the current issue, the Chamber, by majority, used said power and set a time limit for observations on the issue of holding a trial *in absentia* for 13 December 2019.<sup>9</sup> This order was publicised on 19 November 2019. The LRV should have made this request contemporaneous to that order. Furthermore, Regulation 35 of the RoC allows for the extension or reduction of time limits. The LRV's request to submit observations came 138 days after 13 December 2019. The Defence does not make arguments to the merit of the request to make initial observations, but the Defence notes that access to the confidential observations of the Defence and Prosecution would blur the line between the LRV's request – to make initial observations – and the LRV's apparent secret request – to file a response to the observations of the Parties. The Chamber should deny access to the confidential observations of the Parties until such time that the LRV submits its own observations, assuming the Chamber allows said observations.
14. Articles 64(2) and 67(1) of the Rome Statue require the Chamber to conduct the trial proceedings fairly and ensures the Accused is treated fairly and impartially. Granted access to the confidential versions of the observations of the Parties before the LRV submits its observations gives an unfair advantage to the LRV, allowing the LRV to respond to observations of the Parties instead of making original observations on the issue of holding a trial *in absentia*.
15. Finally, before granting access to the confidential versions of the observations of the Parties, the Defence requests that it be allowed to review its observations and redact information from the LRV as it deems appropriate and necessary.
16. The LRV has failed to demonstrate why it requires confidential versions of the Defence's and Prosecution's observations in order to make its own observations on the legality of holding a trial *in absentia*. Granting access to these observations would violate Articles 64(2) and 67(1) of the Rome Statute, and obfuscate the requirements demarcated in Regulations 34 and 35 of the RoC. As such, the Defence requests the Chamber to deny the LRV request to have, in advance of submitting its observations, the confidential versions of the Defence's and Prosecution's observations.

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<sup>9</sup> Trial Chamber IV, *Public redacted version of 'Order following Status Conference on 30 October 2019'*, 13 November 2019, [ICC-02/05-03/09-671-Red](#), page 6.

**D. The Defence has a right pursuant to Rule 91(2) of the RPE to make written submissions on the observations made by the LRV.**

17. In its request, the LRV substantiates its request to submit observations, in part, pursuant to Rule 91(2) of the RPE.<sup>10</sup>
18. Pursuant to Rule 91(2) of the RPE, “[t]he Prosecutor and the defence shall be allowed to reply to any oral or written observations by the legal representative for victims.”
19. If the LRV is granted permission to submit observations on holding a trial *in absentia*, the Defence respectfully requests recognition that it may reply to the observations of the LRV.

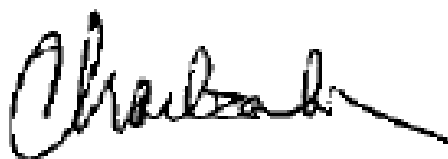
### **III. CONCLUSIONS**

20. The Defence for Abdallah Banda Abakaer Nourain requests:
  - a. To make no submissions on whether to allow the LRV to make observations on holding a trial *in absentia*;
  - b. That Trial Chamber IV reject the LRV’s request to receive the unredacted version of the transcript from 30 October 2019 and 13 November 2019 order;
  - c. That the LRV not receive confidential versions of the Prosecution’s and Defence’s submission on whether to hold a trial *in absentia* until after the submission of the LRV’s observations and after the Prosecution and Defence ensure that redactions are not needed in its own observations; and
  - d. Respectfully that Trial Chamber IV acknowledge that the Defence has the right to reply to the observations of the LRV pursuant to Rule 91(2) of the Rules of Procedure and Evidence if granted leave to make observations.

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<sup>10</sup> Trial Chamber IV, *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*, [ICC-02/05-03/09-683](#), para. 20.

Respectfully submitted,



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Chief Charles Achaleke Taku

On behalf of Abdallah Banda Abakaer Nourain

Dated this 5<sup>th</sup> day of May, 2020

At Baltimore, Maryland, United States of America