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No.: **ICC-02/05-03/09**

Date: **14 July 2026**

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 “Prosecution 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

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I. INTRODUCTION

1. The Prosecution respectfully requests the Trial Chamber's permission to withdraw all charges against Abdallah Banda Abakaer Nourain ("Mr Banda") ("Request").¹ Having assessed the totality of the evidence in line with its obligation to continually re-evaluate the strength of its cases, the Prosecution considers that at this stage there is no longer a reasonable prospect of conviction in the case against Mr Banda. This is due to the significant deterioration of key evidence in the case which cannot be strengthened with further investigations. In the circumstances, the Prosecution considers that the appropriate course is to promptly withdraw the charges against Mr Banda. In taking this step, the Prosecution is guided by the interests of fairness and justice.

2. The Prosecution makes this Request pursuant to article 64(2) of the Statute, in line with the Court's prior practice.² If, however, the Chamber considers that article 61(9) is *lex specialis* in these circumstances, such that the Prosecution may withdraw the charges without leave,³ then the Prosecution respectfully submits this Request as its notification of the withdrawal of charges against Mr Banda, with its reasons for doing so.

3. The Prosecution further respectfully notes that given this Request and the fact that the Prosecution's more recent focus has been on evidence assessment, as opposed to arrest efforts, it has not addressed the latter in this filing.

II. CONFIDENTIALITY

4. Pursuant to regulation 23bis(2) of the Regulations of the Court, this Request is classified as under seal *ex parte*, available only to the Prosecution, as it refers to filings of the same classification. If the Chamber decides to reclassify the Prosecution's submission or to issue a public decision regarding the same, the Prosecution respectfully requests the Chamber to provide it with advance notice of one week. This would allow the Prosecution to inform the victims and witnesses in advance.

¹ The Prosecutor has recused himself from this case, accordingly this report is filed in the record of the case under the signature of Deputy Prosecutor Nazhat Shameem Khan.

² ICC-01/09-02/11-696 ("[Muthaura Termination Decision](#)"), p. 1, para. 11; ICC-01/09-02/11-1005 ("[Kenyatta Termination Decision](#)"), p. 3. See also ICC-01/09-02/11-698 ("[Muthaura Judge Eboe-Osuji Separate Opinion](#)"), paras. 9-38.

³ ICC-01/09-02/11-698 ("[Muthaura Judge Ozaki Dissenting Opinion](#)"), paras. 1-5.

III. SUBMISSIONS

5. The Prosecution considers that withdrawal of the charges against Mr Banda is the fair and correct course of action at this juncture in the proceedings, based on its most recent and considered assessment that the evidence no longer presents a reasonable prospect of conviction in the case at trial.⁴ The legal framework for withdrawing the charges, and the Prosecution's reasons for doing so in this case are set out below.

6. The Prosecution notes that on 15 September 2023, the Chamber ordered the Prosecution and Registry to file updates regarding any information as to Mr Banda's suspected whereabouts and the efforts being made to secure his arrest ("Order").⁵ Given the Prosecution's findings while re-assessing the evidence, its focus has necessarily shifted away from arrest efforts, and towards terminating the proceedings expeditiously. In these circumstances, the Prosecution anticipates that the Chamber no longer requires the information sought in the Order, and it therefore has not addressed those matters in this Request. However, the Prosecution stands ready to provide the Chamber with further information regarding previous arrest efforts, or any other matter, should the Chamber require it.

7. The Prosecution's decision to seek the withdrawal of the charges against Mr Banda was the result of a considered and methodical process of evaluation, as described below. The Prosecution had been preparing to file this Request at the time the Order was issued.

A. Legal framework for withdrawing the charges

8. The Prosecution is responsible under the Court's legal framework for framing the charges upon which an accused is brought to trial.⁶ It must also ensure the effective

⁴ The Prosecution applies the standard of "reasonable prospect of conviction" when assessing the strength of the evidence against accused persons in cases at trial: [Office of the Prosecutor Policy Paper on Case Selection and Prioritisation](#), 15 September 2016, para. 53. See e.g. ICC-02/05-254-Red ("Darfur Prosecution Report to PTC"), para. 13; ICC-01/14-01/21-155-Red3 ("[Said Pre-Confirmation Brief](#)"), fn. 733; [Muthaura Prosecution Notice of Withdrawal of Charges](#), para. 1. The standard may also be expressed as a "realistic prospect of conviction".

⁵ ICC-02/05-03/09-723-Conf-Exp; ICC-02/05-03/09-725-Conf-Exp.

⁶ ICC-01/04-02/06-2666-Red ("[Ntaganda AJ](#)"), para. 325 (stating that the charges are formulated by the Prosecutor and confirmed or declined by the Pre-Trial Chamber"); ICC-01/05-01/13-2275-Red ("[Bemba et al. AJ](#)"), para. 196 ("[T]he Prosecutor, being the 'charging entity' under the Court's legal framework, has the responsibility to clearly formulate the charges for which confirmation for trial is sought [...]"); [Muthaura Judge Ozaki Dissenting Opinion](#), para. 3; ICC-01/09-02/11-584 ("[Muthaura DCC Decision](#)"), para. 18 ("[T]he charges are formulated by the prosecution prior to the confirmation hearing and are presented in the DCC"); ICC-01/09-02/11-382-Red ("[Kenyatta Confirmation Decision](#)"), paras. 284-285 (confirming that while the Pre-Trial Chamber may request the Prosecutor to consider amending the legal characterisation of facts, conversely, consistent with the principle of prosecutorial discretion, the Chamber does not have the authority to request the Prosecutor to consider adding new charges).

investigation and prosecution of crimes in full respect of the rights of accused persons and of the interests and personal circumstances of victims and witnesses.⁷ In discharging these duties, it is incumbent on the Prosecution to seek to withdraw the charges pursuant to regulation 60 of the Regulations of the Office of the Prosecutor if it considers that the evidence does not support the charges to the requisite standard at any stage in the proceedings.

9. The procedure for withdrawing the charges depends on the procedural phase of the case. Article 61(9) of the Statute sets out the procedure for amending charges after confirmation and before the trial begins, and for withdrawing charges *after the commencement of the trial*. Previous chambers have interpreted the latter term to mean, in the context of article 61(9), the “true opening of the trial when the opening statements, if any, are made prior to the calling of witnesses”.⁸ However, the Statute is silent as to the procedure for withdrawing charges once a case is before the Trial Chamber, but before the trial has commenced.

10. The case against Mr Banda is in such a phase. While the case was twice set down for the trial to commence,⁹ the Chamber vacated the trial dates due to, *inter alia*, Mr Banda’s unwillingness to appear pursuant to the summons to appear issued by the Court.¹⁰ Despite an arrest warrant having been subsequently issued against him on 11 September 2014,¹¹ Mr Banda remains at large and no new trial date can be set.

11. There have been two prior instances in the Court—*Muthaura* and *Kenyatta*—in which the Prosecution sought to withdraw the charges at a similar stage to the present case. In those cases, the Trial Chambers rendered their decisions on the withdrawal of charges pursuant to article 64(2) of the Statute, and not article 61(9).¹² This is because the Chambers found that article 61(9) did not squarely address the situation where the case was at the trial preparation stage and the trial had not yet commenced.¹³ It was therefore apt to rely upon the Trial

⁷ [Statute](#), article 54(1).

⁸ ICC-01/04-01/06-1084 (“[Lubanga Trial Proceedings Decision](#)”), para. 39; [Muthaura Termination Decision](#), para. 10 (fn. 16).

⁹ ICC-02/05-03/09-455 (“[First Trial Date Decision](#)”), para. 25 (setting a trial start date of 5 May 2014); ICC-02/05-03/09-590-Red (“[Second Trial Date Decision](#)”), para. 24 (setting a trial start date of 18 November 2014).

¹⁰ ICC-02/05-03/09-1-RSC (“[Summons to Appear](#)”); ICC-02/05-03/09-564-Red (“[First Trial Cancellation Decision](#)”); ICC-02/05-03/09-606 (“[Arrest Warrant](#)”), para. 25.

¹¹ [Arrest Warrant](#).

¹² [Muthaura Termination Decision](#), p. 1, para. 11; [Kenyatta Termination Decision](#), p. 3 (rendering its decision pursuant to articles 64(2) and (10) and rule 134(1)).

¹³ [Muthaura Termination Decision](#), para. 10; See also *Muthaura* Judge Eboe-Osuji Separate Opinion, paras. 9-38. But see [Muthaura Judge Ozaki Dissenting Opinion](#), para. 2 (Judge Ozaki dissented from the *Muthaura* Termination Decision on the basis that she considered article 61(9) is the *lex specialis* when it comes to amending or withdrawing charges after they have been confirmed, and that it does not require the Prosecutor to

Chamber's more general powers under article 64(2) 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.

12. The Prosecution considers it appropriate, in the unique circumstances of this case, to seek the Chamber's permission pursuant to article 64(2) to withdraw the charges against Mr Banda.

13. If, however, the Chamber considers that article 61(9) is the *lex specialis* such that its leave is not required to withdraw the charges at this stage, then the Prosecution respectfully submits that this Request may be taken as the Prosecution's notice of the withdrawal of charges against Mr Banda, and the Chamber may terminate the case directly.

B. Withdrawal of the charges is the appropriate course at this juncture

14. The Prosecution was ready to proceed to trial against Mr Banda in 2014, when this case was first set down for trial, and was satisfied at that stage of the strength of the evidence in securing his conviction.

15. During the ten years that have elapsed since that time, while carrying out efforts to secure Mr Banda's appearance at trial, the Prosecution continued to investigate the case, maintain contact with witnesses and re-assess the strength of the case as appropriate in light of any relevant developments. During this time, it became apparent to the Prosecution that one key [REDACTED] witness, P-0441, had engaged in conduct that significantly undermined his credibility. However, at that time, the Prosecution assessed that the remainder of the evidence in the case was sufficient to justify the maintenance of a warrant of arrest for Mr Banda.

16. On 30 March 2022, [REDACTED],¹⁴ [REDACTED].¹⁵

17. Since that time, the Prosecution continued its investigations, including by further analysing collected evidence, interviewing a number of new witnesses and re-contacting prior witnesses to confirm their continued availability and willingness to cooperate with the

seek leave to withdraw the charges before the trial has commenced). The Prosecution had advanced the same view before the *Muthaura* Trial Chamber: ICC-01/09-02/11-687 ("[Muthaura Prosecution Notice of Withdrawal of Charges](#)"), paras. 2-7. Judge Ozaki, however, went on to preside over the *Kenyatta* Trial Chamber which unanimously rendered its decision on the withdrawal of the charges pursuant to article 64(2): [Kenyatta Termination Decision](#), pp. 3, 6.

¹⁴ [REDACTED].

¹⁵ [REDACTED].

Prosecution and attend trial. During this process it became apparent to the Prosecution that it would no longer be able to rely on the evidence of yet another key [REDACTED] witness, P-0477, who had also engaged in conduct undermining his credibility and become uncooperative. The evidence of P-0441 and P-0477 was pivotal to establishing two of the three contested issues for trial, namely: whether the attack on the MGS Haskanita on 29 September 2007 was unlawful; and if so, whether Mr Banda was aware of the factual circumstances that established the unlawful nature of the attack.¹⁶

18. Despite further investigations to attempt to strengthen the evidence on these issues, and having exhausted all investigative leads, the Prosecution is unable to fill the gaps left by this evidence from other sources. While there are other witnesses who can testify to some of the contested issues, the Prosecution will not be able to rely solely on their evidence given that key aspects of their evidence are uncorroborated, and these witnesses present their own credibility issues.

19. In addition, the Prosecution conducted a recent interview of a key new witness who was previously not available. He provided exculpatory evidence that contradicts the allegations against Mr Banda, in particular regarding the unlawful nature of the attack, and concerning Mr Banda's knowledge of and intent for the charged crimes. The Prosecution considers that this evidence is likely to present as credible and reliable, and, if accepted by the Chamber, will undermine the case against Mr Banda.

20. The cumulative impact of these recent developments is the substantial deterioration of the Prosecution's case against Mr Banda. As a result, the Prosecution now no longer considers there are reasonable prospects of convicting Mr Banda on any of the charges against him.

21. To confirm this assessment, Deputy Prosecutor Khan—acting in accordance with the authority delegated to her following the Prosecutor's recusal from the case—instructed the Office to engage an external adviser to independently review the case. The external adviser, [REDACTED], provided his report on 11 September 2023. The external adviser independently concluded, consistently with the Prosecution's assessment, that there was a low probability of

¹⁶ See [Contested Issues Joint Submission](#), para. 3; ICC-02/05-03/09-227 ("[Contested Issues Decision](#)"), para. 46 (noting the Joint Prosecution and Defence Submission on Contested Issues and deciding that the trial would proceed only on the basis of the contested issues).

convicting Mr Banda, and recommended that the Prosecution seek to terminate the case against him.

22. Thus, after considered deliberation and review of the state of the evidence now available to it, including with the benefit of an independent external review, the Prosecution considers that the evidence does not present a reasonable prospect of conviction. Bearing in mind its duty to ensure that it proceeds to trial only on the basis of evidence that is sufficient to prove the guilt of an accused beyond a reasonable doubt, the Prosecution considers that the appropriate course of action is to promptly seek to withdraw the charges against Mr Banda.

23. The Prosecution makes this Request at the earliest available opportunity following its most recent assessment of the case, at a time when no realistic possibility has yet presented itself of Mr Banda being arrested or detained.

24. The Prosecution does not take the decision to withdraw the charges lightly. In particular, it acknowledges the impact that the withdrawal of charges will have on the 103 participating victims in this case,¹⁷ who have been waiting for over 15 years for justice for the crimes committed during the attack on the MGS Haskanita on 29 September 2007. While the Prosecution has a duty to ensure that justice is achieved for the victims of those crimes, it also has a duty to proceed to trial only on the basis of evidence that is sufficient to convict Mr Banda. In the Prosecution's considered view, the evidence no longer meets that threshold.

25. The withdrawal of the charges will result in the termination of the case against Mr Banda, but does not extinguish all prospects of justice for the crimes committed during the attack. This is because the Prosecution's Request is without prejudice to it bringing new charges based on the same or similar factual circumstances should it obtain sufficient evidence to support the charges.¹⁸ As previously held in this Court, the principle of *ne bis in idem* does not attach in circumstances where the charges are withdrawn prior to the commencement of the trial.¹⁹

¹⁷ ICC-02/05-03/09-545 ("[Victims Participation Decision](#)"), para. 12.

¹⁸ [Kenyatta Termination Decision](#), para. 9; ICC-01/09-02/11-981 ("[Kenyatta Adjournment Decision](#)"), para. 56.

¹⁹ [Kenyatta Termination Decision](#), para. 9; [Kenyatta Adjournment Decision](#), para. 56; [Muthaura Judge Ozaki Dissenting Opinion](#), para. 4.

IV. CONCLUSION

26. For the reasons outlined above, the Prosecution respectfully requests the Chamber's permission pursuant to article 64(2) of the Statute to withdraw all charges against Abdallah Banda Abakaer Nourain, and requests the Chamber to make the attendant orders withdrawing the outstanding arrest warrant against him and terminating the proceedings.

27. In the alternative, should the Chamber consider that its permission is not required, the Prosecution respectfully submits this filing to notify the Chamber that it is withdrawing all charges against Mr Banda and provide its reasons for doing so pursuant to article 61(9) of the Statute.

28. In so doing, the Prosecution respectfully advises the Chamber that no arrest is necessary.



Nazhat Shameem Khan
Deputy Prosecutor

Dated this 14th day of July 2026

At The Hague, the Netherlands