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Cour
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Court

ANNEX

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

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DISSENTING OPINION OF JUDGE ALAPINI GANSOU

1. In today's decision,[1] the Majority rejects the Prosecution's: (i) request for reclassification[2] and (ii) its application for leave to appeal the Chamber's decision rejecting the Prosecution's request to withdraw the charges against Mr Banda.[3] For the reasons set out below, I respectfully disagree with the Majority's findings.

2. As recalled by the Majority, the question of whether and for how long *ex parte* proceedings should be allowed depends on the specific circumstances of the case, particularly on the risk of prejudice to a fair trial.[4] Contrary to the Majority's view, I find no compelling reason to keep the current *ex parte* classification of the filings connected to this litigation. As observed by the Prosecution,[5] the Issues appear to implicate Mr Banda's rights. Mr Banda should therefore be afforded the opportunity to provide submissions thereupon in accordance with his right to a fair trial under Article 67(1) of the Statute. Accordingly, I would have directed the Prosecution to file confidential redacted versions of its filings, which would have allowed arrest efforts to be pursued whilst safeguarding Mr Banda's due process rights.

3. I concur with the Majority's view on the applicable legal framework for granting leave to appeal.[6] However, I disagree with my colleagues' conclusion that none of the three Issues satisfy the requirements under Article 82(1)(d) of the Statute.

4. In respect of the First Issue, as noted by the Prosecution,[7] the issue of whether there is statutory basis for the Prosecution to withdraw the charges at this stage constitutes a due process issue and therefore affects the fairness of the proceedings. Moreover, as pointed out by the Prosecution,[8] this course of action would have an impact on whether a case proceeds to trial, and consequently on the time and resources of the Prosecution having to secure Mr Banda's arrest before seeking withdrawal of the charges. Accordingly, I am satisfied that the First Issue affects both the expeditious conduct of the proceedings and the outcome of the trial.

[1] Decision on the Prosecution's application for leave to appeal 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] Majority Decision, paras 11-13.
[4] Majority Decision, para. 5.
[5] Application, ICC-02/05-03/09-730-Conf-Exp, para. 23.
[6] Majority Decision, para. 3.
[7] Application, ICC-02/05-03/09-730-Conf-Exp, para. 22.
[8] Application, ICC-02/05-03/09-730-Conf-Exp, paras 26-27.

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5. In respect of the Second Issue, I recall that in accordance with Article 64(2) of the Statute a trial chamber 'shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.' As pointed out by the Prosecution,[9] the Second Issue concerns the question of whether a trial chamber may exercise its discretion under Article 64(2) of the Statute to promptly terminate cases when the charges are no longer supported by the requisite evidentiary standard, and thus affects the fair and expeditious conduct of proceedings.

6. In respect of the Third Issue, as observed by the Prosecution, the issue of whether the Chamber abused its discretion in assessing the merits of the Prosecution's request, touches upon its 'prerogative under the Statute for conducting investigations, framing the charges, and presenting the case at trial',[10] which inevitably affects the fairness and expeditious conduct of the proceedings.

7. Furthermore, contrary to my colleagues' views,[11] I am persuaded that immediate resolution by the Appeals Chamber of the three Issues would materially advance the proceedings. In adopting this dissenting opinion, I have first taken into consideration, as observed by the Prosecution,[12] that appellate review would ensure that the current proceedings (which have been ongoing for 14 years) are not unnecessarily prolonged based on an incorrect decision. The Chamber must not remain oblivious to the effect on the proceedings that the Impugned Decision has, bearing in mind the Prosecution's assessment of its case and the unlikelihood that a trial will proceed given Mr Banda's failure to appear before the Chamber.[13] Second, whilst the decision to authorise the withdrawal of the charges under Article 61(9) of the Statute may be for a trial chamber to make,[14] the Appeals Chamber would settle through its authoritative determination the legal basis for doing so.

8. For the foregoing reasons, I would have granted leave to appeal the three Issues as formulated by the Prosecution.

[9] Application, ICC-02/05-03/09-730-Conf-Exp, para. 17.
[10] Application, ICC-02/05-03/09-730-Conf-Exp, para. 20.b.
[11] Majority Decision, para. 12.
[12] Application, ICC-02/05-03/09-730-Conf-Exp, para. 3.
[13] Application, ICC-02/05-03/09-730-Conf-Exp, para. 23.
[14] Majority Decision, para. 12.

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Judge Reine Alapini-Gansou

Dated this **28 November 2023**

At The Hague, The Netherlands

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