

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

Date: **22 June 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**

**Prosecution's Response to the Legal Representatives for Victims' "Observations sur un procès *in absentia* dans la perspective des victims"**

**Source: Office of the Prosecutor**

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court***  
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## I. INTRODUCTION

1. Following the status conference held on 30 October 2019, the Trial Chamber, by majority, invited the parties “to make submissions on trials *in absentia* in light of the specific circumstances of this case [...]”<sup>1</sup> Judge Prost dissented: in her view, the Statute and settled jurisprudence clarified that a trial *in absentia* was not possible before the Court in the circumstances, and therefore, submissions on the issue were not necessary.<sup>2</sup>

2. On 13 December 2019, both the Prosecution and the Defence, by way of written submissions, expressed their views *against* holding a trial *in absentia* for Mr Banda.<sup>3</sup> In particular, as the Prosecution submitted, the Statute—as the Appeals Chamber has also confirmed—does not allow trials *in absentia*. Its object and purpose requires Mr Banda’s presence at trial.<sup>4</sup> Although trials before the Court may proceed in the temporary absence of an accused in certain exceptional circumstances (article 63(2) and rules 134 *bis*, 134 *ter* and 134 *quater*), those circumstances do not apply to Mr Banda.<sup>5</sup> Moreover, in the particular circumstances of Mr Banda’s situation (where he remains at large), allowing the trial to proceed *in absentia* would negate the very reasons for replacing the summons against him with a warrant for his arrest and undermines the Court’s essential function in this case and others.<sup>6</sup> Significant practical obstacles further strongly militate against a trial *in absentia*, including those arising from the retrial or trial *de novo* that must likely be conducted—should Mr Banda be convicted *in absentia*.<sup>7</sup>

3. The Trial Chamber, by majority, granted the Legal Representatives for Victims (LRV) leave to express the victims’ views on this issue.<sup>8</sup> On 10 June 2020, the Legal Representatives for Victims conveyed those views.<sup>9</sup> According to the LRV, the victims considered that the Government of the Sudan’s non-cooperation with the Court and the United Nations Security Council’s inaction had left the arrest warrant against Mr Banda unexecuted.<sup>10</sup> In these circumstances, the majority of the victims considered that proceeding

<sup>1</sup> ICC-02/05-03/09-671-Red (“[19 November 2019 Order](#)”), p. 6.

<sup>2</sup> [19 November 2019 Order](#), p. 6.

<sup>3</sup> ICC-02/05-03/09-673-Red (“[Prosecution Submissions](#)”), paras. 1-70; ICC-02/05-03/09-674-Red (“[Defence Submissions](#)”), paras. 1-27.

<sup>4</sup> [Prosecution Submissions](#), paras. 2-3, 21-31.

<sup>5</sup> [Prosecution Submissions](#), paras. 4-5, 32-44.

<sup>6</sup> [Prosecution Submissions](#), paras. 57-61.

<sup>7</sup> [Prosecution Submissions](#), paras. 45-56, 62-70.

<sup>8</sup> ICC-02/05-03/09-686 (“[LRV Submissions Decision](#)”), para. 8.

<sup>9</sup> ICC-02/05-03/09-687-Red (with confidential annexes A and D and public annexes B and C) (“LRV Observations”).

<sup>10</sup> LRV Observations, paras. 61-62.

with a trial *in absentia* could assist towards establishing if Mr Banda had committed the crimes alleged and in discovering the truth, providing reparations to the victims, and allowing them to express their grief.<sup>11</sup>

4. The Prosecution respectfully notes the victims' views, and in particular, their concerns that the trial against Mr Banda has not yet commenced.<sup>12</sup> It takes this opportunity to further clarify its position, in light of the issues raised.<sup>13</sup>

5. *First*, in the Prosecution's view, there are critical distinctions—in law and in principle—between a trial *in absentia* (or a trial by default) and continuing a trial when an accused is generally present for trial but is *temporarily* excused/absent in certain exceptional circumstances. The former is not permitted under the Court's statutory framework,<sup>14</sup> while the latter is allowed under the Rules of Procedure and Evidence, though limited only to those accused subject to summons and tailored to specific situations outlined in those Rules.<sup>15</sup>

6. Significantly, the two concepts—trial *in absentia* and temporary absence from trial—may not be easily amalgamated.<sup>16</sup> To this end, the Prosecution notes that the recent Appeals Chamber decision in *Gbagbo & Blé Goudé* on the question of conditional release granted to the two acquitted persons addressed—as *obiter dicta*—whether future proceedings in the case (*i.e.*, a trial that may result from the pending appeal) could in principle continue without their physical presence should they wilfully fail to re-appear before the Court for those proceedings.<sup>17</sup> Although the Appeals Chamber expressed its views on the subject, it was careful not to impose them on any future trial chamber in the *Gbagbo & Blé Goudé* proceedings, much less a different trial chamber.<sup>18</sup> Moreover, although the Appeals Chamber considered that future proceedings in the *Gbagbo & Blé Goudé* case may be continued should

<sup>11</sup> LRV Observations, paras. 62, 79.

<sup>12</sup> LRV Observations, paras. 35, 69-72, 75.

<sup>13</sup> [LRV Submissions Decision](#), para. 9 (allowing the parties to respond to the LRV Observations).

<sup>14</sup> ICC-01/09-01/11-1066 OA5 (“[Ruto Continuous Presence AD](#)”), para. 53 (“[...] Ultimately, 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) [...] was incorporated in order to preclude this possibility”); ICC-02/05-01/09-397-Anx2 OA2 (“[Bashir Judges Bossa and Ibanez Dis. Op](#)”), paras. 70-81.

<sup>15</sup> Rule 134 *bis* (allowing an accused subject to a summons to be present through the use of video technology during part or parts of his or her trial); rule 134 *ter* (allowing an accused subject to a summons to be excused and to be represented by counsel only during part or parts of his or her trial, in exceptional circumstances); rule 134 *quater* (allowing an accused subject to a summons who is mandated to fulfil extraordinary public duties at the highest national level to be excused from presence at trial and to be represented by counsel only, when he or she explicitly waives the right to be present at trial).

<sup>16</sup> *Contra* LRV Observations, paras. 65-68 (arguing that, similar to rules 134 *bis*, 134 *ter*, 134 *quater*, other exceptions to the accused's presence at trial may be made).

<sup>17</sup> ICC-02/11-01/15-1355-Red (“[Gbagbo Conditional Release AD](#)”), paras. 68-71.

<sup>18</sup> [Gbagbo Conditional Release AD](#), para. 71 (“The Appeals Chamber does not, by this decision, impose upon any future trial chamber an obligation to continue proceedings in the wilful absence of Mr Gbagbo or Mr Blé Goudé. Nor is the desirability of doing so, in the actual circumstances of the question, hereby determined.”).

they wilfully fail to comply with the Court's order to re-appear, the rationale that the Appeals Chamber relied on does not apply to Mr Banda's situation.<sup>19</sup>

7. *Second*, while the Prosecution understands the victims' wishes to establish the truth regarding the *Haskanita* incident and receive reparations,<sup>20</sup> holding a trial *in absentia* may not necessarily lead to those outcomes. Human rights law—that this Court must be guided by under article 21(3)—requires that if an accused is convicted *in absentia*, he or she is generally entitled to a retrial in person.<sup>21</sup> Moreover, the Court's legal framework allows reparations orders only against convicted persons.<sup>22</sup> Therefore, Court-ordered reparations are possible only if a case leads to a conviction (following the retrial or confirmation on appeal), which may or may not occur. Notwithstanding, the Trust Fund for Victims (TFV) may, in principle, assist victims through their assistance mandate—irrespective of whether Mr Banda is tried *in absentia* or not.<sup>23</sup>

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<sup>19</sup> [Gbagbo Conditional Release AD](#), para. 68 (“[...] It may be mentioned in this regard that what distinguishes this case from others in which a suspect or accused person may have failed to appear before the Court, is that the threshold erected in article 60 of the Statute has been crossed. This is in the sense that any suspect or accused (or in this case, acquitted person) who has physically appeared before the Court pursuant to article 60, has crossed the threshold of the Court's effective exercise of jurisdiction [...]).”)

<sup>20</sup> LRV Observations, paras. 69-72, 75, 79.

<sup>21</sup> See e.g., [Bashir Judges Bossa and Ibanez Dis. Op.](#), paras. 65-69.

<sup>22</sup> ICC-01/04-01/06-3129 A A2 A3 (“[Lubanga Reparations AD](#)”), para. 76.

<sup>23</sup> Article 79(1), Statute. See also [Lubanga Reparations AD](#), paras. 107-108 (“[...] The Appeals Chamber recalls that the Trust Fund has a dual mandate: 1) to provide assistance to victims within the Court's jurisdiction and (2) to implement Court ordered reparations. [...] This first mandate is not contingent on a Court order and is not funded by Court-ordered reparations [...]).”)

## II. SUBMISSIONS

### A. Holding trials in absentia and allowing temporary absences from attending trial are distinguishable

8. The LRV Observations convey the victims’ perspectives on “un procès *in absentia*”. However, these Observations do not specify what specific form the proceedings “*in absentia*” should take.<sup>24</sup>

9. *First*, the LRV notes that article 63(1) underscores the general rule that an accused must be present at his or her trial.<sup>25</sup> The Prosecution agrees.<sup>26</sup> Notwithstanding, relying on *Ruto & Sang* case law, the LRV argues that article 63(1) does not expressly disallow trials in *absentia*.<sup>27</sup> The Prosecution takes a different view. As the Appeals Chamber held in *Ruto & Sang*, article 63(1) was incorporated in the Statute to preclude the possibility of trials *in absentia*.<sup>28</sup> It also found that article 63(1) establishes that the accused shall be present during the trial, reflecting the central role of the accused person in the proceedings, necessary for the proper administration of justice.<sup>29</sup> Although the Appeals Chamber found that article 63(1) should be interpreted flexibly and did not operate as an absolute bar in all circumstances to continuing proceedings when the accused is absent,<sup>30</sup> this pronouncement related to allowing an accused to be *temporarily* absent from trial in exceptional circumstances—a legally distinct notion from *per se* holding trials *in absentia*.<sup>31</sup>

10. In addition to the Court’s legal framework, international human rights law and international criminal law more broadly distinguishes between a trial *in absentia* (where the accused is not present for its entirety) and allowing the accused to be temporarily absent from the trial. While article 14 of the International Covenant on Civil and Political Rights (ICCPR)

<sup>24</sup> LRV Observations, paras. 36, 66-67 (referring to the exceptions in Rules 134*bis*, 134*ter* and 134*quater* as “*in absentia*” proceedings) and 77 (referring to proceedings with the accused participating by video-conference and the victims testifying in the courtroom in The Hague and being examined by Defence counsel.)

<sup>25</sup> LRV Observations, para. 33.

<sup>26</sup> [Ruto Continuous Presence AD](#), para. 61.

<sup>27</sup> LRV Observations, para. 65.

<sup>28</sup> [Ruto Continuous Presence AD](#), para. 53.

<sup>29</sup> [Ruto Continuous Presence AD](#), para. 49; [Bashir Judges Bossa and Ibanez Dis. Op.](#), para. 66.

<sup>30</sup> [Ruto Continuous Presence AD](#), paras. 1, 50, 55.

<sup>31</sup> [Ruto Continuous Presence AD](#), para. 62 (setting out several limitations on a Trial Chamber’s discretion to excuse an accused person from presence during trial, including absence in exceptional circumstances, possibility of alternative measures, limited duration of absence, explicit waiver of right to be present at trial, representation by counsel, and a case by case determination of absence).

provides that an accused is entitled to be tried in his presence,<sup>32</sup> trials *in absentia* are exceptional, and when held for justified reasons, the rights of the defence must be strictly observed.<sup>33</sup> In this context, the phrase “*in absentia*” has been used to refer to circumstances in which an accused has not yet been arrested.<sup>34</sup> Mr Banda is one such accused, against whom the arrest warrant requiring his presence for trial is still outstanding.

11. Similarly, case law of the ICTR and ICTY has distinguished between trials by default or trials *in absentia* (where an accused has not been apprehended)<sup>35</sup> and continuing a trial in an accused’s temporary absence (where an accused has been apprehended, but is deemed to have waived the right to be present through his or her own wilful refusal to attend the proceedings).<sup>36</sup> In this latter context (and expressly in cases when the accused was already in custody), the ICTR and ICTY have found that the right of an accused person to be present at trial is not absolute and that an accused can waive that right.<sup>37</sup>

<sup>32</sup> Article 14, [ICCPR](#). See Article 8, [American Convention on Human Rights](#); Article 7, [African Charter on Human and Peoples’ Rights](#) and Article 6, [European Convention on Human Rights](#).

<sup>33</sup> Human Rights Committee, [General Comment 13](#), Article 14 (Twenty-first session, 1984), U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994), para. 11. See also [Dembukov v. Bulgaria](#), Application no. 68020/01, 7 July 2008, para. 47 (noting that a waiver of the right to take part in the trial must be unequivocally established, have minimum safeguards and should not run counter to any important public interest); [Jones v. The United Kingdom](#), Application no. 30900/02, 9 September 2003 (noting that an unequivocal waiver of the right to be present must include clarity on the state of the law that an accused could be tried in his absence throughout and that the accused could reasonably foresee this).

<sup>34</sup> [Nahimana et al. v. The Prosecutor](#), Case No. ICTR-99-52-A, Judgement, 28 November 2007 ([Nahimana AJ](#)), para. 98, referring to the Report of the Secretary General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), para. 101 (“[...] There is a widespread perception that trials *in absentia* should not be provided for in the statute as this would not be consistent with article 14 of [the ICCPR], which provides that the accused shall be entitled to be tried in his presence.”).

<sup>35</sup> [Prosecutor v. Blaskić](#), Case No. IT-95-14-AR108 bis, Judgement on the Request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997 (“[Blaskić AD](#)”), para. 59 (“The Appeals Chamber finds that, generally speaking, it would not be appropriate to hold *in absentia* proceedings against persons falling under the primary jurisdiction of the International Tribunal [...]. Indeed, even when the accused has clearly waived his right to be tried in his presence [...], it would prove extremely difficult or even impossible for an international criminal court to determine the innocence or guilt of that accused.”); [Prosecutor v. Karemera et al.](#), Case No. ICTR-98-PT, Decision on Severance of André Rwamakuba and Amendments of the Indictment, 7 December 2004 (“[Karemera Severance Decision](#)”), para. 24 (noting that accused who had not yet been arrested had a right to be tried in their presence); [Prosecutor v. Bizimana et al.](#), Case No. ICTR-98-44-I, Decision on the Prosecutor’s Motion for Separate Trial and for Leave to File an Amended Indictment, 8 October 2003 (“[Bizimana Severance Decision](#)”), para. 3 (noting the Chamber’s inability to try the accused *in absentia*).

<sup>36</sup> [Nahimana AJ](#), para. 97, distinguishing between situations of trials “by default” (where an indictee has yet to be apprehended or is on the run) and situations where an accused is in custody but voluntarily chooses not to appear for trial.

<sup>37</sup> [Nahimana AJ](#), para. 99 (“[...] the Appeals Chamber is not convinced that the precedents cited [...] support the view that a trial in the absence of the accused is prohibited for and by the *ad hoc* Criminal Tribunals where an accused who had been apprehended and informed of the charges against him refuses to be present for trial. [...]”); [Zigiranyirazo v The Prosecutor](#), Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006 (“[Zigiranyirazo AD](#)”), paras. 13-14 (noting that an accused’s right to be tried in his or her presence implies a right to be physically present at trial and noting that an accused’s right to be tried in his or her presence is not absolute, in the context of a Chamber’s ability to remove a persistently disruptive accused); [Milosević v. The Prosecutor](#), Case No. IT-2-54-AR73.7, Decision on Interlocutory Appeal of the Trial



12. It is in this latter sense that aspects of the *Gbagbo & Blé Goudé* conditional release decision must be read<sup>38</sup>—consistent with the Appeals Chamber’s earlier case law in *Ruto & Sang*.<sup>39</sup> This must be so, given that when it found that proceedings may be continued without the accused’s physical presence in cases of wilful absence, the Appeals Chamber in *Gbagbo & Blé Goudé* relied specifically on the ICTR Appeals Chamber in *Nahimana et al.*<sup>40</sup> That case (*Nahimana et al.*) related to the situation of Mr Barayagwiza who refused to attend trial while he was in the ICTR’s custody.<sup>41</sup> Those facts do not support holding a trial *in absentia* when an accused, such as Mr Banda, has still not been apprehended pursuant to the arrest warrant.

13. Further, the circumstances in which the Appeals Chamber expressed its views on this subject are unique to the *Gbagbo & Blé Goudé* case and do not bind any future trial chamber.<sup>42</sup> The Appeals Chamber’s discussion is linked to the specific remedy sought by the Prosecutor on appeal (and the possibility of a new trial following the appeal) and one of the conditions imposed on the acquitted persons’ release (*i.e.*, whether they would comply with the Court’s orders, including those to appear for that new trial).<sup>43</sup> Moreover, these facts are distinct from Mr Banda’s situation. Not only had the two acquitted persons been in the Court’s custody and detained until January 2019 (when they were acquitted at the close of the Prosecution case), they remain on conditional release during the appeals phase.<sup>44</sup> In this sense, the Appeals Chamber noted that it may be argued that the acquitted persons had physically appeared before the Court pursuant to article 60 and had “crossed the threshold of the Court’s effective jurisdiction”.<sup>45</sup>

14. In contrast—and notwithstanding that he had initially appeared before the Court pursuant to a summons—Mr Banda remains at large and the arrest warrant against him remains unexecuted. As the Appeals Chamber has underscored in *Bashir*, when a Chamber has decided that an arrest warrant (and not a summons) is the more appropriate means of securing presence before the Court, it engages an important power, serving a fundamental

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Chamber’s Decision on the Assignment of Defense Counsel, 1 November 2004 (“[Milosević AD](#)”), para. 13 (noting an accused’s right to be present can be restricted when he substantially disrupts the trial).

<sup>38</sup> [Gbagbo Conditional Release AD](#), paras. 68-71.

<sup>39</sup> [Ruto Continuous Presence AD](#), paras. 49, 50, 53, 55, 62.

<sup>40</sup> [Gbagbo Conditional Release AD](#), para. 70, fn. 115 (relying on [Nahimana AJ](#), paras. 96-109).

<sup>41</sup> [Nahimana AJ](#), paras. 110-116 (noting that Mr Barayagwiza was in the ICTR’s custody and had participated in several hearings at the pre-trial stage, but had decided to absent himself from the trial hearings, and that he had waived his right to be present in those circumstances).

<sup>42</sup> [Gbagbo Conditional Release AD](#), para. 71.

<sup>43</sup> [Gbagbo Conditional Release AD](#), para. 68.

<sup>44</sup> [Gbagbo Conditional Release AD](#), paras. 2-25, 56-73.

<sup>45</sup> [Gbagbo Conditional Release AD](#), para. 68.



function of the Court.<sup>46</sup> In these circumstances, those obliged to execute the arrest warrant are not free to render the warrant nugatory merely by refusing to execute it.<sup>47</sup> Allowing Mr Banda's trial to proceed *in absentia* would render this arrest warrant nugatory.

15. *Second*, although the LRV argues that other exceptions to the presence of the accused at trial— similar to the ones carved out in the *Ruto & Sang* case and in Rules 134 *bis*, 134 *ter* and 134 *quater*—may be created to overcome the difficulties in holding a trial in this case,<sup>48</sup> this would likely require further legislative intervention by the Assembly of States Parties (ASP). Nor do the existing exceptions to an accused's presence at trial contained in the Rules (including rule 134 *bis* allowing an accused's participation by video technology) amount to holding a trial *in absentia*.<sup>49</sup> Further, as the Prosecution has already submitted, the existing exceptions in Rules 134 *bis*, 134 *ter* and 134 *quater* do not apply to Mr Banda, especially as he is subject to an arrest warrant, and not a summons.<sup>50</sup>

## **B. Human rights law requires safeguards in the event of a conviction *in absentia***

16. The Prosecution is mindful of the victims' desire for proceedings against Mr Banda, so that the Court can establish his alleged criminal responsibility and then grant the victims reparations.<sup>51</sup> However, trying Mr Banda *in absentia* may not lead to these outcomes.

17. Significantly, under international human rights law, the presence of a defendant in criminal proceedings is the general rule.<sup>52</sup> Accordingly, trials *in absentia* are generally incompatible with internationally recognised human rights,<sup>53</sup> unless after being convicted *in absentia*, the accused is generally entitled to a retrial.<sup>54</sup> A conviction *in absentia*, therefore,

<sup>46</sup> ICC-02/05-01/09-397 OA2 ("[Bashir AJ](#)"), para. 190.

<sup>47</sup> [Bashir AJ](#), para. 190.

<sup>48</sup> LRV Observations, para. 68.

<sup>49</sup> *Contra* LRV Observations, paras. 65-67, 77.

<sup>50</sup> [Prosecution Submissions](#), paras. 4-5, 32-44.

<sup>51</sup> LRV Observations, para. 79.

<sup>52</sup> [Bashir Judges Bossa and Ibanez Dis. Op.](#), paras. 64-69 (noting in particular that according to cases before the Inter-American Court of Human Rights and the African Court of Human and Peoples' Rights, the defendant must be present in criminal proceedings against himself or herself, without exception).


<sup>53</sup> Human Rights Committee, *Mbenge v. Zaire*, 25 March 1983, no. 16/1977, para. 14.1 (noting that everyone is entitled to be tried in his or her presence and the judgement *in absentia* requires that, notwithstanding the absence of the accused, all due notification has been made to inform him of the date and place of his trial and to request his attendance); *Maleki v. Italy*, 27 July 1999, no. 699/2996, para. 9.3 ("The Committee has held in the past that a trial *in absentia* is compatible with article 14, only when the accused was summoned in a timely manner and informed of the proceedings against him [...]").

<sup>54</sup> [Bashir Judges Bossa and Ibanez Dis. Op.](#), para. 68. See HRC, *Maleki v. Italy*, paras. 9.5, 10; ECtHR, [Colozza v. Italy](#), Application no. 9024/80, 12 February 1985, paras. 26-33; [Sejdovic v. Italy](#), Application no. 56581/00, 1 March 2006, para. 82 ("[...] a denial of justice nevertheless undoubtedly occurs where a person convicted *in*

would likely not be final until a fresh determination on the merits in Mr Banda's presence is held. Therefore, not only would Court-ordered reparations remain linked to, and contingent upon, the confirmation of any conviction *in absentia* upon retrial or appeal,<sup>55</sup> conducting a retrial would itself be challenging, with several attendant practical difficulties.<sup>56</sup> These difficulties include the possibility that evidence might be unavailable at the time of the retrial, that a further burden might be imposed on victims and witnesses during the retrial and that there would be further costs to the Court.

### III. CONCLUSION

18. For the reasons above, and those canvassed in its submissions of 13 December 2019, the Prosecution respectfully submits that Mr Banda's trial cannot be held *in absentia* while he remains at large.




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Fatou Bensouda  
Prosecutor

Dated this 22<sup>nd</sup> day of June 2020

At The Hague, The Netherlands

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*absentia* is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself.”); [Demebukov v. Bulgaria](#), Application no. 68020/01, 7 July 2008, para. 45; [Medenica v. Switzerland](#), Application no. 20491/92, 12 December 2001, para. 54; see also ICC-01/09-02/11-863-Anx-Corr (“[Kenyatta Judge Eboe-Osuji Dis Op](#)”), para. 99.

<sup>55</sup> [Lubanga Reparations AD](#), para. 76.

<sup>56</sup> [Prosecution Submissions](#), para. 68.