

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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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**

**Public redacted version of “Prosecution’s submissions on trials *in absentia* in light of the specific circumstances of the *Banda* case”, 13 December 2019, ICC-02/05-03/09-673-Conf-Exp**

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

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## I. INTRODUCTION

1. On 13 November 2019, in the “Order following Status Conference on 30 October 2019,”<sup>1</sup> Trial Chamber IV (“Trial Chamber” or “Chamber”), by majority, 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>2</sup>

2. Trials *in absentia* are not permitted by the Rome Statute (“Statute”). Article 63(1) clearly provides “[t]he accused shall be present during the trial.”<sup>3</sup> This article precludes the possibility of a trial *in absentia* at the International Criminal Court (“ICC” or “Court”), and the Appeals Chamber has confirmed this.

3. The clear and unambiguous meaning of article 63(1) is confirmed by a contextual reading of the Statute and by the drafting history of that article. Furthermore, the object and purpose of the Statute requires an accused’s presence at trial.

4. In exceptional circumstances, and under specific conditions, article 63(2) and rules 134*bis*,<sup>4</sup> 134*ter* and 134*quater* of the Rules of Procedure and Evidence (“Rules”) provide that trials at the ICC may proceed in the temporary absence of an accused.<sup>5</sup> These exceptional circumstances do not apply to Mr Banda.

5. Significantly, however, the exceptions under the Rules to an accused’s presence at trial apply only when an accused is under summons (in addition, rule 134*ter* expressly permits only partial absences from trial). Accused such as Mr Banda who are under arrest warrants do not benefit from such exemptions, and for good reason. An arrest warrant secures the presence of the suspect or accused before the Court. As the Appeals Chamber has held, arrest warrants serve “a fundamental function of the Court” and cannot be rendered “nugatory merely by refusing to execute [them].”<sup>6</sup> To allow a trial *in absentia* for Mr Banda, in the

<sup>1</sup> *The Prosecutor v. Abdallah Banda Abakaer Nourain* (“Banda”), Order following Status Conference on 30 October 2019, 13 November 2019, ICC-02/05-03/09-671-Conf-Exp (“Order”).

<sup>2</sup> Order, p. 6.

<sup>3</sup> Article 63(1) of the Statute.

<sup>4</sup> The Prosecution notes that Rule 134*bis* does relate to the *presence* of an accused subject to a summons “through the use of video technology” (emphasis added).

<sup>5</sup> Article 63(2) of the Statute; Rules 134*bis*, 134*ter* and 134*quater* of the Rules.

<sup>6</sup> *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397-Corr (“Bashir Appeal Judgment”), para. 190. See also *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Joint Dissenting Opinion of Judge Luz Del Carmen Ibáñez Carranza and Judge Solomy Balungi Bossa to the *Bashir* Appeal Judgment, 6 May 2019, ICC-02/05-01/09-397-Anx2 (“Joint Dissenting Opinion of Judges Ibáñez and Bossa”), paras. 93-94.

circumstances of this case, would vitiate the fundamental purpose behind replacing the summons with an arrest warrant against him.

6. Finally, the specific circumstances of this case present further significant practical obstacles that strongly militate against a trial *in absentia*.

## II. CONFIDENTIALITY

7. Pursuant to regulation 23bis(2) of the Regulations of the Court,<sup>7</sup> this filing is classified as confidential *ex parte*, available to the Defence, Registry and Prosecution only, because it refers to other documents marked with the same classification. The Prosecution will file a public redacted version as soon as practicable.

## III. BACKGROUND

8. On 20 November 2008, the Prosecution requested an arrest warrant for Mr Banda<sup>8</sup> or, in the alternative, a summons to appear.<sup>9</sup> On 27 August 2009, Pre-Trial Chamber I issued a summons to appear, without prejudice to the Chamber's power to review its determination under articles 58(1) and 58(7) of the Statute, respectively.<sup>10</sup>

9. Mr Banda appeared before the Court at his initial appearance on 17 June 2010.<sup>11</sup> The confirmation of charges hearing took place on 8 December 2010<sup>12</sup> in the absence of Mr Banda after he waived his right to be present pursuant to article 61(2)(a) of the Statute and

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<sup>7</sup> Regulation 23bis(2) of the Regulations of the Court.

<sup>8</sup> *Banda*, Public Redacted Version of Prosecutor's Application under Article 58 filed on 20 November, 17 June 2010, ICC-02/05-03/09-20-Red ("Arrest Warrant Application"), paras.10 and 169.

<sup>9</sup> Arrest Warrant Application, paras.10 and 170.

<sup>10</sup> *Banda*, Summons to Appear for Abdallah Banda Abakaer Nourain, 27 August 2009, ICC-02/05-03/09-3, para. 20.

<sup>11</sup> *Banda*, Initial Appearance Hearing, 17 June 2010, ICC-02/05-03/09-T-4-ENG ET WT 17-06-2010 1-27 SZ PT.

<sup>12</sup> *Banda*, Confirmation of Charges Hearing, 8 December 2010, ICC-02/05-03/09-T-9-Red-ENG CT WT 08-12-2010 1-52 NB PT ("Confirmation of Charges Hearing").

rule 124(1) of the Rules.<sup>13</sup> Pre-Trial Chamber I confirmed charges against Mr Banda on 7 March 2011.<sup>14</sup>

10. On 6 March 2013, the Trial Chamber set the trial date for 5 May 2014.<sup>15</sup> On 16 April 2014, the Trial Chamber vacated this date.<sup>16</sup> On 14 July 2014, the Trial Chamber instructed the Registrar to inform the Government of Sudan (“GoS”) of Mr Banda’s summons to appear and to request that it to take “all necessary steps” to facilitate Mr Banda’s presence at trial.<sup>17</sup> [REDACTED].<sup>18</sup>

11. On 11 September 2014, the Chamber, by majority, issued a warrant of arrest for Mr Banda.<sup>19</sup> 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.”<sup>20</sup> As a result, the Chamber ruled that a warrant of arrest now appeared necessary to ensure Mr Banda’s presence at trial.<sup>21</sup>

12. On 26 September 2014, the Chamber issued an order that requested the Defence to confirm “in a straight forward and unequivocal way whether Mr Banda will or not appear for his trial in circumstances in which: a) the cooperation of the Government of Sudan in facilitating Mr Banda’s appearance before the Court is not forthcoming; [footnote omitted] and b) the Court is not in a position to [REDACTED].”<sup>22</sup>

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<sup>13</sup> *Banda*, Defence Request pursuant to Rule 124(1) of the Rules of Procedure and Evidence, waiving the right of the persons concerned to be present at the hearing on the confirmation of charges and request that the hearing be held in their absence, pursuant to Article 61(2)(a) of the Rome Statute, 27 October 2010, ICC-02/05-03/09-86 and Confirmation of Charges Hearing, p. 13, l. 10-17.

<sup>14</sup> *Banda*, Corrigendum of the “Decision on the Confirmation of Charges,” 7 March 2011, ICC-02/05-03/09-121-Corr-Red, p. 74.

<sup>15</sup> *Banda*, Decision concerning the trial commencement date, the date for final prosecution disclosure, and summonses to appear for trial and further hearings, 6 March 2013, ICC-02/05-03/09-455, para.25.

<sup>16</sup> *Banda*, Public redacted Decision vacating the trial date of 5 May 2014, 16 April 2014, ICC-02/05-03/09-564-Red, para. 13.

<sup>17</sup> *Banda*, Public Redacted Decision as to Further Steps for the Trial Proceedings, 14 July 2014, ICC-02/05-03/09-590-Red, para. 37(c).

<sup>18</sup> [REDACTED]

<sup>19</sup> *Banda*, Warrant of arrest for Abdallah Banda Abakaer Nourain, 11 September 2014, ICC-02/05-03/09-606 (“Arrest Warrant”).

<sup>20</sup> Arrest Warrant, para. 21.

<sup>21</sup> Arrest Warrant, para. 24.

<sup>22</sup> *Banda*, Order on the Defence Application for Leave to Reply to “Prosecution response to the Defence application for leave to appeal the 11 September 2014 arrest warrant decision or for reconsideration of the same,” 29 September 2014, ICC-02/05-03/09-612-Conf, para. 6.

13. On 6 October 2014, the Defence confirmed that “where no assistance is to be provided [REDACTED] either by the GoS or the Court [REDACTED], [footnote omitted] then Mr. Banda will [REDACTED] not to attend trial.”<sup>23</sup>

14. On 3 March 2015, the Appeals Chamber confirmed the Chamber’s decision to issue the arrest warrant.<sup>24</sup>

15. [REDACTED].<sup>25</sup> [REDACTED].<sup>26</sup>

16. [REDACTED].<sup>27</sup> [REDACTED].<sup>28</sup>

17. [REDACTED].<sup>29</sup> [REDACTED].<sup>30</sup>

18. [REDACTED].<sup>31</sup> [REDACTED].<sup>32</sup>

19. [REDACTED].<sup>33</sup> [REDACTED].<sup>34</sup>

20. [REDACTED].

#### IV. SUBMISSIONS

##### 1) The ordinary meaning and context of article 63(1) requires the presence of Mr Banda at a trial

21. The Appeals Chamber has stressed that the cardinal principle of interpretation of treaties enshrined in article 31 of the Vienna Convention on the Law of Treaties applies when examining provisions of the Statute.<sup>35</sup> The terms captured in its articles must be “interpreted

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<sup>23</sup> *Banda*, Defence Reply to “Prosecution response to the Defence application for leave to appeal the 11 September 2014 arrest warrant decision or for reconsideration of the same,” 6 October 2014, ICC-02/05-03/09-614-Conf-Exp, para. 14.

<sup>24</sup> *Banda*, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain against Trial Chamber IV’s issuance of a warrant of arrest, 3 March 2015, ICC-02/05-03/09-632-Conf, para. 36.

<sup>25</sup> [REDACTED]

<sup>26</sup> [REDACTED]

<sup>27</sup> [REDACTED]

<sup>28</sup> [REDACTED]

<sup>29</sup> [REDACTED]

<sup>30</sup> [REDACTED]

<sup>31</sup> [REDACTED]

<sup>32</sup> [REDACTED]

<sup>33</sup> [REDACTED]

<sup>34</sup> [REDACTED]

<sup>35</sup> See *Situation in the Democratic Republic of Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006 ICC-01/04-168 OA3, para. 33; *The Prosecutor v. Germain Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled “Decision on the Defence Request

[...] in accordance with the[ir] ordinary meaning [...] in their context and in the light of its object and purpose.”<sup>36</sup>

22. The “ordinary meaning” of article 63(1) makes clear that the presence of the accused at trial is required. The Appeals Chamber has confirmed that article 63(1) does not permit trials *in absentia*.<sup>37</sup>

23. When article 63(1) is considered in the context of the Statute as a whole, the mandatory nature of an accused’s attendance at trial is made even clearer.

24. The exceptions to the requirement that an accused be present at trial are explicitly set out in the Statute in article 63(2) which allows a Trial Chamber to remove an accused who, “being present before the Court, continues to disrupt the trial,” but only in “exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.”<sup>38</sup>

25. The accused’s obligation to attend trial is also clear from the legislative intent of articles 58(1)(b) and 58(7), which provide a Pre-Trial Chamber the power to issue an arrest warrant or summons, respectively, “to ensure the person’s appearance” at trial.<sup>39</sup>

26. In relation to a confirmation hearing, pursuant to article 61(2)(a), an accused is entitled to waive his attendance at the confirmation, which Mr Banda chose to do, or pursuant to article 61(2)(b), confirmation may progress *in absentia* where the person has fled or cannot be found. The Rome Statute includes no similar provision allowing an accused to waive his right to be present at trial or for proceedings to continue despite the accused failing to appear before the Court. As noted in the Joint Separate Opinion to the Appeal Judgment in *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (“*Ruto*”), “[t]he silence of the

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Concerning Languages,” 27 May 2008, ICC-01/04-01/07-522 OA3, para. 39; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 9 June 2008, ICC-01/04-01/07-573 OA6, para. 5; *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victim’s Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432 OA9 OA10, para. 55; *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference of 10 June 2008,” 21 October 2008, ICC-01/04-01/06-1486 OA13, para. 40.

<sup>36</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, *Treaty Series*, vol. 1155, article 31.

<sup>37</sup> *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 (“*Ruto Appeal Judgment*”), para. 53.

<sup>38</sup> Article 63(2) of the Statute.

<sup>39</sup> Articles 58(1)(b) and 58(7) of the Statute.

Statute in this regard is not particularly surprising, given the existence of a provision mandating the presence of the accused during the trial.”<sup>40</sup>

## 2) The object and purpose of the Statute requires Mr Banda’s presence at trial

27. The Appeals Chamber has noted that article 63(1) of the Statute establishes that the accused shall be present during trial, “reflecting the central role of the accused person in proceedings and the wider significance of the presence of the accused for the administration of justice.”<sup>41</sup>

28. The Appeals Chamber stated that an accused person “is not merely a passive observer of the trial,” but rather “an active participant” who should have the opportunity to follow witness testimony, and confront it where necessary to thereby ensure that “the fullest and most comprehensive record of the relevant events may be formed.”<sup>42</sup> It also found that an accused’s absence from his trial would have a detrimental impact on “the morale and participation of victims and witnesses” and public confidence in the Court.<sup>43</sup>

29. Finally, the Joint Separate Opinion to the *Ruto* Appeal Judgment stated that the presence of an accused as a requirement of trial is “consistent with the gravitas of the proceedings and their importance from the perspective of the victims of the alleged crimes and the international community as a whole.”<sup>44</sup>

## 3) The drafting history suggests article 63(1) precludes a trial *in absentia*

30. The legislative history of article 63(1) of the Statute leaves no room for a different interpretation since holding trials *in absentia* was considered at the Rome Conference and rejected. The attendance requirement in article 63(1) was maintained without significant variation throughout the Statute’s negotiating history.<sup>45</sup> The delegations at the Rome

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<sup>40</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Joint Separate Opinion of Judge Erkki Kourula and Judge Anita Ušacka to the “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 OAS”, ICC-01/09-11-1066-Anx (“*Ruto* Appeal Judgment Joint Separate Opinion”), para. 7.

<sup>41</sup> *Ruto* Appeal Judgment, para. 49. In this context, the Appeals Chamber discussed how “the presence of the accused during the trial plays an important role in promoting public confidence in the administration of justice.”

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ruto* Appeal Judgment Joint Separate Opinion, para. 8.

<sup>45</sup> William Schabas and Veronique Caruana, “Article 63 Trial in the presence of the accused,” in Triffterer and Ambos, *The Rome Statute of International Criminal Court: A Commentary*, 3<sup>rd</sup> edition (Hart: 2016), p. 1564-1567.

Conference agreed on only one exception – article 63(2)’s mechanism for the removal of a disruptive accused.<sup>46</sup>

31. As the Appeals Chamber has noted, “[u]ltimately, concerns in relation to the rights of the accused, as well as the practical utility of trials *in absentia* and their potential to discredit the Court prevailed and article 63(1) of the Statute was incorporated in order to preclude this possibility.”<sup>47</sup>

**4) The provisions in the Statute and the Rules that permit the temporary absence of an accused underscore that Mr Banda’s presence is required for trial**

32. In exceptional circumstances and under specific conditions, the Statute and the Rules permit trials at the ICC to proceed in the temporary absence of an accused. In the present circumstances, none of these provisions apply to Mr Banda.

**a. The Trial Chamber’s discretion to remove a disruptive accused present at Court pursuant to article 63(2) does not apply to Mr Banda**

33. Article 63(2), discussed above, relates to an accused “being present before the Court” who “continues to disrupt the trial.” Since Mr Banda is not present at the Court and there are no trial proceedings, this provision is clearly not relevant.

**b. The Trial Chamber’s discretion to permit the voluntary excusal of an accused person from trial pursuant to article 63(1) does not extend to Mr Banda**

34. In relation to an accused who voluntarily requests to be absent from trial, in the *Ruto* Appeal Judgment the Appeals Chamber found that “Article 63(1) does not operate as an absolute bar in all circumstances to the continuation of trial proceedings in the absence of the accused.”<sup>48</sup>

35. However, it ruled that the discretion of the Trial Chamber under article 63(1) is limited and “must be exercised with caution.”<sup>49</sup> In particular, the Appeals Chamber stated that the “presence of the accused must remain the general rule and that article 63(1) [...] clearly limits the Trial Chamber’s discretion to excuse an accused person from presence

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<sup>46</sup> *Id.* at p. 1566.

<sup>47</sup> *Ruto* Appeal Judgment, para. 53.

<sup>48</sup> *Ruto* Appeal Judgment, para. 1.

<sup>49</sup> *Ruto* Appeal Judgment, para. 61.

during the trial.”<sup>50</sup> In so doing, the Appeals Chamber then set out a number of limitations, which include, in particular:

- (i) the absence of the accused can only take place in exceptional circumstances and must not become the rule; [...]
- (iii) any absence must be limited to that which is strictly necessary;
- (iv) the accused must have explicitly waived his or her right to be present at trial; and
- (vi) the decision as to whether the accused may be excused from attending part of his or her trial must be taken on a case-by-case basis [...]<sup>51</sup>

36. The Appeals Chamber reversed the Trial Chamber’s decision because “the Trial Chamber provided Mr Ruto with what amount[ed] to a blanket excusal before the trial had even commenced, effectively ma[king] his absence the general rule and his presence an exception.”<sup>52</sup> The Appeals Chamber also noted that “the Trial Chamber did not exercise its discretion to excuse Mr Ruto on a case-by-case basis, at specific instances of the proceedings, and for a duration limited to that which was strictly necessary.”<sup>53</sup>

37. The Appeals Chamber’s reasoning precludes a trial *in absentia* in relation to Mr Banda, in particular, because it would contradict the requirement that an accused’s absence must not become the rule. Rather than providing an explicit waiver of the right to be present at trial as contemplated by the Appeals Chamber, [REDACTED]. Furthermore, the Appeals Chamber’s criticism of the Trial Chamber’s “blanket excusal” of Mr Ruto before trial had even commenced strongly militates against Mr Banda’s trial *in absentia* when his trial has not started, notwithstanding his initial appearance.<sup>54</sup>

### **c. Rules 134bis, 134ter and 134quater do not apply to Mr Banda**

38. Rules 134bis, 134ter and 134quater, which were adopted by the Assembly of States Parties shortly after the *Ruto* Appeal Judgment was issued, clearly do not apply to Mr Banda. These rules expressly apply to accused persons who are “subject to a summons to appear.” Mr Banda is and should remain subject to an arrest warrant, as explained below.

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<sup>50</sup> *Ibid.*

<sup>51</sup> *Ruto* Appeal Judgment, para. 62.

<sup>52</sup> *Ruto* Appeal Judgment, para. 63.

<sup>53</sup> *Ibid.*

<sup>54</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802, para. 210: “the commencement of the trial occurs when the opening statements are made, immediately before the beginning of the evidence.”

Nevertheless, even if Mr Banda was subject to a summons to appear, he could not be tried *in absentia* pursuant to these rules.

39. Rule 134*bis* relates to an accused at trial subject to a summons who submits a written request to the Chamber to be allowed to be present “through the use of video technology during part or parts of his or her trial.”<sup>55</sup> Clearly, this rule would not permit an *in absentia* trial of Mr Banda. [REDACTED].<sup>56</sup>

40. Rule 134*ter* codifies the limitations set out by the *Ruto* Appeal Judgment in relation to the exceptional absence from trial of an accused subject to a summons. This rule requires that an accused submit a written request to the Chamber to be excused and to be represented by counsel during “part or parts of his or her trial.”<sup>57</sup> As noted above, this rule would not apply to a person subject to an arrest warrant, nor would it be applicable where the accused has not consented to any such waiver.<sup>58</sup>

41. Rule 134*quater* relates to an accused at trial subject to a summons who is “mandated to fulfil extraordinary public duties at the highest national level” who may submit a written request to the Trial Chamber to be excused and to be represented by counsel only.<sup>59</sup> Plainly, Mr Banda, [REDACTED] is not “mandated to fulfil extraordinary public duties at the highest national level.”

42. In considering a request pursuant to rule 134*quater*, the Trial Chamber’s decision should, *inter alia*, “be taken with due regard to the subject matter of the specific hearings in question and is subject to review at any time.”<sup>60</sup> These requirements would prevent a blanket excusal of an accused for the entirety of the trial proceedings.<sup>61</sup>

43. Furthermore, the primacy of the Statute is a bedrock principle upon which the administration of justice by the Court is premised.<sup>62</sup> To be consistent with the operative provisions of the Statute, and, in particular, with article 63(1), rule 134*quater* cannot provide the basis for Mr Banda’s *in absentia* trial. The Appeals Chamber introduced a measure of flexibility in the interpretation of article 63(1) by granting the Trial Chamber some measure

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<sup>55</sup> Rule 134*bis*(1) of the Rules.

<sup>56</sup> [REDACTED]

<sup>57</sup> Rule 134*ter*(1) of the Rules.

<sup>58</sup> *See above* paras. 5 and 37.

<sup>59</sup> Rule 134*quater*(1) of the Rules.

<sup>60</sup> Rule 134*quater*(2) of the Rules.

<sup>61</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*, 18 February 2014, ICC-01/09-01/11-1186, paras. 57 and 63.

<sup>62</sup> *See* Articles 1, 21(1)(a) and 51(5) of the Statute.

of discretion to excuse an accused from trial proceedings.<sup>63</sup> However, the Appeals Chamber stressed that such discretion is limited and must be exercised with caution.<sup>64</sup> The accused's absence must not become the rule and his or her presence the exception.<sup>65</sup> Therefore, rule 134*quater* cannot be construed as departing from this cardinal principle. To interpret these provisions differently would constitute “a wholesale departure from the intention of the drafters”<sup>66</sup> and “appear to be an inappropriate arrogation of the legislative function by the judiciary.”<sup>67</sup>

44. Moreover, rules 134*bis*, 134*ter* and 134*quater* crucially preserve the authority of the Trial Chamber to control the proceedings, including by being able to rule on when any such absence “must be limited to what is strictly necessary,”<sup>68</sup> or to review an excusal decision “at any time.”<sup>69</sup> The ability to do so requires the presence of the accused in court as the Chamber deems necessary. This is why the cooperation of the accused with the Court is so essential to the operation of these rules. Where an accused such as Mr Banda is beyond the Court's reach and is refusing to cooperate, the Trial Chamber will be unable to enforce any conditions it may impose on an accused, undermining the very rationale for the operation of rules 134*bis*, 134*ter* and 134*quater*.

##### **5) Practical considerations militate against a trial *in absentia* for Mr Banda**

45. There are a number of practical reasons for why trial *in absentia* proceedings are particularly inappropriate in the present circumstances.

46. The prospect of a trial *in absentia* while the accused remains at large may discourage the willingness of victims and witnesses to participate in the proceedings. As the Appeals Chamber has noted, the continuous absence of an accused from his trial “would have a detrimental impact on the morale and participation of victims and witnesses.”<sup>70</sup> Furthermore, victims and witnesses may reasonably believe that they may be vulnerable to retaliation by an accused at large.

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<sup>63</sup> *Ruto* Appeal Judgment, paras. 50, 55 and 56.

<sup>64</sup> *Ruto* Appeal Judgment, para. 61.

<sup>65</sup> *Ruto* Appeal Judgment, para. 63.

<sup>66</sup> *Ruto* Appeal Judgment Joint Separate Opinion, para. 11.

<sup>67</sup> *Ibid.*

<sup>68</sup> Rule 134*ter*(3) of the Rules.

<sup>69</sup> Rule 134*quater*(2) of the Rules.

<sup>70</sup> *Ruto* Appeal Judgment, para. 49.

47. Moreover, an *in absentia* trial during which Mr Banda remains at large would likely exacerbate any existing security challenges, which are already significant given that the Court currently has no ability to operate in Sudan.

48. [REDACTED].<sup>71</sup> [REDACTED].<sup>72</sup>

49. [REDACTED].<sup>73</sup> [REDACTED].<sup>74</sup> [REDACTED].<sup>75</sup>

50. [REDACTED].

51. An *in absentia* trial would likely further complicate this process. The fact that Mr Banda would remain at large during *in absentia* proceedings may further complicate [REDACTED]. Moreover, States unfamiliar with trials *in absentia* may be unwilling to support the Court in the circumstances of such proceedings.

52. On the basis of the above, the Court may need to expend additional resources, including financial resources, in relation to *in absentia* proceedings against Mr Banda. These expenses would be further increased in the event that, following an *in absentia* trial, Mr Banda is apprehended and granted a retrial or *de novo* trial in his presence which, pursuant to relevant human rights standards, would be an inevitable requirement to safeguard the accused's rights.<sup>76</sup>

53. Article 21(3) of the Statute requires the Court to interpret and apply the Statute in accordance with internationally recognised human rights.<sup>77</sup> Significantly, most regional human rights bodies have generally found that trials *in absentia* are not *per se* incompatible with the requirements of a fair trial as protected by internationally recognised human rights treaties, but are permissible under very strict conditions.<sup>78</sup> One such requirement is the right

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<sup>71</sup> [REDACTED]

<sup>72</sup> [REDACTED]

<sup>73</sup> [REDACTED]

<sup>74</sup> [REDACTED]

<sup>75</sup> [REDACTED]

<sup>76</sup> A *de novo* trial upon the appearance of the accused is one of the safeguards provided in systems where trials *in absentia* can be held when an accused is still at large. *See e.g.* ECHR, *Colozza v. Italy*, Appl. no. 9024/80, "Judgment," 12 February 1985; *see also* ECHR, *Sejdovic v. Italy*, Appl. no. 56581/00, "Judgment" [GC], 1 March 2006.

<sup>77</sup> Article 21(3) of the Statute.

<sup>78</sup> *See* HRC, *Ali Maleki v Italy*, Comm. 699/1996, "Views," CCPR/C/66/D/699/1996, 15 July 1999, paras. 9.2-9.5; HRC, *Monguya Mbenge v. Zaire*, Comm. 16/1977, "Views," CCPR/C/18/D/16/1977, 8 September 1977, para. 14.1; ECHR, *Medenica v. Switzerland*, Appl. no. 20491/92, "Judgment," 12 December 2001, para. 54.

to a retrial for persons convicted *in absentia* who later appear before the court that tried them.<sup>79</sup>

54. In any new trial, there would be a significant risk that evidence may no longer be available, particularly in the event of witness interference. These practical considerations underline the importance of the presence of the accused “for the administration of justice.”<sup>80</sup>

55. Assuming, *arguendo*, that rules 134*bis*, 134*ter* or 134*quater* could be construed by a Trial Chamber to provide the legal basis for *in absentia* trials for accused that remain at large, neither the Statute nor the Rules provide the necessary safeguards to protect the rights of an accused or those of the victims and witnesses in *in absentia* proceedings. By contrast, the Special Tribunal for Lebanon (“STL”) expressly contemplates such proceedings in its Statute<sup>81</sup> and Rules of Procedure and Evidence.<sup>82</sup> As such, the STL has adopted specific measures to guarantee the rights of an absent accused, such as the right to a retrial before the Trial Chamber and/or the Appeals Chamber when he or she appears,<sup>83</sup> and the protection of the victims and witnesses in such proceedings. For instance, the assigned Defence counsel to an *in absentia* accused must not have any contact with the accused.<sup>84</sup>

56. The ICC Statute and the Rules do not address such scenarios nor provide such guarantees. This is intentional and reflects the will of the drafters to reject *in absentia* trial proceedings and instead require the presence of an accused at trial.<sup>85</sup>

## 6) Mr Banda is subject to an arrest warrant

<sup>79</sup> See HRC, *Ali Maleki v Italy*, Comm. 699/1996, “Views,” CCPR/C/66/D/699/1996, 15 July 1999, para.9.5; ECHR, *Medenica v. Switzerland*, Appl. no. 20491/92, “Judgment,” 12 December 2001, para. 54; ECHR, *Stoichkov v. Bulgaria*, Appl. no. 9808/02, “Judgment,” 24 March 2005, para. 56.

<sup>80</sup> *Ruto* Appeal Judgment, para. 49. See *above* para. 28.

<sup>81</sup> Article 22(1) of the Statute of the Special Tribunal for Lebanon (“STL Statute”) provides: “The Special Tribunal shall conduct trial proceedings in the absence of the accused [...]”

<sup>82</sup> See Rules 105*bis*, 106, 107, 108 and 109 of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon (“STL Rules”).

<sup>83</sup> See Article 22(1)(c) and 22(3) of the STL Statute; See Rules 108(A), 109(C)(iii-iv), 109(E)(ii) of the STL Rules.

<sup>84</sup> See Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims appearing before the Special Tribunal for Lebanon, STL/CC/2012/03/Rev.1, article 8(E); see also article 8(E)(i) which provides that “[i]f Defence Counsel is contacted, directly or indirectly, by the *in absentia* accused, he shall [...] (i) refuse to discuss any element of the case with the *in absentia* accused” (emphasis added).

<sup>85</sup> *Ruto* Appeal Judgment, para.53. When dismissing Germain Katanga’s appeal of the Presidency’s article 108 Decision on the basis that such article does not give rise to a right of appeal, the Appeals Chamber noted the intent of the framers of the Statute: “If it had been intended that such decisions were to be appealed, the States Parties, in regulating the article 108 procedure in such a detailed way, would have expressly provided for such a right to appeal;” see *The Prosecutor v. Germain Katanga*, Decision on the admissibility of Katanga’s appeal against the “Decision pursuant to article 108(1) of the Rome Statute,” 9 June 2016, ICC-01/04-01/07-3697 09-06-2016 1/10 OA15 (“Katanga’s appeal against article 108(1) Decision”), para. 10.

57. As the Appeals Chamber stressed in the Appeal Judgment in *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, issuing an arrest warrant to secure the presence of a suspect engages “an important power that serves a fundamental function of the Court. This is particularly so when the Pre-Trial Chamber has decided that an arrest warrant is the more appropriate means of securing presence before the Court.”<sup>86</sup>

58. When deciding to issue an arrest warrant against Mr Banda on 11 September 2014, the Trial Chamber stressed 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.”<sup>87</sup> The Trial Chamber noted that “the summons to appear is intended for individuals that are not only personally willing to appear on a voluntary basis but are also *in a position to do so*.”<sup>88</sup>

59. [REDACTED].<sup>89</sup>[REDACTED].<sup>90</sup>[REDACTED].<sup>91</sup> Notwithstanding the questionable veracity of Mr Banda’s explanation for preventing his appearance at trial, he remains at large. The conditions for the existence of an arrest warrant continue to be satisfied under article 58(1)(b)(i) and, for that reason, the arrest warrant should not be vacated.<sup>92</sup>

60. Lastly, even assuming *arguendo* that the Chamber found that trials *in absentia* could be permitted by the Rome Statute, the Prosecution submits that it is premature to consider this option.[REDACTED].<sup>93</sup>

61. [REDACTED]<sup>94</sup> [REDACTED].<sup>95</sup> Following the Status Conference on 30 October 2019,<sup>96</sup> the Chamber asked for submissions from the Defence in relation to [REDACTED] and information on Mr Banda’s whereabouts.<sup>97</sup> [REDACTED].<sup>98</sup> The Prosecution submits that, at this stage, [REDACTED].

## 7) Mr Banda should not be tried *in absentia* as an “absconding accused”

<sup>86</sup> *Bashir* Appeal Judgment, para. 190.

<sup>87</sup> Arrest Warrant, para. 21.

<sup>88</sup> Arrest Warrant, para. 22 (emphasis added).

<sup>89</sup> [REDACTED]

<sup>90</sup> [REDACTED]

<sup>91</sup> [REDACTED]

<sup>92</sup> Suspending the arrest warrant would thereby deprive the Court of the legal justification to seek assistance for the arrest and surrender of Mr Banda from Member States. No such obligation on Member States arises from a summons to appear. *See* Article 58(5) of the Statute; [REDACTED]

<sup>93</sup> [REDACTED]

<sup>94</sup> [REDACTED]

<sup>95</sup> [REDACTED]

<sup>96</sup> [REDACTED]

<sup>97</sup> *Banda*, Order following Status Conference on 30 October 2019, 13 November 2019, ICC-02/05-03/09-671-Conf-Exp, paras. 8-10.

<sup>98</sup> [REDACTED]

62. The Prosecution notes that in *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* and *The Prosecutor v. Uhuru Muigai Kenyatta*, the Trial Chamber expressed the view that it has the discretion to proceed with the trial of an absconding accused after his initial submission to the jurisdiction of the Court in an on-going case.<sup>99</sup> The reasons expressed included concerns that an absconding accused may “frustrate the trial and the course of justice”<sup>100</sup> and “cause real anguish to witnesses and victims.”<sup>101</sup>

63. The Trial Chamber could potentially consider Mr Banda an “absconding accused” since he has accepted the jurisdiction of the Court, made his initial appearance on 17 June 2010, and agreed that his confirmation of charges hearing could proceed in his absence on 8 December 2010. Since 11 September 2014, Mr Banda has been subject to an arrest warrant and has not surrendered himself to the Court, despite his stated willingness to attend his trial.

64. Nevertheless, in the present circumstances, the Court’s legislative framework, the jurisprudence of the Appeals Chamber, and the practical considerations in this case strongly militate against a trial *in absentia* in relation to Mr Banda as a purported “absconding accused.”

65. A complete trial *in absentia* of an absconding accused, or exempting an absconding accused from the entire length of the proceedings against him when he has failed to appear for trial, is entirely inconsistent with article 63(1) which requires the accused’s presence at trial. As discussed above, the statutory exceptions to this requirement would not cover a trial *in absentia*. To venture beyond these exceptions would require the Assembly of States Parties (“ASP”) to amend the Statute accordingly.<sup>102</sup>

66. Further, for the reasons set out above, the limited exceptions to the requirement of an accused’s continuous presence at trial, as set out in rules 134*bis*, 134*ter* and 134*quater*, as

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<sup>99</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, 18 June 2013, ICC-01/09-01/11-777, paras. 44-46; *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, 18 October 2013, ICC-01/09-02/11-830, paras. 64 and 83. This view was also expressed in Judge Eboe-Osuji’s dissenting opinion to a reconsideration decision by the Trial Chamber in the Kenyatta case, *see The Prosecutor v. Uhuru Muigai Kenyatta*, Dissenting Opinion of Judge Eboe-Osuji to the Decision on the Prosecution’s motion for reconsideration of the decision exercising Mr Kenyatta from continuous presence at trial, 27 November 2013, ICC-01/09-02/11-863-Anx-Corr (“Dissenting Opinion of Judge Eboe-Osuji”).

<sup>100</sup> *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, 18 June 2013, ICC-01/09-01/11-777, para. 44.

<sup>101</sup> Dissenting Opinion of Judge Eboe-Osuji, para. 54.

<sup>102</sup> The Appeals Chamber concluded that it was “for the ASP to address if the Court’s underlying legal texts should be amended to allow appellate review of article 108 decisions.” Katanga’s appeal against article 108(1) Decision, para. 16.

well as their rationale, would also militate against a trial *in absentia* of Mr Banda in the present circumstances.

67. The *Ruto* Appeal Judgment would also preclude a trial *in absentia* of Mr Banda as an absconding accused. In particular, its criticism of the Trial Chamber’s excusal of Mr Ruto before trial had even commenced,<sup>103</sup> and the requirements that the absence of an accused must not be the rule and that an accused must explicitly waive his right to be present at trial, do not support a trial *in absentia* for Mr Banda.<sup>104</sup> The Prosecution further notes that in relation to an accused’s right, pursuant to article 67(1)(d), to be “present at trial,” the Appeals Chamber found that article 63(1) precludes an interpretation of article 67(1)(d) “that would allow for a finding that the accused had implicitly waived his or her right to be present by absconding or failing to appear for trial.”<sup>105</sup>

68. Lastly, the practical considerations in the present case, discussed above, militate against a trial *in absentia* of Mr Banda as an absconding accused. In particular, an *in absentia* trial, followed by a retrial or trial *de novo*, is likely to exacerbate rather than ameliorate<sup>106</sup> distress to witnesses and victims.<sup>107</sup> Moreover, in the event that an *in absentia* trial results [REDACTED] without the condition of his surrender, a trial *in absentia* could have the unintended effect of incentivising Mr Banda not to surrender to the Court. Other suspects under warrants of arrest could also be similarly discouraged from cooperating with the Court. Furthermore, such an outcome would vitiate the fundamental purpose of issuing an arrest warrant to ensure appearance at trial.

69. In sum, the Prosecution maintains its position notwithstanding the Chamber’s possible consideration of a new exemption from article 63 requirements in the distinct practical situation of the present case. Any such exemption would arise from a scenario quite distinct from the one before the Trial and Appeals Chambers in the *Ruto* case, which formed the

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<sup>103</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Admissibility and Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802, para.210: “the commencement of the trial occurs when the opening statements are made, immediately before the beginning of the evidence.” *See above* para. 37.

<sup>104</sup> *Ruto* Appeal Judgment, para. 61.

<sup>105</sup> *Ruto* Appeal Judgment, para. 54.

<sup>106</sup> In considering the practical reasons in support of a trial *in absentia* of an absconding accused, Judge Eboe-Osuji referred to “real anguish to witnesses and victims” that may be caused by an accused who absconds on the eve of commencement of trial. *See* Dissenting Opinion of Judge Eboe-Osuji, para. 54.

<sup>107</sup> The Prosecution was motivated by similar concerns in the days leading up to the commencement date for Mr Banda’s trial, originally scheduled for 5 May 2014. The Prosecution took the position that absent a clear commitment by Mr Banda to comply with his original summons to appear at trial, it would be “inefficient and disruptive to the lives and livelihoods of witnesses to embark on the logistical activities required to ensure their appearance in The Hague.” *See Banda*, Prosecution Response to “Defence Submissions pursuant to Decision subsequent to the status conference of 7 April (ICC-02/05-03-09-553-Conf)”, 15 April 2014, ICC-02/05-03/09-562-Conf, para. 2.

subsequent focus of codification of rules 134*bis*, 134*ter* and 134*quater* by the ASP. This is because the underlying rationale for any such exemption in the present circumstances would be wholly inconsistent with the requirements of article 63. Specifically, the *Ruto* Appeal Judgment and the amendments to rule 134 foresaw the possibility for (i) a *partial exemption* from presence requirements under article 63 in circumstances where the scope of such exemptions would be (ii) subject to *Trial Chamber control*, thereby rendering these exemptions compatible with the general presence requirement under article 63(1). By contrast, holding the trial *in absentia* in the factual circumstances of this case would amount to a *total exemption* from the presence requirements under article 63, and a revocation of the Trial Chamber's ability to control the scope and application of such exemptions, in a manner that would be wholly incompatible with, and indeed abrogate, the requirements of article 63 of the Statute.

## V. Conclusion

70. For the foregoing reasons, the Prosecution submits that Mr Banda's trial cannot proceed *in absentia* while he remains at large.



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Fatou Bensouda  
Prosecutor

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