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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

Public redacted version of

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

To be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

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REGISTRY

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Procedural background

1. On 13 October 2023, Trial Chamber IV (the ‘Chamber’) issued its decision rejecting the Prosecution’s request¹ to withdraw the charges against Abdallah Banda Abakaer Nourain (the ‘Request’) (the ‘Initial Decision’).²
2. On 28 November 2023, the Chamber, by majority, Judge Alapini Gansou dissenting, rejected the Prosecution’s request for leave to appeal the Initial Decision, stating in particular that a decision by the Appeals Chamber ‘providing an interpretation of the legal regime for the withdrawal of charges, would not materially advance the proceedings with respect to Mr. Banda’ and that appeal could not be granted ‘on arguments addressing broader effects on the jurisprudence, as opposed to the specific trial proceedings at issue’.³
3. On that same date, the Chamber scheduled an *ex parte* status conference for 7 February 2024 for the Prosecution to provide, *inter alia* ‘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’(the ‘Order’).⁴
4. On 2 February 2024, the Prosecution filed written submissions in preparation for the status conference (the ‘Prosecution Submissions’).⁵
5. On 7 February 2024, the Chamber heard oral submissions by the Prosecution.⁶

II. Submissions and analysis

6. Although the Statue does not provide any guidance on reconsideration of judicial decisions, the case law at the Court has established that a chamber has the power to reconsider its decision upon request of the parties or *proprio motu*.⁷ Trial chambers have determined that

¹ Prosecution’s request to withdraw the charges against Abdallah Banda Abakaer Nourain and Response to Order directing the Registry and the Prosecution to provide updates, 5 October 2023, ICC-02/05-03/09-727-Conf-Exp.

² Decision on the Prosecution’s request to withdraw the charges against Abdallah Banda Abakaer Nourain, ICC-02/05-03/09-728-Conf-Exp.

³ 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’, ICC-02/05-03/09-731-Conf-Exp, para. 12.

⁴ Order scheduling a status conference, ICC-02/05-03/09-732-Conf-Exp, paras 2, 4.

⁵ Prosecution’s outline of briefing to the Trial Chamber (with two confidential, *ex parte*, only available to the Prosecution, annexes), ICC-02/05-03/09-733-Conf-Exp.

⁶ Transcript of hearing, ICC-02/05-03/09-T-028-Conf-Exp.

⁷ See Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Defence request for reconsideration and, in the alternative, leave to appeal the ‘Decision on witness preparation and familiarisation’, 9 April 2020, ICC-01/12-01/18-734 (‘*Al Hassan Reconsideration Decision*’), para. 11; Trial Chamber I, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, Public redacted version of Decision on Defence request for reconsideration of “Decision on Defence submissions on cooperation with Sudan”, 29 March 2022, ICC-02/05-01/20-650-Red (‘*Abd-Al-Rahman Reconsideration Decision*’), para. 10.

reconsideration is exceptional and should only take place if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.⁸ Chambers have also determined that new facts and arguments arising since the decision was rendered may be relevant to this assessment.⁹

7. The new submissions and information made by the Prosecution, are matters which the Chamber would have taken into account when reaching its Initial Decision. It is thus clearly in the interests of justice that the Chamber considers whether these new arguments provide good and sufficient reason to alter the Initial Decision.¹⁰

8. The Chamber, by majority, Judge Alapini Gansou dissenting, has concluded, for the reasons which follow, that the Prosecution has not demonstrated a deterioration in the evidence which affects its sufficiency to establish substantial grounds to believe that Mr. Banda committed the crimes as charged. Therefore, the Majority considers it unnecessary to reconsider its decision on the interpretation of Article 61(9) of the Rome Statute (the ‘Statute’) and restricts its reconsideration solely to the issue of the substantive basis for the request to withdraw the charges.

9. The Majority addresses first the appropriate standard under the Statute to be applied with respect to a request for leave to withdraw charges brought after the confirmation of proceedings.¹¹ The Request made reference to the test of whether the evidence supports a reasonable prospect of conviction.¹² In its Order, the Chamber reminded the Prosecution to

⁸*Al Hassan* Reconsideration Decision, ICC-01/12-01/18-734, para. 11; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Defence request seeking partial reconsideration of the ‘Decision on Defence request for admission of evidence from the bar table’, 22 February 2018, ICC-01/04-02/06-2241 (‘*Ntaganda* Reconsideration Decision’), para. 4; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance, 15 June 2016, ICC-02/04-01/15-468 (‘*Ongwen* Reconsideration Decision’), para. 4; *Abd-Al-Rahman* Reconsideration Decision, ICC-02/05-01/20-650-Red, para. 10.

⁹ *Al Hassan* Reconsideration Decision, ICC-01/12-01/18-734, para. 11; *Ntaganda* Reconsideration Decision, ICC-01/04-02/06-2241, para. 4; *Ongwen* Reconsideration Decision, ICC-02/04-01/15-468, para. 4; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba et al.*, Decision on Defence Request for Reconsideration of or Leave to Appeal ‘Decision on “Defence Request for Disclosure and Judicial Assistance”’, 22 September 2015 (notified on 24 September 2015), ICC-01/05-01/13-1282, para. 8; Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Sang Defence’s Request for Reconsideration of Page and Time Limits, 10 February 2015, ICC-01/09-01/11-1813, para. 19; *Abd-Al-Rahman* Reconsideration Decision, ICC-02/05-01/20-650-Red, para. 10.

¹⁰ See similarly, *Abd-Al-Rahman* Reconsideration Decision, ICC-02/05-01/20-650-Red, para. 10.

¹¹ As stated, the Majority has decided not to reconsider its previous finding that Article 61(9) does not provide for withdrawal of the charges after confirmation and before trial. However for the purpose of its reconsideration of sufficiency of the basis of the Request, it will consider what the applicable standard should be if such a withdrawal were permissible.

¹² Request, ICC-02/05-03/09-727-Conf-Exp, paras 1, 5, 20.

apply the statutory test as to whether there is sufficient evidence to establish substantial grounds to believe that Mr. Banda committed the crimes as charged ('substantial grounds test'). While the Prosecution proceeded in accordance with the Order applying this test applicable to confirmation decisions, the Majority considers that this issue requires further elaboration as it is essential to its reasoning and conclusion.

10. The Majority recognises that the standard of reasonable prospect of conviction exists in national systems, in particular those with an adversarial system where the Prosecutor has broad powers and discretion over the presentation and withdrawal of charges.¹³ However, this standard is not provided for in the Statute or other applicable law. Rather it is contained in policy papers of the Prosecution.¹⁴ The Prosecution has explained its use of the test as a means of ensuring that its ethical obligations are met.¹⁵

11. The Majority notes that it is open to the Prosecution to apply this standard to the assessment of cases within the investigation phase of the proceedings, especially in the context of case selection and prioritisation where the Prosecution is operating independently. However, it cannot be imposed within the judicial proceedings, in conflict with the applicable standards which govern pre-trial or trial proceedings. Importantly, the Majority recalls the hybrid nature of the Statute's system and the fact that it reflects a balance between legal traditions. Notably, in the Statute, the decision to bring a case to trial is not that of the Prosecution alone. Rather, the charges brought by the Prosecution are first considered by the Pre-Trial Chamber to determine if there is sufficient evidence to warrant a trial. The standard adopted in the Statute for this safeguard is the substantial grounds test, designed to filter out cases where the evidence is insufficient to merit proceeding to trial.

12. In the view of the Majority, it is this standard which applies from the presentation of the charges to the Pre-Trial Chamber for confirmation until the commencement of trial. It is especially the case once the Pre-Trial Chamber has determined there is sufficient evidence to meet the substantial grounds test. It is in this respect that the policy of the Prosecution does not

¹³ Office of the Director of Public Prosecutions, Public Prosecution Service of Canada Deskbook, 2023, section 2.3(4), <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p2/ch03.html>. See England and Wales, Director of Public Prosecutions, The Code for Crown Prosecutors, 2018, <https://www.cps.gov.uk/publication/code-crown-prosecutors> referring to realistic prospect of conviction.

¹⁴ See Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, para. 8. See also Prosecution's application for leave to appeal the "Decision on the Prosecution's request to withdraw the charges against Abdallah Banda Abakaer Nourain", 23 October 2023, ICC-02/05-03/09-730-Conf-Exp, paras 3, 14, 20, 22, 23; Request, ICC-02/05-03/09-727-Conf-Exp, paras 1, 5, 20, both referring to 'reasonable prospect of conviction'.

¹⁵ Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, paras 5-9.

sit comfortably with the statutory system in so far as it creates an obligation for the Prosecution to consider the evidence with a view to the reasonable prospect of conviction – a higher standard – throughout all stages of the proceedings, including post confirmation. As indicated, this standard cannot replace what is prescribed in the statutory framework once a Pre-Trial Chamber has determined that the statutory test for proceeding to trial has been met.

13. The Majority notes the motivation of the Prosecution in applying this standard to its assessment of cases and in particular the ethical concerns. Nonetheless, 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. In this context, 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 these requirements of the Rome Statute. Thus, while the Prosecution indeed must be vigilant as to the deterioration or loss of evidence, especially in cases where the trial is delayed, that assessment should remain centred on whether any changes in the evidence affect its sufficiency to meet the substantial grounds test.

14. With that context, the Majority reiterates that the issue before it is whether the changes in evidence the Prosecution has identified are such that this standard is no longer met. Moreover, the Majority notes the focus must be on the findings of the Pre-Trial Chamber, which has assessed the evidence for sufficiency and sets the facts and circumstances of the case for the trial proceedings.

15. The Majority acknowledges that the Prosecution has brought this request in good faith, based on its assessment of the evidence and after taking a variety of steps to gather alternative evidence with respect to areas of concern. Further, while originally framed to the higher standard, the Majority accepts that the Prosecution has duly reconsidered the matter with reference to the applicable standard but is of the view that it is no longer met.

16. Applying these principles, the Majority turns to the findings of the Pre-Trial Chamber and the submissions of the Prosecution as to the evidence identified as impacting on the sufficiency of the case.

17. The Prosecution advances that the deterioration of the evidence of two witnesses and exculpatory evidence from a new witness, in combination, have substantially depreciated the evidence in the case such that it should no longer proceed to trial.¹⁶

18. The Prosecution has framed its analysis of the evidence on the basis of the contested issues which were identified by agreement between the Prosecution and the Defence and subsequently adopted by the Trial Chamber as the basis for the trial.¹⁷ Further, according to the Prosecution submissions it is the second issue – Mr. Banda’s awareness of the factual circumstances establishing the unlawful nature of the Attack – which has been impacted. The analysis of the Majority is premised on those same assumptions.

19. As indicated above, the starting point for the analysis is the findings of the Pre-Trial Chamber on this point. The Majority considers it relevant to set out in more detail the nature of those findings. The Pre-Trial Chamber first found to the applicable standard that the African Union Mission in Sudan (‘AMIS’) personnel stationed at MGS Haskanita enjoyed protection afforded to civilians at the time relevant to the case. The Pre-Trial Chamber did so adopting the analysis and factual findings from the Abu Garda case including that there was “no evidence” suggesting that AMIS personnel took any direct part in hostilities or used force beyond self-defence in fact there was evidence to the contrary.¹⁸

20. Similarly, the Pre-Trial Chamber, relying on the Abu Garda reasoning and findings, decided that there were substantial grounds to believe that, at the time of the attack of 29 September, AMIS installations, material, units and vehicles stationed at the MGS Haskanita

¹⁶ Transcript of hearing, ICC-02/05-03/09-T-028-Conf-Exp, p. 31, line 24 to p. 33, line 23. During the hearing, in response to a question, the Prosecution made reference to the fact that they had lost contact with some other witnesses however they indicated that the impact of the loss of that evidence was not as significant. The Majority relies on this assertion and has focused its analysis on the three witnesses of concern the Prosecution has identified in its filing and oral submissions.

¹⁷ Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, para. 14 *referring to* the three contested issues, namely Issue 1: whether the attack on the MGS Haskanita on 29 September 2007 was unlawful; Issue 2: if the attack is deemed unlawful, whether the Accused was aware of the factual circumstances that established the unlawful nature of the attack; and Issue 3: whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations. *See* Decision on the Joint Submission regarding the contested issues and the agreed facts, 28 September 2011, ICC-02/05-03/09-227, whereby the Chamber decided that the trial would only proceed on the basis of the contested issues.

¹⁸ Corrigendum of the “Decision on the Confirmation of Charges”, 7 March 2011, ICC-02/05-03/09-121-Conf-Corr (a public redacted version was filed on 8 March 2011, ICC-02/05-03/09-121-Corr-Red) (the ‘Confirmation Decision’), paras 63 and 75 *referring to* Pre-Trial Chamber I, *The Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red (the ‘Abu Garda Decision’), paras 110, 112-125, 132.

were entitled to the protection afforded to civilian objects.¹⁹ The Majority notes that on this issue, the analysis in the Abu Garda case centred on the Defence contention that the Government of Sudan ('GoS') representatives used their presence inside the MGS Haskanita compound to provide intelligence to the GoS on the movement of the rebel troops.²⁰ In particular the evidence focused on alleged activities by GoS representative Captain Bashir.²¹ On this issue, the Pre-Trial Chamber in this case specifically recounts the relevant findings in the Abu Garda decision with the following citations²²:

[...] the Majority in the Abu Garda Case found that after the fighting that broke out in the Haskanita village on 10 September 2007, in the course of which GoS aircraft bombed the area,[footnote omitted] members of rebel armed groups, including SLA-Unity, went to the MGS Haskanita and "accused the GoS representative who was present in the MGS Haskanita, of relaying information to the GoS for the purpose of bombing their groups, and threatened that they would attack the MGS Haskanita if the GoS attacked them again." [footnote omitted] Some indirect evidence further suggested that "Captain Bashir [the GoS representative stationed at the MGS Haskanita] was using the Thuraya phone in the AMIS communication room within the MGS Haskanita to relay the coordinates of the position of the armed rebel groups to the GoS." [footnote omitted]

However, based on the same evidence as that currently before the Chamber, the Majority found in the Abu Garda Case that: "regardless of the veracity and duration of the alleged inappropriate activities performed by Captain Bashir during his stay at the MGS Haskanita, he was removed from the compound well before the attack which is the subject of the charges in the present case, and that his departure was witnessed by some members of the armed rebel groups. The alleged inappropriate activities of Captain Bashir cannot therefore be considered as having had an impact on the protected status of AMIS installations, material, units or vehicles at the MGS Haskanita at the time of the 29 September 2007 attack" [footnote omitted] and that, "even if it were to be accepted

¹⁹ Confirmation Decision, ICC-02/05-03/09-121-Conf-Corr, para. 63 *referring to* Abu Garda Decision, ICC-02/05-02/09-243-Red, para. 149.

²⁰ Abu Garda Decision, ICC-02/05-02/09-243-Red, paras 134-135.

²¹ In addition to the allegations pertaining to Captain Bashir, the defence contended he was ultimately replaced by another GoS representative who continued Captain Bashir's alleged inappropriate activity. However in the Abu Garda case this allegation was found to be unsupported by the evidence. *See* Abu Garda Decision, ICC-02/05-02/09-243-Red, paras 143-148.

²² Confirmation Decision, ICC-02/05-03/09-121-Conf-Corr, para. 69 *referring to* Abu Garda Decision, ICC-02/05-02/09-243-Red, paras 137, 138, 142, 147.

that Captain Bashir relayed information to the GoS, the evidence in any event shows that he was removed well before the attack of 29 September 2007 and that there is nothing concrete to suggest that after his removal information continued to be relayed to the GoS." [footnote omitted]

21. Evidently, these findings relate to the determination as to whether objectively the AMIS installations, material, units and vehicles stationed at MGS Haskanita were entitled to the protection afforded to civilian objects and not to the subjective element under consideration. However, these findings also underpin the Pre-Trial Chamber's determination in this case on the subjective element as to what reasonably could have informed Mr. Banda's belief as to whether this was a protected facility or not. In essence, the finding incorporated by the Pre-Trial Chamber was that there was no factual basis to the allegation that at the time of the attack the MGS facilities were being used to convey information to the GoS. On the evidence before the Pre-Trial Chamber this was information that was known to the rebel groups members who were present and witnessed Captain Bashir being removed by helicopter from the premises.²³

22. The Pre-Trial Chamber went on to note that the complaints in issue related to a specific GoS representative present in the AMIS compound, no other complaints were reported and there was no claim that AMIS personnel or others present at the facility participated directly in hostilities. On this basis the Pre-Trial Chamber found that these allegations "cannot be advanced by the perpetrators, including Abdallah Banda [...] as a ground *per se* to deny their awareness of the factual circumstances establishing the protection enjoyed by AMIS personnel".²⁴

23. The Pre-Trial Chamber proceeded to consider the issue of awareness on the basis of inferences drawn from relevant facts and circumstances with emphasis on the nature of the attack and the fact that a rebel group refused to participate in an attack directed at AMIS personnel and facilities.²⁵ In the view of the Majority, this analysis must be read holistically as there is no one fact or circumstance which alone was determinative in terms of the ultimate finding.

²³ Confirmation Decision, ICC-02/05-03/09-121-Conf-Corr, para. 69 *referring to* Abu Garda Decision, ICC-02/05-02/09-243-Red, paras 142, 147.

²⁴ Confirmation Decision, ICC-02/05-03/09-121-Conf-Corr, para. 70.

²⁵ Confirmation Decision, ICC-02/05-03/09-121-Conf-Corr, paras 72-87.

24. Within this holistic assessment the Pre-Trial Chamber specifically addressed the evidence relevant to whether the perpetrators were unaware of the removal of Captain Bashir or believed that despite his removal information was still being relayed to the GoS from the MGS Haskanita. Contrary to the submissions of the Prosecution,²⁶ the Pre-Trial Chamber did not reject the evidence supporting this contention, which was the four [REDACTED] witness statements as to what information and orders they were given. Rather the Pre-Trial Chamber considered the totality of the evidence but gave more weight to other evidence in particular the objective details of the attack itself. Thus, the Pre-Trial Chamber had considered and assessed this [REDACTED] evidence in reaching their conclusion.

25. After a detailed analysis of relevant evidence – noting specifically the manner of the attack and statements from some [REDACTED] witnesses – the Pre-Trial Chamber concluded it was sufficient to establish to the relevant standard the requisite intent and awareness on the part of Mr. Banda.²⁷

26. The Majority turns to the submissions of the Prosecution as to how the changes in the evidence impact on the aforesaid conclusions of the Pre-Trial Chamber.

27. First, the Majority considers the effect of the newly obtained evidence of P-0512 which the Prosecution submits is exculpatory and sufficiently strong to change the inference to be drawn as to the awareness of Mr. Banda as to the protections.

28. P-0512 is the sole witness who attests to the fact that the attackers were looking for Bashir asking “where is the tent of the commander and where is the tent of the government representative Bashir.”²⁸ The Chamber has not reviewed the actual statement such that the details as to who said this and in what context is not known. The Chamber has based its assessment solely on the basis of the information provided by the Prosecution in its written and oral submissions. It is clear on the basis of those submissions that the evidence does not point to Mr. Banda having been present at the time nor does it identify those who spoke as belonging to his group.²⁹

²⁶ Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, para. 33.

²⁷ Confirmation Decision, ICC-02/05-03/09-121-Conf-Corr, para. 86.

²⁸ Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, para. 34 (i).

²⁹ Transcript of hearing, ICC-02/05-03/09-T-028-Conf-Exp, p. 17, line 25 to p. 20, line 4.

29. The Majority acknowledges that the Pre-Trial Chamber specifically stated that there was no evidence to suggest that the attackers attempted to locate the GoS representative at any moment during the attack. Thus, clearly the evidence of P-0512 is relevant and potentially exculpatory. However, the Majority does not agree that it is of such significance it would have changed the conclusion of the Pre-Trial Chamber as to the sufficiency of the evidence. The Majority recalls that the analysis of the Pre-Trial Chamber considered holistically the nature of the attack, its scope and the targets, as well as the extent of the pillaging. The Pre-Trial Chamber also specifically points to the evidence that one rebel group refused to participate upon learning that it was aimed at the African Union ('AU') and the questions posed by some of the [REDACTED] to the legitimacy of the attack.³⁰ The Majority also recalls the Pre-Trial Chamber's finding that Captain Bashir had been removed from the premises well before the attack. In these combined circumstances, the fact that one or even a few of the rebels, not identified as linked to Mr. Banda and outside of his presence, mistakenly believed Bashir might be present does not detract in any significant way from the finding of the Pre-Trial Chamber. Further the Majority does not consider that the additional evidence cited by the Prosecution as being supportive of the existence of the suspicion is of relevance³¹ as all of it was considered by the Pre-Trial Chamber. In the view of the Majority, the discrete point attested to by P-0512 does not add substantial weight to this existing evidence nor does it change the conclusions reached by the Pre-Trial Chamber with respect to the same.

30. For these reasons, the Majority considers that while the evidence of P-0512 is relevant, it does not detract significantly from the sufficiency of the evidence to meet the substantial grounds test as determined by the Pre-Trial Chamber.

31. The Majority turns to consider the impact of the potential loss of witnesses P-0441 and P-0477 on the sufficiency of the evidence. Regarding the two witnesses – P-0441 and P-0477 – the Majority notes that this is not a case where either witness has died or disappeared such that his or her evidence is no longer available. Rather, the Prosecution submits that as a result of serious concerns which have arisen, the credibility of the two witnesses has deteriorated, to the point where they can no longer be presented as witnesses for the Prosecution.

32. The Majority has received information from the Prosecution as to the circumstances surrounding this conclusion and evidently that information would need to be disclosed to the

³⁰ Confirmation Decision, ICC-02/05-03/09-121-Conf-Corr, paras 83-84.

³¹ Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, para. 34 (ii), (iii), and (iv).

Defence in due course. Consistent with jurisprudence,³² at this stage of the proceedings and without having heard these witnesses the Majority will not engage in any assessment of credibility nor comment on the opinion formed by the Prosecution. The Majority notes that under the Rome Statute system, while the Prosecution may decide to withdraw witnesses from its list, this does not necessarily mean that this evidence will not be available to the Trial Chamber. In accordance with Article 69(3) the Chamber has the authority to request the submission of all evidence that it considers necessary for the determination of the truth. Moreover, as noted by the Prosecution,³³ the Chamber may require the attendance and testimony of witnesses and the production of documents and other evidence pursuant to Article 64(6)(b). Therefore, at this stage it is not possible to conclude that this evidence would be unavailable for the trial proceedings. However, in light of the concerns expressed, the evidence has been assessed on the basis of the possibility that these two witnesses would not give evidence before the Trial Chamber.

33. The Prosecution argues that P-0441 provided critical evidence which the Prosecution was relying on to establish the subjective element. Notably, [REDACTED]. [REDACTED].³⁴ However, the Majority notes that the Pre-Trial Chamber relied on this evidence when discussing the common plan not with respect to the subjective element. Moreover, while this was the only direct evidence of [REDACTED], the Pre-Trial Chamber cited a considerable amount of additional witness evidence [REDACTED].³⁵ The Pre-Trial Chamber cited this evidence cumulatively in finding that the commanders agreed to attack the MGS Haskanita.³⁶

34. With respect to subjective awareness the Prosecution argues that this evidence as to the agreement to attack the AU was an important element from which inferences could be drawn as to the motivation for the attack and knowledge of protected status. While the Majority understands this to be of relevance, as indicated, the Pre-Trial Chamber did not rely on this

³² See Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment in the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions, 31 March 2021 (notified on 1 April 2021), ICC-02/11-01/15-1400, paras 117, 316; Appeals Chamber, *The Prosecutor v. Callixte Mbarushimana*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", 30 May 2012, ICC-01/04-01/10-514, para. 48; Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011, ICC-01/05-01/08-1386, para. 37.

³³ Transcript of hearing, ICC-02/05-03/09-T-028-Conf-Exp, p. 37, lines 1-14.

³⁴ Confirmation Decision, ICC-02/05-03/09-121-Conf-Corr, para. 132, n. 203.

³⁵ Confirmation Decision, ICC-02/05-03/09-121-Conf-Corr, para. 132, n. 204.

³⁶ The only issue discussed at length by the PTC was whether the meeting included the commanders and **the troops**.

evidence from P-0441 in its consideration of the issue of subjective element. Moreover, as noted above, [REDACTED]. In this respect the Majority does not place the same emphasis on the distinction drawn by the Prosecution as between the direct and indirect evidence given as ultimately the Trial Chamber would address all evidence freely and holistically. In these combined circumstances, the Majority does not agree with the Prosecution submission that the potential absence of this evidence from P-0441, impacts on the sufficiency of the evidence to establish subjective awareness to the substantial grounds standard.

35. With respect to the evidence of P-0477 the Majority notes that his evidence – while of relevance –, formed no part of the Confirmation Decision since he was interviewed only in 2014.³⁷ In these circumstances the Majority fails to see how the potential loss of the same erodes the base upon which the Pre-Trial Chamber reached its determination that the evidence was sufficient to the standard.

36. Similarly, in this specific context of assessing the impact of changes in the evidence, the Majority does not consider relevant other evidence cited by the Prosecution which may potentially support the inference that Mr. Banda was not aware of the protected status, given all of that evidence was before the Pre-Trial Chamber. Moreover, the Majority considers there is an inherent inconsistency in the Prosecution's reliance on the lack of direct evidence that Mr. Banda knew Captain Bashir had been removed, when there is equally no direct evidence that Mr. Banda ever knew about the alleged activities of Captain Bashir at the premises of MGS Haskanita in the first place.³⁸

37. Having considered the submissions regarding the deterioration of the evidence individually and holistically, the Majority finds that the Prosecution has not demonstrated that the changes in the evidence justify the withdrawal of the charges.

38. Given this finding the Majority points out two additional issues of relevance to the sufficiency of the case which were not necessary for the Pre-Trial Chamber to consider. As touched upon briefly by the Prosecution,³⁹ if it had been demonstrated to the standard that Mr. Banda was not aware of the factual circumstances that established the unlawful nature of the

³⁷ Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, para. 46. See Transcript of hearing, ICC-02/05-03/09-T-028-Conf-Exp, p. 31, lines 13-18.

³⁸ Transcript of hearing, ICC-02/05-03/09-T-028-Conf-Exp, p. 19, line 1 to p. 21, line 6.

³⁹ Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, para. 39; Transcript of hearing, ICC-02/05-03/09-T-028-Conf-Exp, p. 27, line 19 to p. 29, line 9.

attack, an additional analysis would be necessary as to whether the attack was indiscriminate or proportional. While having heard short submissions on the point, the Majority has not analysed this issue nor reached any conclusions regarding the same. We would simply invite the Prosecution to consider in detail the evidence on this issue to the substantial grounds test.

39. Finally, the analysis of the Prosecution is premised on the charges as framed including with respect to the mode of liability.⁴⁰ The Majority would invite the Prosecution to also reflect on the evidence with a view to the power of the Trial Chamber to apply another mode of liability under Regulation 55 of the Regulations of the Court.

40. With all the above findings in mind the Majority urges the Prosecution to reconsider its assessment of the evidence in the case and its sufficiency to meet the statutory standard. Further the Chamber **directs** the Prosecution, in coordination with the Registry, to continue with efforts to locate Mr Banda and to execute the outstanding warrant of arrest.

IV. Disposition

41. For these reasons the Majority, having reconsidered its assessment in the Initial Decision of the sufficiency of the grounds forming the basis of the Request, reaches, by majority, the same conclusion to decline the Prosecution's Request to withdraw the charges against Mr Banda. The Chamber further **directs** the Prosecution and Registry to secure the arrest of the fugitive, as indicated in paragraph 40 above.

42. Judge Alapini Gansou appends a dissenting opinion to this Decision.

/Signed/

Judge Kimberly Prost

Presiding Judge

/Signed/

Judge Reine Alapini-Gansou

/Signed/

Judge María del Socorro Flores Liera

Dated this **17 July 2026**

At The Hague, The Netherlands

⁴⁰ Prosecution Submissions, ICC-02/05-03/09-733-Conf-Exp, para. 29.