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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 "Reconsideration of the Decision
on the Prosecution's request to withdraw the charges against Abdallah Banda
Abakaer Nourain"**

Source: Office of the Prosecutor

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Introduction

1. In its decision of 13 October 2023, the Trial Chamber rejected the Prosecution's¹ request ("Request") to withdraw the charges against Abdallah Banda Abakaer Nourain ("Initial Decision").² The Chamber, by majority, Judge Alapini-Gansou dissenting, also rejected the Prosecution's request for leave to appeal that decision.³ The Chamber then scheduled an *ex parte* status conference for the Prosecution to provide "a detailed briefing to the Chamber as to the basis for [its Request]" and "to provide an update on the efforts being made to secure Mr Banda's arrest".⁴ The Prosecution filed written submissions in preparation for, and made oral submissions at the status conference which was held on 7 February 2024.⁵

2. 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 Initial Decision of the sufficiency of the grounds forming the basis of the Request, and reached the same conclusion to decline the Request ("Decision").⁶ Judge Alapini-Gansou, concluded that having reconsidered the Initial Decision, she would authorise the Prosecution to withdraw all charges against Mr Banda ("Dissenting Opinion").⁷

3. The Prosecution respectfully requests leave to appeal on two distinct issues arising from the Decision ("the Issues"):

- a. Whether the Majority erred in requiring the Prosecution to apply the "substantial grounds to believe" standard in assessing the evidence, and the manner in which it required the Prosecution to apply it, without properly considering the Prosecution's duties in the circumstances of this case ("First Issue");⁸ and
- b. Whether the Majority erroneously failed to comply with its duty under article 64(2) of the Statute to properly consider if Mr Banda's right to a fair trial could be guaranteed

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

² ICC-02/05-03/09-728-Conf-Exp ("[Initial 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.

³ ICC-02/05-03/09-730-Conf-Exp ("[ALA](#)"); ICC-02/05-03/09-731-Conf-Exp ("[ALA Decision](#)").

⁴ ICC-02/05-03/09-732-Conf-Exp ("[Order](#)"), paras 2, 4.

⁵ ICC-02/05-03/09-733-Conf-Exp ("[Written Submissions](#)"); ICC-02/05-03/09-T-028-Conf-Exp ("[Hearing Transcript](#)").

⁶ ICC-02/05-03/09-734-Conf-Exp ("[Decision](#)"), para. 41.

⁷ ICC-02/05-03/09-734-Conf-Exp-Anx ("[Dissenting Opinion](#)"), para. 16.

⁸ [Decision](#), paras. 9-14.

where the Prosecution has concluded, and substantiated, that Mr Banda's guilt cannot be established at trial based on a deterioration of the evidence ("Second Issue").

4. 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. In addition, an immediate resolution by the Appeals Chamber may materially advance the proceedings by ensuring that the case against Mr Banda is not unnecessarily prolonged based on an incorrect decision. Given the lengthy and sensitive litigation on the matter, the Appeals Chamber should resolve the Issues through an authoritative determination.

5. The Prosecution makes this Application requests bearing in mind its duties of objectivity and to respect the rights of the Accused, pursuant to articles 54(1)(a) and (c) of the Statute.

Confidentiality

6. 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. Due to the *ex parte* nature of the proceedings referred to above, the Defence is not currently aware of the issues in this litigation. As the Prosecution has submitted previously, 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.⁹ The Trial Chamber, by majority, rejected the Prosecution's prior request to reclassify the underlying information, finding that Mr Banda's "fair trial rights are not immediately implicated".¹⁰ The Prosecution considers that the present Application directly implicates Mr Banda's fair trial rights, as set out below.¹¹ Therefore, in the interests of fairness to Mr Banda, the Prosecution requests the Chamber to reclassify this Application and the related filings, decisions and information as confidential so that the Defence may have access.

Submissions

7. In deciding an application for leave to appeal under article 82(1)(d) of the Statute, the question for the Trial 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

⁹ [ALA](#), para. 6.

¹⁰ [ALA Decision](#), para. 6. Judge Alapini-Gansou dissented, finding that the ALA raised issues concerning the Request that appeared to implicate Mr Banda's rights, and he should therefore be afforded the opportunity to provide submissions in accordance with his right to a fair trial under article 67(1) of the Statute: ICC-02/05-03/05-731-Conf-Exp-Anx ("ALA Dissenting Opinion"), para. 2.

¹¹ See below paras. 19-24, 26-28.

criteria in article 82(1)(d).¹² The Prosecution refers 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.

I. The Issues arise from the Decision and are appealable

8. The two 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”.¹³ They are not merely questions over which there is disagreement or conflicting opinion.¹⁴

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

9. The First Issue concerns whether the Majority erred in requiring the Prosecution to apply the “substantial grounds to believe” standard in assessing the evidence, and the manner in which it required the Prosecution to apply it, without properly considering the Prosecution’s duties in the circumstances of this case (“First Issue”).¹⁵ The First Issue arises from the Decision because the Majority considered and rejected the Prosecution’s submissions on applying the “reasonable prospects of conviction” standard at this stage of the proceedings.¹⁶ In its Initial Decision, the Trial Chamber did not accept the Prosecution’s assessment of the evidence which applied this standard because the Chamber believed that there was no power under the Statute to withdraw the charges at this stage (*i.e.*, after charges were confirmed but before the opening of trial).¹⁷ In the Chamber’s subsequent order convening the *ex parte* status conference, it instructed the Prosecution to assess the evidence applying the “substantial grounds to believe” test.¹⁸ The Prosecution adhered to this instruction, concluding that the evidence did not meet this standard either.¹⁹ However the Prosecution explained its prior application of the “reasonable prospects of conviction” standard, and that applying this standard across its cases was consistent with its ethical duties under the Court’s legal framework.²⁰ The Majority rejected

¹² ICC-02/04-01/05-20 (“[Uganda ALA Decision](#)”), para. 22.

¹³ See ICC-01/04-168 (“[DRC Extraordinary Review Decision](#)”), para. 9; ICC-01/04-01/06-1433 (“[Lubanga Judge Song Diss. Op.](#)”), para. 4; ICC-01/05-01/08-532 (“[Bemba Charges ALA Decision](#)”), 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.

¹⁴ [DRC Extraordinary Review Decision](#), para. 9.

¹⁵ [Decision](#), paras. 9-14.

¹⁶ [Decision](#), paras. 9-14.

¹⁷ [Request](#), paras. 1, 5, 8, 20; [Initial Decision](#), paras. 9, 11.

¹⁸ [Order](#), para. 3. The Chamber otherwise did not comment on the appropriate standard in the [Initial Decision](#) or in its decision denying the Prosecution leave to appeal the Initial Decision: see generally [Initial Decision](#); [ALA Decision](#).

¹⁹ [Written Submissions](#), paras. 5-6, 9, 40; [Hearing Transcript](#), 2:23-3:2.

²⁰ [Written Submissions](#), paras. 5-9; [Hearing Transcript](#), 3:14-5:13, 18:16-24.

these submissions in the Decision, maintaining its view that the Prosecution may only apply the “substantial grounds to believe” standard to assess the sufficiency of evidence at this stage of the proceedings.²¹ The Chamber stated that this issue was “essential to its reasoning and conclusion”.²²

10. The First Issue is appealable as it is an identifiable subject or topic requiring a decision for its resolution. The Majority’s decision to apply the “substantial grounds to believe” standard arises from its particular interpretation of the Statute. The Majority recalled the hybrid nature of the Statute’s system and the role of the Pre-Trial Chamber in committing cases to trial.²³ It concluded that to determine if there is sufficient evidence to warrant a trial, “[t]he standard adopted in the Statute for this safeguard is the substantial grounds test”.²⁴ It stated that “there can be no ethical concerns about the Prosecution proceeding to trial on the basis of evidence which has been confirmed by the judiciary as meeting those requirements of the Rome Statute.”²⁵ However, the Majority failed to appreciate the Prosecution’s role and responsibilities under the Statute that give rise to specific legal and ethical duties. This includes the Prosecution’s burden to establish guilt beyond reasonable doubt (article 66(3)); its duty to independently prosecute cases (article 42(1)); and its duty of objectivity and to fully respect the rights of accused persons (article 54(1)(a) and (c)). The Prosecution can only discharge these duties by proceeding to trial with evidence that it considers capable of meeting its burden of proof. Otherwise, an accused could be made to stand trial, and face restrictions on his liberty, to answer charges that cannot be proven beyond reasonable doubt. This is untenable, especially in the circumstances of this case, in which Mr Banda was committed to trial 13 years ago and the evidence has by now significantly deteriorated.²⁶

11. The Majority also misappreciated the position of the Pre-Trial Chamber. The Pre-Trial Chamber does not share the Prosecution’s knowledge of the evidence, nor is it required to. Its role in confirmation proceedings is to filter out weak cases, and ensure that only persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought are committed for trial.²⁷ The “substantial grounds to believe” standard under article 61(7) is therefore designed to protect the rights of an accused against wrongful and unfounded charges.²⁸ Thus, in deciding whether to confirm the charges, the Pre-Trial Chamber may decide

²¹ [Decision](#), paras. 9-14.

²² [Decision](#), para. 9.

²³ [Decision](#), para. 11.

²⁴ [Decision](#), para. 11.

²⁵ [Decision](#), para. 13.

²⁶ The Pre-Trial Chamber confirmed the charges and committed Mr Banda and Mr Jerbo to trial on 7 March 2011: ICC-02/05-03/09-121-Corr-Red (“[Confirmation Decision](#)”).

²⁷ ICC-01/14-01/21-218-Red (“[Said Confirmation Decision](#)”), para. 35.

²⁸ ICC-02/05-02/09-243-Red (“[Abu Garda Confirmation Decision](#)”), para. 39.

not to hear any oral evidence but instead may rely on witness statements and transcripts, and even summaries of witness statements—as it did in this case.²⁹ The same degree of assessment cannot inform the trial preparation process. This is especially the case when there is a gap of 13 years between the confirmation of charges and the “trial readiness” analysis. Such analysis requires an understanding of the strength, resilience and durability of the evidence for its use in a future trial. These are factors that the Prosecution is uniquely placed to know given its investigative and prosecutorial mandate before the Court, and which it considers when assessing the reasonable prospects of conviction. Accordingly, previous Trial Chambers have terminated proceedings on the eve of trial following the Prosecution’s assessment that there were no reasonable prospects of conviction, or that it could not prove guilt beyond reasonable doubt.³⁰

12. In brief, the Prosecution in moving past the confirmation stage and towards trial has an ethical and legal responsibility to be “trial ready” in accordance with the burden and standard of proof required at trial.

13. The First Issue also arises from the Decision because, even when the Prosecution assessed the evidence applying the “substantial grounds to believe” standard as instructed,³¹ the Majority erred in this assessment.³² In particular, the Majority considered the evidence against individual findings of the Pre-Trial Chamber that were made 13 years ago, and failed to give appropriate weight to the Prosecution’s assessment of such evidence.³³ The findings of the Pre-Trial Chamber in this case cannot simply be revisited as though there has been no passage of time, and that the evidence has not progressively altered or degraded. Yet the Majority erroneously approached the Pre-Trial Chamber’s findings in this way. For example, it did not appear to give any consideration to the Prosecution’s submission that the evidence had

²⁹ [Confirmation Decision](#), para. 41.

³⁰ ICC-01/09-02/11-696 (“[Muthaura Termination Decision](#)”), para. 11 (noting the Prosecution’s submission that “it has no reasonable prospect of securing evidence that could sustain proof beyond reasonable doubt”, and granting the withdrawal of charges under article 64(2) of the Statute); ICC-01/09-02/11-1005 (“[Kenyatta Termination Decision](#)”), para. 10 (citing ICC-01/09-02/11-983 (“[Kenyatta Charges Withdrawal Notice](#)”) and considering it appropriate to terminate the proceedings). See [Kenyatta Charges Withdrawal Notice](#), para. 2 (stating that the evidence had not improved to such an extent that the accused’s alleged criminal responsibility could be proven beyond reasonable doubt). See also in the context of withdrawing charges during the confirmation hearing: ICC-01/14-01/22-276 (“[Mokom Charges Withdrawal Order](#)”), paras. 8-9 (noting the Prosecution’s reasons for withdrawal but stating that given this is a matter of prosecutorial discretion at this stage of the proceedings, it would not scrutinise the Prosecution’s reasons for withdrawing the charges) citing ICC-01/14-01/22-275 (“[Mokom Charges Withdrawal Notice](#)”), para. 5 (withdrawing the charges as the Prosecution does not consider that there is a reasonable prospect of conviction).

³¹ [Written Submissions](#), paras. 5-6, 9, 40; [Hearing Transcript](#), 2:23-3:2.

³² [Decision](#), paras. 26-37.

³³ [Decision](#), paras. 26-37.

deteriorated over time because of, *inter alia*, the vicissitudes of witness cooperation, and credibility and reliability concerns for the remaining available witnesses.³⁴

14. The Majority also failed to give the appropriate weight to the Prosecution's conclusion on the availability and reliability of evidence, given the Prosecution's ability to speak with witnesses in order to make such assessments. The Prosecution knows the full body of evidence in the case, including the witnesses' complete statements, and can assess the impact of individual items of evidence against the whole. By contrast, the Chamber could only rely on the Pre-Trial Chamber's citations and the Prosecution's summaries and descriptions of the evidence.³⁵ Nevertheless the Majority made its own findings regarding the impact of individual items of evidence on the Pre-Trial Chamber's assessment of the sufficiency of the evidence, rejecting the Prosecution's submissions on their impact.³⁶

15. Moreover, the Majority took an atomistic approach in assessing how the changes in the Prosecution's evidence added to or subtracted from the evidence of the key factors that the Pre-Trial Chamber relied upon to establish Mr Banda's *mens rea*.³⁷ The Majority stated that it considered the submissions regarding the deterioration of evidence holistically.³⁸ However, its findings show that it did not conduct the necessary holistic assessment of how the changes in the evidence of the incriminating and exonerating factors affected the overall strength of the case against Mr Banda, as the Prosecution had done.

16. For example, the Majority: (i) did not consider how the new evidence of P-0512 significantly strengthened existing exculpatory factors;³⁹ (ii) failed to acknowledge that in light of the strengthened exculpatory factors, the direct evidence of P-0441 of the contents of the planning meeting, or alternatively of P-0477, would have been important incriminating evidence of Mr Banda's *mens rea*, even if the Pre-Trial Chamber had not relied on it in considering this issue,⁴⁰ yet the Prosecution could no longer rely upon this evidence;⁴¹ (iii) equated the Prosecution's lack of direct evidence of Mr Banda's awareness that Captain Bashir had been removed from the MGS Haskanita before the attack with its lack of direct evidence

³⁴ [Written Submissions](#), para. 22; [Hearing Transcript](#), 33:4-23.

³⁵ See e.g. [Decision](#), paras. 28 (citing the Prosecution's summary of the evidence of P-0512, acknowledging that the Chamber had not reviewed the actual statement), 33 (citing the Pre-Trial Chamber's analysis of the evidence of an alleged planning meeting),

³⁶ E.g. compare [Decision](#), para. 30 with [Written Submissions](#), paras. 34(i), 36, 38 and [Hearing Transcript](#), 13:8-24, 19:3-25 (regarding the impact of the new evidence of P-0512); compare [Decision](#), para. 34 with [Written Submissions](#), paras. 34(vi), 36-37 and [Hearing Transcript](#), 30:20-11 (regarding the impact of the loss of P-0441's evidence).

³⁷ [Written Submissions](#), paras. 30-35.

³⁸ [Decision](#), para. 37.

³⁹ [Decision](#), paras. 28-30. See [Written Submissions](#), paras. 34(i), 36, 38; [Hearing Transcript](#), 13:8-24, 19:3-25.

⁴⁰ *Contra* [Decision](#), paras. 34, 35.

⁴¹ [Written Submissions](#), paras. 34-40; [Hearing Transcript](#), 30:20-11, 32:15-33:9.

that he knew about the illegitimate activities of Captain Bashir at the MGS Haskanita in the first place,⁴² ignoring the Prosecution's submissions on the inferences that could be drawn about the latter;⁴³ and (iv) did not consider relevant the other evidence cited by the Prosecution which further strengthened the exculpatory factors, together with the developments concerning P-0512, P-0441 and P-0477, as it found that this evidence was already before the Pre-Trial Chamber.⁴⁴

17. Judge Alapini-Gansou, by contrast, relied upon the Prosecution's "substantial grounds to believe" assessment of the evidence.⁴⁵ Her approach was consistent with previous Trial Chambers that did not require the Prosecution to report with the level of detail regarding its assessment as the Majority did in this case to substantiate its request to withdraw the charges.⁴⁶

18. The First Issue is an identifiable subject or topic requiring a decision for resolution which was essential to adjudicate the withdrawal request. The contrasting views and approaches of the Majority, the Dissenting Judge and the Prosecution on this Issue are not merely a disagreement on a discrete procedural question of how to assess the strength of cases. They impact a range of cross-cutting issues including the standard and manner for assessing evidence to withdraw charges after confirmation and before a trial has commenced, the Prosecution's legal and ethical obligations in conducting prosecutions, the fair trial rights of the Accused, and the integrity and efficient and expeditious conduct of proceedings. Moreover, resolution of the Issue is essential to determine the matters arising in the judicial cause under examination, namely, whether the Prosecution's assessment should have resulted in it being permitted to withdraw the charges at this stage.

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

19. The Second Issue concerns whether the Majority erroneously failed to comply with its duty under article 64(2) of the Statute to properly consider if Mr Banda's right to a fair trial could be guaranteed where the Prosecution has concluded, and substantiated, that Mr Banda's guilt cannot be established at trial based on a deterioration of the evidence.

⁴² [Decision](#), para. 36.

⁴³ [Hearing Transcript](#), 19:3-25, 20:16-26:5.

⁴⁴ [Decision](#), para. 36. See [Written Submissions](#), paras. 45, 46.

⁴⁵ [Dissenting Opinion](#), para. 8.

⁴⁶ In *Muthaura* and *Kenyatta* the Prosecution presented its assessment of the evidence in two pages and one page respectively: ICC-01/09-02/11-687 ("[Muthaura Charges Withdrawal Notice](#)"), pp. 6-7; [Kenyatta Charges Withdrawal Notice](#), p. 3. In this case, the Prosecution first presented a summary of its assessment in two and a half pages, and then presented a summary of its assessment in ten pages: Request, pp. 6-9; [Written Submissions](#), pp. 9-21. It elaborated on its assessment at the status conference: [Hearing Transcript](#), 7:4-16:5.

20. The Second Issue clearly arises from the decision because the Majority did not assess the impact that proceeding to trial under these circumstances would have on Mr Banda's fair trial rights or the fairness of the proceedings. The Prosecution raised these concerns before the Trial Chamber,⁴⁷ as acknowledged by Judge Alapini-Gansou.⁴⁸

21. Instead of addressing the Prosecution's arguments, consistent with its duty under article 64(2), the Majority observed that "in the statutory system the test of substantial grounds to believe has been adopted balancing fairness to the accused and the interests of justice more broadly, including those of victims".⁴⁹ Apart from this remark, the Majority made no further reference to having considered Mr Banda's fair trial rights. This is despite the Appeals Chamber's clear pronouncement that the fairness of a trial is primarily a concern regarding the accused.⁵⁰ In any event, the Majority did not consider how continuing the case would be in the interests of justice or the victims' interests where the Prosecution considers that the accused's guilt cannot be established at trial.

22. In this context, the Majority failed to consider the impact on Mr Banda's fair trial rights of continuing the proceedings, maintaining the warrant of arrest, arresting and transferring him to the seat of the Court, and detaining him until the trial. In particular, it failed to consider that upon Mr Banda's transfer to the Court, the Prosecution would reiterate its view on the insufficiency of evidence and seek to withdraw the charges. If the Trial Chamber were to again deny the request, the Prosecution would find itself unable to present a case, and call no evidence.⁵¹ In a similar vein, Judge Alapini-Gansou found that given the current stage of the proceedings, any continuation would come to "no meaningful end" and would "infringe upon Mr Banda's right to a fair trial."⁵²

23. The Majority assumes that the Prosecution will still effectively prosecute the case. This is apparent from its finding that "while the Prosecution may decide to withdraw witnesses from its [witness] list, this does not necessarily mean that this evidence will not be available to the Trial Chamber."⁵³ However, if the proceedings were to continue to trial, the Prosecution would be unable to present a case.

⁴⁷ [Request](#), paras. 1, 5, 22-23; [ALA](#), paras. 14, 22-25, 29; [Written Submissions](#), para. 7; [Hearing Transcript](#), 3:21-5:19.

⁴⁸ See [Dissenting Opinion](#), para. 4; see also fn. 10 (citing [Hearing Transcript](#), 3:14-5:13).

⁴⁹ [Decision](#), para. 13.

⁵⁰ ICC-01/04-02/12-271-Corr, ("[Ngudjolo AJ](#)"), para. 255.

⁵¹ Of note, the Majority did not make a finding that the Prosecution was incorrect in its conclusion that there is no reasonable prospect of conviction in this case, but rather considered that this was not the correct standard to apply at this stage (see [Decision](#), paras. 9-15).

⁵² [Dissenting Opinion](#), para. 5.

⁵³ [Decision](#), para. 32.

24. The Trial Chamber would be effectively left to conduct the entire case itself. This may be possible in a purely inquisitorial system, but it is not fairly possible in the Rome Statute system. As noted by the Appeals Chamber, trial proceedings at the Court include elements of adversarial proceedings, such as the party driven system of evidence presentation.⁵⁴ It would also run counter to the distribution of functions and powers under the Statute. The Prosecution is responsible for conducting investigations and prosecutions before the Court⁵⁵ and the Trial Chamber is mandated to hear and adjudicate cases.⁵⁶ Nor would it be feasible for the Trial Chamber to do so, given its limited knowledge of all the evidence in this case.

25. For all these reasons, the Second Issue is an appealable issue arising from the Decision.

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

a) The Issues significantly affect the fairness of the proceedings

26. The 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 the procedural and substantive rights and obligations of all participants to be respected.⁵⁷ The proposed Issues significantly affect the fair conduct of the proceedings because they determine the standard and manner in which evidence must be assessed before confirmed charges may be withdrawn, and the weight that must be given to the Prosecution in conducting that assessment. The resolution of the Issues will ultimately determine whether the evidence in this case warrants the withdrawal of the charges and the termination of the case before Mr Banda is arrested and a trial commences.

27. Otherwise, if the Decision is allowed to stand, the Prosecution will be required to wait until the commencement of trial to take the necessary action to withdraw the charges. It will file a new request under article 61(9) to withdraw the charges, and if that request is rejected, it will be unable to present its case, and call no evidence. In either case, the termination of the proceedings without a conviction will be the only final outcome in this case, given the Prosecution’s assessment that the evidence does not give rise to a reasonable prospect of conviction, or even substantial grounds to believe that Mr Banda committed the charged crimes.

⁵⁴ ICC-01/05-01/08-323 (“[Bemba Interim Release AD](#)”), para. 32; ICC-01/04-01/07-476 (“[Katanga Redactions AD](#)”), para. 63; ICC-01/04-02/06-2026 (“[Ntaganda No Case to Answer AD](#)”), paras. 44, 47. *See also* ICC-01/04-01/06-1432 (“[Lubanga Victims Participation AD](#)”), Judge Pikis Dis. Op., para. 14.

⁵⁵ [Statute](#), article 42(1).

⁵⁶ [Statute](#), article 64.

⁵⁷ ICC-01/04-135-tEN (“[DRC Victims Participation Decision](#)”), para. 38 (stating also that fairness “entails equilibrium between the parties, which assumes both respect for the principle of equality and the principle of adversarial proceedings” [...]); ICC-01/14-01/21-275-Anx (“[Said Judge Ugalde Godinez Sep. Op.](#)”), para. 7.

28. Prolonging this outcome has an obvious and immediate impact on Mr Banda, above all. Maintaining criminal proceedings against an accused on the basis of an erroneous assessment of the evidence poses a significant fairness issue. Mr Banda remains wanted for arrest, and once arrested and transferred to the seat of the Court, he may be detained during the proceedings. These restrictions on his liberty, and the concomitant impact that they would have on other aspects of his life, would serve no meaningful end given the Prosecution's belief that the evidence is not capable of securing a conviction at trial. In fact, these restrictions can only cause harm in these circumstances.

29. The continuation of the proceedings in these circumstances also affects the fairness of the proceedings for the victims. The victims' hopes will be raised if Mr Banda is arrested and the trial is set to commence, only to be extinguished due to the Prosecution's inability to prove the case beyond reasonable doubt. It also impacts the fairness of proceedings for the Prosecution. The Decision places the Prosecution in the unethical position of continuing arrest efforts and conducting other activities in preparation for trial—and utilising its limited resources in doing so—in circumstances where it must seek to terminate the case as soon as the trial commences due to a lack of evidence to secure a conviction.⁵⁸

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

30. The Issues significantly affect the expeditious conduct of the proceedings. This means the timely and efficient conduct of proceedings.⁵⁹ The Prosecution has assessed that the evidence is no longer capable of securing a conviction at trial and that the conditions for terminating the case are met. The resolution of the Issues will allow the proceedings to be terminated without undue delay. By contrast, in maintaining the proceedings, requiring Mr Banda's arrest and ordering the commencement of the trial, the Court and participants will incur

⁵⁸ [Decision](#), paras. 38-41.

⁵⁹ Expeditious proceedings are intimately connected with the efficient administration of international justice. See [Said Judge Ugalde Godínez Sep. Op.](#), para. 7 ("Fairness and expeditious are [] fundamental aspects of the procedural activity at trial. [...] Expeditiousness concerns the legal obligation that the chamber must fulfil so that the procedural activity, while being fair, i.e. equally expeditious—i.e. without unnecessary delays—and effective"); *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 (referring to "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").

the time and cost of participating in the arrest, transfer, pre-trial and trial activities which will only be nullified at a later stage.⁶⁰

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

31. An issue only needs to impact the fair and expeditious conduct of the proceedings or the outcome of the trial.⁶¹ Nevertheless, the proposed Issues also significantly affect the outcome of the trial. This is because the Decision, if allowed to stand, will result in the proceedings continuing to trial, rather than being terminated without undue delay. If the proceedings continue, and Mr Banda is arrested and the trial ordered to commence, the Prosecution would be unable to bring evidence that it considers sufficient to discharge its burden of proof. In accordance with its legal and ethical duties, the Prosecution would need to seek to terminate the case as soon as possible after the trial commences by making a renewed request to withdraw the charges under article 61(9) or calling no evidence. In either case, the proceedings will have continued to no meaningful end, thereby expending valuable resources of the Court. Either outcome is undesirable when the Chamber may exercise its powers to more expediently terminate the case at this stage. The Issues therefore have a critical impact on the outcome of the trial.

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

32. The prompt referral of the Issues to the Appeals Chamber and its authoritative determination will help the proceedings move forward by ensuring that the proceedings follow the right course.⁶² 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 standard and manner in which evidence must be assessed before confirmed charges may be withdrawn, the weight that must be given to the Prosecution in conducting that assessment, and the resulting steps to terminate the proceedings if the evidence is considered insufficient.

⁶⁰ [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.

⁶¹ ICC-01/05-01/08-75 (“[Bemba Disclosure ALA Decision](#)”), para. 8; ICC-02/04-112 (“[Uganda Victims 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.

⁶² [DRC Extraordinary Review Decision](#), paras.14-15, 18.

33. 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.⁶³ This is a particular concern in this case, given that the integrity of proceedings will be irreparably damaged if Mr Banda is required to answer charges at trial for which the Prosecution knew, and informed the Chamber, it did not have sufficient evidence. This is a fundamental question of fairness, which impacts Mr Banda, the victims and the Prosecution.⁶⁴ If left without being remedied on appeal, the errors in the Decision could cloud or unravel the judicial process in this case.⁶⁵

34. Therefore, for the reasons already stated by the Prosecution, not only must the Issues be resolved, but the case must be terminated without undue delay. This requires clarity as to the statutory basis for doing so. In its Initial Decision, the Chamber stated that neither article 61(9) nor 64(2) of the Statute permitted withdrawals of the charges at this stage.⁶⁶ It distinguished this case from *Muthaura* and *Kenyatta*—where the Trial Chambers relied on article 64(2) to allow or note the Prosecution's withdrawal of charges and terminate the case before the opening of the trial—on the basis that the Accused is a fugitive from justice.⁶⁷ However, the Majority later appeared to suggest that the Chamber would be empowered to authorise a withdrawal at this stage under article 61(9).⁶⁸ In the Decision, the Majority stated it was not necessary for it to reconsider its Initial Decision on the inapplicability of article 61(9) of the Statute given its views on the merits of the request to withdraw.⁶⁹ As such, the question of the statutory basis to terminate the charges at this stage of the proceedings does not arise from the Decision. The Prosecution therefore cannot formulate this as an issue for appeal.

35. However, the question of the power and procedure to withdraw charges before the commencement of trial is fundamental to meaningfully resolve the Issues and ensure that the proceedings follow the correct course in this case. To this end, Judge Alapini-Gansou reconsidered her position in the Initial Decision and found that article 61(9) must be interpreted in this case as permitting the withdrawal of the charges prior to the commencement of the trial.⁷⁰

⁶³ [DRC Extraordinary Review Decision](#), paras. 14-15, 18.

⁶⁴ *See above* paras. 26-29.

⁶⁵ [DRC Extraordinary Review Decision](#), para. 16.

⁶⁶ [Decision](#), para. 12.

⁶⁷ [Initial Decision](#), paras. 7-9.

⁶⁸ [ALA Decision](#), para. 12 (“[I]t transpires from the plain wording of Article 61(9) of the Statute that the decision to authorise withdrawal of the charges is for a trial chamber to make. This is acknowledged by the Prosecution as it submits that ‘[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.’ On this point, in its decision, in aid of the efficiency of the proceedings, the Chamber gave consideration to the merits of the withdrawal [...]”).

⁶⁹ [Decision](#), para. 8.

⁷⁰ [Dissenting Opinion](#), paras. 3-5.

36. In these circumstances, if leave to appeal is granted, the Prosecution will ask the Appeals Chamber to determine this issue for itself, as a matter intrinsically linked to the Issues.⁷¹ The Prosecution will request the Appeals Chamber to find that articles 61(9) and/or 64(2) of the Statute enable the Prosecution to withdraw the charges at this stage, with the Chamber's leave.

Relief sought

37. For the reasons set out above, the Prosecution respectfully requests the Trial Chamber to grant leave to appeal on the two Issues identified, pursuant to article 82(1)(d) of the Statute.



Nazhat Shameem Khan
Deputy Prosecutor

Dated this 12th day of March 2024

At The Hague, The Netherlands

⁷¹ See ICC-01/14-01/21-514 (“[Said Appeal Admissibility Decision](#)”), para. 24 (“The Appeals Chamber [] has consistently declined to consider arguments of an appellant [...] that are not intrinsically linked to the issue as defined by the chamber granting leave”); ICC-01/04-01/07-521 OA5 (“[Ngudjolo Redactions AD](#)”), para. 37 (determining that the Appeals Chamber would consider arguments on appeal that were “intrinsically linked to the issue on appeal as certified”); ICC-02/11-01/15-369 OA7 (“[Gbagbo Regulation 55\(2\) AD](#)”), para. 25 (“The Appeals Chamber recalls that it may consider arguments “intrinsically linked to the issue on appeal as certified by the [relevant] Chamber”).