

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

**No. ICC-02/05-03/09
Date: 23 April 2024**

TRIAL CHAMBER IV

Before:
Judge Kimberly Prost
Judge Keebong Paek
Judge Nicolas Guillou

SITUATION IN DARFUR, SUDAN

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

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

Decision on the Prosecution's application for leave to appeal the 'Reconsideration of 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

I. Procedural background

1. On 13 October 2023, Trial Chamber IV (the ‘Chamber’) issued its decision rejecting the Prosecution’s request¹ to withdraw the charges against Abdallah Banda Abakaer Nourain (the ‘Request’) (the ‘Initial Decision’).²

2. On 2 and 7 February 2024,³ the Chamber received new information from the Prosecution concerning its Request.

3. On 6 March 2024, the Chamber reviewed *proprio motu* its Initial Decision and, by majority, Judge Alapini Gansou dissenting, reached the same conclusion to reject the Prosecution’s Request (the ‘Impugned Decision’).⁴

4. On 12 March 2024, the Prosecution filed its application for leave to appeal the Impugned Decision (the ‘Application’).⁵

II. Applicable law

5. 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.⁶

III. Submissions and analysis

6. At the outset, the Chamber notes the Prosecution’s request to reclassify its Application and ‘the related filings, decisions and information’ as confidential.⁷

¹ 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, 5 October 2023, ICC-02/05-03/09-727-Conf-Exp.

² Decision on the Prosecution’s request to withdraw the charges against Abdallah Banda Abakaer Nourain, ICC-02/05-03/09-728-Conf-Exp. The Chamber, by majority, Judge Alapini Gansou dissenting, rejected the Prosecution’s application for leave to appeal this decision. See 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’, 28 November 2023, ICC-02/05-03/09-731-Conf-Exp (‘Decision on Leave to Appeal Withdrawal of Charges Decision’).

³ Prosecution’s outline of briefing to the Trial Chamber (with two confidential, *ex parte*, only available to the Prosecution, annexes), 2 February 2024, ICC-02/05-03/09-733-Conf-Exp (‘Written Submissions’); Transcript of hearing, 7 February 2024, ICC-02/05-03/09-T-028-Conf-Exp.

⁴ Reconsideration of the Decision on the Prosecution’s request to withdraw the charges against Abdallah Banda Abakaer Nourain, ICC-02/05-03/09-734-Conf-Exp.

⁵ Prosecution’s application for leave to appeal the “Reconsideration of the Decision on the Prosecution’s request to withdraw the charges against Abdallah Banda Abakaer Nourain”, ICC-02/05-03/09-735-Conf-Exp.

⁶ 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.

⁷ Application, ICC-02/05-03/09-735-Conf-Exp, para. 6.

7. The Chamber is not persuaded by the Prosecution's submission that reclassification is warranted because Mr Banda's fair trial rights are immediately implicated,⁸ particularly considering that, as held in a previous decision,⁹ Mr Banda remains a fugitive from justice. Relatedly, the Chamber considers that acceding to the Prosecution's request would hinder the execution of the outstanding arrest warrant. Given these circumstances, the current *ex parte* classification of the aforementioned filings remains necessary.

8. In its Application, the Prosecution requests leave to appeal the following two issues:

*Whether the Majority erred in requiring the Prosecution to apply the "substantial grounds to believe" standard in assessing the evidence, and the manner in which it required the Prosecution to apply it, without properly considering the Prosecution's duties in the circumstances of this case (the 'First Issue');*¹⁰

*Whether the Majority erroneously failed to comply with its duty under article 64(2) of the Statute to properly consider if Mr Banda's right to a fair trial could be guaranteed where the Prosecution has concluded, and substantiated, that Mr Banda's guilt cannot be established at trial based on a deterioration of the evidence (the 'Second Issue');*¹¹

9. The Prosecution submits that the two 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 contends that the two Issues significantly affect the fairness of the proceedings, particularly concerning the Prosecution,¹⁵ Mr Banda¹⁶ and the victims.¹⁷ Specifically the Prosecution submits that the Issues significantly affect the expeditious conduct

⁸ Application, ICC-02/05-03/09-735-Conf-Exp, para. 6.

⁹ Decision on Leave to Appeal Withdrawal of Charges Decision, ICC-02/05-03/09-731-Conf-Exp, paras 5-6.

¹⁰ Application, ICC-02/05-03/09-735-Conf-Exp, para. 3.

¹¹ Application, ICC-02/05-03/09-735-Conf-Exp, para. 3.

¹² Application, ICC-02/05-03/09-735-Conf-Exp, paras 9, 20-25.

¹³ Application, ICC-02/05-03/09-735-Conf-Exp, paras 10-18.

¹⁴ Application, ICC-02/05-03/09-735-Conf-Exp, para. 18.

¹⁵ Application, ICC-02/05-03/09-735-Conf-Exp, paras 26-27.

¹⁶ Application, ICC-02/05-03/09-735-Conf-Exp, para. 28.

¹⁷ Application, ICC-02/05-03/09-735-Conf-Exp, para. 29.

of the proceedings¹⁸ and the outcome of the trial.¹⁹ The Prosecution avers that immediate resolution of the Issues by the Appeals Chamber would materially advance the proceedings.²⁰

11. The Chamber recalls that an appealable issue is an ‘identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion’.²¹ Accordingly, issues that merely misrepresent or reargue points made in the Impugned Decision do not fall within the scope of appealable issues under Article 82(1)(d) of the Statute.²²

12. As regards the First Issue, the Chamber notes that, in spite of the Prosecution’s previous litigation on the matter,²³ it is not until now that it formally challenges the application of the ‘substantial grounds to believe’ test. Moreover, the Chamber observes, as pointed out by the Prosecution,²⁴ that its instruction to assess the evidence applying the ‘substantial grounds to believe’ test stems from its order convening the *ex parte* status conference. In its submissions leading to, and during, the status conference,²⁵ the Prosecution explained its prior application of the ‘reasonable prospects of conviction’ standard, but at no point did it challenge the Chamber’s order specifying the use of the ‘substantial grounds to believe’ test. Rather, the Prosecution accepted the instruction and adhered to it.²⁶ In addition, the Prosecution merely expresses its disagreement with the Chamber’s application of the ‘substantial grounds to believe’ standard and its conclusions regarding the same.²⁷ The Chamber therefore finds that the First Issue does not arise from the Impugned Decision.

13. As regards the Second Issue, the Chamber finds that it amounts to re-litigation of points which have already been made before the Chamber. Although the Prosecution may disagree with the outcome of the Impugned Decision, the Majority did consider the Prosecution’s

¹⁸ Application, ICC-02/05-03/09-735-Conf-Exp, para. 30.

¹⁹ Application, ICC-02/05-03/09-735-Conf-Exp, para. 31.

²⁰ Application, ICC-02/05-03/09-735-Conf-Exp, paras 32-36.

²¹ Appeals Chamber, *Situation in the Democratic Republic of Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9. See Application, ICC-02/05-03/09-735-Conf-Exp, para. 8.

²² See Trial Chamber I, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, Decision on the Defence’s request for reconsideration or, alternatively, leave to appeal the Decision on the Defence’s Request for postponement of the presentation of its case, 31 May 2023, ICC-02/05-01/20-938-Red, para. 25.

²³ 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, 23 October 2023.

²⁴ Application, ICC-02/05-03/09-735-Conf-Exp, para. 9.

²⁵ Written Submissions, ICC-02/05-03/09-733-Conf-Exp, paras 5-9; Transcript of hearing, 7 February 2024, ICC-02/05-03/09-T-028-Conf-Exp.

²⁶ Application, ICC-02/05-03/09-735-Conf-Exp, para. 9.

²⁷ Application, ICC-02/05-03/09-735-Conf-Exp, paras 13-16.

submissions on Mr Banda's fair trial rights and found that these were not affected. Indeed, as submitted by the Prosecution,²⁸ the Majority noted these concerns and observed that the substantial grounds to believe test 'had been adopted balancing fairness to the accused and the interests of justice more broadly'.²⁹ In this regard, the Majority underscored that while the Prosecution must be vigilant as to the deterioration or loss of evidence, that assessment should remain centred on whether these changes affect its sufficiency to meet the substantial grounds test.³⁰ In fact, the entire process of allowing the Prosecution to adduce further evidence for assessment by the Chamber was in recognition of the fair trial rights of the accused.

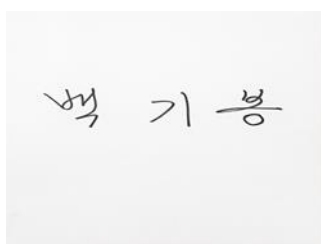
14. Having found that the Issues identified in the Application are not appealable within the meaning of Article 82(1)(d) of the Statute, the Chamber need not address the remaining requirements under this provision.

IV. Disposition

15. For the foregoing reasons, the Chamber rejects the Prosecution's Application in its entirety.



Judge Kimberly Prost



Judge Keebong Paek



Judge Nicolas Guillou

Dated this **23 April 2024**

At The Hague, The Netherlands

²⁸ Application, ICC-02/05-03/09-735-Conf-Exp, para. 21.

²⁹ Impugned Decision, ICC-02/05-03/09-734-Conf-Exp, para. 13.

³⁰ Impugned Decision, ICC-02/05-03/09-734-Conf-Exp, para. 13.