

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No. ICC-02/05-03/09

Date: 28 November 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 (with confidential, *ex parte*, only available to the Prosecution, Annex)

Decision on the Prosecution's application for leave to appeal the '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, by majority, Judge Alapini Gansou dissenting, this ‘Decision on the Prosecution’s application for leave to appeal the ‘Decision on the Prosecution’s request to withdraw the charges against Abdallah Banda Abakaer Nourain’.

I. Procedural background

1. On 13 October 2023, the Chamber issued its decision rejecting the Prosecution’s request to withdraw the charges against Abdallah Banda Abakaer Nourain (the ‘Request’) (the ‘Impugned Decision’).¹

2. On 23 October 2023, the Prosecution filed its application for leave to appeal the Impugned Decision (the ‘Application’).²

II. Applicable law

3. The Chamber incorporates by reference the applicable legal framework for granting leave to appeal pursuant to Article 82(1)(d) of the Rome Statute (the ‘Statute’), as set out in a previous decision.³

III. Submissions and analysis

4. At the outset, the Chamber notes the Prosecution’s request for reclassification of its Request, the Impugned Decision and its Application as confidential.⁴ Alternatively, the Prosecution requests the reclassification of these filings as public.⁵ The findings of the Chamber below are made by majority, Judge Alapini Gansou dissenting.

5. The Chamber observes that the Appeals Chamber has held that *ex parte* proceedings should be limited.⁶ The Appeals Chamber has further held that ‘[w]hether *ex parte* proceedings

¹ Decision on the Prosecution’s request to withdraw the charges against Abdallah Banda Abakaer Nourain, ICC-02/05-03/09-728-Conf-Exp.

² Prosecution’s application for leave to appeal the “Decision on the Prosecution’s request to withdraw the charges against Abdallah Banda Abakaer Nourain”, ICC-02/05-03/09-730-Conf-Exp.

³ Decision on the Defence request for leave to appeal the Chamber’s decision of 10 December 2021, 31 January 2022, ICC-02/05-03/09-715-Conf-Exp, para. 7.

⁴ Application, ICC-02/05-03/09-730-Conf-Exp, paras 5-6.

⁵ Application, ICC-02/05-03/09-730-Conf-Exp, paras 5-6.

⁶ Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Public redacted version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’, 30 March 2021, ICC-01/04-02/06-2666-Red, para. 119.

are acceptable, and for how long *ex parte* submissions can be withheld from the other party, will depend on the specific circumstances of the case and, in particular, the risk of prejudice to the fair trial of an ongoing case'.⁷

6. The Chamber is unpersuaded by the Prosecution's submission that reclassification should be ordered as 'Mr Banda may have a vested interest to participate in the litigation',⁸ particularly given that Mr Banda remains a fugitive from justice such that fair trial rights are not immediately implicated. At the same time the reclassification requests, if granted, would hamper the efforts to facilitate the arrest of Mr Banda. The Chamber therefore finds that the current *ex parte* classification of the Request, the Impugned Decision and the Application is necessary in the specific circumstances of this case. Should Mr Banda's appearance be secured, the matter can be reconsidered.

7. For the reasons expressed in her dissenting opinion, Judge Alapini Gansou, contrary to the view of the Majority, considers that there is no compelling reason to keep the current *ex parte* classification of the filings connected to this litigation.

8. In its Application, the Prosecution requests leave to appeal the Impugned Decision. The Prosecution identifies the following three issues:

*Whether the Statute provides a legal basis for the Prosecution to withdraw the charges, with or without the Chamber's leave, in the period after charges have been confirmed by the Pre-Trial Chamber and before the trial has commenced before the Trial Chamber (the 'First Issue');*⁹

*Whether, in finding that article 64(2) of the Statute does not provide a legal basis for the Prosecution to request to withdraw the charges, the Chamber erroneously distinguished this case from Muthaura and Kenyatta on the basis that Mr Banda is a fugitive from justice (the 'Second Issue');*¹⁰

⁷ Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Public redacted version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', 30 March 2021, ICC-01/04-02/06-2666-Red, para. 121 *quoting* Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmanski, 8 June 2018, ICC-01/05-01/08-3636-Anx1-Red, *annexed to* Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", para. 429.

⁸ Application, ICC-02/05-03/09-730-Conf-Exp, paras 5-6.

⁹ Application, ICC-02/05-03/09-730-Conf-Exp, para. 2.

¹⁰ Application, ICC-02/05-03/09-730-Conf-Exp, para. 2.

*Whether - if found that a statutory basis exists for the Prosecution to withdraw the charges in the period after charges have been confirmed by the Pre-Trial Chamber and before the trial has commenced before the Trial Chamber – the Chamber abused its discretion in assessing the merits of the Prosecution's Request (the 'Third Issue');*¹¹

9. The Prosecution submits that the three Issues are appealable within the meaning of Article 82(1)(d) of the Statute as they arise from the Impugned Decision,¹² are identifiable subjects or topics requiring a decision for their resolution,¹³ and do not amount to mere disagreement.¹⁴

10. The Prosecution avers that the three Issues significantly affect the fairness of the proceedings, particularly concerning the Prosecution,¹⁵ Mr Banda¹⁶ and the victims.¹⁷ The Prosecution submits that the Issues significantly affect the expeditious conduct of the proceedings¹⁸ and the outcome of the trial.¹⁹ The Prosecution contends that immediate resolution of the Issues by the Appeals Chamber may materially advance the proceedings.²⁰

11. The Chamber notes, as pointed out by the Prosecution,²¹ that for leave to be granted it is insufficient to allege that the approach adopted in the Impugned Decision was erroneous. The moving party must demonstrate the effect on trial fairness or expeditious conduct and that 'immediate resolution by the Appeals Chamber may materially advance the proceedings'.²² For the reasons set out below, the Chamber is not satisfied that this last criteria has been met.

12. The Chamber notes that the Prosecution's submissions on this point amount to mere reiteration of the three Issues²³ or otherwise relate to the correctness of the decision.²⁴ The Prosecution thus fails to advance any arguments to demonstrate that appellate review would

¹¹ Application, ICC-02/05-03/09-730-Conf-Exp, para. 2.

¹² Application, ICC-02/05-03/09-730-Conf-Exp, paras 9, 16, 19.

¹³ Application, ICC-02/05-03/09-730-Conf-Exp, paras 10-14, 17, 20.

¹⁴ Application, ICC-02/05-03/09-730-Conf-Exp, paras 14, 17.

¹⁵ Application, ICC-02/05-03/09-730-Conf-Exp, para. 22.

¹⁶ Application, ICC-02/05-03/09-730-Conf-Exp, para. 23.

¹⁷ Application, ICC-02/05-03/09-730-Conf-Exp, para. 25.

¹⁸ Application, ICC-02/05-03/09-730-Conf-Exp, para. 26.

¹⁹ Application, ICC-02/05-03/09-730-Conf-Exp, para. 27.

²⁰ Application, ICC-02/05-03/09-730-Conf-Exp, paras 28-30.

²¹ Application, ICC-02/05-03/09-730-Conf-Exp, para. 7.

²² See Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Defence request for leave to appeal the 'Decision on Defence request for disclosure of *ex parte* communication between the Chamber and the VWU', 2 December 2022, ICC-01/12-01/18-2430, para. 5.

²³ Application, ICC-02/05-03/09-730-Conf-Exp, para. 28.

²⁴ Application, ICC-02/05-03/09-730-Conf-Exp, paras 3, 29.

allow the proceedings in the Banda case to advance at this juncture. In addition, as observed in the Impugned Decision,²⁵ it transpires from the plain wording of Article 61(9) of the Statute that the decision to authorise withdrawal of the charges is for a trial chamber to make. This is acknowledged by the Prosecution as it submits that '[i]f the Prosecution were to succeed in an appeal on either or both of the First and Second Issues, the case would likely be remanded back to the Chamber for a determination on the merits.'²⁶ On this point, in its decision, in aid of the efficiency of the proceedings, the Chamber gave consideration to the merits of the withdrawal request finding that it was unpersuaded as to the evidentiary basis for the request and as to the exhaustion of investigative possibilities.²⁷ Given this fact, the Chamber finds that a decision by the Appeals Chamber on the Issues, providing an interpretation of the legal regime for the withdrawal of charges, would not materially advance the proceedings with respect to Mr. Banda. Finally, as to the Prosecution's submission that 'prompt resolution of this issue will also assist to advance other proceedings before this Court'²⁸ the Chamber considers that leave to appeal cannot be granted on arguments addressing broader effects on the jurisprudence, as opposed to the specific trial proceedings at issue.²⁹ Given the cumulative nature of Article 82(1)(d) of the Statute, the Chamber need not address the remaining requirements under that provision.

13. In light of the above, the majority of the Chamber rejects the Prosecution's Application.

14. For the reasons set out in her dissenting opinion, Judge Alapini Gansou is of the view that leave for appeal should be granted for the three Issues as articulated by the Prosecution.

²⁵ Impugned Decision, ICC-02/05-03/09-728-Conf-Exp, para. 9.

²⁶ Application, ICC-02/05-03/09-730-Conf-Exp, para. 19.

²⁷ Impugned Decision, ICC-02/05-03/09-728-Conf-Exp, paras 12-13.

²⁸ Application, ICC-02/05-03/09-730-Conf-Exp, para.30.

²⁹ See Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Defence request for leave to appeal the 'Decision on Defence request for disclosure of *ex parte* communication between the Chamber and the VWU', 2 December 2022, ICC-01/12-01/18-2430, para. 9.

FOR THESE REASONS, THE CHAMBER, BY MAJORITY, JUDGE ALAPINI GANSOU DISSENTING, HEREBY

REJECTS the Prosecution's Application in its entirety.

Judge Alapini Gansou appends a dissenting opinion to this Decision.



Judge Kimberly Prost
Presiding Judge



Judge Reine Alapini-Gansou



Judge María del Socorro Flores Liera

Dated this **28 November 2023**

At The Hague, The Netherlands