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TRIAL CHAMBER IV

Before: Judge Kimberly Prost, Presiding Judge
Judge Keebong Paek
Judge Nicolas Guillou

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

THE PROSECUTOR v. ABDALLAH BANDA ABAKAER NOURAIN

Public

Public redacted version of “Urgent Prosecution request for reconsideration of the ‘Reconsideration of the Decision on the Prosecution’s Request to withdraw the charges against Abdallah Banda Abakaer Nourain’”, 12 November 2025, ICC-02/05-03/09-752-Conf

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Introduction

1. On 13 October 2023, the Trial Chamber rejected the Prosecution’s request (“Request”)¹ to withdraw the charges against Abdallah Banda Abakaer Nourain (“Mr Banda”) (“First Decision”).² The Chamber then received written and oral submissions from the Prosecution in an *ex parte* status conference providing further detail as to the basis for the Request.³ On 6 March 2024, the Chamber, by majority, Judge Alapini-Gansou dissenting, issued a new decision in which it stated that it had reconsidered its assessment in the First Decision in light of the further submissions received from the Prosecution and reached the same conclusion to decline the Request (“Second Decision”).⁴

2. The Prosecution respectfully requests the Chamber to reconsider the Second Decision. New facts have arisen that are relevant to the Prosecution’s request to withdraw the charges, and the Chamber’s reconsideration of the Second Decision with regard to these new facts is necessary to prevent an injustice in this case. The Prosecution has recently interviewed two witnesses whose evidence does not improve the Prosecution’s assessment that there are no substantial grounds to believe that Mr Banda committed the charged crimes.

3. In light of the potentially imminent appearance of Mr Banda pursuant to a summons to appear,⁵ and the discussion of trial preparation matters at the upcoming status conference on 18 November 2025,⁶ reconsideration is critical to avoiding the injustice of requiring an accused person to appear to face charges that the Prosecution cannot prove at trial. The

¹ Prosecution 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](#) (“Withdrawal Request”).

² Decision on the Prosecution’s request to withdraw the charges against Abdallah Banda Abakaer Nourain, [ICC-02/05-03/09-728-Conf-Exp](#) (“First Decision”). The Chamber, by majority, Judge Alapini-Gansou dissenting, rejected the Prosecution’s request for leave to appeal that decision. See 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](#); 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’, [ICC-02/05-03/09-731-Conf-Exp](#) (“ALA Decision”).

³ Order scheduling a status conference, [ICC-02/05-03/09-732-Conf-Exp](#), paras 2, 4. Prosecution’s outline of briefing to the Trial Chamber, [ICC-02/05-03/09-733-Conf-Exp](#) (“Written Submissions”); [ICC-02/05-03/09-T-028-Conf-Exp](#) (“Hearing Transcript”).

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](#) (“Second Decision”), para. 41. Judge Alapini-Gansou concluded that, having reconsidered the First Decision, she would authorise the Prosecution to withdraw all charges against Mr Banda. Dissenting Opinion to 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-Anx](#) (“Dissenting Opinion”), para. 16.

⁵ Defence Request for the Conversion of the Arrest Warrant against General Banda into a Summons to Appear (“Summons Request”), [ICC-02/05-03/09-742-Conf-Exp](#).

⁶ Order scheduling a status conference, [ICC-02/05-03/09-749-Conf-Exp](#), para. 4.

Chamber's urgent reconsideration of its Second Decision is thus justified and warranted in this case.

Urgency

4. This request is filed as urgent as the Chamber has scheduled an *ex parte* status conference with the Defence and Registry on 18 November 2025 to discuss, *inter alia*, matters relating to Mr Banda's appearance before the Court and the scheduling of a trial date. Reconsideration of the Second Decision will obviate the need for any further planning and preparations for an appearance, and more critically, will avoid Mr Banda taking material steps to appear before the Court and preparing for trial while fulfilling his current role in the Sudanese Armed Forces.⁷ This will, in turn, obviate the extensive logistics, security planning, and expense involved in organising the appearance of Mr Banda before the Court.

Confidentiality

5. Pursuant to regulation 23bis(2) of the Regulations of the Court, this Request is classified as confidential *ex parte*, available only to the Prosecution, as it refers to filings which bear the same classification.

6. For the reasons set out in its request for re-classification, of the same date, the Prosecution considers that the present request should be made available to Mr Banda. Re-classification is necessary to enable the Prosecution and Defence to make effective submissions at the upcoming status conference and ensures that Mr Banda receives timely disclosure of information consistent with his rights under article 67(2) of the Rome Statute. The Prosecution thus requests the Chamber to re-classify this Request and the related filings, decisions and information as confidential, available only to the Prosecution, Defence and Registry, so that they may have access.⁸

Submissions

7. As previously established in the Court's jurisprudence, reconsideration is an exceptional remedy and should only take place if a clear error of reasoning has been

⁷ [Summons Request](#), para. 20.

⁸ See also [ALA Decision](#), para. 6 ("The Chamber is unpersuaded by the Prosecution's submission that reclassification be ordered as 'Mr Banda may have a vested interest to participate in the litigation', 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. [...] *Should Mr Banda's appearance be secured, the matter can be reconsidered.*") (emphasis added).

demonstrated or if it is necessary to do so to prevent an injustice.⁹ New facts and arguments arising since the decision was rendered may be relevant to this assessment.¹⁰

8. In this case, the Prosecution relies on the following recent developments in its investigation in this case,¹¹ which took place after the issuance of the Second Decision. These developments in the evidence further reinforce the Prosecution's assessment of the case against Mr Banda and its reasons for seeking to withdraw the charges against him. Given the advanced stage of the investigations in this case and the lapse of time since the charges were confirmed (more than 14 years), further investigations are unlikely to yield any evidence that would change the Prosecution's assessment. In the circumstances, reconsideration of the Second Decision is warranted. Moreover, reconsideration is urgent given that Mr Banda's appearance before the Court may soon be secured by way of a summons, as has recently been proposed by the Defence.¹²

A. Interview of P-1840

9. As the Prosecution recently informed the Chamber,¹³ [REDACTED] witness P-1840 was expected to provide relevant information regarding the meetings before the attack on MGS Haskanita between the Justice and Equality Movement ("JEM") and the Sudan Liberation Army. This information would have been relevant to the second of the three contested issues on which the trial is set to proceed, namely, whether—if the attack on the MGS Haskanita is found to have been unlawful—Mr Banda was aware of the factual circumstances that established the unlawful nature of the attack.¹⁴

10. However, P-1840 proved unable to provide any direct knowledge of the planning, execution and aftermath of the attack on MGS Haskanita. P-1840 did not participate in the pre-attack meetings, was not personally acquainted with Mr Banda, and did not participate in or witness the attack itself. Regarding the hearsay evidence that he was able to provide regarding the reasons for the attack that he heard from other JEM members after it took place, he was unable to identify the sources of this information or provide reliable leads for Prosecution investigators to further explore.

⁹ ICC-01/12-01/18-1330, para. 4; ICC-01/14-01/21-275, para. 8; ICC-01/14-01/18-206, para. 20.

¹⁰ ICC-01/12-01/18-1330, para. 4; ICC-01/14-01/18-206, para. 20.

¹¹ See also Update on investigative steps, [ICC-02/05-03/09-741-Conf-Exp](#); Additional update on investigative steps, [ICC-02/05-03/09-744-Conf-Exp](#) ("Update").

¹² [Summons Request](#), para. 29.

¹³ [Update](#), paras. 5-10.

¹⁴ Joint Submission by the Office of the Prosecutor and the Defence Regarding the Contested Issues at the Trial of the Accused Persons, [ICC-02/05-03/09-148](#), para. 3; Decision on the Joint Submission regarding the contested issues and the agreed facts, [ICC-02/05-03/09-227](#), para. 46.

B. Interview of P-0308

11. As the Prosecution recently informed the Chamber,¹⁵ [REDACTED] witness P-0308 was expected to provide relevant information regarding Mr Banda's involvement in meetings with other commanders to plan the attack on MGS Haskanita. However, P-0308 did not participate in the meetings himself, and he did not participate in or directly witness the attack itself. At all relevant times during the attack, and the meeting that took place before it, [REDACTED]. Moreover, P-0308's erratic behaviour during prior interactions with investigators further undermines the reliability of his testimony, such that the Prosecution cannot rely upon it.¹⁶

C. Impact of the new information on the Prosecution's assessment of the case against Mr Banda

12. As previously indicated by the Prosecution, it has assessed that it is unable to prove, *inter alia*, Mr Banda's *mens rea* to the requisite standard, as relevant to the second contested issue for trial.¹⁷ The recent interviews of [REDACTED] witnesses P-1840 and P-0308 were the result of an effort on the part of the Prosecution to ameliorate what it had previously assessed and communicated to the Chamber as fatal deficiencies in the case against Mr Banda.¹⁸ Both P-1840 and P-0308 were expected to provide greater insight into the planning for the attack on MGS Haskanita, such that its illegal purpose—and Mr Banda's knowledge of this—could be established, but they were unable to do so.

13. Due to the significant degradation of existing evidence¹⁹ and exhaustion of available investigative avenues,²⁰ the case against Mr Banda is not viable. Despite identifying cooperative witnesses that might fill gaps in the evidence, the failure of these newly identified investigative avenues to yield tangible results only highlights the very low prospects of being able to improve the case against Mr Banda at this stage of the proceedings, as Judge Alapini-Gansou previously recognised.²¹ Given that neither witness was able to improve the evidence of Mr Banda's *mens rea* for the attack, the Prosecution is more firmly of the view that it does not have substantial grounds to believe that Mr Banda bears individual criminal responsibility

¹⁵ [Update](#), paras. 11-14.

¹⁶ See e.g. DAR-OTP-0215-3834, p. 2.

¹⁷ [Written Submissions](#), paras. 16, 28-29, 34-40; [Hearing Transcript](#), 7:6-9, 8:16-18, 15:22-16:5, 19:3-13, 27:11-28:5.

¹⁸ [Written Submissions](#), paras. 36-40, 52-57.

¹⁹ See also [Written Submissions](#), paras. 42-51; [Hearing Transcript](#), 10:5-13:5.

²⁰ See also [Written Submissions](#), paras. 52-57; [Hearing Transcript](#), 7:10-9:11, 14:14-16:1.

²¹ [Dissenting Opinion](#), para. 14.

for the attack on MGS Haskanita and that it will not be able to improve that assessment prior to or during a trial. As such, the charges against him must be withdrawn.

D. Necessity for urgent reconsideration

14. As the Defence has applied for the conversion of the arrest warrant to a summons to appear,²² with indications [REDACTED],²³ the prospect of Mr Banda's potential appearance before the Court is now imminent. At this stage, the Chamber's urgent reconsideration of the Second Decision is necessary to prevent an injustice against Mr Banda. The Prosecution is legally and ethically duty bound under article 54(1) of the Rome Statute to seek to establish the truth and take appropriate measures to ensure the effective investigation and prosecution of crimes, while fully respecting the rights of accused persons.²⁴ In that context, Mr Banda enjoys a presumption of innocence for the crimes with which he has been charged.

15. A swift reconsideration of the Second Decision would remove the burden on Mr Banda of continuing to live under the shadow of the serious allegations levied against him. It would also prevent him taking material steps and experiencing the disruption necessary to appear before the Court. These steps are unjustifiable in circumstances where the Prosecution is already aware that it will be unable to prove its case against Mr Banda. Yet the Defence [REDACTED],²⁵ and it continues its preparation for the case without the knowledge that the Prosecution is of the view that it can no longer sustain the case against Mr Banda.

16. This situation also affects the integrity of the Court as a whole. Considerable time, expense and labour would be expended by the Court in continuing the proceedings against Mr Banda that cannot succeed at trial. Moreover, the Court would suffer significant reputational damage should preparations for trial advance further, resulting in Mr Banda traveling to The Hague to learn that the Prosecution seeks to withdraw the charges. It would also be deleterious to the victims, whose hopes and expectations will be raised, to prolong this case further than necessary. Furthermore, the Court's relationships on which it would rely to make said arrangements, in particular with the Dutch and the Sudanese authorities, may also be damaged.

²² [Summons Request](#), paras. 21, 25.

²³ Transmission of Observations from the Republic of Sudan pursuant to Order ICC-02/05-03/09-746-Conf-Exp, [ICC-02/05-03/09-747-Conf-Exp](#); Annex II to the Transmission of Observations from the Republic of Sudan pursuant to Order ICC-02/05-03/09-746-Conf-Exp, [ICC-02/05-03/09-747-Conf-Exp-AnxII](#).

²⁴ See [Dissenting Opinion](#), para. 14.

²⁵ Defence Request for Additional Items for the Status Conference on 18 November 2025, [ICC-02/05-03/09-750-Conf-Exp](#), para. 22.

17. For the reasons stated above, it is important that the proceedings against Mr Banda be brought to an end. As the Prosecution has previously submitted, the Chamber may authorise the withdrawal of the charges at this stage of the proceedings under article 64(2) of the Statute, which requires the Chamber to ensure a fair and expeditious trial conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.²⁶ Alternatively, article 61(9) could be viewed as *lex specialis* for this phase of the case, namely, where charges have been confirmed but the trial is yet to commence, such that the Chamber's authorisation is not required for the Prosecutor to withdraw the charges.²⁷

18. While the Chamber found in the First Decision that article 61(9) does not provide a statutory basis for the Prosecutor to withdraw the charges after confirmation and before the trial, with or without leave of the Chamber, it relied on, *inter alia*, Mr Banda's status as a fugitive in reaching its interpretation.²⁸ It subsequently acknowledged that the decision to authorise the Prosecution's request to withdraw the charges is one for the Chamber to make under article 61(9).²⁹ The Chamber did not consider it necessary to reconsider its interpretation of article 61(9) in its Second Decision since it determined the Prosecution's request to withdraw the charges solely on its merits.³⁰

19. The Prosecution respectfully submits that it is now appropriate for the Chamber to reconsider its prior interpretation of article 61(9), and to find, as Judge Alapini-Gansou found, that in the unique circumstances of this case, the provision allows the Prosecution to seek the withdrawal of the charges with the Chamber's leave.³¹ Alternatively, it may exercise its powers under article 64(2) to authorise the withdrawal of the charges, as two prior chambers in this Court have done at similar phases of the proceedings.³²

20. As indicated in the Defence's proposal to secure Mr Banda's appearance at Court pursuant to a summons to appear, Mr Banda may soon no longer be a fugitive from justice. As such, this should no longer be a relevant factor in the Chamber's interpretation of articles 61(9) or 64(2) and its power to authorise a withdrawal of charges at this stage in the

²⁶ [Withdrawal Request](#), para. 11.

²⁷ [Withdrawal Request](#), paras. 9, 13.

²⁸ [First Decision](#), para. 9.

²⁹ [First Decision](#), para. 9.

³⁰ [Second Decision](#), para. 8.

³¹ [Dissenting Opinion](#), para. 5.

³² Two chambers of this Court have authorised the withdrawal of charges at a similar stage of proceedings, under article 64(2) of the Statute: *Prosecutor v. Muthaura and Kenyatta*, Decision on the withdrawal of charges against Mr Muthaura, [ICC-01/09-02/11-696](#), p. 1, para. 11; *Prosecutor v. Kenyatta*, Decision on the withdrawal of charges against Mr Kenyatta, [ICC-01/09-02/11-1005](#), p. 3. See also *Prosecutor v. Muthaura and Kenyatta*, Partial Dissenting Opinion of Judge Ozaki and Concurring Separate Opinion of Judge Eboe-Osuji, [ICC-01/09-02/11-698](#), paras. 9-38.

proceedings. Rather, Mr Banda's imminent appearance gives rise to an urgent need to avoid an injustice in this case, and the Chamber should be guided by these concerns to authorise the withdrawal of the charges and terminate the proceedings against Mr Banda.

Relief sought

21. For the reasons set out above, the Prosecution respectfully requests the Trial Chamber to reconsider the Second Decision and authorise the withdrawal of the charges against Mr Banda pursuant to article 61(9) of the Rome Statute or, alternatively, article 64(2).



Nazhat Shameem Khan, Deputy Prosecutor

Dated this 14th day of July 2026

At The Hague, The Netherlands