

ANNEX 1

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version of Annex 1

ICC-02/05-03/09-771-Conf-Anx-1

Independent Expert Review of Prosecution Case in
Prosecutor v. Abdallah Banda Abakaer Nourain (ICC-02/05-03/09)

11 September 2023

Summary of Report and Conclusions

The *Banda* case arises from the murder of 12 peacekeepers and members of the African Union Mission in Sudan (AMIS) on 29 September 2007 during an attack on their compound in Haskanita Village, Um Kadada locality in North Darfur. Abdallah Banda Akabaer Nourain (Banda) is one of three persons charged with crimes committed during this attack. On 2 February 2010, PTC 1 declined to confirm the charges against Mr. Bahar Idriss Abu Garda (Garda). On 7 March 2011, PTC 1 did confirm charges against Banda and Saleh Mohammed Jerbo Jamus (Jerbo). The charges against Jerbo were dropped after he died in April 2013. The charges against Banda remain pending and he is currently the subject of an arrest warrant. Upon review of the legal theory and evidence in the case I have formed a view about the strength of the Prosecution case and I have an opinion about what the proper exercise of prosecutorial discretion requires.

A core event in the case is a meeting alleged to have taken place on 29 September 2007, prior to the attack on MGS Haskanita. The Prosecution alleges that Banda is criminally responsible as a co-perpetrator who shared joint control over the attack on MGS. The Prosecution must establish, with proof beyond a reasonable doubt that Banda entered into an agreement to commit crimes under the Rome Statute. Upon review of the evidence in the case, there is no direct evidence of what took place at this meeting. There are a number of witnesses who provided inconsistent, fragmented and speculative

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Independent Expert Review – *Banda* Case

evidence about what transpired at that meeting. Several of these witnesses are no longer available for trial.

Although the *Banda* Chamber found that there were substantial grounds to believe (with significant reservations about the quality of the evidence) that Banda was at this meeting and did in fact agree to co-perpetrate crimes, this conclusion is severely undermined by a subsequent Joint Submission in which the Prosecution agreed with the Defense that Banda was not present at this key meeting² and instead was informed of the decision taken during the meeting at a third brief meeting between Jerbo and Banda just prior to the attack.³ A Trial Chamber, viewing this evidence, is likely to find that the Prosecution has failed to establish several material facts necessary to prove both objective and subjective elements beyond reasonable doubt.

The evidence is also equivocal on the state of mind of the co-perpetrators when they entered into an agreement to attack MGS Haskanita. While the Prosecution's theory is that the agreement to attack was made with the knowledge that there were no GoS representatives/operatives present at MGS Haskanita, the evidence is mixed on this issue with some evidence suggesting that when rebel forces entered the camp they were looking for a specific GoS representative by name.⁴ This evidence is from a new witness designated P0512 who is likely to be deemed credible by a Trial Chamber and may raise a reasonable doubt about the criminal nature of the agreement between the co-perpetrators.

Prosecutors are entrusted with significant public resources to investigate and prosecute crimes under their jurisdiction. They are also entrusted with prosecutorial discretion to make decisions regarding the judicious use of such resources. Even where the evidence establishes a *prima facie* case against an accused, substantial grounds for a confirmation of charges, a prosecutor should exercise their discretion to not prosecute a case where the prosecutor concludes that there is a low probability of conviction given the evidence available for trial.

In my view, based on my experience investigating and prosecuting several significant international cases and having made recommendations to prosecutors, I have worked under with respect to the exercise of their discretion, it is my firm view, and recommendation to the Deputy Prosecutor, that she exercise the

² Joint Submission, Annex A, para. 16.

³ Joint Submission, Annex A, para. 18.

⁴ P0512 Statement.

[REDACTED] Independent Expert Review – *Banda* Case

authority delegated to her by the Prosecutor, to consider terminating the of the case against Banda. The probability of conviction is sufficiently low that it cannot justify imposing the hardship of testifying on the victims and witnesses in this case. The prospect of success at trial is so minimal that it cannot justify the expenditure of the resources that would be required at trial and diverting resources that are already stretched from situations where obtaining justice for victims is more likely.

This was a tragic event with grave consequences not only for the victims, but for their families, their colleagues and international efforts to bring peace to the region. My task was to examine the strength of the Prosecution legal theory and sufficiency of its evidence. None of my findings or opinions should be seen as diminishing this tragedy, the continued loss suffered by the victims’ families or the honorable service undertaken by these and all international peacekeepers.

I remain available to assist the Office of the Prosecutor if needed in this or any other matter.

[REDACTED]

[REDACTED]
Dated this 11 September 2023
[REDACTED]

Assessment Process

1. In early May, 2023, I was contacted by a member of OTP staff inquiring whether I would be willing to assist the OTP by conducting a pro bono independent expert review of a case. I was not provided any information about the case. On 23 May 2023, I was sent the terms of reference which included non-disclosure of the information I would receive. I signed the agreement after an amendment I requested was made (authorizing me to disclose confidential information pursuant to an order of a court).
2. On 30 May 2023, I met with members of the *Banda* team to be briefed on the case and the nature of the review I was to conduct. I was asked to review the legal theory of the case as well

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Independent Expert Review – *Banda* Case

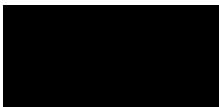
as the sufficiency of the evidence. I was not told the purpose of the review nor did anyone on the team express their individual or collective views about the case.

3. Over the course of the following weeks I was provided with materials through a secure transfer portal. These materials included court documents, witness statements and interview records as well as miscellaneous documentary evidence. I maintained these documents on a secure encrypted site I use for such work that can only be accessed by me.

4. [REDACTED]

5. I concluded my initial review of these materials on 25 August 2023. I carefully reviewed the DCC, the *Garda* Confirmation decision, the *Banda* Confirmation decision, the Joint Submission, Decision on the Joint Submission and witness testimony as necessary to understand the witness testimony beyond the characterizations in the relevant documents. The process I used included the following steps:

- a. I first studied the confirmation decisions in both the *Garda* and *Banda* cases. I reviewed the findings of the two chambers and examined the evidence they based their conclusions on. I considered their views on the strength and coherence of Prosecution evidence. I then considered whether the evidence would meet the higher burden the Prosecution would face at trial.
- b. I considered the impact the loss of evidence provided by the Dropped Witnesses would have on the Prosecution’s ability to sustain its trial burden. In particular, I identified evidentiary gaps that would undermine the Prosecution’s case unless other credible, reliable and available evidence could substitute for these losses at trial.
- c. I examined the Joint Submission (executed after both confirmation hearings) and considered the implications of this agreement for the trial. I examined inconsistencies



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Independent Expert Review – *Banda* Case

and contradictions between this document and the findings of both confirmation chambers.

- d. I did not review the statements of all witnesses in the case. I did not review the statements of those witnesses who were available to the Prosecution at the time of the *Banda* Confirmation hearing on the belief that had the Prosecution would have called these witnesses given the findings of the *Garda* Chamber.
 - e. I examined the statements of witnesses who were identified/selected after the confirmation process to determine whether these witnesses provided evidence which could appropriately substitute for witnesses that were dropped.
6. On 25 August 2023, I sent my report and summary letter in draft form. While I had well-formed views of the case, I did have some questions about whether additional evidence existed with respect to some points. I also requested information, at least in general terms, why some witnesses the *Garda* and *Banda* Chambers relied on in their decisions had been dropped. I requested this information so that I could assess whether there were procedural mechanisms available to adduce this evidence at trial that were implicated by the reason for dropping the witness (*e.g.*, death of the witness).
 7. On 7 September 2023, I participated in a second meeting with OTP staff. I sought clarification about which witnesses were available; which were not and generally why not; and explored with them their efforts to address several of the infirmities in the case theory and evidence.
 8. After my second meeting with OTP staff, I received two additional statements and a chart with the final assessments regarding the availability and credibility of witnesses. After reviewing these materials, I finalized this report.
 9. I have attached the chart of the current status of witnesses as Annex A and will use the following conventions to indicate the status of witnesses in this report.

[REDACTED]

Color	Typeface	Comment ⁵
Green	P0001	“green indicates a witness who does not have significant reliability issues, and can be called at trial, if available.”
Orange	P0001	“orange indicates a witness who may have some credibility issues, but is still sufficiently reliable to be called (or statement submitted, if deceased).”
Red	P0001	“red indicates a witness who is either uncontactable, or is so lacking in credibility as to be unusable.” ⁶

Review of Legal Theory and Evidence

10. The Garda and Banda Confirmation Chambers both correctly took the view that Count 2 (Article 8(2)(e)(iii)) was the central count of the DCC and that counts 1 and 3 depended upon confirmation of count 2. I have focused most of my analysis on count two.

Count 2: Article 8(2)(e)(iii) Directing attacks against personnel installations, material units or vehicles involved in a peacekeeping mission.

Objective Elements

11. The seven elements of count 2, as enumerated in the ICC Elements of Crimes are:

1. The perpetrator directed an attack.
2. The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.
3. The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.

⁵ The classifications were sent to me via secure transfer on 7 September 2023 in a document entitled “Lists of witnesses in Banda, ICC-02/05-03/09” (List of Witnesses).

⁶ Note, that witnesses P0312 and P0314 were designated as “green” witnesses in the List of Witnesses. However, on the last page of this list is a table titled “Summary of Dropped Witnesses” in which both witnesses are included. I have therefore treated them as dropped witnesses for the purposes of this report.

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Independent Expert Review – *Banda* Case

4. Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.
 5. The perpetrator was aware of the factual circumstances that established that protection.
 6. The conduct took place in the context of and was associated with an armed conflict not of an international character.
 7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.
12. The *Banda* Chamber, in its analysis of the objective elements of the crime (elements 1, 2 and 4 above) relied on core factual findings of the *Garda* Chamber where the findings were relevant to both cases; were not challenged by the *Banda* defense, and were supported by evidence presented in the *Banda* case.⁷
13. The core *Garda* findings that the *Banda* Chamber incorporated were:
- (i) there are substantial grounds to believe that an attack was directed against the MGS Haskanita on 29 September 2007;
 - (ii) there are substantial grounds to believe that AMIS was involved in a peacekeeping mission in accordance with the UN Charter as it was established under the auspices of the African Union, a regional agency within the meaning of Article 52 of the UN Charter with a mandate to maintain peace and security and (a) was deployed with the consent of the parties to the conflict active at the time of the agreements; (b) was impartial in its dealings with all parties to the conflict and (c) its personnel were not allowed to use force except in self-defence;
 - (iii) there are substantial grounds to believe that AMIS personnel were entitled to the protection afforded to civilians at all the times relevant to the present case; and that
 - (iv) there are substantial grounds to believe that, at the time of the attack of 29 September 2007, AMIS installations, material, units and vehicles stationed at the MGS Haskanita were entitled to the protection afforded to civilian objects.⁸
14. The *Banda* Chamber noted the complete parity between the two cases and accordingly in paragraph 64 found substantial grounds to believe that all the objective elements of count 2 were established. Given the fact that several witnesses that the *Garda* Chamber relied on will

⁷ *Banda* Confirmation Decision, para. 63.

⁸ *Banda* Confirmation Decision, para. 63.

[REDACTED]

Independent Expert Review – *Banda* Case

not be relied on by the OTP at the eventual trial of Banda, it is important to analyze the impact these Dropped Witnesses are likely to have on the OTP’s case and whether it is able to sustain its higher burden of proof at trial (proof beyond reasonable doubt). I will examine each essential finding of the *Garda* Chamber in turn below:

(i) there are substantial grounds to believe that an attack was directed against the MGS Haskanita on 29 September 2007.

15. The *Garda* Chamber found that the OTP adduced “extensive evidence” establishing that MGS Haskanita was attacked on 29 September 2007.⁹ This evidence included witness statements, UN and AU reports, media reports and press articles.¹⁰ The Chamber also noted that the Defence was not contesting this aspect of the case. The witnesses relied on by the OTP were: [P0416](#), [P0419](#), [P0417](#), [P0420](#), [P0446](#), and [P0447](#).
16. Despite the fact that the OTP will only be able to call one witness at trial who has no known credibility issues, it is my view that the OTP will still be able to sustain its trial burden on this point. The evidence of the available witnesses is corroborated by contemporaneous reports and official documents recording this significant event.
17. **Conclusion:** The current state of the evidence is likely sufficient to sustain OTP’s burden of proof at trial. Even if trial defence counsel should adopt a different strategy to counsel at the confirmation hearing and contest that this attack occurred, it is my view that a trial chamber would ultimately find the prosecution has met its burden on this element based on the current state of the evidence.

⁹ *Garda* Confirmation Decision, para. 105.

¹⁰ *Garda* Confirmation Decision, para. 105.

(ii) there are substantial grounds to believe that AMIS was involved in a peacekeeping mission in accordance with the UN Charter as it was established under the auspices of the African Union, a regional agency within the meaning of Article 52 of the UN Charter with a mandate to maintain peace and security and (a) was deployed with the consent of the parties to the conflict active at the time of the agreements; (b) was impartial in its dealings with all parties to the conflict and (c) its personnel were not allowed to use force except in self-defence;

Determination that AMIS is a peacekeeping mission.

18. The *Garda* Chamber used three principles in arriving at its determination that AMIS was a peacekeeping mission in accordance with the UN Charter. These principles are: consent of the parties; impartiality; and deadly force limited to self-defence.

Consent of the Parties

19. The *Garda* Chamber found that this criterion had been satisfied by a Protocol between the different parties to the armed conflict signed on 9 November 2004 (Modalities Agreement). This finding does not rely on any of the Dropped Witnesses and is not impugned by other evidence in the proceeding. The OTP should be able to sustain its trial burden relying on this evidence.

Impartiality

20. The *Garda* Chamber found that at all times, even under challenging circumstances, AMIS forces treated the warring parties on “equal footing”. This finding was based on the testimonial evidence of two AMIS members who remain available to the OTP for trial. There is no reason to believe that the OTP will be unable to sustain its burden on this point.

AMIS personnel were only authorized to use force in cases of self-defence (Garda, para. 118)

21. The *Garda* Chamber reviewed the mandate given to AMIS from the Peace and Security Council of the African Union. The Chamber quotes from the minutes of the meeting where the mandate was articulated – there is no explicit mention of deadly force being limited to self-defence. The court then examined an NGO report that referenced a draft Rules of Engagement (RoE) document. According to this evidence, deadly force was limited to self-defence of AMIS personnel. AMIS could only use non-lethal force to protect installations and property. The *Garda* Chamber noted in para. 116 and 117 that it only had at its disposal “indirect” references to the RoE and it relied on corroborating evidence provided by **P0446** and **P0447** about AMIS induction procedures and instructions. It concluded in paragraphs 116-118, that AMIS forces had been trained during their induction process that they were only authorized to employ deadly force in

cases of actual self-defence.¹¹ P0447 provided evidence that during [REDACTED] [REDACTED] “AMIS should not fire at or kill a rebel or member of any faction until the life of (AMIS soldiers) is totally in danger.” The evidence of P0447 will be unavailable at trial. Although the *Garda* Chamber relied on a statement of P0446, given the credibility issues related to this witness, his evidence is likely to be approached cautiously by the Trial Chamber.

22. **Conclusion:** In the current state of evidence, OTP is relying on an NGO report of a draft Rules of Engagement purported to limit the use of deadly force except for cases of self-defence. The excerpted minutes from the Peace and Security Council of the African Union do not contain any explicit mention of this and absent the evidence of P0447 and the less than fully credible evidence of P0446 this cannot be inferred. The OTP now lacks the ability to establish BRD that AMIS personnel were instructed with respect to this limitation on the use of deadly force. Given the current state of the evidence, a Trial Chamber will likely have a reasonable doubt as to whether this limitation can be established and accordingly have a reasonable doubt as to whether the OTP has established that AMIS personnel were peacekeeping troops in accordance with the UN Charter.

(iii) there are substantial grounds to believe that AMIS personnel were entitled to the protection afforded to civilians at all the times relevant to the present case; and (iv) there are substantial grounds to believe that, at the time of the attack of 29 September 2007, AMIS installations, material, units and vehicles stationed at the MGS Haskanita were entitled to the protection afforded to civilian objects.

23. I will analyze the third and fourth key finding incorporated by the *Banda* Chamber together.
24. The *Garda* Defence did not contest the fact that AMIS was a peacekeeping mission. The *Banda* defence is contesting this issue.¹² It did challenge the Prosecution’s assertion that MGS Haskanita was entitled to the protection afforded civilians under IHL. The *Garda* Defence

¹¹ In my 7 September 2023 meeting with OTP lawyers, they informed me that despite having made exhaustive and protracted efforts to obtain a copy of the final RoE, from the African Union and the United Nations they will not have this key document establishing a material fact in the case. It is likely that a Trial Chamber will find the document an essential document and draw an inference that is adverse to the Prosecution case.

¹² *Joint Submission*, para. 3(iii).

Independent Expert Review – *Banda* Case

contended that MG Haskanita was being used for military purposes and to support hostile activities that resulted in loss of life and thus deprived itself of protected status.¹³

AMIS personnel stationed at MGS Haskanita

25. The *Garda* Chamber in para. 132 of its decision, found that AMIS personnel stationed at MGS Haskanita were entitled to the protections afforded to civilians during the time of the attack. In coming to this finding, the chamber relied on the evidence of [P0416](#), [P0419](#), [P0420](#), [P0446](#), and [P0447](#). As described above, [P0447](#) will not be called at trial and the evidence of [P0446](#) merits caution by the Trial Chamber. In reaching its conclusion, the *Garda* Chamber relied on its earlier findings related to the use of deadly force which, as described above, are undermined by [P0446's](#) lack of credibility and the loss of [P0447](#). The Chamber also cited [P0447](#) with respect to flight restrictions placed on AMIS supporting a finding of [REDACTED]. Given that this finding also relies on the evidence of [P0417](#) and [P0419](#), the Prosecution may be unable to meet its burden on this point at trial.

26. Witnesses [P0417](#) and [P0419](#) provide evidence that only members of the AMIS Protection Force had access to lethal arms and that the ordinary response to rising hostilities was a retrenchment of AMIS and curtailing their activities which might be misinterpreted as provocative (the *Garda* Chamber cites an example of the muted AMIS response to an attack on a Haskanita village).

27. **Conclusion:** In my view, the current state of the evidence is not of a quantity and quality that would allow the Prosecution to sustain its trial burden to establish that AMIS personnel at MGS Haskanita were protected persons during the attack on the compound.

AMIS installations, material, units or vehicles stationed at the MGS Haskanita

28. The *Garda* Confirmation Chamber found that the Prosecution had adduced sufficient evidence to establish substantial grounds to establish that at the time of the attack “AMIS installations, material, units and vehicles stationed at MGS Haskanita” were protected civilian objects. The analysis of the court focused primarily on defense allegations that two representatives of the Government of Sudan were present on the compound and using their presence to obtain intelligence information related to opposing forces.¹⁴

¹³ *Garda* Confirmation Decision, para. 127.

¹⁴ *Garda* Confirmation, para. 133-34.

29. The *Garda* Chamber, in addressing these allegations, considered the evidence of six Prosecution witnesses: P0315, P0355, P0416, P0417, P0446, and P0447. Given, that P0417 and P0447 are no longer witnesses my analysis will be restricted to the evidence of the remaining four.
30. The evidence establishes that after GoS forces bombarded rebel troops by air on 10 September 2007, members of the rebel armed groups including Mohammed Osman went to MGS Haskanita to protest the presence of GoS personnel, and in particular Captain Bashir, who they believed were using their vantage point to provide targeting information to the GoS. They threatened to attack the base for this reason if they were attacked by GoS forces again.¹⁵ This evidence was corroborated by an African Union Investigation Report admitted in evidence.¹⁶
31. There was also evidence that Bashir used AMIS communications equipment to relay targeting information to GoS forces.¹⁷
32. This event and the threats made during it, were reported to AMIS headquarters in Al Daein. The court relied on the evidence of P0417, P0419 and P0447 to find that Captain Bashir left via helicopter on 17 September 2007.
33. **Conclusion:** Discounting the evidence of P0447 and P0417 as unavailable witnesses, the OTP must rely on the evidence of four witnesses (two with credibility problems) for a consequential issue at trial. Should a trial chamber have a reasonable doubt about whether or not Captain Bashir or other GoS personnel were present at MGS Haskanita and providing actionable intelligence to GoS forces, such a finding would undermine a finding that MGS Haskanita was protected under international law. In my view, this is a sufficiently important fact that the OTP should not rely on the evidence of four witnesses who together each give an incomplete, although complementary, accounts of this event. The Prosecution also relied on some photographic evidence of Bashir's departure, evidence that appears to have been authenticated by P0446; the OTP should consider more reliable witnesses to adduce this evidence through.

¹⁵ *Garda* Confirmation, para. 136-38.

¹⁶ *Garda* Confirmation, para. 140.

¹⁷ *Garda* Confirmation, para. 147 citing the evidence of P0419 and P0446.

34. This event, in my view, has great significance given [REDACTED] the presence of Bashir and other GoS personnel undermined the protected status of the base and [REDACTED] and facilitated Bashir leaving MGS Haskanita.
35. The absence of any GoS personnel during the time of the attack appears to rely exclusively on the testimony of P0420. It is inconceivable to me that the Prosecution would rely at trial on the evidence of a single witness for such an important point. Even witnesses perceived as “strong” prior to trial are viewed with less credibility and reliability after effective cross examination. While the *Garda* Chamber did find substantial grounds based on Prosecution evidence some of its language was tepid and equivocal.¹⁸
36. The evidence summarized by the *Garda* Chamber paints a confused and opaque picture of whether or not there may have been GoS personnel engaged in disqualifying activities at the time of the attack. My concern for the reliance on this evidence is shared by the *Garda* Confirmation Chamber which stated in paragraph 145, “The Majority further underlines the inconsistency between the statement [P0446] with respect to whether or not Captain Bashir was eventually replaced.”¹⁹
37. I reviewed the statement of P0512, a new witness. This witness was [REDACTED] [REDACTED] spent significant time at MGS. He reports that when the compound was attacked soldiers were looking for Bashir by name. This evidence so significantly undermines the evidence adduced at the Confirmation hearing as to raise a reasonable doubt at trial.
38. It is important to note the distinct difference between the different burdens of proof that apply to confirmation proceedings and trial. Under the statute the Prosecution must establish the existence of “substantial grounds” (Article 61(8)) for confirmation of the charges and proof “beyond reasonable doubt” at trial (Article 66). In the *Garda* case, the Defence argued that the principle *in dubio pro reo* applied at all stages of proceedings including during confirmation. Had the *Garda* adopted this argument, it may not have made the findings it did given the ambiguity

¹⁸ See for example, *Garda* Confirmation, para. 148. “[T]he evidence suggests that there was no representative of the GoS at the MGS Haskanita after the removal of Captain Bashir and at the time of the attack of 29 September 2007.

¹⁹ *Garda* Confirmation, para. 145.

Independent Expert Review – *Banda* Case

of the evidence on the point of whether GoS personnel were present at MGS Haskanita. The Chamber said that while significant ambiguity or contradictory evidence might result in charges not being confirmed such a result would not be the result of the application of *in dubio pro reo*

Subjective Elements

39. This confusion also has implications for the subjective requirements of the crime. Article 32 (Mistake of Fact or Mistake of Law) raises the possibility that those who attacked MGS Haskanita on 29 September 2007 were reasonably mistaken about the absence of GoS operatives engaged in hostile activities and believed that their attack on the compound was lawful under international law. Although P0304 is no longer a Prosecution witness, the *Banda* Defence is likely to rely on his evidence summarized in paragraph 68 of the *Banda* Confirmation Decision which states, “Witness 304 refers to Abdallah Banda as the commander [REDACTED] [REDACTED] the witness states [REDACTED] “there were government soldiers in Haskanita and that [they] must go there and attack”.²⁰

40. Other dropped witnesses provide similar evidence. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

41. [REDACTED]
[REDACTED]
[REDACTED]

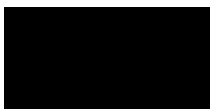
²⁰ *Banda* Confirmation, para. 68.

²¹ *Banda* Confirmation, para. 68.

²² *Note*, Although witness P0312 is designated as a “green” witness in the List of Witnesses I received on 7 September 2023, the last page of that document indicates that the witness has been dropped.

²³ *Banda* Confirmation, para. 68.

²⁴ *Note*, Although witness P0314 is designated as a “green” witness in the List of Witnesses I received on 7 September 2023, the last page of that document indicates that the witness has been dropped.



42. While not specifically considering Article 32, the *Banda* Chamber addressed the relevant facts in paragraph 77 *et. seq.* The *Banda* Chamber considered two scenarios:

- (i) The perpetrators were aware that Captain Bashir was removed; or
- (ii) The perpetrators were either not aware of the removal of Captain Bashir or believed that despite his removal, information was still related to the GoS from the MGS Haskanita.²⁵

43. The Chamber noted that “scant evidence was presented that could unequivocally support one of these two scenarios and exclude the other”.²⁶ The *Banda* Chamber’s findings regarding the first scenario are found in paragraph 79.

79. As regards the first scenario, the Chamber recalls that the complaints made by members of rebel armed groups, including SLA-Unity, only concerned the alleged misuse of AMIS facilities by a specific representative of the GoS. No other issue was raised in their complaints that might call into question the protected status of the MGS Haskanita's installations, material, units and vehicles. It follows that if it is accepted that the perpetrators were aware of the removal of the said GoS representative. Captain Bashir, then they had no other reason, following his removal, to believe on the day of the attack that any of the AMIS facilities were used to contribute effectively to military action. For these reasons, the Chamber finds that there are substantial grounds to believe that if the first scenario is accepted as proven to the required threshold, then the perpetrators were aware that the abovementioned facilities, located in the MGS Haskanita, made no effective contribution to military action at the time of the attack and were therefore protected.

44. I find the *Banda* Chamber’s reasoning, devoid of any footnotes, unpersuasive. It erroneously imputes the knowledge of AMIS personnel that Bashir had left to the attackers. This is speculative and contrary to the evidence [REDACTED] who all state that the attack was undertaken on the belief that the installation was being used by GoS personnel for military purposes. At trial, the OTP will have a heavy burden to establish that the attackers knew that all GoS personnel gathering intelligence, including Captain Bashir, had left the camp and that intelligence targeting activities had ceased.

45. While the *Banda* Chamber ultimately finds that “there is sufficient evidence to establish substantial grounds to believe that not only did the perpetrators, including Abdallah Banda and

²⁵ *Banda* Confirmation, para. 77.

²⁶ *Banda* Confirmation, para. 78.

Independent Expert Review – *Banda* Case

Saleh Jerbo, intend the AMIS personnel, installations, material, units and vehicles stationed in Haskanita to be the target of their attack on 29 September 2007, but they were also aware of the factual circumstances that established their protection at all times relevant to the attack on 29 September 2007”, it does so without citing to any specific evidence establishing Banda’s knowledge.

46. When addressing the second scenario, the *Banda* Chamber recognizes the import of the evidence of the witnesses mentioned above but finds that this evidence is counteracted by the manner in which the attack unfolded.²⁷ The *Banda* Chamber found the following factors persuasive:

1. Communications equipment was disabled early in the attack making the improper transmission of targeting information by GoS personnel impossible.²⁸
2. “There was no evidence to suggest the attackers attempted to locate GoS representatives...”²⁹
3. Pillaging began to occur shortly after the attack began.³⁰
4. Some rebel leaders refused to participate in the attack on the grounds it was an African Union compound.³¹
5. One [REDACTED] witness, believed the real motivation for the attack was to pillage and resupply the rebels.³²
6. [REDACTED]
[REDACTED]³³

47. Three of the factors that the *Banda* Chamber found persuasive relied on witnesses that will not be called at trial. **P0433** is the evidential basis for number 4; **P0314** is the basis for number 5; and **P0312** is the basis for number 6. The inference drawn from the first factor is weak given that

²⁷ *Banda* Confirmation, para. 80 (refers to paragraph 68 of its decision which sets out the relevant evidence of these witnesses).

²⁸ *Banda* Confirmation, para.81.

²⁹ *Banda* Confirmation, para.81.

³⁰ *Banda* Confirmation, para.81.

³¹ *Banda* Confirmation, para.83.

³² *Banda* Confirmation, para.83.

³³ *Banda* Confirmation, para.84.

Independent Expert Review – *Banda* Case

there is no evidence that the majority of the attackers or even the leaders of the attack were aware of the disabling of the communications equipment. It is also improbable that an attack would cease immediately once communication equipment was disabled.

48. I find number 2 unpersuasive. The absence of evidence that GoS personnel were actively being sought does not provide a strong inference that it was in fact the AMIS installation itself that was the target of the attack. Also note, that a new witness, P0512, [REDACTED] gives evidence that during the attack rebels were asking for Bashir by name. And finally, the fact that pillaging began early in the attack is a weak inference that the pillaging of protected property was the sole reason for the attack to the exclusion of terminating the ability of the installation to be used for transmitting targeting information.
49. The *Banda* Chamber engaged in separate analysis regarding attacks on AMIS personnel (Count 2) and the installation itself reasoning that while a belief that GoS personnel were on installation property might be relevant to the perpetrators' *mens rea* vis-à-vis the attack on the installation, it was not vis-à-vis relevant to the attack on AMIS personnel who the perpetrators knew were protected persons.³⁴ I am cautious about whether the reasoning underlying the *Banda's* Confirmation Chamber's distinction will be adopted by a trial chamber. Footnote 107 of the *Banda* Confirmation decision notes that one of the first things that happened during the attack was the disabling of the generator powering the lights and leaving the camp in darkness.³⁵ This is also confirmed by P0512 (new witness). The darkness that enveloped the camp in its early stages raises the question of whether OTP can establish BRD that the AMIS personnel were specifically targeted as protected persons and not mistaken for GoS personnel thought to be in the camp.
50. **Conclusion:** Unless the evidence has evolved since the confirmation decision, I do not think the current state of the evidence can meet the Prosecution's burden of proof at trial on this point.

³⁴ *Banda* Confirmation, para. 76 et seq.

³⁵ *Banda* Confirmation, f.n. 107 citing the evidence of P0420 (P0420 is available as a trial witness).

Count 1: Article 8(2)(c)(i) Violence to life and person.

51. As stated by both the *Garda* and *Banda* chambers, the determination of Count 2 is dispositive of the other two. I will therefore confine my analysis to count 1 (and count 3) to more cursory observations about the legal theory and evidence.

52. The Prosecution alleges that the following AMIS personnel were killed as a result of the attack:

[REDACTED]

[REDACTED] The Prosecution further alleges that other AMIS personnel [REDACTED]

[REDACTED] suffered substantial injuries establishing an attempt to murder them.

53. I have not been provided with the evidence (photographic, forensic, expert) establishing the cause of death of the victims or establishing their identity as AMIS personnel, such matters of proof are so rudimentary I am assuming that OTP has gathered the evidence necessary to establish the requisite facts to a trial standard.

54. The question of whether the AMIS personnel were protected persons during the time of the attack is an essential question for Count 1 and I incorporate by reference the discussion above on this point.

55. With respect to the subjective requirements of Article 8(2)(c)(i), the manner and means of death and injury caused to the victims generates the inferences necessary for the Prosecution to meet its trial burden (subject to Article 25 requirements).

56. **Conclusion:** Although several dropped witness are cited in the analysis of the *Banda* Confirmation decision, I do not see it as undermining the Prosecutions ability to ultimately establish this crime beyond reasonable doubt at trial.

Count 3: Article 8(2)(e)(v) Pillaging

57. For the reasons stated above, I will confine my analysis to some cursory observations.

58. Article 8(2)(e)(v) has two objective elements: (i) the perpetrator appropriated certain property; and (ii) the appropriation was without the consent of the owner. The Prosecution alleges that



Independent Expert Review – *Banda* Case

the following AMIS equipment was pillaged: about 17 vehicles belonging to AMIS, ammunitions and weapons from the armoury, large quantities of fuel, food, refrigerators, laptops, cell phones, Thuraya satellite phones, video cameras, uniforms, jewellery. mattresses, suitcases, tents and money.³⁶

59. The *Banda* Chamber found substantial grounds establishing the pillaging of AMIS property by Banda, Jerbo and their fighters. I am concerned that after reviewing the footnotes in this section, the majority of the evidence is provided by witnesses that have now been dropped (~~P0304~~, ~~P0305~~, ~~P0306~~, ~~P0312~~, and ~~P0433~~). Although ~~P0307~~ is available to testify at trial. I urge caution on relying on this evidence alone to meet OTP’s trial burden.

60. I am particularly concerned with the source of the evidence that Banda was seen personally stealing a vehicle. The footnote to this finding includes both dropped and trial witnesses. In paragraph 120, the *Banda* Chamber recounts some of the strongest direct evidence against Banda.

[REDACTED]

This evidence derives from the statement of ~~P0466~~, a witness who has been dropped. It is difficult to imagine that similarly strong evidence is available from another witness.

61. **Conclusion:** This count can ordinarily be established at trial in a straightforward manner. Given that the majority of the evidence adduced during the confirmation process comes from witnesses that are unavailable for trial, it is important that the proof of this count is carefully reviewed and gaps in evidence addressed.

³⁶ DCC paras. 85-87.

Individual Criminal Responsibility

Mode of Liability: Article 25(3)(a) Criminal responsibility as a co-perpetrator, or indirect co-perpetrator

62. The Prosecution alleges that both Abdallah Banda and Saleh Jerbo personally led the attack on MGS Haskanita and are liable for the crimes committed during that attack under Article 25(3)(a) which states:

25(3) In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

63. The *Banda* Chamber adopted the interpretation of Article 25(3)(a) developed by the *Lubanga* Chamber that includes the concept of co-perpetration based on joint control over the crime.³⁷

326. The Chamber is of the view that the concept of co-perpetration is originally rooted in the idea that when the sum of the co-ordinated individual contributions of a plurality of persons results in the realisation of all the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all the others and, as a result, can be considered as a principal to the whole crime.

...

342. The concept of co-perpetration based on joint control over the crime is rooted in the principle of the division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner. Hence, although none of the participants has overall control over the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task.

64. The objective elements of co-perpetration, as developed in ICC jurisprudence, and used by *Banda* Chamber are: (a) the suspect must be part of a common plan or an agreement with one or more persons; and (b) the suspect and the other coperpetrator(s) must carry out essential contributions in a coordinated manner which results in the fulfilment of the material elements of the crime.

³⁷ *Lubanga* Confirmation Decision (29 Jan. 2007) paras. 326, 342.

Independent Expert Review – Banda Case

(a) the suspect must be part of a common plan or an agreement with one or more persons;

65. The Banda Chamber found substantial grounds to believe that both Banda and Jerbo together with other JEM and SLA commanders held a meeting on 29 September 2007 during which it was decided by those present to launch an attack on MGS Haskanita and commit the crimes alleged by the Prosecution. Constituent to this finding are a number of subordinate facts. The table below enumerates these facts and the sources of evidence upon which these findings were made.

Factual Finding	Source of Evidence
A meeting was held with commanders and troops of JEM Splinter Group, SLA-Unity and SLA – Abdul Shafie in a camp near Dalil Babiker	
Witnesses mention Banda and Jerbo as participants in the meeting	
Some witnesses “claim to have seen either or both of them”	
A witness heard that during the meeting a decision was taken “to attack the AU in Haskanita”	
After the meeting commanders and troops were told to go on a “mission” to attack the MGS Haskanita compound	
The meeting was for commanders only	
The commanders who masterminded the attack included Banda and Jerbo.	
The commanders who masterminded attack “were not far removed” from the attackers.	
The command structure was loosely organized and the people “tasked” to be in charge changed over the course of the event.	
Each vehicle had a commander who blew a whistle	
Some troops were originally instructed to go behind “government soldiers in Haskanita”	

Factual Finding	Source of Evidence
“At the very latest, the troops realized that they were attacking the ‘African Union’, having learned of which some of them decided to withdraw”.³⁸	[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

66. The above chart demonstrates that most of the evidential basis for the *Banda* Chamber finding substantial grounds with respect to the first objective element will not be available at trial; what remains available is undermined by known credibility issues. The burden of establishing these allegations beyond reasonable doubt at trial rests entirely on ~~P0312~~, ~~P0314~~, ~~P0441~~ and P0442. I am unable to assess how a trial chamber is likely to view and weigh the evidence of P0442, but I have grave concerns about the Prosecution's ability to establish this definitional requirement of co-perpetrator liability.

67. The *Banda* Chamber noted that “very little evidence was provided at this stage to provide one aspect of the allegations agreed by the Prosecutor and the Defence. In paragraph 65 of the DCC it is alleged that ‘[a]t this location, [REDACTED] Banda and Jerbo held a meeting with commanders and troops of the JEM Splinter Group and the SLA-Unity [Redacted] (...)’ [REDACTED]”

68. **Conclusion:** The Prosecution's will not be able to meet its trial burden with respect to this objective element of Article 35(3)(a). The evidence currently available for trial is insufficient as a matter of law to establish this element.

(b) the suspect and the other coperpetrator(s) must carry out essential contributions in a coordinated manner which results in the fulfilment of the material elements of the crime.

69. The *Banda* Chamber understands the Prosecution to allege Banda exercised joint control over the crime and each participant was tasked with one or more of the following six essential contributions:³⁹

³⁸ *Banda Confirmation*, para. 134.

³⁹ *Banda Confirmation*, para. 137.

Independent Expert Review – Banda Case

(1) taking part in the planning meeting and agreeing on the common plan; (2) ordering their respective troops directly and through their subordinate commanders to attack the MGS Haskanita; (3) providing the needed troops, equipment and materials to carry out the attack; (4) personally leading and participating in the attack together with commanders and troops, and looting of the MGS Haskanita; (5) participating personally in the distribution and/or disposal of some of the property looted from the MGS Haskanita; and (6) failing to punish any of the perpetrators from their respective groups involved in the attack.

70. The chart below sets out the constituent subordinate findings made by the chamber with respect to each of these essential contributions.

Factual Finding	Source of Evidence
(b1) Designing and Planning the Attack	
	The Chamber incorporated para 135 by reference. The evidence set out in paragraph 135 is discussed in the previous table above.
(b2) ordering and providing troops, equipment and materials necessary to carry out the attack	
Banda was the Commander-in-Chief or General Commander of the JEM	
Banda left the main JEM on 30 June 2007 and took some troops and vehicles with him.	
After leaving main JEM Banda joined Abu Garda and went together towards Haskanita	
Banda's troops were seriously degraded by Dr. Khalil Ibrahim recovering troops and a skirmish with government troops on the morning of 29 September 2007 near Dalil Babikir	
Banda's role in the JEM-Splinter Group was as a commander	
Banda was the "Commander-in-Chief" of the mission to attack the AU compound.	
Jerbo was second in command to Banda	
(b3) Personal participation in leading the attack and looting of property from the MGS Haskanita	
The JEM splinter group was personally led by Banda and was one of the groups responsible for the attack on MGS Haskanita	

Independent Expert Review – *Banda* Case

Factual Finding	Source of Evidence
Banda was in the car leading the attack and personally fired on the compound	
Banda personally took vehicles, fuel and food.	
Banda took eight AMIS vehicles	

71. As the above chart demonstrates, many of the essential findings of the *Banda* Confirmation Chamber relied on evidence that is no longer available because the witnesses supplying that evidence will not be called at trial.

72. **Conclusion:** After reviewing the evidence I believe that while the Prosecution can prove a *prima facie* case on this element, the likelihood of it meeting its burden at trial is compromised by the number of witnesses who have been dropped or whose credibility is in question.

Key Meeting Where Agreement is Said to Have Taken Place

73. Central to the Prosecution’s legal theory is a meeting where Banda, Garda, Jerbo and others agreed to attack MGS Haskanita. The evidence is confusing on exactly when this meeting took place, who was present and who participated in the agreement upon which Banda’s criminal liability is based.

74. In the DCC (19 October 2010)⁴⁰, the Prosecution asserts that there were two meetings on 27 September 2007. One in the morning (para. 65) and a second shortly after the fighting subsided in Dalil-Babiker. During this first meeting, the DCC does not allege that any criminal agreement

⁴⁰ I was not given the DCC filed in the *Garda* case. The DCC I was provided was for the *Banda* and *Jerbo* cases. I am operating on the assumption that there were amendments to the case theory or allegations that would be material for my analysis.

Independent Expert Review – *Banda* Case

was made. It does allege at the meeting held after the fighting, that Banda was present and entered into an agreement with Garda, Jerbo and other commanders to attack MGS Haskanita.

75. In the *Garda* Confirmation Decision (8 February 2010), the Chamber states that the Prosecution in its submissions allege that the agreement to attack MGS Haskanita was made over the course of two meetings held on the day of the attack.⁴¹ According to the Chamber’s recounting of the Prosecution position, the first meeting took place after the fighting in Dalil-Babiker (2nd meeting in DCC) at the location where the retreating rebels gathered.⁴² The second meeting took place in a forest near MGS Haskanita and was attended by Garda and other commanders (Banda’s presence is implied).⁴³ This meeting is not in the original DCC.

76. The *Garda* Chamber found the Prosecution’s evidence on the first meeting to be “weak and unreliable” and incapable of supporting a finding of substantial grounds that Garda was present or participated in the meeting.⁴⁴

“The Chamber finds that the evidence tendered by the Prosecution is so scant and unreliable that the Chamber is unable to be satisfied that there are substantial grounds to believe that Mr. Abu Garda participated in any meeting in which a common plan to attack the MGS Haskanita was agreed upon.”⁴⁵

77. The *Banda* Confirmation Decision (7 March 2011) only mentions one meeting. This is the meeting where the inculpatory agreement took place. This meeting is described as a meeting that took place on 29 September 2007 after skirmishes with GoS forces (2nd meeting in the DCC, 1st in the *Garda* decision). While the *Banda* Chamber found the evidence to be inconsistent, it

⁴¹ *Garda* Confirmation, para. 163.

⁴² *Garda* Confirmation, para. 164.

⁴³ *Garda* Confirmation, para. 165.

⁴⁴ *Garda* Confirmation, para. 173.

⁴⁵ *Garda* Confirmation, para. 179.

Independent Expert Review – *Banda* Case

did find it sufficient to establish substantial grounds that the meeting took place, that Banda participated and that a criminal plan was agreed.⁴⁶

78. Both Chambers remarked at the “indirect” nature of the evidence and the fact that the Prosecution did not produce a witness who was physically present and could provide direct first-hand evidence.⁴⁷ I do not believe the Prosecution will be able to sustain its trial burden on this issue based on this evidence.

79. In the Joint Submission (16 May 2011), the Prosecution and Defence agreed to another version of the meetings held on 29 September 2007. The parties agreed that there was a meeting on the morning of the attack between Banda and Jibril; no criminal plan was agreed during this meeting.⁴⁸ The parties agreed that at about 5pm a meeting took place after the battle with GoS forces that day. At this meeting the decision to attack MGS Haskanita was agreed (1st meeting in DCC, 2nd *Garda*, 1st *Banda*) . While the agreed fact lists the participants of this meeting including Jerbo, Banda is not one of the people stated to be present. It was unclear to me whether the Prosecution agreed that Banda was not present at this important meeting or whether the parties simply failed to agree on whether he was.⁴⁹ A subsequent agreed fact clarifies this issue.

80. The Joint Submission includes an agreement about a third meeting. This meeting takes place shortly after the second meet approximately 7km southwest of Haskanita village. Banda and Jerbo met with other rebel fighters. The Prosecution agreed that at this meeting, “Mr. Jerbo informed Mr. Banda of the decision that had been taken at the meeting described in paragraph 16 above [second meeting] to attack GoS forces and the MGS Haskanita.”⁵⁰ In the Joint Submission, the Prosecution agreed that Banda was not at the critical meeting during which the criminal plan was agreed. The legal theory reflected by this concession appears to be that Banda did not participate in the agreement but acquiesced to it after the fact.

⁴⁶ *Banda* Confirmation, para. 132.

⁴⁷ *Garda* Confirmation, para. 169.

⁴⁸ Joint Submission Annex, para. 15.

⁴⁹ Joint Submission Annex, para. 16.

⁵⁰ Joint Submission Annex, para. 18.

Independent Expert Review – *Banda* Case

81. When and where Banda agreed to a common plan is perhaps the most central issue in the case. I agree with both the *Garda* and *Banda* Chambers that the evidence on what transpired at the meeting held at Dalil-Babiker where the Prosecution alleges the criminal plan was agreed is indirect, weak and inconsistent.
82. Another infirmity of the Prosecution’s proof is the temporal relationship between this meeting and whether the co-perpetrators were subjectively aware that MGS Haskanita was no longer being used by GoS to gather targeting information. The Prosecution evidence is inconsistent on this point [REDACTED] placing the time that fighters knew all GoS operatives had left at just prior to the attack.
83. The agreement in the Joint Submission that Banda was not present at the Dalil-Babker meeting compounds the inability of the Prosecution to establish both the objective element that Banda agreed with other co-perpetrators to commit crimes as well as the subjective element that he was aware at the time of the agreement that there were no GoS operative using MGS Haskanita for military purposes.

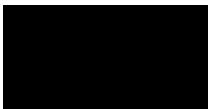
Mode of Liability: Article 25(3)(f) Attempt Liability

84. This mode relates to AMIS personnel who survived the attack. Separate analysis is unnecessary.

Joint Submission

85. On 16 May 2011, The Prosecution and Defense filed a joint submission pursuant to a direction from PTC1 that “the Prosecution and the Defense provide...an update on the status of the discussions on a possible agreement...as to facts.”⁵¹ In the submission, the Defence informed the Prosecution and the Court that it intended to contest three specific issues at trial:
- i. Whether the attack on the MGS Haskanita on 29 September 2007 was unlawful;
 - ii. If the attack is deemed unlawful, whether the Accused persons were aware of the factual circumstances that established the unlawful nature of the attack; and

⁵¹ *Banda*, Joint Submission, para. 2



Independent Expert Review – *Banda* Case

iii. Whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations.

86. These three issues are not only the most significant issues in the case but coincide with the areas of proof and legal theory where I have noted infirmities and gaps above. The Prosecution will be called upon to meet its full trial burden on these issues, one that is compromised by the current state of the evidence.
87. The agreed facts contained in the confidential annex to the Joint Submission do relieve the Prosecution of some of burden of production of evidence at trial. Having said this, it is unlikely that a Trial Chamber will enforce such agreement should Banda’s trial counsel seek to void the agreement. If the Joint Submission were to be used at trial, Mr. Kahn would have served on both sides of the agreement having negotiated it when defence counsel and enforcing it while Prosecutor. This is a clear conflict of interest that a trial chamber will remedy if requested to do so.
88. Although it is unlikely this agreement will be enforced against the Defence, it is likely that the Prosecution will be estopped from pursuing a theory at trial which contradicts it. In other words, the Prosecution will be prevented from arguing at trial that Banda was present at the Dalil-Babker meeting.

New Witnesses

89. I was provided witness statements for “new” witnesses who were identified/selected after the confirmation of the charges. I have reviewed these materials with a view to determining whether any of them have evidence which can fill the evidential gaps left by the witnesses who have been dropped or in gaps of proof that I have identified above. The notes of my review are in the table below.

Witness number	Summary of Evidence	Comment
P0512	• [REDACTED] • [REDACTED] • There was one GoS representative there named Bashir • On the night of the attack the rebels were looking for Bashir • [REDACTED] • The rebels suspected that there was a high level of cooperation between AMIS and GoS even after the departure of Bashir • [REDACTED]	P0512 provides information that undermines the confirmation decision. The Prosecution argued and the <i>Banda</i> Chamber agreed that by the time of the attack the rebels were aware that Bashir had left the camp. This witness says that the rebels were looking for him during the attack. P0512 contradicts P0523 regarding when

Independent Expert Review – *Banda* Case

Witness number	Summary of Evidence	Comment
	- The attackers initially shot at guards through the fence. AMIS returned fire and in that skirmish about 5 AMIS soldiers were killed. - Rebels destroyed the generator early in the attack	Bashir left the camp. [REDACTED] [REDACTED] [REDACTED]
P0523	[REDACTED] - There were representatives of the rebels stationed at MGS Haskanita [REDACTED] [REDACTED] [REDACTED] - Rebels insisted GoS representatives leave MGS Haskanita. - GoS representative left in early August - Believes rebel representative would have known but this is an assumption – no direct knowledge. He does believe that there is “no chance” that they did not know the GoS representative had left. - One of the attacker said to him that they were not there to harm AMIS but to take supplies that they needed. - Talks about rebels coming to the camp and firing, then leaving and then returning later that day.	P0523 provides details about the attack and the presence of GoS and rebel representatives at MGS. This witness does not have relevant evidence with respect to the key meeting where the Prosecution alleges a criminal plan was agreed.
P1097		I received copies of interview transcripts on 7 September 2023. I did a cursory review of the interview transcripts and did not find any evidence which would cause me to amend my conclusions.
P1105		I received copies of interview transcripts on 7 September 2023. I did a cursory review of the interview transcripts and did not find any evidence which would cause me to amend my conclusions.

90. I have reviewed new evidence provided by [REDACTED] and [REDACTED] working with [REDACTED]. Neither provides information or evidence which assists in addressing the infirmities and gaps identified in the case.

Conclusion

91. A core event in the case is a meeting alleged to have taken place on 29 September 2007 prior to the attack on MGS Haskanita. The Prosecution is alleging that Banda is criminally responsible as a co-perpetrator who shared joint control over the attack on MGS. The Prosecution must establish with proof beyond a reasonable doubt that Banda entered into an agreement to commit crimes under the Rome Statute. Upon review of the evidence in the case, there is no direct evidence of what took place at this meeting. There are a number of witnesses (who have

Independent Expert Review – *Banda* Case

been dropped since the confirmation proceedings in the Garda and Banda cases) who provided inconsistent, fragmented and conclusory evidence about what transpired at that meeting.

92. Although the Banda Chamber found that there were substantial grounds to believe (with significant reservations about the quality of the evidence) that Banda was at this meeting and did in fact agree to co-perpetrate crimes, this conclusion is severely undermined by a subsequent Joint Submission in which the Prosecution agreed with the Defense that Banda was not present at this key meeting and instead was informed of the decision taken there by Jerbo at a third brief meeting just prior to the attack. A Trial Chamber, viewing this evidence, is likely to find that the Prosecution has failed its burden of proving both a necessary objective element as well a subjective element.
93. The evidence is also equivocal on the state of mind of the co-perpetrators when they entered into an agreement to attack MGS Haskanita. While the Prosecution's theory is that the agreement to attack was made with the knowledge that there were no GoS representatives/operatives present at MGS Haskanita, the evidence is mixed on this issue with some suggesting that when rebel forces entered the camp they were looking for a GoS representative by name. This evidence is from a witness likely to be deemed credible by a Trial Chamber that will view such evidence as raising a reasonable doubt about the criminal nature of the agreement between the co-perpetrators.
94. It is my view that the Prosecution will be unable to establish Banda's criminal responsibility for the 29 September 2007 attack on MGS Haskanita beyond reasonable doubt.

[ICC] CONFIDENTIAL

Lists of witnesses in BANDA, ICC-02/05-03/09

Below are the different lists of evidence that have been submitted throughout the years. Some witnesses have been both dropped and added again (*for example P-0439 was dropped after the agreed facts but added back in the next iteration of the list. The status of “dropped” or “not dropped” is not particularly significant. The real issues are availability and credibility/reliability, which are in turn indicated via colour coding below.*).

Regarding the colour coding:

- red indicates a witness who is either uncontactable, or is so lacking in credibility as to be unusable.
- Orange indicates a witness who may have some credibility issues, but is still sufficiently reliable to be called (or statement submitted, if deceased).
- Green indicates a witness who does not have significant reliability issues, and can be called at trial, if available.

List of evidence Submitted pursuant to Article 61 (3) of the Statute ICC-02/05-03/09-84 Anx A, 22 October 2010 and Prosecution’s Submission of an amended list of evidence ICC-02/05-03/09-104 18 November 2010 (confirmation hearing)

NO	Witness ID	Group	Contact established
1	P-0304		Not contacted
2	P-0305		Not contacted
3	P-0306		Not contacted
4	P-0307		Contacted, willing to testify
5	P-0312		Contacted, willing to testify
6	P-0314		Contacted, willing to testify
7	P-0315		Contacted, willing to testify
8	P-0355		Contacted, willing to testify
9	P-0416		Contacted, willing to testify
10	P-0417		No contact established
11	P-0419		Contacted, willing to testify
12	P-0421		Not contacted
13	P-0420		Contacted, willing to testify
14	P-0433		Not contacted
15	P -0439		Contacted, willing to testify
16	P-0441		Not contacted

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17	P-0442		Contacted, willing to testify
18	P-0445		Contacted, willing to testify
19	P-0446		Contacted, willing to testify
20	P-0447		Not contacted
21	P-0466		Not contacted

Prosecutions revised list of Evidence and witnesses, in light of the Agreement on Facts between the Parties, ICC-02/05-03/09-162, 13 June 2011

NO	Witness ID	Group	Contact established
1	P-0307		Contacted, willing to testify
2	P-0314		Contacted, willing to testify
3	P-0433		Not contacted
4	P-0416		Contacted, willing to testify
5	P-0417		No contact established
6	P-0419		Contacted, willing to testify
7	P-0420		Contacted, willing to testify
8	P-0446		Contacted, willing to testify
9	P-0445		Contacted, willing to testify
10	P-0326		Contacted, willing to testify
11	P-0315		Contacted, willing to testify
12	P-0355		Contacted, willing to testify
13	P-0442		Contacted, willing to testify
14	P-0441		Not contacted
15	P-0466		Not contacted

In the revised list of evidence the Prosecution dropped P-0304, P-0305, P-0306, P-0312, P-0421, P-0439, P-0447.

[ICC] CONFIDENTIAL

Prosecution's Updated list of Witnesses ICC-02/05-03/09-189-AnxA, 5 August 2011

NO	Witness ID	Group	Contact established
1	P-0307		Contacted, willing to testify
2	P-0416		Contacted, willing to testify
3	P-0417		No contact established
4	P-0419		Contacted, willing to testify
5	P-0420		Contacted, willing to testify
6	P-0446		Contacted, willing to testify
7	P-0445		Contacted, willing to testify
8	P-0326		Contacted, willing to testify
9	P-0315		Contacted, willing to testify
10	P-0355		Contacted, willing to testify
11	P-0442		Contacted, willing to testify
12	P-0439		Contacted, willing to testify
13	P-0485		Contacted, willing to testify
14	P-0486		Contacted, willing to testify
15	P-0487		Contacted, reluctant to testify

In the updated list of Witnesses the Prosecutor dropped P-0314, P-0433, P-0441, P-0466 and added P-0439, P-0485, P-0486 and P-0487.

Prosecution's Updated List of Evidence and List of Witnesses ICC-02/05-03/09-469, 2 May 2013

This is the last filing I can find in RM before the pending additions, regarding witnesses the Prosecutions list of witnesses remains the same as the list filed on 5 August 2011.

Prosecution application to amend its lists of witnesses and evidence ICC-02/05-03/09-557-Conf, 11 April 2014, pending

[ICC] CONFIDENTIAL

NO	Witness ID	Group	Contact established
16	P-0441		Not contacted
17	P-0449		Deceased
18	P-0455		Contacted, willing to testify
19	P-0460		Contacted, willing to testify
20	P-0511		Contacted, willing to testify

Second Prosecution application to amend its lists of witnesses and evidence and request for authorisation of redactions, ICC-02/05-03/09-589-Conf-Exp, 7 July 2014, pending

NO	Witness ID	Group	Contact established
21	P-0477		Contacted, credibility and cooperation issues

Summary of dropped witnesses

NO	Witness ID
1	P-0304
2	P-0305
3	P-0306
4	P-0312
5	P-0314
6	P-0421
7	P-0447
8	P-0466
9	P-0433

5 new witnesses have been interviewed during 2022-2023

NO	Witness ID	Group
1	P-1105	
2	P-1097	
3	P-1099	
4	P-0523	
5	P-0512	