



ANNEX

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

DISSENTING OPINION OF JUDGE ALAPINI GANSOU

1. In light of the new information and submissions provided by the Prosecution, the Majority reconsidered *proprio motu* the Initial Decision.¹ In its decision, the Majority found unnecessary to reconsider the interpretation of Article 61(9) of the Statute and, upon reviewing the merits of the Request, confirmed the Initial Decision declining to authorise the withdrawal of the charges against Mr Banda.

2. I concur with the Majority's view on the applicable law to the reconsideration of judicial decisions.² However, having considered the new information available, I am of the view that the Chamber should have reconsidered *proprio motu* the interpretation set out in its Initial Decision of Article 61(9) of the Statute and the merits of the Prosecution's Request.

I. Interpretation of Article 61(9) of the Statute

3. In the Initial Decision the Chamber held that the statutory framework does not provide a legal basis to withdraw charges after confirmation, prior to trial, with or without leave of the Chamber. The Chamber thus rejected the Request as being without statutory basis.³ Nonetheless, in its decision, the Chamber considered the merits of the Request in summary form in the interests of efficiency of the proceedings. It then concluded that the Prosecution had failed to substantiate the grounds for its Request.⁴

4. Considering the new information submitted, I accept that, as articulated by the Prosecution,⁵ and in the interests of the fairness of the proceedings, a solution must be found to the current state of affairs. Pursuant to Article 21(3) of the Statute, the application and interpretation of the Court's legal framework must be consistent with internationally recognised human rights. As held by the Appeals Chamber, human rights underpin every aspect of the Statute.⁶

¹ Reconsideration of the Decision on the Prosecution's request to withdraw the charges against Abdallah Banda Abakaer Nourain (the 'Majority Decision'). This Dissenting Opinion refers to short forms as used in the Majority Decision.

² Majority Decision, para. 6.

³ Initial Decision, para. 9.

⁴ Initial Decision, paras 11-15.

⁵ Transcript of hearing, ICC-02/05-03/09-T-028-Conf-Exp, p. 5, lines 9-12.

⁶ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 37.

5. The Majority's interpretation of Article 61(9) bars the Prosecution from seeking leave to withdraw the charges until the trial commences. Effectively, this means that such request would only be entertained by the Chamber should Mr Banda appear before the Court. The Prosecution has now substantiated, as will be analysed below, the grounds for its Request, namely the deterioration of its case⁷ and the exhaustion of investigative avenues to fill these evidentiary gaps.⁸ Given the current stage of the proceedings and, as noted by the Prosecution,⁹ its unique position to know all the body of evidence at this juncture, I am of the view that the proceedings would be halted to no meaningful end should the Chamber decline to authorise the Request. This would thus infringe upon Mr Banda's right to a fair trial.¹⁰ Consequently, I find that Article 61(9) should allow the Prosecution, in the specific circumstances of this case, to seek withdrawal of the charges with the Chamber's leave. I will now turn to the merits of the Prosecution's request.

II. The merits of the Prosecution's request

6. As previously stated, the Prosecution has now provided details concerning the grounds for its Request. This new information and submissions, as indicated below, give good and sufficient reason to alter the Initial Decision in order to prevent an injustice.

7. The Prosecution contends that the evidentiary developments undermine its ability to prove contested issue two (one of the three the contested issues of this trial),¹¹ which in turn affects its ability to prove Mr Banda's responsibility for *any* of the charged crimes.¹² In particular, the Prosecution submits that the evidence no longer establishes that Mr Banda was aware of the factual circumstances that established the protected status of AMIS installations at the time of the Attack.¹³ It contends that it cannot longer rely on the evidence of two key

⁷ Request, ICC-02/05-03/09-727-Conf-Exp, paras 15-17, 19-20.

⁸ Request, ICC-02/05-03/09-727-Conf-Exp, para. 18.

⁹ Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, para. 7.

¹⁰ Transcript of hearing, ICC-02/05-03/09-T-028-Conf-Exp, p. 3, line 14 to p. 5, line 13. *See Appeals Chamber, The Prosecutor v. Mathieu Ngudjolo Chui*, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute", 7 April 2015, ICC-01/04-02/12-271-Corr, para. 255.

¹¹ Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, para. 14 and Transcript of hearing, ICC-02/05-03/09-T-028-Conf-Exp, p. 7, lines 4-9 *referring to* the three contested issues, namely Issue 1: whether the attack on the MGS Haskanita on 29 September 2007 was unlawful; Issue 2: if the attack is deemed unlawful, whether the Accused was aware of the factual circumstances that established the unlawful nature of the attack; and Issue 3: whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations. *See Decision on the Joint Submission regarding the contested issues and the agreed facts*, 28 September 2011, ICC-02/05-03/09-227, whereby the Chamber decided that the trial would only proceed on the basis of the contested issues.

¹² Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, para. 29.

¹³ Prosecution Submissions, ICC-02/05-03/09-733-Conf-Ex, para. 35.

[REDACTED] witnesses due to [REDACTED].¹⁴ The Prosecution submits that all feasible investigative avenues have been exhausted.¹⁵

8. Contrary to the Majority's view,¹⁶ I am persuaded that the Prosecution has clearly set out how the deterioration in the evidence has eroded its case. At this stage of the proceedings, no evidence has been submitted nor discussed before the Chamber. Accordingly, in order to avoid prejudging on the strength of the Prosecution's case, I will rely on the Prosecution's assessment of the same.

9. As instructed in the Order, the Prosecution Submissions assess the sufficiency of the evidence applying the substantial grounds test,¹⁷ as opposed to the 'reasonable prospect of conviction' test outlined in the Request.

10. The Prosecution has assessed the evidence relied upon in the Confirmation Decision¹⁸ and has provided detailed information on its availability (or lack thereof) for an eventual trial.¹⁹ Whilst focusing on the developments concerning P-0441, P-0447 and P-0512, the Prosecution has considered 'the context of all the other evidence'.²⁰

11. As observed by the Prosecution,²¹ although the Pre-Trial Chamber held that there were substantial grounds to believe that Mr Banda was aware of the protected status of AMIS installations at the time of the Attack, it highlighted the 'scant evidence' that could either unequivocally establish whether (i) Mr Banda was aware that Captain Bashir had been removed from the MGS Haskanita or (ii) that he was not aware of his removal, or believed that the base was still being used to relay information to the GoS.²² The Prosecution submits that its evidence to prove Mr Banda's awareness has deteriorated.²³ In fact, the Prosecution states that recently discovered evidence, along with other pieces of information, now supports a different

¹⁴ Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, paras 16, 41-51.

¹⁵ Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, paras 52-57.

¹⁶ Majority Decision, paras 8, 19-37.

¹⁷ Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, paras 6, 36-40; Transcript of hearing, ICC-02/05-03/09-T-028-Conf-Exp, p. 18, lines 16-17.

¹⁸ Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, paras 24-25, 30-33

¹⁹ Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, paras 26-27, 34-40.

²⁰ Transcript of hearing, ICC-02/05-03/09-T-028-Conf-Exp, p. 33, lines 4-9.

²¹ Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, para. 32.

²² Confirmation Decision, ICC-02/05-03/09-121-Conf-Corr, paras 77-78.

²³ Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, paras 34(v), (vi) and (vii), 36-40; Transcript of hearing, ICC-02/05-03/09-T-028-Conf-Exp, p. 9, lines 16-18, p. 10, line 10 to p. 11, line 17, p. 12, lines 2-22, p. 13, line 8 to p. 14, line 11, p. 30, line 20 to p. 31, line 11.

Prosecution case theory,²⁴ namely that ‘Mr Banda believed that the MGS Haskanita was being used to relay information to the GoS, and this was the reason for the Attack’.²⁵ The Prosecution has considered, in the alternative, whether the evidence would establish that the Attack was indiscriminate or disproportionate, and has assessed that the evidence thereon would be equally insufficient.²⁶

12. Moreover, in assessing the evidentiary developments above, the Prosecution has factored in: (i) the impact these would have on its ability to prove Mr Banda’s responsibility for any of the charged crimes²⁷ and (ii) its prognosis should it be required to produce evidence on non-contested issues if a differently composed Trial Chamber so orders or if Mr Banda disputes any of the agreed facts.²⁸

13. Furthermore, the Prosecution has given details for the basis of its credibility assessment of the two key [REDACTED] witnesses it no longer intends to rely on.²⁹ Although, as observed by the Majority,³⁰ the Chamber may rely on its power under Article 69(3) of the Statute to order the submission of evidence, I am satisfied that the Prosecution’s assessment of its case is premised on the unavailability of these pieces of evidence.

14. Finally, I observe that under Article 54(1) of the Statute, the Prosecution has the power to investigate all facts and evidence in order to establish the truth. It follows that the Prosecution is uniquely placed to assess the feasibility of further lines of inquiry.³¹ The Prosecution has described the investigative steps it has taken to fill the evidentiary gaps, as well as the unavailability of further investigative measures.³² Given the current stage of the Prosecution’s

²⁴ Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, para. 34(i), (iii), (iv), and (ix); Transcript of hearing, ICC-02/05-03/09-T-028-Conf-Exp, p. 19, lines 14-21, p. 20, line 21 to p. 21, line 3, p. 21, line 21 to p. 22, line 16.

²⁵ Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, para. 35.

²⁶ Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, para. 39; Transcript of hearing, ICC-02/05-03/09-T-028-Conf-Exp, p. 27, line 11 to p. 29, line 9.

²⁷ Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, para. 29.

²⁸ Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, para. 20.

²⁹ Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, paras 41-51; Transcript of hearing, ICC-02/05-03/09-T-028-Conf-Exp, p. 11, line 8 to p. 12, line 1, p. 12, line 23 to p. 13, line 5.

³⁰ Majority Decision, para. 32.

³¹ For example, although referring to a different set of circumstances, I observe that in the Comoros situation, the Appeals Chamber noted the Prosecution’s discretionary powers concerning its investigations. *See Appeals Chamber, Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I’s ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”’, 2 September 2019, ICC-01/13-98, paras 76, 80.

³² Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, paras 52-57; Transcript of hearing, ICC-02/05-03/09-T-028-Conf-Exp, p. 9, lines 4-11, p. 14, line 12 to p. 15, line 21, p. 32, line 15 to p. 33, line 9.

investigations³³ and the time elapsed since the Confirmation Decision, I accept that the Prosecution has substantiated its assertion that it has exhausted all investigative leads and that ‘there is no realistic possibility of collecting further evidence that would strengthen [its] case’.³⁴

15. As a final point, I wish to record my concerns regarding the current state of affairs. The proceedings against Mr. Banda initiated more than 14 years ago, when Pre-Trial Chamber I summoned him to appear before this Court.³⁵ However, the trial proceedings against him have been dormant since 2014 as this Chamber (in a previous composition) suspended all litigation and trial preparatory measures due to Mr Banda’s failure to appear.³⁶ As noted above, the Prosecution assesses its case as no longer meeting the evidentiary standard, and sees no prospect of strengthening it with further investigations. Little progress has been made to secure the fugitive’s arrest and, in the Prosecution’s³⁷ and the Registry’s³⁸ prognosis, it does not seem forthcoming. In these circumstances I find that the only possible outcome, in the interests of justice, is to terminate the proceedings against Mr. Banda.

16. For the foregoing reasons, having reconsidered the Initial Decision, I would authorise the Prosecution to withdraw all charges against Mr Banda.

/Signed/

Judge Reine Alapini-Gansou

Dated this 17 July 2026

At The Hague, The Netherlands

³³ Transcript of hearing, ICC-02/05-03/09-T-028-Conf-Exp, p. 34, line 19 to p. 35, line 25.

³⁴ Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, para. 57.

³⁵ SUMMONS TO APPEAR FOR ABDALLAH BANDA ABAKAER NOURAIN, 27 August 2009, ICC-02/05-03/09-3.

³⁶ Warrant of arrest for Abdallah Banda Abakaer Nourain, 11 September 2014, ICC-02/05-03/09-606.

³⁷ Transcript of hearing, ICC-02/05-03/09-T-028-Conf-Exp, p. 41, lines 1-3.

³⁸ Transcript of hearing, ICC-02/05-03/09-T-028-Conf-Exp, p. 40, lines 10-19.