

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 13 May 2020

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

**Decision on the Legal Representative of Victims' request for leave to make
submissions**

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 Chief Charles Achaleke Taku

Legal Representatives of Victims

Hélène Cisse

Jens Dieckmann

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber IV ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain*, pursuant to Article 68(3) of the Rome Statute ('Statute') issues this 'Decision on the Legal Representative of Victims' request for leave to make submissions'.

I. BACKGROUND AND SUBMISSIONS

1. On 19 November 2019, after the matter had already come up during the status conference held on 30 October 2019,¹ at which the parties and the Registry were present, the majority of the Chamber, Judge Prost dissenting, noted that the parties had not been in a position during the status conference to make substantive submissions, and 'invite[d] the parties to file any observations on trials *in absentia* in the specific circumstances of this case' by 13 December 2019 ('Order').²
2. On 13 December 2019, the Office of the Prosecutor ('Prosecution') and the Defence made their observations.³
3. On 28 April 2020, the Legal Representative of Victims ('LRV') filed a request for leave to make observations on trial *in absentia* in the specific circumstances of the case ('Request').⁴ She submits that the possibility of the case against Mr Banda taking place *in absentia* directly concerns the interests of the victims she represents. Pursuant Article 64(3) of the Statute, and referring to the stage of the present proceedings, the LRV avers that she ought to be permitted to make the same observations the parties were invited to.⁵ The LRV further indicates that in order to make informed observations, she requires access to the unredacted

¹ Transcript of Hearing of 30 October 2019, ICC-02/05-03/09-T-27-CONF-ENG, p. 25.

² Order following Status Conference on 30 October 2019-Conf-Exp, ICC-02/05-03/09-671-Conf-Exp, 13 November 2019, para. 11. A public redacted version was filed on 19 November 2019: ICC-02/05-03/09-671-Red.

³ 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; and Defence Submissions on *in absentia* proceedings pursuant to the Trial Chamber's Order of 13 November 2019 (ICC-02/05-03/09-674-Conf-Exp),

⁴ 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. 47.

⁵ ICC-02/05-03/09-683, paras 21-43.

transcript of the status conference of 30 October 2019 and the observations by the parties, which were each filed confidential *ex parte*, only available to the parties and the Registry ('Reclassification Request').⁶

4. On 5 May 2020, the Defence responded to the LRV. The Defence takes no position as to the Request.⁷ It submits that the Reclassification Request should be rejected, as the LRV failed to demonstrate how the rights of the victims are affected by not having access to the unredacted transcript of the status conference,⁸ and that since the LRV only wants to make observations in line with the Chamber's invitation in the Order and does not wish to respond to the parties, it need not have access to the observations of the parties.⁹
5. On 11 May 2020, the Prosecution filed a public redacted version of its observations in trials *in absentia*.¹⁰ That same day, the Prosecution responded to the LRV.¹¹ Noting that the issue of whether Mr Banda's trial is held *in absentia* directly affects the personal interests of victims participating in the proceedings, the Prosecution does not oppose the Request.¹² It defers to the Chamber as regards the Reclassification Request.¹³

II. ANALYSIS

6. As set out below, the present decision is rendered by majority, Judge Prost dissenting.
7. At the outset, the Chamber notes the LRV's complaint that neither she, nor her associate counsel, has received notification of (public) filings in the present case since 2015. The Chamber regrets that the relevant sections of the Registry have failed to ensure that the LRV

⁶ ICC-02/05-03/09-683, paras 44-46.

⁷ Defence Response to the Legal Representatives for Victims filing ICC-02/05-03/09-683, ICC-02/05-03/09-684, para. 3.

⁸ ICC-02/05-03/09-684, paras 4-11.

⁹ ICC-02/05-03/09-684, paras 12-16.

¹⁰ 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, ICC-02/05-03/09-673-Red.

¹¹ Prosecution's Response to the Legal Representatives for Victims' filing ICC-02/05-03/09-683, ICC-02/05-03/09-685.

¹² ICC-02/05-03/09-685, paras 6-9.

¹³ ICC-02/05-03/09-685, paras 10-15.

was notified of filings that she normally should have received notification of. The Chamber clarifies that the majority of the filings in the present case would not have been notified to the LRV due to the topic and/or level of confidentiality. While the Chamber considers it commendable that the LRV has kept herself apprised of the developments in the case via the Court's website, she does not explain why she did not inform the Registry about the lack of notification, or why the present request is made five months after the time she indicates that she learned about the Order via the Court's website.

8. Notwithstanding the tardiness of the Request, the majority of the Chamber, mindful that the personal interests of the victims would be affected if any *in absentia* proceedings were to take place, considers it appropriate to permit the victims to present their views on this issue through the LRV,¹⁴ now that the LRV has indicated that she wishes to present observations on this matter.
9. Any responses by the parties to the LRV's observations may be filed by the regular response deadline.¹⁵
10. As to the Reclassification Request, the majority considers it appropriate that the LRV receive a lesser redacted version of the transcript of the hearing. The Registry is therefore instructed to prepare a confidential version, to be notified to the parties and the LRV, that leaves unredacted page 1, line 1 to page 17, line 15; page 25, line 24 to page 28, line 19; and page 29, line 25 to page 32, line 8.¹⁶
11. The majority agrees with the Defence that the observations to be filed by LRV should not be responding to the parties' observations.¹⁷ The majority further notes the Defence's concern that the LRV should not be placed in a more favourable position than the parties, who did not yet have each other's observations when they filed theirs.¹⁸ As the observations concern

¹⁴ See Article 68(3) of the Statute.

¹⁵ See Regulation 34(b) of the Regulations of the Court.

¹⁶ These page and line numbers correspond to the English version of the transcript. The Registry is instructed to also prepare a French redacted version corresponding to the abovementioned page and line numbers.

¹⁷ The Chamber further recalls in this regard that participants, such as the LRV, may respond only to filings of the parties after having been granted leave to do so: see Regulation 24(5) of the Regulations of the Court.

¹⁸ ICC-02/05-03/09-684, paras 12-13.

a legal issue, the majority does not consider that the LRV having knowledge of the parties' submissions creates an advantage for the LRV or any prejudice to the accused. However, the majority does not see why access to the unredacted observations of the parties is 'essential', as submitted by the LRV, for her to be in a position to make observations representing the views of the victims on the issue of *in absentia* proceedings in the circumstances of the present case. After the LRV made her request, the Prosecution filed a public redacted version of its observations. To ensure that information about the case is public to the extent possible, the Defence will also be instructed to prepare a public redacted version of its observations, or, if appropriate, seek reclassification from confidential *ex parte* to public. However, the LRV need not receive this version prior to filing her observations.

12. Judge Prost, who dissented to the Order with regards to the invitation for observations, would have rejected the Request for the same reasons as expressed at the time,¹⁹ which are incorporated here by reference. In these circumstances, Judge Prost would also have rejected the Reclassification Request.

FOR THE FOREGOING REASONS, THE CHAMBER, BY MAJORITY, JUDGE PROST DISSENTING,

GRANTS the Request;

DIRECTS the LRV to file observations on trials *in absentia* in the specific circumstances of this case by 10 June 2020;

PARTIALLY GRANTS the Reclassification Request;

INSTRUCTS the Registry to prepare a lesser redacted version of the transcript of the 30 October 2019 status conference, and give the LRV access to this version by 20 May 2020; and

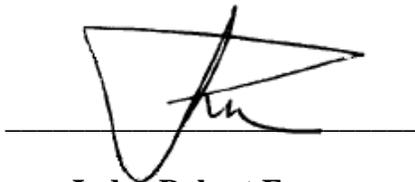
¹⁹ Order, ICC-02/05-03/09-671-Red, p. 7.

ORDERS the Defence to prepare public redacted version of filing ICC-02/05-03/09-674-Conf-Exp, or seek its reclassification as public, by 10 June 2020.

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

A handwritten signature in black ink, appearing to read 'K. Prost', written over a horizontal line.

Judge Kimberly Prost, Presiding Judge

A handwritten signature in black ink, appearing to read 'R. Fremr', written over a horizontal line.

Judge Robert Fremr

A handwritten signature in black ink, appearing to read 'R. Alapini-Gansou', written over a horizontal line.

Judge Reine Alapini-Gansou

Dated 13 May 2020

Done at The Hague, The Netherlands