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TRIAL CHAMBER IV

Before: Judge Kimberly Prost, Presiding Judge
Judge Keebong Paek
Judge Nicolas Guillou

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

THE PROSECUTOR v. ABDALLAH BANDA ABAKAER NOURAIN

Public, with Public Annex A and Public Redacted Annex B

Public redacted version of “Prosecution’s outline of briefing to the Trial Chamber”, 18 November 2025, ICC-02/05-03/09-733-Conf-Red

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Introduction

1. The Trial Chamber has convened a confidential *ex parte* status conference on 7 February 2024 for the Prosecution¹ to provide the Chamber with, *inter alia*, “a detailed briefing as to the basis for [the Prosecution’s] request to withdraw the charges”.² The Prosecution respectfully submits this outline of its briefing to assist the Chamber and facilitate a focused discussion at the status conference.

2. The Prosecution sought to withdraw the charges because it is now unable to rely on the evidence of two [REDACTED] witnesses (P-0441 and P-0477) who previously could have provided critical inculpatory evidence, and has obtained new significant exculpatory evidence provided by a credible [REDACTED] witness (P-0512). The loss of critical insider evidence and the existence of key exculpatory evidence has resulted in the Prosecution being unable to prove its case at trial, as further developed below.

3. This outline is structured as follows. The Prosecution acknowledges the Chamber’s instruction to apply the “substantial grounds to believe” standard and has applied it in its present evidentiary assessment. However it prefaces this assessment by explaining why it had previously applied the “reasonable prospect of conviction” standard (section A). Then, it summarises the key factual issues which underpin the Prosecution’s evidentiary assessment (section B). The Prosecution then sets out its assessment of the evidence and why it no longer meets the “substantial grounds to believe” standard due to recent evidentiary developments (section C). Finally, the Prosecution outlines the steps it has undertaken to strengthen the evidence, and why it considers that all feasible investigative avenues have been exhausted (section D). The Prosecution will develop these points further in the status conference, and stands ready to assist the Chamber with any questions it may have.

Confidentiality

4. Pursuant to regulation 23bis(2) of the Regulations of the Court, this filing is classified as confidential *ex parte*, available only to the Prosecution as it concerns matters to be discussed at the status conference, which will be held on a confidential *ex parte* basis.³

¹ The Prosecution in this case means the Prosecution acting under the direction of Deputy Prosecutor Nazhat Shameem Khan.

² ICC-02/05-03/09-732-Conf-Exp (“Order”), para. 2; see ICC-02/05-03/09-727-Conf-Exp (“Withdrawal Request”).

³ Order, para. 1.

Outline of Briefing

A. The standard applied by the Prosecution to assess the evidence

5. The Chamber has instructed the Prosecution to assess the evidence applying the standard under article 61(7) of the Rome Statute—namely, whether there are substantial grounds to believe that the accused committed the crimes as charged.⁴ This instruction accords with the standard that Pre-Trial Chamber I applied in confirming the charges against Mr Banda almost 13 years ago and committing him to trial.⁵

6. As outlined below, the Prosecution assesses that the evidence no longer meets the “substantial grounds to believe” standard.⁶ However, when requesting to withdraw the charges, the Prosecution had previously applied the “reasonable prospect of conviction” standard.⁷ This is a higher standard,⁸ and one which the Prosecution has applied in other cases when seeking to withdraw charges.⁹ The Prosecution considers it important to briefly explain why it had applied this standard, to avoid giving rise to the perception that it has arbitrarily applied different standards to different cases. In doing so, the Prosecution respectfully notes that it does not seek to re-litigate the question of the applicable standard before the Chamber. To the contrary, it has applied the “substantial grounds to believe” standard in this assessment, as instructed by the Chamber.

7. The Court’s legal and ethical framework strikes a balance between the Prosecution’s independence in investigating and prosecuting cases, and its accountability in carrying out its work. The Prosecution is responsible for conducting independent and effective investigations and prosecutions before the Court.¹⁰ This entails the prerogative to select individuals to prosecute, and to frame the charges,¹¹ while fully respecting the rights of persons under the

⁴ Order, para. 3.

⁵ ICC-02/05-03/09-121-Conf-Corr / ICC-02/05-03/09-121-Corr-Red (“[Confirmation Decision](#)”), paras. 39, 163.

⁶ See below [Section C](#).

⁷ Withdrawal Request, paras. 5, 20, 22.

⁸ The Prosecution interprets this standard to mean whether it is more likely than not that a reasonable trial chamber will convict the accused. The standard may also be expressed as a “realistic prospect of conviction”.

⁹ See e.g. ICC-01/14-01/22-275 (“[Mokom Charges Withdrawal Notice](#)”), para. 1; ICC-02/05-254-Red (“[Darfur Prosecution Report to PTC](#)”), para. 13; ICC-01/09-02/11-687 (“[Muthaura Charges Withdrawal Notice](#)”), para. 1. See also ICC-01/09-02/11-983 (“[Kenyatta Charges Withdrawal Notice](#)”), para. 2; ICC-01/14-01/21-155-Red3 (“[Said Pre-Confirmation Brief](#)”), fn. 733.

¹⁰ [Statute](#), article 42(1); article 54(1)(b); [Code of Conduct for the Office of the Prosecutor](#), para. 51.

¹¹ While the Pre-Trial Chamber may request the Prosecutor to consider amending a charge because the evidence appears to establish a different crime within the Court’s jurisdiction, its role in relation to the charges is otherwise limited to confirming or declining to confirm the charges presented by the Prosecution: [Statute](#), article 61(7).

Statute.¹² The Prosecution investigates all facts and evidence in order to establish the truth,¹³ and advocates a case theory supported by the evidence.¹⁴ As such, the Prosecution is uniquely placed to know all the evidence gathered, or which realistically may be gathered, and is able to holistically assess it at any point in time to determine the strength of a case. Thus, while chambers will assess the Prosecution's case at specific phases of the proceedings,¹⁵ including at phases not expressly regulated under the Statute,¹⁶ the Prosecution has an independent duty to be satisfied at all times that its cases are sufficiently supported by the evidence to warrant the continuation of the proceedings.¹⁷ This duty is consistent with internationally expressed prosecutorial standards.¹⁸ It serves a number of interests—fundamentally, the interest of fairness, recognising the deleterious impact that prolonged criminal proceedings will have on the accused¹⁹ and that unsuccessful prosecutions will have on the victims.²⁰ It also promotes the efficient administration of justice, and the integrity of proceedings in the Court.

8. The Prosecution has expressed this duty as requiring an assessment of whether the evidence gives rise to a “reasonable prospect of conviction”.²¹ Chambers of this Court have

¹² [Statute](#), article 54(1)(c); [Code of Conduct for the Office of the Prosecutor](#), para. 51(b).

¹³ [Statute](#), article 54(1).

¹⁴ ICC-01/09-02/11-728 (“[Kenyatta Article 64\(4\) Decision](#)”), para. 119.

¹⁵ The Statute expressly provides for judicial determinations of a case to take place: upon challenges to the jurisdiction of the Court or admissibility of a case (article 19); when issuing a warrant of arrest or a summons to appear (article 58); when confirming the charges before trial (article 61); and when deciding whether to convict or acquit the accused (article 74).

¹⁶ Trial Chambers have also assessed cases in determining Defence no-case-to-answer motions at the conclusion of the Prosecution's case at trial: ICC-02/05-01/20-T-116-Red-ENG, 4:1-11:7 (“[Abd-Al-Rahman No Case to Answer Decision](#)”); ICC-02/11-01/15-T-232-ENG, 1:15-5:7 (“[Gbagbo & Blé Goudé No Case to Answer Decision](#)”); ICC-01/09-01/11-2027-Red-Corr (“[Ruto & Sang No Case to Answer Decision](#)”), p. 1.

¹⁷ [Regulations of the Office of the Prosecutor](#), regulation 60.

¹⁸ See e.g. International Association of Prosecutors, [Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors](#), 23 April 1999, para. 4.2(d) (Prosecutors shall continue criminal proceedings only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence); Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, [Guidelines on the Role of Prosecutors](#), 27 August to 7 September 1990, para. 14 (Prosecutors shall not continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded); Committee of Ministers of the Council of Europe, [The Role of Public Prosecution in the Criminal Justice System](#), 6 October 2000, paras. 2 (in all criminal justice systems, public prosecutors decide whether to initiate or continue prosecutions), 27 (prosecutors should not continue prosecution when an impartial investigation shows the charge to be unfounded).

¹⁹ The prolongation of cases adds to the time that a person stands accused but untried and has their liberty interfered with, their employment, family and social relations disrupted, their financial resources drained, and exacerbates the stress and anxiety that they experience.

²⁰ Victims may see the continuation of a case after many years—especially in cases such as the present one where over a decade has lapsed and the accused has absconded—as demonstrating the Prosecution's continued belief in the strength of the case, and are likely to anticipate an outcome commensurate with this belief.

²¹ Office of the Prosecutor, [Policy on Situation Completion](#), 15 June 2021, para. 35; Office of the Prosecutor, [Policy paper on case selection and prioritisation](#), 15 September 2016, paras. 23, 51, 53. See also [Regulations of the Office of the Prosecutor](#), regulation 60; [Code of Conduct for the Office of the Prosecutor](#), para. 51(1).

accepted the Prosecution’s application of this standard.²² It is consistent with prosecutorial standards in many domestic jurisdictions—in particular, in those applying the adversarial model of criminal proceedings.²³ The standard is objective, and is based on the evidence alone, and not on other factors. The Prosecution considers that applying this standard across its cases is consistent with its ethical duties under the Court’s legal framework.

9. In this case, the Prosecution assesses that not only does the evidence not give rise to a reasonable prospect of conviction, but it also no longer establishes substantial grounds to believe that Mr Banda committed the charged crimes.

B. Factual and procedural context for the Prosecution’s assessment

10. The following background explains the key issues that are the focus of the Prosecution’s evidentiary assessment.

i. The confirmed charges

11. On 7 March 2011, Pre-Trial Chamber I confirmed the charges against Mr Banda (Commander in Chief of the Justice and Equality Movement-Splinter Group (“JEM-Splinter Group”)) and Mr Jerbo (commander of the Sudan Liberation Army-Unity command (“SLA-

²² 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). See also ICC-01/14-01/22-276 (“[Mokom Charges Withdrawal Order](#)”), paras. 8-9 citing [Mokom Charges Withdrawal Notice](#) (noting the Prosecution’s reasons for withdrawal but stated it would not scrutinise those reasons given the prosecutorial discretion under article 61(4) to withdraw the charges before they are confirmed); ICC-01/09-02/11-1005 (“[Kenyatta Termination Decision](#)”), para. 10 citing [Kenyatta Charges Withdrawal Notice](#) (finding that in light of the Notice filed, it was appropriate to terminate the proceedings).

²³ See e.g. [Australia](#): Commonwealth Director of Public Prosecutions, [Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process](#), 24 February 2021, paras. 2.5 and 2.8 (a prosecution should not proceed if, *inter alia*, there is no reasonable prospect of a conviction being secured); [Canada](#): [Public Prosecution Services of Canada Deskbook](#), 2020, Part II, section 2.3(4) (Crown counsel are under a continuous duty to consider through all stages of the prosecution whether there is, *inter alia*, a reasonable prospect of conviction, and if not, to withdraw the charges or enter a stay of proceedings); [England and Wales](#): Crown Prosecution Service, [The Code for Crown Prosecutors](#) (October 2018), paras. 2.2 and 4.6 (the Crown Prosecution Service must make assessments about whether it is appropriate to commence or continue a prosecution, and in doing so, be satisfied that there is, *inter alia*, sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge, which means that a reasonable [trier of fact] [...] is more likely than not to convict the defendant); [Fiji](#): Director of Public Prosecutions, [The Prosecution Code 2003](#), paras. 5.1-5.2 (no person shall be prosecuted unless there is sufficient evidence, assessed by ensuring that there is a reasonable prospect of conviction). [United States](#): American Bar Association, [Criminal Justice Standards for the Prosecution Function](#) (2017), standard 3-4.3(b) (prosecutors should maintain charges only if they reasonably believe, *inter alia*, that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt); United States Department of Justice, [Justice Manual](#) (2018), 9-27.220 (the standard to apply in commencing or recommending a federal prosecution is whether the admissible evidence will probably be sufficient to obtain and sustain a conviction); [Mexico](#): [Código Nacional de Procedimientos Penales, 1914, Diario Oficial de la Federación, 5 Marzo 2014](#), art. 327(V) (a case will be dismissed after an investigation where the Public Ministry considers that it does not have enough elements to found an accusation: “Agotada la investigación, el Ministerio Público estime que no cuenta con los elementos suficientes para fundar una acusación”).

Unity”)) (now deceased).²⁴ The charges allege that on 29 September 2007, Mr Banda, Mr Jerbo and other unit commanders led rebel troops from the JEM-Splinter Group, SLA-Unity and SLA-Abdul-Shafie in attacking the military observer group site established by the African Union Mission in Sudan (“AMIS”) at Haskanita (“MGS Haskanita”) (“the Attack”). The perpetrators killed 12 AMIS peacekeepers and severely injured at least 8 others in the Attack. The perpetrators engaged in large-scale shooting of the MGS Haskanita camp, and appropriated property belonging both to the AMIS and its personnel. The Pre-Trial Chamber confirmed all three counts alleged by the Prosecution, namely:²⁵

- a. **Count 1:** Violence to life and attempted violence to life under articles 8(2)(c)(i) and 25(3)(a) (direct co-perpetration) and 25(3)(f);
- b. **Count 2:** Intentionally directing attacks against AMIS peacekeeping personnel, installations, materials, units and vehicles involved in a peacekeeping mission under articles 8(2)(e)(iii) and 25(3)(a) (direct co-perpetration); and
- c. **Count 3:** Pillaging under articles 8(2)(e)(v) and 25(3)(a) (direct co-perpetration).

12. In its decision, the Pre-Trial Chamber relied upon many of its findings in the related *Abu Garda* case²⁶ to the extent they were applicable to the charges against Mr Banda.²⁷ The Prosecution cites to those findings below, where relevant.

ii. Case narrative

13. The following briefly summarises the key events leading up to the Attack on 29 September 2007, drawn from the *Abu Garda* and *Banda* Confirmation Decisions, and the statement of facts agreed between the Prosecution and Defence (“Agreed Facts”):²⁸

Approximately three weeks prior to the Attack, the Government of Sudan (“GoS”) had bombed the rebels in Haskanita village. Rebel groups went to the MGS Haskanita and complained to AMIS, accusing the GoS representative stationed there, Captain Bashir, of relaying the rebels’ coordinates to the GoS so that the GoS could bomb them. The rebels threatened to attack the MGS Haskanita if the GoS attacked them again.

²⁴ [Confirmation Decision](#). On 4 October 2013, the Trial Chamber terminated the proceedings against Mr Jerbo following his death on 19 April 2013: ICC-02/05-03/09-512-Conf / ICC-02/05-03/09-512-Red (“[Jerbo Termination Decision](#)”).

²⁵ [Confirmation Decision](#), para. 163, pp. 4-5, 74.

²⁶ The Prosecution had brought the same charges against Bahar Idriss Abu Garda (former Vice President of JEM) in a separate case, also before Pre-Trial Chamber I. However the Chamber declined to confirm the charges due to a lack of sufficient evidence concerning his individual criminal responsibility: ICC-02/05-02/09-243-Red (“[Abu Garda Confirmation Decision](#)”), paras. 231-233, 236, p. 97.

²⁷ [Confirmation Decision](#), para. 23.

²⁸ ICC-02/05-03/09-148-Conf-AnxA / ICC-02/05-03/09-148-AnxA-Red (“[Agreed Facts](#)”).

Following these threats, AMIS removed Captain Bashir from the MGS Haskanita. His removal had taken place one to two weeks before the Attack.

On the morning of 29 September 2007, the GoS shelled rebel groups and a battle took place between the GoS and rebels in Dalil Babikir. That afternoon, rebel commanders met to discuss the response to the GoS attack and a decision was taken to attack the GoS forces and the MGS Haskanita. Subsequently, Mr Jerbo met with Mr Banda to inform him of that decision and Mr Banda agreed to participate in the Attack with his forces from JEM Splinter. The rebels launched the Attack shortly thereafter.

iii. The contested issues underpinning the Prosecution's assessment

14. On 16 May 2011, the Prosecution and the Defence informed the Trial Chamber of their agreement that Mr Banda would only contest the following three issues at trial, all of which relate to Count 2 (intentionally directing attacks on peacekeeping personnel, installations, material, units and vehicles involved in a peacekeeping mission) ("Contested Issues"):

- a. **Issue 1:** whether the attack on the MGS Haskanita on 29 September 2007 was unlawful;
- b. **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
- c. **Issue 3:** whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations.²⁹

15. On 28 September 2011, the Trial Chamber decided that the trial would proceed only on the basis of the three Contested Issues, and that the parties should not present evidence or make submissions other than on those issues.³⁰

16. To allow for a streamlined and incisive analysis, the Prosecution has focused its assessment to concentrate only on the issues that are impacted by the evidentiary developments in the case. Its assessment therefore concentrates on Contested Issue 2. The degradation of the evidence—in particular, the loss of witnesses P-0441 and P-0477 due to serious and irreparable credibility issues, and the recent exonerating evidence of P-0512—cumulatively erode the Prosecution's ability to prove Mr Banda's *mens rea*. The Prosecution assesses that there are no longer substantial grounds to believe that Mr Banda was aware of the factual circumstances

²⁹ ICC-02/05-03/09-148 ("[Contested Issues](#)"), para. 3.

³⁰ ICC-02/05-03/09-227 ("[Contested Issues Decision](#)"), para. 46.

establishing the protected status of AMIS personnel and objects, and hence, the unlawful nature of the Attack.³¹

17. The Prosecution does not foresee significant difficulties in establishing Contested Issue 1 to the “substantial grounds to believe” standard. However, given its foundational importance to the issues arising under Contested Issue 2, the Prosecution *first* briefly outlines its assessment on Contested Issue 1. This is to account for the interrelated legal and factual findings arising under both issues, and to logically set out the predicate findings under Contested Issue 1 that must be established to support the findings under Contested Issue 2. For example, it is necessary to first find that AMIS personnel and objects had protected status at the time of the Attack (Contested Issue 1) before it can be found that Mr Banda was aware of the factual circumstances establishing their protected status and hence the unlawfulness of the Attack (Contested Issue 2).

18. The assessment does not include any discussion of Contested Issue 3. This issue is not impacted by the evidentiary developments. There remain substantial grounds to believe that AMIS was a peacekeeping force under the UN Charter, as the Pre-Trial Chamber found,³² and there are reasonable prospects of establishing this at trial.

19. The assessment also excludes any analysis of Count 1 (murder and attempted murder) or Count 3 (pillaging). This is because the findings on Count 2—in particular whether AMIS personnel and objects had protected status during the Attack³³—will have legal implications for the acts charged in Counts 1 and 3. It is therefore first necessary to affirmatively establish the Contested Issues to prove Mr Banda’s responsibility for *any* of the charged crimes.³⁴

20. The Prosecution’s assessment is premised on the assumption that the case it must prove at trial will be limited to the Contested Issues. However, if Mr Banda disputes any or all of the Agreed Facts when he eventually appears before the Court,³⁵ the Prosecution may be required

³¹ See below [Section C.ii](#).

³² [Confirmation Decision](#), para. 63(ii), citing [Abu Garda Confirmation Decision](#), paras. 109-112, 120-125. See [Elements of Crimes](#), Article 8(2)(e)(iii), para. 2.

³³ [Elements of Crimes](#), Article 8(2)(e)(iii), para. 4

³⁴ For the same reason, the Pre-Trial Chamber focused its assessment by firstly determining whether Count 2 was established, before assessing Counts 1 and 3: [Confirmation Decision](#), paras. 57-58; [Abu Garda Confirmation Decision](#), para. 59.

³⁵ The Agreed Facts were the subject of an agreement Mr Banda reached with the Prosecution almost 13 years ago under the advice of his former lead counsel. New lead counsel was appointed to represent him on 25 September 2019: ICC-02/05-03/09-664-Conf-Exp / ICC-02/05-03/09-664-Red (“[Lead Counsel Decision](#)”).

to adduce evidence of those facts at trial.³⁶ Moreover, regardless of Mr Banda's position, a differently composed Trial Chamber may also wish to hear evidence on any of the non-contested issues.³⁷ In either situation, the Prosecution's prognosis of the case would be the same—if not worse—given the broadened evidentiary burden it would be required to meet, with evidence that has by now significantly deteriorated.

C. The Prosecution's assessment of the evidence

21. The Chamber has directed the Prosecution to apply the “substantial grounds to believe” standard in assessing the evidence at this stage and to “focus on, and specifically address, the evidence relied upon by the Pre-Trial Chamber and any developments in terms of the availability of the same”.³⁸ Consequently, the Prosecution has structured its assessment to (i) outline the Pre-Trial Chamber's assessment of Contested Issues 1 and 2 and examine the impact on that assessment of subsequent developments in the evidence, in particular the impact of the exonerating evidence of new witness P-0512, and the loss of witnesses P-0441 and P-0477 who have engaged in conduct significantly undermining their credibility;³⁹ and (ii) explain the serious credibility issues regarding witnesses P-0441 and P-0477.⁴⁰

22. The Prosecution prefaces its assessment by noting that the currently available evidence differs significantly from the evidence considered by the Pre-Trial Chamber.⁴¹ In the 13 years that have lapsed since the Confirmation Decision was issued, the vicissitudes of witness cooperation over time have meant that several of the original witnesses have become uncontactable, uncooperative or otherwise unavailable for trial. Of the remaining available witnesses, some present credibility and reliability issues, and the Prosecution necessarily exercises caution in relying upon their evidence, particularly where they provide the sole or main evidence on a particular fact. The Prosecution has also interviewed new witnesses who are not relied upon in the Confirmation Decision, in its effort to fill the gaps in evidence caused

³⁶ See e.g. ICC-01/04-02/06-2058 (“[Ntaganda Agreed Fact Decision](#)”), paras. 3-9 and ICC-01/04-02/06-2184-Red (“[Ntaganda Agreed Fact Evidence Decision](#)”) (the Trial Chamber granted the Prosecution leave to adduce evidence on a previously agreed fact to which the Accused denied agreeing).

³⁷ [Contested Issues Decision](#), paras. 24, 46.

³⁸ Order, para. 3.

³⁹ [Section C.i](#) to [C.iii](#).

⁴⁰ [Section C.iv](#).

⁴¹ If applying the “reasonable prospect of conviction” standard to the evidentiary assessment, however, two factors are relevant in examining the Pre-Trial Chamber's findings. *First*, in applying the article 61(7) standard, the Pre-Trial Chamber was able to rely upon evidence of a lower probative value than would be required to prove the case at trial, including summaries of witness evidence and the evidence of anonymous witnesses: [Confirmation Decision](#), para. 41. See also [Abu Garda Confirmation Decision](#), para. 173. *Second*, the evidence was not contested by Mr Banda's Defence at the confirmation hearing: [Contested Issues](#), para. 5; [Confirmation Decision](#), paras. 17, 43.

by the deterioration of other evidence. Their evidence is referred to in this assessment where relevant.

i. Contested Issue 1: The unlawful nature of the Attack

23. The Prosecution does not foresee any significant difficulties in affirmatively establishing Issue 1. However, certain legal and factual findings relevant to Contested Issue 1 are closely related or predicate to those arising under Contested Issue 2. Accordingly, the Prosecution briefly sets out its assessment of Contested Issue 1 to provide a logical narrative of the Prosecution's case, and to facilitate an understanding of the full scope of the challenges that the Prosecution now faces in proving it.

Pre-Trial Chamber findings

24. To conclude that the Attack was unlawful, the Pre-Trial Chamber found that AMIS personnel or objects were not being used to make an effective contribution to GoS military action at the time of the Attack, and therefore had protected status at the time of the Attack.⁴² The Pre-Trial Chamber inferred this based primarily on the following circumstances:

- (i) Captain Bashir had been removed from the MGS Haskanita, almost two weeks before the Attack. His removal took place in the presence of members of the rebel groups (but not JEM).⁴³
- (ii) There was no GoS representative at the MGS Haskanita at the time of the Attack,⁴⁴ and no concrete evidence to suggest that information continued to be relayed to the GoS after Captain Bashir's removal.⁴⁵

25. Thus, the Pre-Trial Chamber found that even if Captain Bashir had inappropriately used the AMIS facilities at the MGS Haskanita, he was gone well before the Attack. His activities therefore did not affect the protected status of AMIS at the time of the Attack.⁴⁶

⁴² [Abu Garda Confirmation Decision](#), para. 89 (“[...] installations, materials, units or vehicles involved in a peacekeeping mission in the context of an armed conflict not of an international character shall not be considered military objectives, and thus shall be entitled to the protection given to civilian objects, unless and for such time as their nature, location, purpose or use make an effective contribution to the military action of a party to a conflict and insofar as their total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage”). See also para. 133.

⁴³ [Abu Garda Confirmation Decision](#), para. 141 (fns. 219-221) (citing P-0417, P-0419, P-0446).

⁴⁴ [Abu Garda Confirmation Decision](#), para. 144 (fns. 226-228) (citing P-0419, P-0420).

⁴⁵ [Abu Garda Confirmation Decision](#), para. 147 (fn. 233).

⁴⁶ [Abu Garda Confirmation Decision](#), para. 142.

Prosecution's assessment

26. The evidence continues to support the finding that the Attack was unlawful. The evidence of Captain Bashir's removal from the MGS Haskanita before the Attack is now strengthened by the recently obtained statement of P-0512⁴⁷ [REDACTED]. He stated that Bashir was the GoS representative at the camp, but had left one week before the Attack. There was no GoS representative in the camp from Bashir's departure to the day of the Attack.⁴⁸ The Prosecution considers P-0512's evidence to be credible and reliable, and corroborated by other witnesses.⁴⁹ [REDACTED] also states that GoS representatives had left the MGS Haskanita, although he places their departure a few weeks before the Attack.⁵⁰

27. The Prosecution considers there remain substantial grounds to believe that the AMIS personnel and objects had protected status at the time of the Attack, rendering the Attack unlawful. The Prosecution also considers that there are reasonable prospects of establishing this at trial provided the Chamber accepts that there are no other reasonable inferences arising from the evidence.

ii. *Contested Issue 2: Mr Banda's awareness of the factual circumstances establishing the unlawful nature of the Attack*

28. As a result of recent evidentiary developments, the Prosecution considers there are no longer substantial grounds to believe that Mr Banda was aware of the factual circumstances that established the protected status of the AMIS personnel, installations, material, units and vehicles at MGS Haskanita at the time of the Attack.⁵¹ The Prosecution case relied on a number of inferences to establish Mr Banda's awareness, including as to his motive for the Attack, and his participation in a planning meeting prior to the Attack. The Prosecution case also relied upon this planning meeting to prove Mr Banda's agreement in the common plan to carry out the Attack.

29. However, the new evidence from witness P-0512, and the fact that the Prosecution can no longer rely upon the evidence of P-0441 and P-0477, means that the evidence now more strongly supports the inference that Mr Banda believed that the GoS was receiving information from the MGS Haskanita at the time of the Attack. The Prosecution is therefore unable to

⁴⁷ The Prosecution obtained a statement from P-0512 [REDACTED]. This witness was previously not available in the investigation. See below para. 54.

⁴⁸ P-0512, DAR-OTP-00001323.

⁴⁹ P-0419 and P-0420.

⁵⁰ P-0523, DAR-OTP-0225-0065, para 47. The Prosecution obtained his statement [REDACTED].

⁵¹ [Elements of Crimes](#), Article 8(2)(e)(iii), para. 5; [Confirmation Decision](#), para. 67.

establish a requisite element of the crime under Count 2, and Mr Banda's responsibility as a co-perpetrator under article 25(3)(a). This affects its ability to prove *any* of the charged crimes.

Pre-Trial Chamber findings

30. The Pre-Trial Chamber found that there were substantial grounds to believe that Mr Banda intended to attack the AMIS personnel, installations, material, units and vehicles at MGS Haskanita, and was aware of the factual circumstances that established their protected status at the time of the Attack.⁵²

31. As to Mr Banda's awareness of the circumstances establishing the protected status of *AMIS personnel*, the Chamber inferred this from the evidence that: AMIS had regularly communicated its limited scope and mandate to the rebels, and took steps to avoid conflict with the rebels;⁵³ and only used force in self-defence.⁵⁴

32. As to Mr Banda's awareness of the circumstances establishing the protected status of *AMIS installations, material, units and vehicles*, this depended on what the perpetrators knew or believed regarding the use of these objects up to the time of the Attack. The Chamber found there was "scant evidence" to unequivocally say whether (i) Mr Banda was aware that Captain Bashir had been removed from the MGS Haskanita (which would render his participation in the Attack unlawful), or (ii) that he was not aware of Bashir's removal, or believed the base was still being used to relay information to the GoS (which would render his participation lawful, provided the Attack complied with the principles of distinction and proportionality).⁵⁵ The Chamber did not make any concrete findings to support the first scenario.⁵⁶ Instead, it discounted the second scenario, finding that it was inconsistent with the *manner* in which the Attack unfolded:

- (i) Even after the attackers hit and destroyed the telecommunications centre and combat post in the MGS Haskanita, they continued their Attack and overpowered AMIS personnel.⁵⁷
- (ii) There was no evidence that the attackers attempted to locate any GoS representative. To the contrary one group of rebels shouted "where is the OC [the AMIS Officer Commander]?"⁵⁸

⁵² [Confirmation Decision](#), paras. 85-86.

⁵³ [Confirmation Decision](#), paras. 71-74 (fns. 96-102) (citing P-0417, P-0419, P-0420, P-0433, P-0447).

⁵⁴ [Confirmation Decision](#), para. 75 (fns. 103-105) (citing P-0304, P-0307, P-0446).

⁵⁵ [Confirmation Decision](#), paras. 77-78.

⁵⁶ [Confirmation Decision](#), para. 79.

⁵⁷ [Confirmation Decision](#), para. 81 (fns. 107-109) (citing P-0420, P-0419, P-0315).

⁵⁸ [Confirmation Decision](#), para. 82 (citing P-0446).

- (iii) The attackers started pillaging as soon as they entered the compound.⁵⁹ One witness stated he believed, based on what happened after the Attack, that the motive for the Attack was to resupply the rebels with ammunition, fuel and foodstuffs in order to leave the area.⁶⁰
- (iv) One rebel group had argued with Mr Jerbo about the illegality of attacking the African Union and refused to participate.⁶¹ [REDACTED] and another disbelieved Jerbo that the reason was because the AMIS was cooperating with the GoS.⁶²

33. The Chamber discounted the evidence of four witnesses showing that the motive for the Attack was because the rebels (including Mr Banda) believed that the AMIS was giving information to the GoS about rebel positions.⁶³ The Chamber found that there were substantial grounds to believe that when conducting the Attack, Mr Banda and Mr Jerbo did not intend to target any military objective but rather appeared to have been driven by *other motives* such as pillaging goods that the rebels were lacking such as vehicles, fuel, weapons and communications equipment.⁶⁴

Prosecution's assessment

34. The following evidentiary developments now strongly support the inference that, *contrary* to the Prosecution's case theory and the Pre-Trial Chamber's findings, at the time of the Attack, Mr Banda believed that GoS representatives were using the MGS Haskanita facilities to relay intelligence to the GoS to attack the rebels. This inference prevents the Prosecution from proving an element of article 8(2)(e)(iii) in Count 2.⁶⁵ As a result, the Prosecution would not be able to establish any of the charged crimes. The *currently available evidence* raises the following issues:

- (i) Contrary to the Pre-Trial Chamber's finding that there was no evidence the attackers were looking for GoS representatives,⁶⁶ recently interviewed witness P-0512—[REDACTED]—stated that during the Attack, the attackers “were looking for BASHIR”.⁶⁷ [REDACTED].⁶⁸ The witness stated that the rebels always suspected that there was a high

⁵⁹ [Confirmation Decision](#), para. 82 (fns. 110-115) (citing P-0417, P-0419, P-0446, P-0315, P-0447).

⁶⁰ [Confirmation Decision](#), para. 83 (fn. 117) (citing P-0314).

⁶¹ [Confirmation Decision](#), para. 83 (fn. 116) (citing P-0433).

⁶² [Confirmation Decision](#), para. 84 (fns. 118-120) (citing P-0305 and P-0312).

⁶³ [Confirmation Decision](#), para. 80, citing para. 68 (fns. 86-90) (citing P-0304, P-0312, P-0314, P-0433).

⁶⁴ [Confirmation Decision](#), para. 85.

⁶⁵ [Elements of Crimes](#), Article 8(2)(e)(iii), para. 5.

⁶⁶ [Confirmation Decision](#), para. 82.

⁶⁷ Statement of P-0512, DAR-OTP-00001323, para 40.

⁶⁸ Statement of P-0512, DAR-OTP-00001323 para 40.

level of cooperation between AMIS and the GoS.⁶⁹ The Prosecution assesses P-0512 as credible.

- (ii) Another witness (P-0446) also gave evidence of this suspicion, stating that he heard from a member of a rebel group that they believed the GoS was still getting intelligence from the MGS Haskanita after Captain Bashir's removal—although the Pre-Trial Chamber discounted this aspect of his evidence, finding it inconsistent with other aspects.⁷⁰ P-0446 also stated that Captain Bashir had been using the Thuraya phone in the AMIS communication room to relay coordinates of the rebel positions to the GoS.⁷¹ P-0446 presents some credibility issues.⁷²
- (iii) The evidence of the rebels' suspicion is also consistent with the evidence that prior to the Attack, some rebels had been told by their commanders that the reason for attacking the MGS Haskanita was because AMIS was giving information or collaborating with the GoS about rebel positions.⁷³ The Pre-Trial Chamber discounted this evidence, finding instead that the rebels were driven by the motive of pillaging to resupply the rebels.⁷⁴ This was based on one witness's belief,⁷⁵ and others who witnessed pillaging taking place.⁷⁶ However the new evidence of P-0512, that the rebels were searching for Captain Bashir, is consistent with the evidence of the motive that the Pre-Trial Chamber had discounted.
- (iv) Other factors are also consistent with the attackers' motive of stopping the MGS Haskanita from being used to attack them: (i) the rebels had previously complained to AMIS and threatened to attack the base if they were attacked again by the GoS;⁷⁷ and (iii) Mr Banda had seen a GoS plane circling overhead on the morning of the Attack, and this was followed by shelling which presaged the battle of Dalil Babikir between the GoS and rebel groups.⁷⁸ This may have led the rebels to believe that the MGS Haskanita was still being used to communicate rebel coordinates to the GoS pilots that day.

⁶⁹ Statement of P-0512, DAR-OTP-00001323, para 53.

⁷⁰ [Abu Garda Confirmation Decision](#), paras. 144 (fn. 224), 145.

⁷¹ [Confirmation Decision](#), para. 69 (fn. 93).

⁷² This witness was inconsistent in some aspects of his evidence, leading the Pre-Trial Chamber to disregard some parts of his evidence, while accepting others. Compare [Abu Garda Confirmation Decision](#), paras. 144-145 with [Confirmation Decision](#), paras. 75, 82.

⁷³ [Confirmation Decision](#), para. 80, citing para. 68 (fns. 86-90) (citing P-0304, P-0312, P-0314, P-0433).

⁷⁴ [Confirmation Decision](#), para. 85.

⁷⁵ [Confirmation Decision](#), para. 83 (fn. 117) (citing P-0314).

⁷⁶ [Confirmation Decision](#), para. 82 (fns. 110-115) (citing P-0446, P-0419, P-0315, P-0417).

⁷⁷ [Abu Garda Confirmation Decision](#), para. 138 (fns. 213, 214) (citing P-0416, P-0446, P-0315, P-0355).

⁷⁸ [Agreed Facts](#), paras. 5, 15.

- (v) A significant aspect of the Prosecution's case concerns Mr Banda's participation in a meeting with Mr Jerbo and/or other commanders, prior to the Attack. The contents of this meeting are relevant to inferring Mr Banda's awareness of the protected status of AMIS personnel and objects at the time of the Attack. They are also relevant to proving Mr Banda's agreement in the common plan to commit the Attack, needed to establish his liability as a co-perpetrator under article 25(3)(a). The Prosecution alleges that Mr Banda attended a meeting on 29 September 2007 during which it was agreed to commit the Attack.⁷⁹ However, in light of the evidentiary developments discussed in the following paragraph, there are now no witnesses who can give evidence of the content of this critical meeting. There is also conflicting evidence as to how many meetings took place between the rebel commanders prior to the Attack, and which of those Mr Banda attended.⁸⁰ Nonetheless, the Parties have agreed that Mr Banda was not at a first planning meeting between Mr Jerbo and other commanders at which it was agreed to carry out the Attack, but that he met with Mr Jerbo shortly afterwards, who conveyed to him the plan to carry out the attack, in which Mr Banda agreed to participate with his forces.⁸¹
- (vi) Evidentiary developments in the case undermine the inferences that may be drawn as to the content of this meeting. Specifically, at the hearing on the confirmation of charges, the Prosecution had relied on the evidence of [REDACTED] at the time of the Attack (P-0441), [REDACTED]. The Pre-Trial Chamber cited this evidence.⁸² In the absence of any other available witness evidence, P-0441's evidence would have been critical to establishing the rebel commanders' agreement in the common plan, [REDACTED].⁸³ However, the Prosecution can no longer rely on this witness due to serious credibility issues that have arisen.⁸⁴

⁷⁹ ICC-02/05-03/09-79-Conf / ICC-02/05-03/09-79-Red ("DCC"), paras. 65-69.

⁸⁰ For example, the Prosecution in *Abu Garda*, the Pre-Trial Chamber found that a number of rebel commanders met near Dalil Babiker in the immediate aftermath of the GoS attack on 29 September 2007: [Abu Garda Confirmation Decision](#), para. 169. In the present case, it found that witnesses had seen Mr Banda and Mr Jerbo gathering with other commanders in the aftermath of the GoS attack, and one witness had heard that during this meeting the decision was taken to attack the MGS Haskanita: [Confirmation Decision](#), paras. 131-135.

⁸¹ [Agreed Facts](#), paras. 16, 18.

⁸² [Confirmation Decision](#), para. 132.

⁸³ After the parties had filed the Agreed Facts, the Prosecution decided that it was no longer necessary to rely on P-0441. However, after it appeared that another witness who gave evidence relevant to the unlawful motive for the attack and the state of mind of the attackers (P-0442) was not willing to testify *viva voce*, the Prosecution sought to reinstate P-0441 to its list of witnesses for trial: ICC-02/05-03/09-557-Conf ("Prosecution First List of Witnesses Amendment Application"), para. 5.

⁸⁴ See below [Section C.iv.a](#).

- (vii) To strengthen the evidence regarding the meeting, the Prosecution located and interviewed [REDACTED] at the time of the Attack, [REDACTED] (P-0477). [REDACTED], his evidence had significant potential to assist the Court in determining the truth in the case. He stated that the motive for the Attack was to steal vehicles, and that the attackers knew that the Attack was wrong.⁸⁵ However, P-0477 has recently engaged in conduct that has seriously undermined his credibility, rendering his evidence also unusable.⁸⁶
- (viii) There are four other witnesses who state that either or both Mr Banda and Mr Jerbo attended a meeting with other commanders in the aftermath of the attack by the GoS on rebel forces.⁸⁷ However, none give evidence relevant to the *content* of the meeting. Their evidence moreover contains some internal contradictions.
- (ix) Other factors are also consistent with the inference that Mr Banda did not know that Captain Bashir had already been removed from the MGS Haskanita, or otherwise believed that the compound was being used to convey information to GoS forces, by the time of the Attack: (i) the Parties have agreed that Mr Banda arrived in the Haskanita area on the morning of the Attack,⁸⁸ (ii) his forces were not present at the base when Captain Bashir was removed;⁸⁹ and (iii) there is no concrete evidence to show that members of the JEM-Splinter Group had knowledge of Captain Bashir's removal or that any member conveyed that information to Mr Banda prior to the Attack.⁹⁰

35. In light of the above factors, the circumstantial evidence now strongly supports the inference 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. The Prosecution assesses that the evidence no longer establishes substantial grounds to believe that Mr Banda was aware of the factual circumstances that established the protected status of AMIS installations at the time of the Attack. Consequently, there are also no reasonable prospects of proving this element of Count 2 at trial.

⁸⁵ ICC-02/05-03/09-589-Conf-Exp ("Prosecution Second List of Witnesses Amendment Application"), para. 4.

⁸⁶ See below [Section C.iv.b.](#)

⁸⁷ [Confirmation Decision](#), para. 131 (fns. 201-202) (citing P-0304, P-0305, P-0306, P-0307).

⁸⁸ [Agreed Facts](#), paras. 5, 15. The Prosecution notes however that there is evidence showing that Mr Banda arrived there about a week before the attack: P-0477, DAR-OTP-0192-0543 lines 684-687; P-0441, DAR-OTP-0171-0591 para 85.

⁸⁹ [Abu Garda Confirmation Decision](#), para. 141 (fns. 218-221).

⁹⁰ There is evidence that the rebel group SLA Minni Minawi had representatives at the MGS Haskanita: [Abu Garda Confirmation Decision](#), para. 146 (fn. 246) (citing P-0416, P-0419, P-0446, P-0420). However, there is no evidence of such representation from Mr Banda's JEM-Splinter group, an autonomous faction that broke away from the "main" JEM group in about July 2007 after Mr Banda had been dismissed as the chairman of JEM: [Agreed Facts](#), para. 4.

iii. Conclusion on the impact of recent evidentiary developments on the case

36. The Prosecution's inability to rely on P-0441 and P-0477 as witnesses in the case, and the new potentially exculpatory evidence from credible witness P-0512, fatally erode the Prosecution's ability to prove its case. This is particularly so regarding Contested Issue 2 on Mr Banda's awareness of the protected status of AMIS personnel and objects at MGS Haskanita and as such, his awareness of the unlawfulness of the Attack. These developments also affect the inferences that the Prosecution seeks to draw regarding Mr Banda's intent to commit the crimes and his agreement in the common plan to carry out the Attack.

37. In particular, P-0441 was the only witness [REDACTED], which resulted in the commission of the charged crimes.⁹¹ While the Prosecution had since found and interviewed P-0477, [REDACTED] at the time of the Attack who was partly able to fill the evidentiary gap created by the loss of P-0441 due to conduct undermining his credibility,⁹² the Prosecution is also no longer able to rely on P-0477's evidence since he has also engaged in conduct undermining his credibility.⁹³ In addition, he has become uncooperative.

38. Significantly, the Prosecution's initial assessments about the reasons for the attack on MGS Haskanita and Mr Banda's awareness of same, and how these matters could be inferred from the manner of the attack, are now expressly contradicted by P-0512's recent evidence. According to P-0512, the attackers were searching for GoS representative Captain Bashir, who had (or was suspected to have) provided an effective contribution to the GoS's military action against the rebels.

39. Moreover, if the rebels believed the MGS Haskanita was still being used to collaborate with the GoS, then the Prosecution must show that the attackers failed to distinguish between legitimate and illegitimate military objectives and/or caused disproportionate damage to protected persons and objects.⁹⁴ The evidence on the manner in which the Attack was carried out does not definitively establish the inference that it was indiscriminate or disproportionate.⁹⁵

⁹¹ [Confirmation Decision](#), para. 132.

⁹² See below [Section C.iv.a.](#)

⁹³ See below [Section C.iv.b.](#)

⁹⁴ The principles of distinction and proportionality apply in non-international armed conflicts despite the lack of a corresponding provision in the Rome Statute to the crime in international armed conflicts under article 8(2)(b)(iv) of intentionally launching attacks causing disproportionate loss of life or injury to civilians or damage to civilian objects: [Abu Garda Confirmation Decision](#), para. 88, citing ICRC, [Customary International Humanitarian Law Study](#), rule 8 (principle of distinction, definition of military objectives); rule 14 (principle of proportionality).

⁹⁵ For example: (i) the power generator was disabled at the start of the Attack, leaving the camp in darkness so it cannot be ruled out that the attackers mistakenly targeted protected persons whom they believed to be GoS personnel; (ii) the telecommunications centre of the MGS Haskanita was targeted and disabled early in the

40. In light of the above facts, there are no longer substantial grounds to believe that Mr Banda was aware of the factual circumstances that established the unlawful nature of the attack. For the same reasons, there are no reasonable prospects of convicting Mr Banda on the charges.

iv. *Specific witness issues*

41. The Prosecution provides the following further detail regarding its decision to no longer rely on two key [REDACTED] witnesses, which has significantly impacted the Prosecution's case.

a. *P-0441*

42. P-0441 was one of the witnesses cited in the Confirmation Decision, and was on the Prosecution's first list of evidence for trial submitted in 2010.⁹⁶ In light of the Parties filing the Agreed Facts, and the existence of other witness evidence relevant to proving Mr Banda's *mens rea*, the Prosecution decided that it was no longer necessary to rely on P-0441. However, once it appeared that another witness who gave evidence of the unlawful motive for the Attack and the state of mind of the attackers would not be willing to testify *viva voce*,⁹⁷ the Prosecution considered it necessary to reinstate P-0441 to its list of witnesses for trial.⁹⁸ However, in 2015, it became apparent to the Prosecution that P-0441 had engaged in conduct that significantly undermined his credibility. Specifically, the Prosecution became aware that P-0441 had fraudulently tampered with financial receipts in relation to the Victims and Witnesses Unit ("VWU") for personal gain and had been served a warning note by VWU.⁹⁹ The Prosecution disclosed its note containing this information to the Defence on 16 June 2015.

43. Subsequently, in late 2015 and early 2016, another more serious issue came to light that further undermined his credibility. P-0441 falsely alleged that Mr Banda [REDACTED]. The Prosecution investigated the allegations, which included conducting a mission to [REDACTED], and determined that this claim was entirely false and aimed at defrauding the Court.¹⁰⁰

Attack, but there is no evidence that all attackers knew of this as they were carrying out the attack, nor can it be ruled out that some attackers went beyond the scope of the agreed plan to attack the base; (iii) the majority of AMIS personnel killed were from the Protection Force—the only personnel authorised to have access to lethal arms on the base—and only two of those killed were found to be unarmed, suggesting that the attackers sought to prevent resistance to their attack to the extent necessary to complete their mission; and (iv) no post-mortem reports are available for the victims, therefore it is not possible to conclusively rule out whether they were shot in the heat of battle/caught in cross-fire or targeted indiscriminately.

⁹⁶ ICC-02/05-03/09-104 ("[List of Evidence](#)").

⁹⁷ P-0442. In the Prosecution's last contact with P-0442 in June 2022, he confirmed his willingness to testify.

⁹⁸ Prosecution First List of Witnesses Amendment Application, para. 5.

⁹⁹ Investigation note dated [REDACTED], DAR-OTP-0196-0022.

¹⁰⁰ Annex A: Investigation note dated [REDACTED], DAR-OTP-0201-0199.

44. In light of these developments, the Prosecution can no longer present P-0441 as a credible witness.

45. The Prosecution did not consider the loss of P-0441 in 2016 to be fatal to its case at the time. At that stage, it had already obtained other evidence relevant to establishing Mr Banda's *mens rea*, including a statement in 2014 from P-0477. Rather, the loss of P-0441 became significant since 2022-2023 when P-0477 also presented serious credibility issues, as set out below.

b. P-0477

46. The Prosecution first interviewed P-0477 in 2014 and its application to add him to its list of witnesses is pending before the Chamber.¹⁰¹ P-0477 was [REDACTED] at the time of the Attack [REDACTED]. This witness was able to partly fill the evidentiary gap created by the loss of P-0441 as a witness in the case.

47. P-0477 proved to be problematic shortly after being interviewed in 2014. He failed to appear to meet the VWU, and expressed dissatisfaction with VWU's efforts in dealing with him. P-0477 requested financial assistance from the Office, even though he acknowledged that his issues were not related to his cooperation as a witness. The Office informed him it could not provide assistance as his financial issues were not related to his cooperation with the Office.

48. In [REDACTED], the Office contacted P-0477 to assess his willingness to cooperate with the Prosecution. On [REDACTED], P-0477 did not attend a scheduled meeting with OTP investigators to discuss his cooperation, [REDACTED].¹⁰² [REDACTED], he met with OTP investigators and insisted that he would no longer cooperate with the OTP unless [REDACTED]. However, according to information available to the Office, such placement was not justified at the time on the basis of relevant security issues.

49. The following further significant matters arose in the context of P-0477's interactions with the OTP. Based on interactions with the witnesses, the OTP assesses that P-0477 was in contact with associates who took part in the Attack, had spoken with several of them, and may have provoked other witnesses who were due to meet with the OTP, such as [REDACTED], to disengage with investigators.

50. The OTP further assesses that P-0477 appeared to be involved in some criminal activity, and that he believes that the OTP will [REDACTED] and financially support his family. The

¹⁰¹ Prosecution Second List of Witnesses Amendment Application.

¹⁰² Annex B: Investigation report dated [REDACTED], DAR-OTP-00001088.

OTP therefore assesses that P-0477 is driven by financial motives. On 17 January 2023, P-0477 told the OTP that he would not cooperate with the Court unless [REDACTED], or were given money.

51. In light of the above, the Prosecution has determined that it cannot call P-0477.

D. All feasible investigative avenues have been exhausted

52. After Mr Banda absconded and trial preparation measures were suspended in 2014,¹⁰³ the Prosecution shifted its resources to focus on arrest efforts, and hibernated its investigation. Since resuming investigations in recent years, in particular for the past two years [REDACTED],¹⁰⁴ the Prosecution has focused on strengthening the evidence of Mr Banda's *mens rea* for the Attack and his agreement in the common plan.

53. However, the opportunities to strengthen this evidence have been limited, bearing in mind that the investigation was largely completed by the time the case was committed to trial nearly 13 years ago, with the most relevant leads having been exhausted, and fewer witnesses willing to come forward at this stage. As a consequence, the Office has broadened its analysis of the collected evidence to identify what few leads remain that could produce evidence on these issues. The Office's analysis has focused on identifying any other individuals who were referred to in the evidence collection [REDACTED], as well as individuals with knowledge of how the Attack unfolded, and the alleged activities of Captain Bashir in the camp and his removal.

54. As a result of these efforts, the Prosecution interviewed a number of new witnesses [REDACTED]. These witnesses were P-0512 ([REDACTED]) and P-0523 ([REDACTED]) whose relevant evidence is discussed above; and P-1099 ([REDACTED]), P-1097 and P-1105 ([REDACTED]), who did not provide any information that impacted the Prosecution's evidentiary assessment. The Office also re-contacted prior witnesses to confirm their continued availability and willingness to attend trial. The passage of time has resulted in the loss of contact or cooperation with many of the original witnesses that the Pre-Trial Chamber relied upon in confirming the charges.

55. The Office identified a further ten individuals, some previously known and others unknown to the Prosecution, as potentially having knowledge relevant to establishing Mr

¹⁰³ As a consequence of issuing the arrest warrant against Mr Banda, the Trial Chamber suspended all preparatory measures for trial, as well as ruling on all pending filings until Mr Banda's arrest or voluntary appearance, unless good cause was provided: ICC-02/05-03/09-606 ("[Arrest Warrant](#)"), paras. 25, 26.

¹⁰⁴ [REDACTED].

Banda's *mens rea*. Of these, some are reportedly deceased and others who have been approached by the Office are unwilling to cooperate. Others were witnesses [REDACTED] gave versions of events that contradicted the Prosecution's case theory.

56. The Office also expanded its analysis to identify six other individuals [REDACTED]. However, two of them are reportedly deceased and the Office has not been able to obtain contact details of the other four.

57. Given the information available and the leads that have been identified from the Prosecution's analysis activities, the Prosecution considers that all reasonable investigative measures have been exhausted. The Prosecution considers that there is no realistic possibility of collecting further evidence that would strengthen the case to such an extent that establishes substantial grounds to believe that all three contested issues can be affirmatively established, let alone that all elements of the crimes and modes of liability could be established to the article 61(7) standard. For the same reasons, there are no reasonable prospects of convicting Mr Banda on the charges.

Conclusion

58. The Prosecution respectfully submits this outline of its briefing for the Chamber's consideration. The Prosecution will amplify these points at the status conference, and stands ready to address any questions the Chamber may have on these issues.



Nazhat Shameem Khan
Deputy Prosecutor

Dated this 16th day of July 2026

At The Hague, The Netherlands