

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No. ICC-02/05-03/09

Date: 13 October 2023

TRIAL CHAMBER IV

Before:

**Judge Kimberly Prost, Presiding Judge
Judge Reine Alapini-Gansou
Judge María del Socorro Flores Liera**

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

THE PROSECUTOR* v. *ABDALLAH BANDA ABAKAER NOURAIN

Confidential, *ex parte*, only available to the Prosecution

**Decision on the Prosecution's request to withdraw the charges against Abdallah
Banda Abakaer Nourain**

To be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor Nazhat Shameem Khan Julian Nicholls	Counsel for the Defence
Legal Representatives of Victims	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	<i>Amicus Curiae</i>
REGISTRY	
Registrar Osvaldo Zavala Giler	Counsel Support Section
Victims and Witnesses Unit	Detention Section
Victims Participation and Reparations Section	Other

TRIAL CHAMBER IV (the ‘Chamber’) of the International Criminal Court, in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain*, issues this ‘Decision on the Prosecution’s request to withdraw the charges against Abdallah Banda Abakaer Nourain’.

I. Procedural background

1. On 27 August 2009, Pre-Trial Chamber I issued a summons to appear for Mr Banda (the ‘Summons to Appear’).¹
2. On 7 March 2011 the Pre-Trial Chamber confirmed charges against Mr Banda, elevating the case to trial (the ‘Confirmation Decision’).²
3. On 11 September 2014, the Trial Chamber decided that the Summons to Appear was no longer sufficient to ensure Mr Banda’s appearance at trial and issued an arrest warrant against Mr Banda (the ‘Warrant of Arrest’),³ which remains to be executed.
4. On 15 September 2023, the Chamber ordered the Registry and the Prosecution to provide written updates concerning Mr Banda’s whereabouts and the efforts being made to secure his arrest (the ‘Order’).⁴
5. On 5 October 2023, in response to the Order, the Prosecution filed a request seeking the Chamber’s permission to withdraw all charges against Mr Banda (the ‘Request’).⁵

II. Submissions and analysis

6. In its Request, the Prosecution submits that following the re-assessment of the evidence against Mr Banda, the Prosecution’s efforts have focused on the termination of the proceedings

¹ SUMMONS TO APPEAR FOR ABDALLAH BANDA ABAKAER NOURAIN, ICC-02/05-03/09-3.

²Corrigendum of the “Decision on the Confirmation of Charges”, ICC-02/05-03/09-121-Conf-Corr (a public redacted version was filed on 8 March 2011, ICC-02/05-03/09-121-Corr-Red).

³ Warrant of arrest for Abdallah Banda Abakaer Nourain, ICC-02/05-03/09-606. The Warrant of Arrest was confirmed by the Appeals Chamber, see Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain against Trial Chamber IV’s issuance of a warrant of arrest, ICC-02/05-03/09-632-Conf (a public redacted version was filed on the same date, ICC-02/05-03/09-632-Red).

⁴ Order directing the Registry and the Prosecution to provide updates, ICC-02/05-03/09-723-Conf-Exp. Upon the Prosecution’s request, the Chamber extended the time limit to comply with the order to 5 October 2023 see Decision on the Prosecution’s request under Regulation 35 for an extension of time to file a written update, 22 September 2023, ICC-02/05-03/09-725-Conf-Exp.

⁵ Prosecution’s request to withdraw the charges against Abdallah Banda Abakaer Nourain and Response to Order directing the Registry and the Prosecution to provide updates, ICC-02/05-03/09-727-Conf-Exp.

against him and not on his arrest. The Prosecution therefore ‘anticipates that the Chamber no longer requires the information sought in the Order’.⁶

7. The Prosecution claims that the evidence no longer presents a reasonable prospect of conviction and therefore seeks the Chamber’s permission to withdraw the charges against Mr Banda pursuant to Article 64(2) of the Rome Statute (the ‘Statute’).⁷ In the alternative, the Prosecution requests the Chamber to take notice of the withdrawal of charges and terminate the case directly pursuant to Article 61(9) of the Statute.⁸

8. At the outset, the Chamber notes that the first item of relief sought is formulated under Article 64(2) of the Statute.⁹ The Chamber does not consider this to provide a legal basis for a request to withdraw charges in the circumstances of this case. The conclusions reached in the *Muthaura* and *Kenyatta* decisions relied on by the Prosecution regarding the applicability of Article 64(2)¹⁰ are inapposite to the case at hand. Notably, as opposed to the current proceedings, none of these cases concerned a fugitive from justice.

9. The Chamber is of the view that Article 61(9) is the relevant statutory provision which vests a trial chamber with the power to authorise the withdrawal of the charges. However, the Chamber notes the plain wording of the section limiting its application to ‘[a]fter the commencement of the trial’¹¹ and requiring the permission of the Trial Chamber. The Chamber considers that this was a deliberate limitation in the Statute. Once the charges are confirmed by a pre-trial chamber the expectation is that the matter will proceed to trial. In this instance, Mr Banda failed to appear for the trial proceedings with the resulting issuance of a warrant for his arrest which remains outstanding. It is for that reason alone that the trial proceeding has been frustrated. It follows the Chamber finds that this Article does not provide a statutory basis for the Prosecutor to withdraw these charges after confirmation, prior to trial, with or without leave of the Chamber. In these circumstances the obligation on the Prosecutor is to make the necessary efforts to locate and secure the arrest of Mr. Banda in execution of the Chamber’s

⁶ Request, ICC-02/05-03/09-727-Conf-Exp, para. 6 referring to Order, ICC-02/05-03/09-723-Conf-Exp.

⁷ Request, ICC-02/05-03/09-727-Conf-Exp, paras 1, 12, 20-22, 26.

⁸ Request, ICC-02/05-03/09-727-Conf-Exp, paras 2, 27.

⁹ Request, ICC-02/05-03/09-727-Conf-Exp, paras 8-12.

¹⁰ Request, ICC-02/05-03/09-727-Conf-Exp, para. 11.

¹¹ See Appeals Chamber, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Prosecutor’s appeal against the “Decision on the Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”, 13 December 2013, ICC-01/09-01/11-1123, paras 26-27.

order.¹² For these reasons the Chamber also rejects the request under Article 61(9) as being without Statutory basis.

10. Furthermore, the Chamber finds that Regulation 60 of the Regulations of the Office of the Prosecutor, as articulated by the Prosecution,¹³ does not provide a legal basis in the circumstances of the case.

11. Having reached this conclusion it is unnecessary for the Chamber to consider the substance of the arguments advanced by the Prosecution in support of its request to withdraw the charges. However, the Chamber considers it would be beneficial to the efficiency of the proceedings to address these arguments in summary form.

12. The Chamber is unpersuaded by the Prosecution's submission that following the deterioration of the evidence of two key witnesses¹⁴ and the exculpatory evidence recently provided by a new witness,¹⁵ the Prosecution's case against Mr Banda has substantially deteriorated.¹⁶ The Chamber recalls that according to the Confirmation Decision,¹⁷ there are reasonable grounds to believe that Mr Banda can be held criminally responsible for the charges as confirmed and on this basis the Pre-Trial Chamber committed him to trial. As the Confirmation Decision itself makes clear, the Pre-Trial Chamber's determination did not rest solely upon the evidence the Prosecution now avers is key to two of the three contested issues for trial.¹⁸ Moreover, the Prosecution fails to provide any details for the basis of its credibility assessment¹⁹ nor has there been an articulation as to why the purported weakening of discrete pieces of evidence underpinning the charges as confirmed would prevent it from putting forward any kind of case.

13. The Chamber is also not satisfied that the Prosecution has substantiated its assertion²⁰ that further investigations would be unable to fill the gaps left by this evidence. The Chamber emphasises that in accordance with Article 54(1) of the Statute, it is incumbent upon the Prosecution to vigorously pursue investigations and preserve evidence. In addition, the fact that

¹² Warrant of arrest, ICC-02/05-03/09-606.

¹³ Request, ICC-02/05-03/09-727-Conf-Exp, para. 8.

¹⁴ Request, ICC-02/05-03/09-727-Conf-Exp, paras 15-17.

¹⁵ Request, ICC-02/05-03/09-727-Conf-Exp, para. 19.

¹⁶ Request, ICC-02/05-03/09-727-Conf-Exp, para. 20.

¹⁷ Confirmation Decision, ICC-02/05-03/09-121-Conf-Corr.

¹⁸ Request, ICC-02/05-03/09-727-Conf-Exp, para. 17.

¹⁹ Request, ICC-02/05-03/09-727-Conf-Exp, paras 15, 17-18.

²⁰ Request, ICC-02/05-03/09-727-Conf-Exp, para. 18.

the Prosecution engaged an external adviser to 'independently review the case'²¹ is immaterial to the Chamber's determination.

14. Finally, the Prosecution's submission that as the principle of *ne bis in idem* would not attach the termination of this case would not bar victims from seeking justice,²² is not one which the Chamber finds compelling. It is in fact contrary to the Prosecution's previous assertion that further investigations would not produce additional evidence.²³ As the Prosecution acknowledges,²⁴ the 103 participating victims in this case 'have been waiting for over 15 years for justice'. Given this, the priority for the Prosecution should continue to be to identify and safeguard evidence and to secure the arrest of the fugitive.

15. In light of the above, the Chamber rejects the Prosecution's Request.

16. The Chamber further notes the Prosecution's submission that it 'anticipates that the Chamber no longer requires the information sought in the Order'.²⁵ Considering the rejection of the Request, the Chamber emphasises that its Order must be complied with by **27 October 2023**.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Prosecution's Request in its entirety; and

DIRECTS the Prosecution to comply with the Order as indicated in paragraph 16 above.

²¹ Request, ICC-02/05-03/09-727-Conf-Exp, paras 21-22.

²² Request, ICC-02/05-03/09-727-Conf-Exp, para. 25.

²³ Request, ICC-02/05-03/09-727-Conf-Exp, para. 18.

²⁴ Request, ICC-02/05-03/09-727-Conf-Exp, para. 24.

²⁵ Request, ICC-02/05-03/09-727-Conf-Exp, para. 6 referring to Order, ICC-02/05-03/09-723-Conf-Exp.



Judge Kimberly Prost
Presiding Judge



Judge Reine Alapini-Gansou



Judge María del Socorro Flores Liera

Dated this **13 October 2023**

At The Hague, The Netherlands