

**Cour
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**International
Criminal
Court**

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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 “Prosecution consolidated response to ‘Observations des Représentants Légaux des Victimes sur la Requête du Procureur ICC-02/05-03/09-752-Conf en Reconsidération de la « Décision (2ème Décision) sur sa demande aux fins de retrait des charges contre Abdallah Banda Abakaer Nourain »’ and ‘Submissions of the Legal Representatives for Victims on ‘Defence’s Request for the Conversion of the Arrest Warrant into a Summons to Appear’ filed on 3 October 2025’, 8 May 2026, ICC-02/05-03/09-776-Conf

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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☒ Legal Representatives of the Victims

☐ Legal Representatives of the Applicants

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I. INTRODUCTION

1. On 1 May 2026, the Legal Representatives of the Victims (“LRV”) filed their observations on the Prosecution’s request for reconsideration of the Trial Chamber’s decision rejecting its request to withdraw the charges (“Reconsideration Request”),¹ and the Defence’s request to convert the arrest warrant to a summons to appear (“Arrest Warrant Conversion Request”).² Pursuant to the Chamber’s orders of 12 December 2025 and 2 April 2026, the Prosecution responds to the LRV observations.³

II. CLASSIFICATION

2. Pursuant to regulation 23bis(2) of the Regulations of the Court, this response is classified as confidential as it refers to filings which bear the same classification.

III. SUBMISSIONS

Reconsideration Request

3. The Prosecution responds to the following aspects of the LRV’s Observations on the Withdrawal Request. The Prosecution otherwise relies on its previous submissions regarding its request to withdraw the charges, which remain unchanged.⁴

4. At the outset, the Prosecution acknowledges the impact that the withdrawal of charges in this case will have on the participating victims. As previously stated, the Prosecution has not taken its decision to request the withdrawal of charges against Mr

¹ Observations des Représentants Légaux des Victimes sur la Requête du Procureur ICC-02/05-03/09-752-Conf en Reconsidération de la « Décision (2ème Décision) sur sa demande aux fins de retrait des charges contre Abdallah Banda Abakaer Nourain », ICC-02/05-03/09-773-Conf (“LRV’s Observations on the Withdrawal Request”). See Order on matters arising from the status conference of 8 December 2025, ICC-02/05-03/09-758-Conf (“Order”), p. 5; Decision on the Prosecution’s request for an extension of time to provide access to witness statements, ICC-02/05-03/09-769-Conf, p. 5.

² Submissions of the Legal Representatives for Victims on ‘Defence’s Request for the Conversion of the Arrest Warrant into a Summons to Appear’ filed on 3 October 2025 ICC-02/05-03/09-772-Conf (“LRV’s Submissions on Defence’s Arrest Warrant Conversion Request”).

³ Order on matters arising from the status conference of 8 December 2025, ICC-02/05-03/09-758-Conf (“Order”), p. 5; Decision on the Prosecution’s request for an extension of time to provide access to witness statements, ICC-02/05-03/09-769-Conf, p. 5.

⁴ 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 (“Withdrawal Request”); Prosecution’s outline of briefing to the Trial Chamber, ICC-02/05-03/09-733-Conf-Red (“Prosecution Briefing”); Transcript of Hearing on 7 February 2024, ICC-02/05-03/09-T-028-Conf-Red-ENG (“7 February 2024 Hearing”); Reconsideration Request.

Banda lightly.⁵ It arrived at this decision after careful consideration of the evidence in the case, having continued to investigate incriminating and exonerating circumstances equally as required under article 54(1)(a) of the Statute, and paying due regard to the interests of fairness and expeditiousness, Mr Banda's fair trial rights and the victims' right to an effective remedy.⁶ By requesting a termination of the proceedings at this juncture, the Prosecution seeks to avoid time-consuming and ultimately fruitless trial proceedings which would harm the interests of not only Mr Banda, but those of the victims, and the overall integrity of the proceedings.

5. While the LRV takes a different view in this regard, the Prosecution respectfully submits that the LRV's position is unmerited, as demonstrated by the following aspects of the LRV's Observations on the Withdrawal Request.

6. First, contrary to the LRV's claim, the new facts presented by the Prosecution in its Reconsideration Request were not merely the submission of additional evidence.⁷ Rather, the Prosecution submitted that the evidence obtained from witnesses P-1840 and P-0308 shows that continued investigations undertaken in line with the Prosecution's duties under article 54, 14 years after the charges were confirmed, were unable to improve the evidence of Mr Banda's *mens rea* for the attack on the MGS Haskanita. Moreover, the recent investigations underscore the weakness of the available evidence in this regard.⁸

7. The evidence of P-1840 and P-0308 therefore constitute relevant new facts which necessarily alter the strength of the evidence in this case, warranting the Chamber's reconsideration of its Second Withdrawal Decision. This is particularly so in light of

⁵ Withdrawal Request, para. 24.

⁶ The right to an effective remedy is expressed in international human rights jurisprudence as a guarantee of an effective procedure, namely, one that is capable of leading to a determination as to whether a violation of the victims' rights have occurred and, if so, the identification, investigation and punishment of those responsible. As such, the obligation on the investigating authority is one of means, and not of result. See D. Shelton, *Remedies in International Human Rights Law* (Oxford: OUP, 2015), pp. 17-18; ECtHR, *Al-Skeini and Others v. The United Kingdom*, Application No. 55721/07, Judgment, 7 July 2011, para. 166; ECtHR, *Isayeva and Others v. Russia*, Application No. 57947/00, Judgment, 24 February 2005, para. 211; ECtHR, *Tahsin Acar v. Turkey*, Application No. 26307/95, Judgment, 8 April 2004, para. 223; ECtHR, *Jaloud v. The Netherlands*, Application No. 47708/08, Judgment, 20 November 2014, para. 186.

⁷ LRV's Observations on Withdrawal Request, para. 32.

⁸ Reconsideration Request, paras. 12-13.

the following observations of the Chamber in its decision: (i) that the evidence of P-0512 that the attackers were “looking for Bashir” was “relevant and potentially exculpatory”;⁹ (ii) [REDACTED];¹⁰ and (iii) that the evidence of the content of this meeting from which Mr Banda’s *mens rea* for the attack would need to be inferred was otherwise based entirely on circumstantial or hearsay evidence of witnesses.¹¹ In this context, that the recently interviewed P-1840 and P-0308 (who have also presented credibility and reliability issues)¹² were only capable of providing further hearsay or unreliable evidence as to the content of the meeting emphasises the weakness of the evidence as to Mr Banda’s *mens rea*. Rather than constituting more of the same evidence that the Pre-Trial Chamber relied on in confirming the charges,¹³ P-1840 and P-0308’s evidence highlights the inability to secure evidence capable of counteracting P-0512’s direct evidence of the attacker’s motives and remedying the deterioration of evidence from P-0441 and P-0477 on the content of the pre-attack meeting and the motives for the attack.¹⁴

8. Second, the LRV does not explain how the factors cited by the Prosecution on the need for reconsideration to prevent an injustice ‘have nothing to do with the prevention of injustice’ (“*n’ont rien à voir avec la prévention de l’injustice*”), or how these factors are inconsistent with the concept of injustice established in the jurisprudence of this Court and the *ad hoc* tribunals.¹⁵ The jurisprudence cited by the LRV does not develop the concept of injustice any further.¹⁶ In any case, as the Prosecution has

⁹ 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 (“Second Withdrawal Decision”), para. 29. P-0512 had stated that the attackers “were looking for Bashir”: Prosecution Briefing, para. 34(i).

¹⁰ Second Withdrawal Decision, paras. 31, 33.

¹¹ Second Withdrawal Decision, para. 33.

¹² Additional update on investigative steps, ICC-02/05-03/09-744-Conf-Red (“Investigative Update”), para. 14; Reconsideration Request, para. 11.

¹³ LRV’s Observations on Withdrawal Request, paras. 63, 78-79, 81.

¹⁴ See Second Withdrawal Decision, para. 39.

¹⁵ LRV’s Observations on Withdrawal Request, para. 37. See also para. 33.

¹⁶ *Contra* LRV’s Observations on Withdrawal Request, paras. 25, 29. The LRV cites the *Lubanga* Order refusing a request for reconsideration, ICC-01/04-01/06-2846, para. 20. This, however, was a four-paragraph decision which does not support the propositions cited by the LRV. If the LRV intended to cite to an earlier decision referenced in that order (namely the Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010, ICC-01/04-01/06-2705), that decision considered whether the impugned decision was “manifestly unsound and its consequences, if left unremedied, would be manifestly unsatisfactory”. The *ad hoc* tribunal decisions cited by the LRV reaffirm the power of chambers to reconsider decisions “if a clear error of reasoning has been demonstrated or it is necessary to do so in order to prevent an injustice”: see *Prosecutor v. Šešelj*, IT-03-67-AR72.1, Decision on Motion for Reconsideration of the “Decision on the Interlocutory Appeal

previously submitted, injustice in this case would clearly arise if Mr Banda were made to appear before the Court in circumstances where the Prosecution is already aware that it will be unable to prove its case against him.¹⁷ The impact would be felt by Mr Banda, and would affect the Court and the victims. The LRV does not engage with this aspect.

9. Third, the LRV's claim that the Prosecution failed to assess the new evidence holistically in light of all evidence in the case and the evidence cited in the Confirmation Decision is incorrect.¹⁸ The Prosecution properly based its request to withdraw the charges on the evidence available to it at the time of making its request.¹⁹ Moreover, in its detailed briefing to the Chamber in support of its request, it explicitly cited the evidence considered by the Pre-Trial Chamber in its article 61(7) decisions in this and the *Abu Garda* case.²⁰ The Prosecution also cited the Parties' agreement as to certain facts,²¹ which did not acknowledge the accuracy of material facts set out in the document containing the charges,²² but rather set out the alleged facts that were not contested by the Parties, which the Chamber could consider to be proven for the purposes of trial.²³ The Prosecution was not required to repeat all of these submissions and citations to the evidence in its Reconsideration Request since it was clear that it was referring to the newly obtained evidence as new facts that altered the assessment of evidence underlying its Withdrawal Request and related submissions.

10. Fourth, the LRV acknowledges the limitations of P-0308's evidence, noting the reliability issues raised by the Prosecution and that the witness did not participate in any pre-attack planning meetings or in the attack itself, and was not a witness to the

concerning Jurisdiction" dated 31 August 2004, 15 June 2006, para. 9; *Prosecutor v. Karemera & Ngirumpatse*, ICTR-98-44-T, Decision on Matthieu Ngirumpatse's motion for reconsideration or alternatively, certification to appeal the decision of 27 October 2010, 25 November 2010, para. 2.

¹⁷ Reconsideration Request, paras. 14-15.

¹⁸ *Contra* LRV's Observations on Withdrawal Request, paras. 67, 80-84.

¹⁹ Withdrawal Request, para. 22; Prosecution Briefing, para. 34.

²⁰ See e.g. Prosecution Briefing, para. 34 (fns. 70-71, 73-77, 80, 82, 87, 89).

²¹ See e.g. Prosecution Briefing, para. 34 (fns. 78, 81, 88).

²² *Contra* LRV's Observations on Withdrawal Request, para. 73.

²³ Annex A to the 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-Conf-AnxA.

attack [REDACTED].²⁴ As such, the evidence of P-0308 cannot be relied upon by the Prosecution to fill the gaps in its case. Instead, this witness's evidence amplifies the overall weakness of the evidence regarding Mr Banda's *mens rea* for the attack.

11. Fifth, the LRV's observations on P-1840's evidence do not reinforce the evidence against Mr Banda, but instead, weaken it.²⁵ The LRV misreads P-1840's evidence in claiming that P-1840 "*indique clairement qu'au moment de l'attaque d'Haskanita le 29 September 2007, le représentant du Gouvernement du Soudan, le Capitaine Bashir, était à El Fasher*."²⁶ Rather, P-1840 refers [REDACTED].²⁷ P-1840 provided no details regarding any departure by the Government of Sudan ("GoS") representative, Bashir.²⁸ The Prosecution reiterates that P-1840 was unable to provide any direct knowledge of the planning meetings, execution and aftermath of the attack on MGS Haskanita, and was not personally acquainted with Mr Banda.²⁹ P-1840 was unable to identify the sources for the hearsay evidence he shared, or provide reliable leads for Prosecution investigators to further explore.

12. In light of these factors, the LRV's observations do not undermine the reasons provided by the Prosecution for the reconsideration of the Second Withdrawal Decision.

13. Finally, the LRV asserts that the external advisor's report has no probative force and appears "immaterial".³⁰ As noted previously on several occasions, the Prosecution did not rely on the external adviser report to reach its conclusion that the case against Mr Banda was no longer viable.³¹ The external adviser report merely confirmed the

²⁴ LRV's Observations on Withdrawal Request, paras. 65-66. See P-0308 screening note DAR-OTP-0215-3834, p. 2. Additional update on investigative steps, ICC-02/05-03/09-744-Conf-Red, para. 14. Reconsideration Request, para. 11.

²⁵ *Contra* LRV's Observations on Withdrawal Request, paras. 48-62.

²⁶ LRV's Observations on Withdrawal Request, para. 48.

²⁷ DAR-OTP-00019219, p. 4.

²⁸ *Contra* LRV's Observations on Withdrawal Request, paras. 48, 55 and 58.

²⁹ DAR-OTP-00019219, p. 1, 2, 5.

³⁰ LRV's Observations on Withdrawal Request, para. 68.

³¹ Withdrawal Request, para. 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 2003. The external adviser independently concluded, consistently with the Prosecution's assessment, that there was a low probability of convicting Mr Banda, and recommended that the Prosecution seek to terminate the case against him."), and 7 February 2024 Hearing, p. 8, l. 9-16; Prosecution response to the LRV's

conclusion that the Prosecution had already reached, after a detailed and thorough evaluation, that the state of the evidence had degraded such that it could no longer prove the charges against Mr Banda.³²

Arrest Warrant Conversion Request

14. In relation to the LRV's Submissions on Defence's Arrest Warrant Conversion Request, the Prosecution refers to and relies upon on its previous submission from 16 October 2025.³³ Accordingly, the Prosecution does not, in principle, object to the Defence's request [REDACTED] placing relevant assurances on the record by confirming its ability and willingness to comply with such logistical arrangements. The Prosecution again stresses that this position is unique to the current circumstances in the case against Mr Banda before the Chamber, and does not establish any precedent in relation to any other suspect in any situation.

IV. CONCLUSION

15. In light of the complete submissions of the Parties and Participants, the Prosecution respectfully requests that the Chamber reconsider the Second Withdrawal

request for access, ICC-02/05-03/09-765-Conf, para. 10 ("As the Prosecution noted in its request to withdraw the charges, it was only *after* the Prosecution had conducted its own considered deliberation and review of the state of the evidence and concluded that the case was no longer viable that it engaged an external adviser, [REDACTED], to independently review the case. This was out of an abundance of caution, to confirm the soundness of the Prosecution's conclusion. The External Adviser Report was thus obtained after the Prosecution's internal review process had already been concluded, and did not inform any part of that internal review. [REDACTED]'s conclusion that there was a low probability of convicting Mr Banda reinforced the Prosecution's own conclusion in this regard. However, it was neither fundamental to, nor determinative of the Prosecution's decision to request the withdrawal of the charges.").

³² Annex 1 to the Prosecution's notification of the disclosure of material and filing of the external adviser report on 16 April 2026, ICC-02/05-03/09-771-Conf-Anx1.

³³ Prosecution's response to "Defence Request for the Conversion of the Arrest Warrant Against General Banda into a Summons to Appear", 3 October 2025, ICC-02/05-03/09-742-Conf-Exp, ICC-02/05-03/09-743-Conf-Exp ("Prosecution's Response to Defence's Arrest Warrant Conversion Request").

Decision and authorise the withdrawal of the charges against Mr Banda pursuant to article 61(9) of the Statute or, alternatively, article 64(2).

16. The Prosecution remains unopposed to the Defence's Arrest Warrant Conversion Request, subject to the relevant assurances being placed on the record [REDACTED].



Nazhat Shameem Khan

Deputy Prosecutor

Dated this 14th day of July 2026

At The Hague, The Netherlands