

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **10 June 2020**

**TRIAL CHAMBER IV**

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

**SITUATION IN THE DARFUR, SUDAN**

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

**PUBLIC**

**Public Redacted Version of “Defence Submissions on *in absentia* proceedings pursuant to the Trial Chamber’s Order of 13 November 2019 (ICC-02/05-03/09-671-Conf-Exp)”, filed on 13 December 2019**

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

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

*Court to:*

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**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
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**Detention Section**

**Victims Participation and Reparations  
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**Other**

## I. Introduction

1. In the “Order following the Status Conference on 30 October 2019” (“Order”),<sup>1</sup> the majority of the Trial Chamber (Judges Fremr and Alapini-Gansou) (“Majority”) invited “the Defence and Prosecution to make submissions on trials *in absentia* in light of the specific circumstances of this case by 13 December 2019”.<sup>2</sup> Judge Prost dissented from the Trial Chamber’s invitation, expressing the “opinion [that] 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”.<sup>3</sup>
2. Further to the Majority’s invitation, the Defence files these submissions on trials *in absentia* in light of the specific circumstances of this case – namely, circumstances in which a mooted trial would commence in the absence of an accused who is not before or otherwise in the custody of the Court. The Defence shares Judge Prost’s opinion. The Rome Statute (“Statute”) bars in full commencing a trial *in absentia* in the circumstances presented by Mr. Banda’s case.
3. In the alternative, presuming *arguendo* that Article 63(1) permits a trial to commence in the circumstances of Mr. Banda’s case, the Defence submits that such a trial may only take place where the accused explicitly gives his consent for such a trial.<sup>4</sup> The Defence advises the Trial Chamber that, following consultations with Mr. Banda, he has expressed his strong and unequivocal opposition to his trial commencing and taking place in his absence, in violation of his fundamental Article 67(1)(d) right to be tried in his presence.

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<sup>1</sup> 13 November 2019, ICC-02/05-03/09-671-Conf-Exp.

<sup>2</sup> *Id.* at p. 6.

<sup>3</sup> *Ibid.*

<sup>4</sup> See Rule 134 *ter* (2)(c) of the Rules of Procedure and Evidence.

4. Lastly, presuming *arguendo* that a trial may take place *in absentia* in the circumstances presented by Mr. Banda's case, and without the explicit consent of the accused, then in accordance with Article 21(3) of the Statute the accused must be guaranteed a full re-trial before a newly composed Trial Chamber in the event of a conviction before the Trial Chamber or Appeals Chamber.

## II. Classification

5. Pursuant to Regulation 23*bis* of the RoC this filing is classified confidential and *ex parte* available only to the Defence, Prosecution and Registry as it refers to confidential communications [REDACTED]. The Defence shall also file a public redacted version of these submissions.

## III. Submissions

### The circumstances of Mr. Banda's case

6. Mr. Banda is an accused person who is not presently before or otherwise in the custody of the Court. As submitted below, none of the recognized exceptions to the Article 63(1) requirement that the accused "be present during the trial" apply to Mr. Banda's circumstances. Mr. Banda's trial may not, accordingly, lawfully commence in his absence.
7. Presuming, *arguendo*, that it is determined that the circumstances of Mr. Banda's case do not present an absolute bar to the commencement of his trial in his absence, it would be a particularly unjust abrogation of Mr. Banda's Article 67(1)(d) right "to be present at the trial" should it commence, in view of his substantial and significant cooperation with the Court and Prosecution, and [REDACTED].
8. In particular, Mr. Banda, unlike any other accused before the Court: (i) appeared on summons for his initial appearance from a State, Sudan, that does not

recognize the authority of and is actively hostile to the Court; (ii) agreed on a ‘short-form’ confirmation hearing, the first in the Court’s history; and (iii) reached an extensive accord with the Prosecution on agreed facts and significant limitation of the issues in contest for trial.

9. Were the Trial Chamber to commence Mr. Banda’s trial in his absence and proceed on the basis of Mr. Banda’s above-mentioned extensive and significant cooperation with the Court, and [REDACTED], Mr. Banda’s fundamental Article 67(1)(d) right to be present at his trial will be irremediably violated.

*The Court’s statutory framework does not permit the commencement of a trial in absentia in the circumstances of this case*

10. Article 63(1) of the Statute provides that: “The accused shall be present during the trial.” Article 67(1)(d) further establishes the fundamental right of an accused “to be present at the trial”, and Article 67(1)(e) the right to examine “the witnesses against him or her”.
11. In contrast, the Statute allows for a confirmation of charges hearing to commence and take place in the absence of a suspect either with his or her written consent<sup>5</sup> (as was the case with Mr. Banda), or where the individual “[f]led or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held”.<sup>6</sup>
12. The drafters explicitly did not include either option – consent, or where the accused has fled or cannot be found – in respect of the commencement of a trial in the absence of an accused and contrary to the accused’s Article 67(1)(e) and (d) rights. The limited exceptions to Article 63(1), as set out in Article 63(2), rules 134

<sup>5</sup> Statute Article 61(2)(a) and Rule 124.

<sup>6</sup> Article 61(2)(b)

ter and Rule 134 *quater* of the Rules of Procedure and Evidence (“Rules”), as well as the Court’s settled jurisprudence,<sup>7</sup> do not allow a trial to commence in the circumstances of Mr. Banda’s case.

13. Should the States Parties determine that the Rome Statute framework should allow for the commencement and conduct of a trial *in absentia* in the circumstances presented by Mr. Banda’s case, the States must either amend Article 63(1) of the Statute directly, or do so by way of amendment of the Rules. Evolution of the fundamental structure of the Rome Statute is a power reserved to the Court’s legislature – the ASP – not its Judges. Even in urgent circumstances where the Judges may adopt amendments of the Rules pursuant to Article 51(3) of the Statute, the normal protection applies to potentially impacted suspects and accused persons: “Amendments to the Rules [...] shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted” (Article 51(4)). The Judges of the Court cannot circumvent the bar on detrimental retroactive application of Rules amendments by amending the Court’s fundamental statutory framework via judicial interpretation.

*The drafting history of the Statute and the Appeals Chamber’s jurisprudence does not support the commencement of trials in absentia in the circumstances of this case*

14. The legislative history of Article 63 indicates that there was considerable controversy on the topic of *in absentia* trials. According to the Schabas/Caruana chapter in Triffterer and Ambos’ commentary on the Statute, multiple positions were proposed, ranging from an absolute prohibition of *in absentia* trials to

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<sup>7</sup> See, e.g., *Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Hearing, 12 May 2009, ICC-01/04-01/06-T-172-Red3-ENG, pp. 1-2; *Prosecutor v. Jean-Pierre Bemba Gombo*, Transcripts of Hearings, 7 November 2011, ICC-01/05-01/08-T-183-Red-ENG, pp. 1-2; 12 April 2013, ICC-01/05-01/08-T-306-Red-ENG, p. 62; 17 June 2013, ICC-01/05-01/08-T-324-ENG, pp. 16-17.

allowing *in absentia* trials in specific circumstances.<sup>8</sup> What is striking is that, even with the proposals to allow *in absentia* trials, the exceptions were circumscribed, maintaining the general principle that an accused should be present at trial.

15. In its final form, Article 63 represents a restrictive approach to *in absentia* trial proceedings. The only stated exception to the presence of the accused is disruptive behaviour. None of the other proposals for exceptions exists in the Statute. Proposals for a general exception for exceptional circumstances, or for specific exceptions for failure to appear at the hearing or when the absence was deliberate, were not included in the statutory language.<sup>9</sup>

16. The Appeals Chamber has reinforced the interpretation that only highly unusual circumstances will allow for a trial to proceed without the presence of the accused. Particularly noteworthy, the Appeals Chamber indicated that a trial *in absentia* cannot proceed when an accused does not expressly waive his or her right to be present. In the *Ruto and Sang* case, the Appeals Chamber found:

that part of the rationale for including article 63 (1) of the Statute was to reinforce the right of the accused to be present at his or her trial and, in particular, to preclude any interpretation of article 67 (1) (d) of the Statute 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>10</sup>

17. In the same judgment, the Appeals Chamber further interpreted the discretion under Article 63(1) as limited by specific, narrow factors, including an explicit waiver:

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<sup>8</sup> William A. Schabas and Veronique Caruana, *Article 63: Trial in the presence of the accused*, in Otto Triffterer and Kai Ambos, *Rome Statute of the International Criminal Court: A Commentary*, (3<sup>rd</sup> ed. 2016), p. 1566.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Prosecutor v. Sang and Ruto*, 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”, ICC-01/09-01/11-1066 OA 5, 25 October 2013, para. 54.

From the foregoing, the following limitations on the discretion of the Trial Chamber to excuse an accused person from presence during trial may be derived: (i) the absence of the accused can only take place in exceptional circumstances and must not become the rule; (ii) the possibility of alternative measures must have been considered, including, but not limited to, changes to the trial schedule or a short adjournment of the trial; (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; (v) the rights of the accused must be fully ensured in his or her absence, in particular through representation by counsel; 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, with due regard to the subject matter of the specific hearings that the accused would not attend during the period for which excusal has been requested.<sup>11</sup>

18. Consequently, pursuant to Article 63 (1), a trial *in absentia* cannot go forward in the absence of various restrictions, including an explicit waiver by the accused. As submitted above, Mr. Banda has expressed his strong and unequivocal opposition to his trial commencing and taking place in his absence, in violation of his fundamental Article 67(1)(d) right to be tried in his presence.

*The statutory procedure for excusal at trial does not apply to the circumstances of this case*

19. Rules 134 *ter* and *quater* provide for excusal of presence from trial, but only on the request of the accused and subject to an explicit waiver of the right to be present. Rule 134 *bis* provides for participation of the accused through video link, where the accused is considered to be virtually present.

20. The Rule 134 excusal provisions apply only in limited circumstances with specific requirements. The situations under both Rule 134 *ter* and *quater* are

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<sup>11</sup> *Id.* at para. 62.



triggered only by a written request from the accused. There is no authority under the Rules for any other party or for a Chamber *sua sponte* to commence a process to consider excusal. Although the Appeals Chamber in the *Ruto and Sang* case found implicit, but highly limited, discretion under Article 63(1) to excuse an accused from presence at trial,<sup>12</sup> the Rules appear to be written with even more restrictive language by requiring a request from the accused.

21. Moreover, in both the Appeals Chamber judgment in *Ruto and Sang* and in Rule 134 *ter* and *quater*, the accused must have “explicitly waived” the right to be present at trial. The language is precise. It requires an explicit waiver, not an implicit waiver. An explicit waiver should require actual knowledge of the trial and a voluntary, intentional relinquishment of the right to be present. Mr. Banda does not consent to the commencement of his trial in his absence, or otherwise relinquish his right to be present.

22. Commentators have expressed the view that a waiver of the right to be present requires that the accused “has done it deliberately and on the basis of actual knowledge of the consequences of his waiver, namely the continuation of the proceedings without his presence”.<sup>13</sup> Stated more succinctly, the commentators define the waiver as “the accused possess[ing] the actual knowledge and clearly intend[ing] to waive his right to be present”.<sup>14</sup>

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<sup>12</sup> *Id.* at paras. 56, 62. See also Joint Separate Opinion of Judge Erkki Kourula and Judge Anita Usacka, ICC-01/09-01/11-1066-Anx (articulating why Article 63 should have been interpreted as precluding trials *in absentia*).

<sup>13</sup> Mohammad Hadi Zakerhossein and Anne-Marie De Brouwer, *Diverse Approaches to Total and Partial In Absentia Trials by International Criminal Tribunals*, 26 *Criminal Law Forum* 181, 212 (2015).

<sup>14</sup> *Ibid.* For a discussion of the decisions of the Human Rights Committee and the ECtHR, requiring actual notice, see also Wayne Jordash and Tim Parker, *Trials in Absentia at the special Tribunal for Lebanon: Incompatibility with International Human Rights Law*, 8 *Journal of International Criminal Justice* 487 (2010); International Bar Association, Report on the “Experts’ Roundtable on trials in absentia in international criminal justice”, September 2016 (citing cases from the HRC and ECtHR).

23. In sum, Rule 134 *ter* and *quater* apply only in situations in which the accused has requested to be excused and, even then, only if there is an explicit waiver. The Rule does not apply if the accused has not requested an excusal.
24. If a waiver of the right to be present is permitted under Article 63(1) without the procedure being initiated by the accused person, in such circumstances, and at a minimum, an explicit waiver should be required as stated by the Appeals Chamber in *Ruto and Sang*. Under this scenario the Trial Chamber must be sufficiently satisfied that the accused has taken a voluntary and intentional decision to give up the right to be present based on actual knowledge of the trial details and the consequences of not being present.

*Right to a re-trial in the event of non-consensual trial in absentia*

25. Article 21(3) of the Statute requires that “[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights”. A right to a retrial is prevalent in systems that allow trials *in absentia*, particularly in the absence of an express waiver by the accused.<sup>15</sup> A right to a retrial is consistent with international human rights norms and, thus, required by Article 21(3) should an accused be convicted of any charges before the Court following a trial conducted in his or her absence and without his or her consent.
26. On a practical level, a retrial of a case at the ICC – given the complexity and length of international criminal proceedings – would result in a significant additional expenditure of resources in personnel, time, and cost, particularly in comparison to the added costs of a typical retrial before a national jurisdiction. From a policy perspective, there is accordingly a strong case against the holding of *trials in absentia* before the Court in the circumstances presented by this case,

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<sup>15</sup> Retrials generally and the ECtHR position are discussed in Zakerhossein and De Brouwer.

where Article 21(3) of the Statute would require the retrial of the accused before a new Trial Chamber in the event of a conviction.

#### **IV. Conclusion**

27. For the reasons set out above, the Defence submits that commencing a trial *in absentia* in the circumstances of this case would not be in accordance with the Court's statutory framework and would be violative of Mr. Banda's fundamental rights.

Respectfully Submitted,



Chief Charles Achaleke Taku  
Lead Counsel for Abdallah Banda Abakaer Nourain

Dated this 10th Day of June 2020  
At Baltimore, Maryland