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Pénale
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**International
Criminal
Court**

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Date: 23 October 2023

TRIAL CHAMBER IV

Before: Judge Kimberly Prost, Presiding Judge
Judge Reine Alapini-Gansou
Judge María del Socorro Flores Liera

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

THE PROSECUTOR v. ABDALLAH BANDA ABAKAER NOURAIN

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

Prosecution's application for leave to appeal the "Decision on the Prosecution's request to withdraw the charges against Abdallah Banda Abakaer Nourain"

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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Other

Introduction

1. In its decision of 13 October 2023, the Trial Chamber rejected the Prosecution's request to withdraw the charges against Abdallah Banda Abakaer Nourain.¹ The Chamber found that neither article 64(2) nor article 61(9) of the Rome Statute ("Statute") provide a legal basis for the Prosecution to withdraw the charges, with or without the Chamber's leave. Given this result, the Chamber found it unnecessary to consider the substance of the Prosecution's arguments regarding the deterioration of its evidence against Mr Banda. The Chamber nonetheless stated that it was unpersuaded by the merits of the Request, and summarised its findings in the interests of procedural efficiency. The Chamber stated that the Prosecution should continue to identify and safeguard evidence and secure Mr Banda's arrest, and ordered the Prosecution to report to the Chamber on arrest efforts by 27 October 2023.²
2. The Prosecution respectfully requests leave to appeal on three distinct issues arising from the Decision:³
 - a. Whether the Statute provides a legal basis for the Prosecution to withdraw the charges, with or without the Chamber's leave, in the period after charges have been confirmed by the Pre-Trial Chamber and before the trial has commenced before the Trial Chamber ("First Issue");⁴
 - b. Whether, in finding that article 64(2) of the Statute does not provide a legal basis for the Prosecution to request to withdraw the charges, the Chamber erroneously distinguished this case from *Muthaura* and *Kenyatta* on the basis that Mr Banda is a fugitive from justice ("Second Issue");⁵ and
 - c. Whether - if found that a statutory basis exists for the Prosecution to withdraw the charges in the period after charges have been confirmed by the Pre-Trial Chamber and before the trial has commenced before the Trial Chamber - the

¹ ICC-02/05-03/09-728-Conf-Exp ("Decision"); ICC-02/05-03/09-727-Conf-Exp ("Request"). The Prosecution also requested the Chamber to make the attendant orders withdrawing the arrest warrant against Mr Banda and terminating the proceedings: Request, para. 26.

² As ordered by the Chamber, the Prosecution will file its report to the Chamber on arrest efforts in a separate filing by 27 October 2023.

³ Collectively, the "Issues".

⁴ Decision, paras. 8-10.

⁵ Decision, para. 8.

Chamber abused its discretion in assessing the merits of the Prosecution's Request ("Third Issue").⁶

3. These Issues arise from the Decision and have an immediate and significant effect on the fair and expeditious conduct of the proceedings, as well as the outcome of the trial. If the Decision stands, Mr Banda will remain the subject of an arrest warrant, on the basis of charges that the Prosecution no longer considers can be established beyond reasonable doubt on the evidence. This clearly and significantly impacts the fairness of the proceedings for Mr Banda. This is an issue that impacts both the right to a fair trial and the right to a trial without delay. If the proposed Issues are unresolved at this stage, the Prosecution will need to redirect its resources towards arrest efforts, and, if Mr Banda is arrested, proceed to trial on the basis of insufficient evidence, contrary to its legal and ethical obligations.⁷ Moreover, effectively requiring the proceedings to continue in circumstances where the Prosecution has unequivocally stated that there is no longer a reasonable prospect of conviction would unnecessarily prolong the proceedings, and expend the limited resources of the Court to no meaningful end. An immediate resolution by the Appeals Chamber may therefore materially advance the proceedings, by ensuring that the case against Mr Banda is not unnecessarily prolonged based on an incorrect decision.
4. The Prosecution notes that the Chamber's decision on an article 82(1)(d) application is procedural, and limited to an impartial and objective assessment of whether the proposed Issues meet the criteria for leave to appeal. Granting leave to appeal on the proposed Issues will enable the Appeals Chamber to determine questions that have great importance to the case against Mr Banda. It will also provide clarity on issues which have been to-date the subject of diverse judicial opinion. The Prosecution respectfully submits that the remedy of leave to appeal is warranted in this instance.

Confidentiality

5. Pursuant to regulation 23bis(2) of the Regulations of the Court, this Application is classified as confidential *ex parte*, available only to the Prosecution, as it refers to the Decision and other filings which bear the same classification. Given the *ex parte* nature of the Request and the Decision, the Defence is not currently in a position to act on the issues in this litigation concerning the Prosecution's request to withdraw the charges.

⁶ Decision, paras. 12-13.

⁷ Article 54(1)(a), Statute; *see also* Code of Conduct for the Office of the Prosecutor, 5 September 2013 ("OTP Code of Conduct"), paras. 49, 51, *especially* para. 51(a) and (b); Regulation 60 of the Regulations of the Office of the Prosecutor ("OTP Regulations").

6. Mr Banda may have a vested interest to participate in the litigation, including in any appeal before the Appeals Chamber, if this Application is granted. To facilitate such participation, the Prosecution requests the Chamber to reclassify its Request, the Decision and this Application as confidential so that the Defence may access the filings. Alternatively, and consistent with its prior stated position,⁸ the Prosecution does not object to the Chamber reclassifying these filings as public. However in the latter case, the Prosecution respectfully requests the Chamber to provide it with advance notice of one week, which would allow it to inform victims and witnesses in advance.

Submissions

7. In deciding an application for leave to appeal under article 82(1)(d) of the Statute, the question for the Chamber is not whether its Decision was correct. Rather, as established by the jurisprudence of the Court, the sole question is whether the identified Issues meet the criteria in article 82(1)(d).⁹ The Prosecution makes references to the merits of the Decision only when necessary to demonstrate that the criteria of article 82(1)(d) are met, for the reasons set out below.

A. The Issues arise from the Decision and are appealable

8. The three Issues arise from the Decision and are appealable. An appealable issue must show “[a]n identifiable subject or topic requiring a decision for its resolution” that is “essential [to determine] matters arising in the judicial cause under examination”.¹⁰ They are not merely questions over which there is disagreement or conflicting opinion.¹¹

a) The First Issue arises from the Decision and is appealable

9. The First Issue concerns whether the Statute provides a legal basis for the Prosecution to withdraw the charges, with or without the Chamber’s leave, in the period after charges have been confirmed by the Pre-Trial Chamber and before the trial has commenced before the Trial Chamber. The issue clearly arises from the Decision, since the Chamber found

⁸ Request, para. 4.

⁹ ICC-02/04-01/05-20 (“*Uganda* ALA Decision”), para. 22.

¹⁰ See ICC-01/04-168 (“*DRC* Extraordinary Review Decision”), para. 9; ICC-01/04-01/06-1433 (*Lubanga* Partly Dissenting Opinion of Judge Song), para. 4 (specifying that “[a] decision ‘involves’ an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made”); ICC-01/05-01/08-532 (“*Bemba* Charges AD”), para. 17; ICC-02/05-02/09-267 (“*Abu Garda* ALA Decision”), para. 25; ICC-01/04-01/06-1557 (“*Lubanga* ALA Decision”), para. 30; ICC-01/04-01/07-2035 (“*Katanga* ALA Decision”), para. 25; ICC-02/05-03/09-179 (“*Banda* ALA Decision”), para. 27.

¹¹ *DRC* Extraordinary Review Decision, para. 9.

that no legal basis can be found in article 61(9) or article 64(2) for the Prosecution to bring the Request.¹²

10. The First Issue is also appealable as it is an identifiable subject or topic requiring a decision for its resolution. The Chamber's rejection of the Prosecution's Request hinged on its findings that: (i) article 64(2) does not provide a legal basis for the request to withdraw charges in the circumstances of this case; (ii) the prior cases of *Muthaura* and *Kenyatta* applying article 64(2) at a similar procedural stage are inapposite because they did not concern fugitives from justice; (iii) article 61(9) is the relevant provision vesting the Trial Chamber with the power to authorise the withdrawal of charges; (iv) the plain wording of article 61(9) deliberately limits this power to after the commencement of the trial;¹³ and (v) there is no other basis for the Prosecution, with or without the Chamber's leave, to withdraw charges before the commencement of the trial.¹⁴

11. The Chamber's reasoning and conclusion on these provisions did not address the differing judicial interpretations in this Court of these same issues. For example, in *Muthaura*, the Trial Chamber granted permission to the Prosecution to withdraw the charges after they had been confirmed and before the trial had commenced, relying on its power under article 64(2).¹⁵ In *Muthaura*, Judge Ozaki stated in dissent that article 61(9) is the *lex specialis* and that the Prosecution may withdraw charges at any time before the trial without the Chamber's permission.¹⁶ In that same case, Judge Eboe-Osuji set out his view in a Separate Opinion that the provision's silence in this regard should not be read as conferring powers upon the Prosecutor to unilaterally withdraw charges. Rather, this must

¹² Decision, paras. 8-9.

¹³ The Chamber interpreted the 'commencement of the trial' as taking place once opening statements are made and the first witness is called: Decision, para. 9 (fn. 11, citing ICC-01/09-01/11-1123 ("*Ruto & Sang* Charges Amendment AD"), paras. 26-27). The phrase "commencement of trial" has been interpreted differently in different procedural contexts: See e.g. ICC-01/04-01/06-1084 ("*Lubanga* Evidence Decision"), para. 39 (stating in the context of article 61(9) that the trial commences "at the true opening of the trial when the opening statements, if any, are made prior to the calling of witnesses"); ICC-01/04-01/07-1213-tENG ("*Katanga* Admissibility Decision"), paras. 30-50, especially para. 49 (finding that in the context of article 19, "the commencement of trial occurs as soon as the [Trial] Chamber is constituted", but that "it is impossible to generally and definitively choose either of the two conceptions that may define the expression "commencement of the trial" and apply it uniformly to all the provisions of the Statute"); ICC-01/05-01/08-802 ("*Bemba* Admissibility Decision"), para. 210 (endorsing the interpretation in *Lubanga*, in the context of article 19); ICC-01/09-01/11-2024 ("*Ruto & Sang* Rule 68 AD"), paras. 80-81 (finding that, in the context of determining whether a rule change regarding prior recorded testimony was applied retroactively during trial, the relevant point at which to determine the rule's retroactivity is the start of the trial, which it held to be the commencement of the evidentiary hearing); ICC-01/09-02/11-696 ("*Muthaura* Charges Withdrawal Decision"), para. 10 (fn. 16) (endorsing the interpretation in *Lubanga*).

¹⁴ Decision, paras. 8-9.

¹⁵ *Muthaura* Charges Withdrawal Decision, pp. 1, 8, para. 11; ICC-01/09-02/11-1005 ("*Kenyatta* Charges Withdrawal Decision"), p. 6.

¹⁶ ICC-01/09-02/11-698 ("*Muthaura* Judge Ozaki Partial Dissenting Opinion and Judge Eboe-Osuji Concurring Separate Opinion"), p. 3, para. 2. Judge Ozaki otherwise concurred with her fellow judges to terminate the proceedings.

be subject to judicial oversight.¹⁷ In *Kenyatta*, the Prosecution filed a notice withdrawing the charges after the charges had been confirmed and before the trial had commenced.¹⁸ The Trial Chamber relied on its powers, *inter alia*, under article 64(2) to note the withdrawal and terminate the case.¹⁹ Notably, it did not require the Prosecution to first seek leave to withdraw the charges.²⁰ In *Mokom*, the Pre-Trial Chamber recently found that article 61(9) requires the Prosecution to seek the Chamber's permission to withdraw the charges after they have been confirmed and before the trial has commenced.²¹

12. To these views, the Chamber in this case added a third interpretation of article 61(9) in finding that the provision's silence in relation to the withdrawal of charges after they have been confirmed and before commencement of the trial was a deliberate limitation in the Statute.²² For the Chamber, this indicated that article 61(9) does not provide a statutory basis for the Prosecution to withdraw charges at this stage, with or without leave.²³ Moreover, the Chamber did not consider the necessary contextual reading of the provision taking into account the object and purpose of the Statute.
13. In addition, the decision of the Chamber did not set out a consideration of the scope of the Chamber's discretionary powers under article 64(2) of the Statute to ensure a fair and expeditious trial, with full respect to the rights of the accused, by permitting the withdrawal of the charges and terminating a case at the Prosecution's request. This is notwithstanding that the very same procedural mechanism was considered, and applied, by the *Muthaura* and *Kenyatta* Trial Chambers.²⁴
14. The prevalence of differing judicial views as to the scope and application of articles 61(9) and 64(2) on the Prosecution's ability to withdraw charges, and the Chamber's powers to terminate the case, further demonstrates that the First Issue is an identifiable subject or topic requiring a decision for its resolution. This is particularly so given that the issue impacts upon the Prosecution's prerogative to frame the charges and to narrow or withdraw the charges, with or without leave as required, if it assesses that there are no longer reasonable prospects of convicting the accused beyond reasonable doubt on the

¹⁷ *Muthaura* Judge Ozaki Partial Dissenting Opinion and Judge Eboe-Osuji Concurring Separate Opinion, pp. 5-6, paras. 13-15.

¹⁸ ICC-01/09-02/11-983 ("*Kenyatta* Charges Withdrawal Notice").

¹⁹ *Kenyatta* Charges Withdrawal Decision, pp. 3, 6.

²⁰ This is implied from the fact that the Trial Chamber "[n]oted the Prosecution's withdrawal of the charges" and "terminated" the case: *Kenyatta* Charges Withdrawal Decision, p. 6.

²¹ ICC-01/14-01/22-276 ("*Mokom* Charges Withdrawal Decision"), para. 7. It is unclear whether Pre-Trial Chamber II's reference to "the Chamber" was to the Pre-Trial Chamber or to the Trial Chamber.

²² Decision, para. 9.

²³ Decision, para. 9.

²⁴ *Muthaura* Charges Withdrawal Decision, p. 1, paras. 8, 11; *Kenyatta* Charges Withdrawal Decision, p. 6.

evidence before it. This has significant ramifications for the Prosecution, the accused and victims. The issue goes to important considerations - on the Prosecution's independence to prosecute, its obligation to seek to withdraw when there is in its view insufficient evidence, the right of all persons to only face charges and a trial on the basis of sufficient evidence, and the role of the judiciary as guardians of a fair trial. These rights exist for all persons including for those who are fugitives from justice. It is thus an appealable issue that does not merely disagree with the Chamber's reasoning. That there exists a range of judicial opinions on the availability of article 61(9) and/or article 64(2) for the Prosecution to request the withdrawal of charges before the commencement of trial demonstrates that this Issue is not based solely on the Prosecution's own views.

b) The Second Issue arises from the Decision and is appealable

15. The Second Issue concerns whether, in finding that article 64(2) of the Statute does not provide a legal basis for the Prosecution to request to withdraw the charges, the Chamber erroneously distinguished this case from *Muthaura* and *Kenyatta* on the basis that Mr Banda is a fugitive from justice.²⁵
16. The Second Issue arises from the Decision as it was material to the Chamber's finding that article 64(2) does not "provide a legal basis for a request to withdraw charges in the circumstances of this case."²⁶ It is an appealable issue as it is an identifiable subject or topic requiring a decision for its resolution. It concerns the scope of the Trial Chamber's discretionary powers under article 64(2) to ensure a fair and expeditious trial, which is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses, by permitting the withdrawal of the charges and terminating a case. Moreover, it concerns the same provision previously considered, and applied, by the *Muthaura* and *Kenyatta* Trial Chambers when the Prosecution sought to withdraw the charges in those cases at similar procedural stages (i.e. after the charges had been confirmed but before the trial had commenced).²⁷
17. In determining that article 64(2) does not apply in the circumstances of this case, the Chamber stated only that *Muthaura* and *Kenyatta* were inapposite to the *Banda* case, and that neither of these cases concerned a fugitive from justice.²⁸ The Chamber's view was that Mr Banda's fugitive status is relevant and determinative in deciding that article 64(2) does not apply. However, the Chamber's basis for this view was not specifically set out.

²⁵ Decision, para. 8.

²⁶ Decision, para. 8.

²⁷ *Muthaura* Charges Withdrawal Decision, p. 1, paras. 8, 11; *Kenyatta* Charges Withdrawal Decision, p. 6.

²⁸ Decision, para. 8.

Its limited reasoning gives rise to further questions regarding, *inter alia*, the appropriateness of exercising discretion under article 64(2) to ensure fair and expeditious proceedings by promptly terminating cases when the charges are no longer supported by the evidence to the requisite standard; and the Prosecution's legal and ethical duties not to proceed with a case if it considers that the evidence does not support the charges to the requisite standard.²⁹ These questions do not merely disagree with the Decision. Rather, they concern matters that require a decision for their resolution given the serious impact that they have on accused persons and victims when cases proceed to trial without sufficient evidence.

c) The Third Issue arises from the Decision and is appealable

18. The Third Issue concerns the question of whether - if a statutory basis exists for the Prosecution to withdraw the charges in the period after charges have been confirmed by the Pre-Trial Chamber and before the trial has commenced before the Trial Chamber - the Chamber abused its discretion in assessing the merits of the Prosecution's Request, in paragraphs 12 to 13 of the Decision. Given it had rejected the Prosecution's two legal bases for bringing the Request, the Chamber stated that it was unnecessary for it to consider the substance of the arguments raised by the Prosecution in support of its Request.³⁰ However, it went on to address in *obiter dicta* the Prosecution's arguments on the merits in summary form. It stated that it was unpersuaded by the Prosecution's submissions that the case against Mr Banda had substantially deteriorated.³¹

19. This Issue arises from the Decision. The Chamber's reasoning demonstrates that it has already assessed and formed a view rejecting the merits of the Request. If the Prosecution were to succeed in an appeal on either or both of the First and Second Issues, the case would likely be remanded back to the Chamber for a determination on the merits. However this would carry a pre-determined outcome. Given the Chamber's stated findings on the merits of the Prosecution's request to withdraw the charges, the Chamber is likely to reject the request on the merits. If the appeal is limited only to the legal issues set out above, the Prosecution will not have had a chance to meaningfully challenge the Decision and correct the course of the proceedings. The Third Issue is therefore inherently connected to the First and/or Second Issues and arises from the Decision.

²⁹ Article 54(1)(a), Statute; *see also* OTP Code of Conduct, paras. 49, 51; Regulation 60 of the OTP Regulations.

³⁰ Decision, para. 11.

³¹ Decision, para. 12.

20. The Third Issue is an appealable one. It is an identifiable subject or topic requiring a decision for its resolution because it addresses the manner in which the Chamber exercised its discretion to arrive at its findings on the merits of the Request. The following aspects of these findings are illustrative of the Chamber's approach:

- a. The Chamber placed undue weight on the findings in the Confirmation Decision, issued by the Pre-Trial Chamber 12 years ago, when the developments in the evidence since that time provide a more accurate and relevant status of the case.³² Those findings were also made against a different and lower standard of proof than the standard applicable at trial.
- b. The Chamber did not afford appropriate consideration to the Prosecution's judgment or evaluation of the evidence. It did not properly consider the Prosecution's intimate knowledge of the case, the Prosecution's ability to speak to witnesses for qualitative assessments of probative value, or its holistic appreciation of the evidence, given its prerogative under the Statute for conducting investigations, framing the charges, and presenting the case at trial.
- c. The Chamber did not properly consider the Prosecution's legal and ethical obligation to only proceed to trial on cases for which it considers it has a reasonable prospect of conviction at trial.³³ The Chamber's approach would require a case to proceed to trial once the charges have been confirmed. It takes that view as a matter of law, as evidenced in paragraph 9 of the Decision.³⁴
- d. While stating that the Prosecution had not provided key details regarding its credibility assessments or the weakening of certain evidence, or details to show that further investigations would not fill the gaps left by the deteriorated evidence, the Chamber nonetheless relied on these factors to conclude that it was unpersuaded regarding the deterioration of the evidence.³⁵ It did so without having access to the evidence in its current state. If the Chamber found the details to be insufficient, it could have instructed the Prosecution to provide further details. Indeed, the Prosecution had explicitly noted this possibility in

³² Decision, para. 12.

³³ Decision, paras. 10, 12-13. *See* article 54(1)(a), Statute; *see also* OTP Code of Conduct, paras. 49, 51; Regulation 60 of the OTP Regulations.

³⁴ Decision, para. 9 (finding that there is no wording in article 61(9) that would enable the Prosecution to seek the withdrawal of charges after they are confirmed but before the trial commences, stating, "[o]nce the charges are confirmed by a pre-trial chamber the expectation is that the matter will proceed to trial").

³⁵ Decision, paras. 12-13.

the Request and confirmed its readiness to assist the Chamber in this regard.³⁶ By failing to request further information where the Chamber thought it was lacking, and proceeding to make a finding based on the information that it perceived to be inadequate, the Chamber failed to exercise its discretion judiciously, and made unreasoned (*obiter*) findings on the merits of the Request. Further, it then said that it was incumbent upon the Prosecution to vigorously pursue investigations and preserve evidence, without acknowledging that the Prosecution had indeed done so, and without giving the Prosecution an opportunity to clarify any doubts in that regard.

21. Whether taken individually or cumulatively, the above findings demonstrate that the Chamber abused its discretion in the manner in which it assessed the merits of the Prosecution's Request.

B. The Issues meet the criteria for leave to appeal under article 82(1)(d)

a) The Issues significantly affect the fairness of the proceedings

22. All three Issues significantly affect the fairness of the proceedings. "Fairness" within the terms of article 82(1)(d) incorporates fairness towards the accused, the victims and the Prosecution. It requires that the procedural and substantive rights and obligations of all participants be respected.³⁷ The circumstances in which the Prosecution may withdraw charges constitute a deep due process issue, which is inherent to the right to a fair trial. The proposed Issues significantly affect the fair conduct of the proceedings because they determine the circumstances in which the Prosecution may withdraw the charges before the trial commences if it concludes that there are no reasonable prospects of convicting the accused, and the correct procedure for doing so.

23. This has an obvious and immediate impact on Mr Banda, above all. If the charges against Mr Banda were to stand at this stage, he would face arrest, transfer to the seat of the Court and deprivation of his liberty until the trial starts. As the Prosecution has unequivocally outlined its view of the weakness of the case and the low prospect of improving the evidence, its legal and ethical duties prevent it from bringing a case to trial in which it is no longer of the view that there are reasonable prospects of conviction. It was in this context that the Prosecution referred in its Request to Regulation 60 of the Regulations of the Office of the Prosecutor. It was not to outline a basis for its request to withdraw

³⁶ Request, para. 6.

³⁷ ICC-01/04-135-tEN ("DRC Victims Participation ALA Decision"), para. 38.

charges in this case.³⁸ Rather, it was to highlight the Prosecution's legal and ethical duties to assess its cases and terminate proceedings at the earliest available opportunity if the evidence no longer meets the requisite standard.³⁹

24. The Prosecution would therefore be compelled to bring a renewed request to withdraw charges pursuant to article 61(9) at the start of the trial for the Chamber's determination. During this time, Mr Banda could remain in custody or face other restrictions on his liberty. This scenario presents serious fairness concerns for Mr Banda.

25. Finally, this scenario also presents fairness concerns for the victims, whose hopes will inevitably be raised by the arrest and commencement of trial of a fugitive against whom they have been waiting for justice for over a decade. Such hopes would then be dampened once the Prosecution files its renewed request to withdraw the charges.

b) The Issues significantly affect the expeditious conduct of the proceedings

26. The three Issues significantly affect the expeditious conduct of the proceedings. This means the timely and efficient conduct of proceedings.⁴⁰ The principle requires that decisions at all stages do not unnecessarily delay the overall determination of responsibility.⁴¹ If the Prosecution is compelled by its legal and ethical obligations to seek to withdraw the case, granting the Prosecution permission to do so and terminating the case at this juncture would aid the expeditious conduct and resolution of the proceedings. By contrast, if the case were to proceed to trial as ordered by the Chamber, the matter would remain on foot before the Chamber until Mr Banda is arrested, the trial preparation is completed, and the trial commences. In line with the Chamber's interpretation, the Prosecution could only then bring its request to withdraw the charges. The Prosecution respectfully submits that this interpretation lacks procedural foundation in the Statute. It is inconsistent with Mr Banda's right under article 67 for the case to be determined without undue delay. Moreover, the progression of the case in this manner would entail the risk

³⁸ Decision, para. 10.

³⁹ See article 54(1)(a), Statute; see also OTP Code of Conduct, paras. 49, 51; Regulation 60 of the OTP Regulations.

⁴⁰ Expeditious proceedings are intimately connected with the efficient administration of international justice. See *Prosecutor v Norman, Kallon and Gbao*, SCSL-2004-07, 08 and 09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003, para. 6 (stating that "the Court's obligation to do justice expeditiously and effectively, as well as fairly"), para. 25 ("we can only do justice that is expeditious, fair and efficient"); *Prosecutor v Milosevic*, IT-02-54-T, Decision on Two Prosecution Requests for Certification of Appeal Against Decision of the Trial Chamber, 6 May 2003 (where in relation to each of the two grounds, the Chamber noted that the issue "will significantly affect the efficient and expeditious conduct of the proceedings").

⁴¹ Delay and promptness of proceedings must be judged in the context of the situations that the Court has jurisdiction over, the complexity of the issues and the circumstances in which investigations take place.

that lengthy and costly arrest, transfer, pre-trial and trial activities are then nullified at a later stage.⁴²

c) The proposed Issues significantly affect the outcome of the trial

27. An issue only needs to impact the fair and expeditious conduct of the proceedings or the outcome of the trial.⁴³ Nevertheless, the Prosecution respectfully observes that the proposed Issues also affect the outcome of the trial. The resolution of each of the proposed Issues could lead to the conclusion that the trial does not commence, let alone proceed to a hearing and determination of the charges, given the Prosecution's assessment of the evidence. If the case proceeds to arrest and trial on the basis ordered by the Chamber, the Prosecution would not be able to bring evidence that it considers sufficient to discharge its burden of proof. In these circumstances, the Prosecution would have to either seek to terminate the case as soon as possible after the trial commences, or expend valuable resources of the Court in conducting a trial that would fail to secure a conviction. Either outcome is undesirable when the Chamber may exercise its powers to more expediently terminate the case at this stage.

d) Immediate resolution of the Issues by the Appeals Chamber may materially advance the proceedings

28. The case against Mr Banda has already had a lengthy history. The Appeals Chamber's immediate resolution of the Issues will materially advance the proceedings by clarifying the circumstances in which the Prosecution may request to withdraw the charges, the appropriate procedure for doing so, and the degree of deference that the Chamber must afford to the Prosecution in assessing the merits of the withdrawal request. As the Appeals Chamber has stated, the "prompt reference of the issue to the court of appeal" and its "authoritative determination" will help the proceedings "move forward" by ensuring that the proceedings follow the right course."⁴⁴

29. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings.⁴⁵ It will also minimise the negative impact that the Decision will likely have on Mr Banda, victims and the

⁴² *Uganda* ALA Decision, para. 36. The Prosecution notes that this can also be viewed as an element relevant to whether the immediate resolution of the issue will materially advance the proceedings – see e.g. *DRC* Extraordinary Review Decision, para. 16.

⁴³ ICC-01/05-01/08-75 ("*Bemba* Disclosure ALA Decision"), para. 8; ICC-02/04-112 ("*Uganda* Victim Participation ALA Decision"), para. 17; ICC-01/04-01/06-1417 ("*Lubanga* Disclosure ALA Decision"), paras. 17-18; ICC-01/04-01/06-1473 ("*Lubanga* Stay of Proceedings ALA Decision"), paras. 21-22.

⁴⁴ *DRC* Extraordinary Review Decision, paras. 14-15, 18.

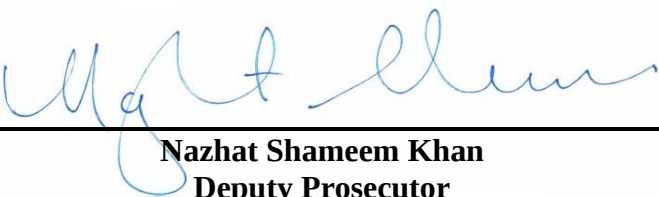
⁴⁵ *DRC* Extraordinary Review Decision, paras. 14-15, 18.

Prosecution.⁴⁶ Otherwise, if left without being remedied on appeal, the errors in the Decision could cloud or unravel the judicial process in this case.⁴⁷

30. In addition to the direct impact on the present proceedings, the prompt resolution of this issue will also assist to advance other proceedings before this Court.⁴⁸ It will provide clarity on the correct procedure to be applied when the Prosecution seeks to withdraw charges after they have been confirmed, but before the trial has commenced. Moreover, the existence of varying judicial views to date on the appropriate power and procedure for withdrawing charges before the commencement of the trial, as set out above,⁴⁹ provides further support for seeking the immediate resolution of the Issues by the Appeals Chamber.

Relief sought

31. For the reasons set out above, the Prosecution respectfully requests the Trial Chamber to grant leave to appeal on the Issues identified in paragraph 2 above, pursuant to article 82(1)(d).



Nazhat Shameem Khan
Deputy Prosecutor

Dated this 23rd day of October 2023

At The Hague, The Netherlands

⁴⁶ See above paras. 22-25.

⁴⁷ DRC Extraordinary Review Decision, para. 16.

⁴⁸ While the impact of immediate resolution of the issue on other proceedings may not itself be sufficient to sustain a grant of leave under Article 82(1)(d), it is a factor to be weighed in deciding whether to grant leave. Pre-Trial Chamber II has previously recognised that in certain circumstances, the potential impact on other proceedings may be “invoked as an additional argument in support of the alleged significant impact on the current proceedings”: *Uganda ALA* Decision, para. 54. See also *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005, para. 5; *Prosecutor v Mrksic*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003.

⁴⁹ See above paras. 11-12.