



**Original: English**

**No. ICC-02/05-03/09  
Date: 7 July 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 LRV request for leave to reply

**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 Charles Achaleke Taku

**Legal Representatives of Victims**

Hélène Cisse  
Jens Dieckmann

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparations**

**The Office of Public Counsel for Victims**

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

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**TRIAL CHAMBER IV** ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain*, having regard to Regulation 24(5) of the Regulations of the Court ('Regulations'), issues this 'Decision on LRV request to reply'.

1. On 11 September 2014, the Chamber, in a previous composition, by majority, Judge Eboe-Osui dissenting, held that, subject to certain limited exceptions, an accused subject to a summons to appear or an arrest warrant shall be present during the trial and vacated the trial date and suspended preparatory measures therefor until Mr Banda's arrest or voluntary appearance ('Arrest Warrant Decision').<sup>1</sup>
2. On 13 November 2019, following a status conference held on 30 October 2019, the Chamber, by majority, Judge Prost dissenting, invited the Defence and the Office of the Prosecutor ('Prosecution') to make submissions on trials *in absentia* in light of the specific circumstances of this case ('Order').<sup>2</sup>
3. On 13 December 2019, the Prosecution<sup>3</sup> and the Defence<sup>4</sup> filed their respective submissions pursuant to the Order, both arguing that the Court's statutory framework does not allow trials *in absentia*.
4. On 13 May 2020, following a request from the LRV in this respect,<sup>5</sup> the Chamber, by majority, Judge Prost dissenting, granted the LRV leave to file observations on trials *in absentia* in the specific circumstances of the case, and

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<sup>1</sup> Warrant of arrest for Abdallah Banda Abakaer Nourain, ICC-02/05-03/09-606.

<sup>2</sup> Order following the Status Conference on 30 October 2019, ICC-02/05-03/09-671-Conf-Exp (confidential *ex parte*, available only to the Defence, the Prosecution, and the Registry; a public redacted version was notified on 19 November 2019 as ICC-02/05-03/09-671-Red).

<sup>3</sup> 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 (confidential *ex parte*, available only to the Defence, the Prosecution, and the Registry; a public redacted version was notified on 11 May 2020 as ICC-02/05-03/09-673-Red).

<sup>4</sup> 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), ICC-02/05-03/09-674-Conf-Exp (confidential *ex parte*, with confidential *ex parte* annex, both available only to the Defence, the Prosecution, and the Registry; a public redacted version was notified on 10 June 2020 as ICC-02/05-03/09-674-Red).

<sup>5</sup> 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, 28 April 2020, ICC-02/05-03/09-683 (notified on 29 April 2020).

invited the parties to file a response, if they wish, by the regular response deadline (‘Decision Granting the LRV Leave to Make Submissions’).<sup>6</sup>

5. On 10 June 2020, the LRV submitted its observations, arguing that, in the circumstances of the case, with the arrest warrant against Mr Banda having been left unexecuted for a long period of time, the majority of the victims consider that proceeding with a trial *in absentia* could assist towards establishing if Mr Banda committed the charged crimes, and therefore also in potentially providing reparations to victims and allowing them to express their grief.<sup>7</sup>
6. On 22 June 2020, the Prosecution<sup>8</sup> and the Defence<sup>9</sup> responded to the LRV’s observations (the latter, ‘Defence Response’). The Defence submits that the Chamber’s legal and factual determinations made in the Arrest Warrant Decision that Mr Banda’s trial cannot commence in his absence in the circumstances of the case constitute *res judicata* and the legal and factual submissions made by the LRV in its observations fall short of demonstrating an exceptional situation that could justify the Chamber *proprio motu* reconsidering its previous decision in this respect.<sup>10</sup>
7. On 25 June 2020, the LRV requested leave to reply to the Defence Response, arguing that the response raises novel questions which the LRV could not have anticipated and which are important for the determination of the issue (‘Request for Leave to Reply’).<sup>11</sup> Specifically, the LRV submits that it wishes to reply to the alleged incorrect use of the concept of *res judicata* by the Defence and further wishes to demonstrate that certain statements made by the Defence in

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<sup>6</sup> Decision on the Legal Representative of Victims’ request for leave to make submissions, ICC-02/05-03/09-686.

<sup>7</sup> Observations sur un procès *in absentia* dans la perspective des victims, ICC-02/05-03/09-687-Conf (confidential, with confidential annexes A and D and public annexes B and C; a public redacted version of the main filing was notified on 19 June 2020 as ICC-02/05-03/09-687-Red).

<sup>8</sup> Prosecution’s Response to the Legal Representatives for Victims’ “Observations sur un procès *in absentia* dans la perspective des victims”, ICC-02/05-03/09-690.

<sup>9</sup> Defence Response to “Observations sur un procès *in absentia* dans la perspective des victimes”, ICC-02/05-03/09-689-Conf-Exp (confidential *ex parte*, available only to the Defence, the Prosecution, and the Registry; a confidential redacted version was notified on the same day as ICC-02/05-03/09-689-Conf-Red).

<sup>10</sup> Defence Response, paras 2, 23-30.

<sup>11</sup> Requête des Représentants Légaux Communs des Victimes aux fins d’être autorisés à soumettre une réplique à la ‘Confidential Redacted Version of Defence Response to «Observations sur un procès *in absentia* dans la perspective des victimes» -ICC-02/05-03/09-689, ICC-02/05-03/09-692-Conf.

the 30 October 2019 status conference triggered the submissions made by the LRV on the possibility of resorting to elements of a trial *in absentia* in the circumstances of this case.<sup>12</sup>

8. On 29 June 2020, the Defence responded to the Request for Leave to Reply, opposing it.<sup>13</sup> It argues that the LRV misrepresents the Defence's statements made during the 30 October 2019 status conference and, consequently, its position in relation to *res judicata*.<sup>14</sup> Therefore, in the Defence's submissions, the issue of *res judicata* was a foreseeable response to the LRV's submissions and a reply thereto is unwarranted.<sup>15</sup>
9. Pursuant to Regulation 24(5) of the Regulations, participants may only reply to a response with the leave of the Chamber, unless otherwise provided for in the Regulations. In the present instance, the Chamber does not consider that it would be assisted by further submissions on the issue identified by the LRV. Judge Prost, who dissented from the Order and from the Decision Granting the LRV Leave to Make Submissions, joins the majority in rejecting the Request for Leave to Reply, for the same reasons as expressed at the time, which are incorporated here by reference.<sup>16</sup> In light of the foregoing, the Chamber rejects the Request for Leave to Reply.

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<sup>12</sup> Request for Leave to Reply, paras 7-14.

<sup>13</sup> Defence Response to the Victim's Request to Reply (ICC-02/05-03/09-692-Conf), ICC-02/05-03/09-693-Conf.

<sup>14</sup> Defence Response, paras 2, 5-7.

<sup>15</sup> Defence Response, paras 3, 8-9.

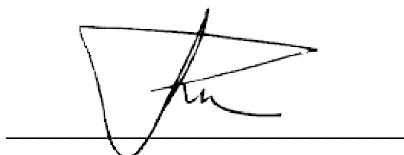
<sup>16</sup> Order, p. 7.

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



**Judge Kimberly Prost**

**Presiding Judge**



**Judge Robert Fremr**



**Judge Reine Alapini-Gansou**

Dated this Tuesday, 7 July 2020

At The Hague, The Netherlands