

Status Conference

(Closed Session)

ICC-02/05-03/09

1 International Criminal Court
2 Trial Chamber IV
3 Situation: Darfur, Sudan
4 In the case of The Prosecutor v. Abdallah Banda Abakaer Nourain - ICC-02/05-03/09
5 Presiding Judge Kimberly Prost, Judge Reine Alapini-Gansou and
6 Judge María del Socorro Flores Liera
7 Ex Parte Status Conference (OTP and Registry only) - Courtroom 1
8 Wednesday, 7 February 2024
9 (The hearing starts in closed session at 9.32 a.m.)
10 THE COURT USHER: [9:32:35] All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE PROST: [9:32:57] Court officer, if you could call the case, please.
14 THE COURT OFFICER: [9:33:01] Good morning, Madam President, your Honours.
15 This is situation in Darfur, Sudan, in the case of The Prosecutor versus
16 Abdallah Banda Abakaer Nourain, ICC case number ICC-02/05-03/09.
17 And for the record, we are in closed session.
18 PRESIDING JUDGE PROST: [9:33:19] Thank you very much.
19 If I could have the appearances, please, Deputy Prosecutor Khan.
20 MS KHAN: [9:33:28](Microphone not activated)
21 THE INTERPRETER: [9:33:31] Microphone.
22 MS KHAN: [9:33:36] I appear today with Julian Nicholls, senior trial lawyer;
23 Helen Brady, who's senior appeals counsel; Cara Pronk-Jordan, behind me, who is the
24 legal coordinator; Pubudu Sachithanandan, who is a trial lawyer; Karin Lundstrom,
25 trial lawyer; Nivedha Thiru, associate appeals counsel; and Claire Sabatini, who is

1 case manager.

2 PRESIDING JUDGE PROST: [9:34:04] Thank you, Madam Deputy Prosecutor.

3 If I could hear from the Registry now, please, for the appearances.

4 MS BERTRAND: [9:34:18](Interpretation) Your Honour, your Honours, good

5 morning. For the Registry today, (Redacted)

6 (Redacted); and myself Anne-Aurore Bertrand, I'm a counsel in legal cooperation.

7 PRESIDING JUDGE PROST: [9:34:41] Thank you very much.

8 Madam Deputy Prosecutor, we'll be hearing from the Prosecution first on the issue of

9 the basis for the request for withdrawal. I would like to start by saying that we, the

10 Chamber has received the filing, of course, that was presented by the Prosecution,

11 which was indeed helpful in terms of focussing on the issues. You can take it as

12 given that the members of the Bench have read that carefully, so that you can make

13 your presentations accordingly, focussing on key points. We have obviously looked

14 through -- through the materials.

15 So, with those brief remarks, I invite you to make your submissions.

16 MS KHAN: [9:35:25] Thank you, Madam President.

17 As your Honours are aware, on 5 October we applied for leave to withdraw all

18 charges in this case, and leave was refused. And then we applied for leave to appeal

19 against that decision, and that was refused by majority. And on 28 November last

20 year, the Prosecution was instructed to provide a detailed briefing to the Trial

21 Chamber for the basis of the application we initially made. So this is the status

22 conference in relation to that instruction.

23 The test we apply, as you will see from the briefing that we have provided to you, is

24 the test of whether we have substantial grounds to believe, but our view is, and my

25 submission is, that in fact, on the facts of this case and the evidence as we know it, we

1 do not pass either test of either substantial grounds or reasonable prospects of success.

2 But for the purpose of this process, we apply substantial grounds to believe.

3 As your Honours, Madam President, as you're aware, the Prosecutor is recused from

4 this case and I have taken responsibility and control over the case because of that

5 recusal, and so the decisions and the recommendations and applications made in this

6 case are entirely mine.

7 Let me start with the issue of the withdrawal of charges and the impact on the

8 withdrawal on the parties.

9 We know that when we make an application for withdrawal that this is a very serious

10 matter, it's a very serious matter for the accused, it's a very serious matter for victims,

11 it's a serious matter for the Court. So we don't take this decision lightly to make this

12 application because we are very well aware of the impact on the trial and the fairness

13 of the proceedings.

14 But we do * have a responsibility, as Prosecutors, to behave in a way which is in

15 accordance with the standards expected of prosecutors, not just in this court but

16 internationally. And we are also very aware of the standards that are imposed by

17 the Rome Statute on the conduct of Prosecutors. In particular, I refer to Article 42(1)

18 on the powers of the Prosecution, Article 54(1)(b), as well as paragraph 51 of the

19 Code of Conduct of the Office of the Prosecutor. And of course we have set these

20 references out in full in the briefing that your Honours have before you.

21 If I may, Madam President, may I just trace the basis of this ethical duty, because it's

22 worth remembering that, ultimately, the basis of the discretion of the Prosecutor

23 comes from the right to a fair trial, and that is quoted over and over again in

24 international standards when defining the scope and our responsibilities as

25 Prosecutors. And, in particular, in 1990, the United Nations Congress on the

1 Prevention of Crime and Treatment of Offenders defined exactly how we should
2 approach the issue of continuing processes. So not only must we not charge people
3 with sufficient evidence, but we must be certain that there's a reasonable basis for
4 continuing with that. And particularly, the United Nations Congress referred to in
5 its preamble to the Universal Declaration of Human Rights -- (Overlapping speakers)

6 THE INTERPRETER: [9:38:59] Message from the interpreters: excessive speed.

7 MS KHAN: [9:39:05] (Overlapping speakers)

8 And then, subsequently, the International Association of Prosecutors issued their
9 standards of professional conduct for prosecutors in 1999 -- I will be slow, Madam
10 President.

11 And in that also, Prosecutors were requested and expected to not only prosecute with
12 a sufficient basis, but that they would not continue with a prosecution on the basis of
13 evidence which is reasonably believed to be reliable and admissible. So this is the
14 International Association of Prosecutors.

15 And then, subsequently, the Council of Europe -- and I mention the Council of
16 Europe because in the event that, you know, there might be an argument that we're
17 talking here about an adversarial system of justice, actually, even the civil law
18 jurisdictions accept that Prosecutors have this duty of continuously evaluating the
19 evidence and only continuing if they have sufficient, and that is also included in the
20 recommendations in 2000 made by the Committee of Ministers of the Council of
21 Europe, and again also based on the right to a fair trial.

22 So, really, we have a duty, and we have a duty to continuously evaluate the state of
23 our cases, and we did so in this case. And in particular, in order to protect the
24 fairness of the proceedings, the efficient administration of justice, the integrity of the
25 proceedings, we did so in a way that was rigorous, where -- and you will hear shortly

1 from Mr Nicholls the efforts that we made to try and find new evidence in order to
2 address any gaps that we might have anticipated. And, really, this process has taken
3 some time, it's been rigorous, but it has been a very serious process and it reflects the
4 seriousness with which we take * these proceedings.

5 So given all of that, and given our ethical duty, what is a Prosecutor to do given the
6 framework of the Rome Statute?

7 So we know at one stage that we do not consider that we have passed the threshold of
8 substantial grounds or of our own internal policy.

9 Are we to wait until the trial commences and not tell the Court, not tell anyone, sit on
10 that information? Is that consistent with our ethical and legal duties and is that
11 something for which the Rome Statute should somehow find a solution in the
12 interests of the fairness of the proceedings?

13 So that's one question.

14 The second, and this is really relevant to the issue of delay, because we have seen
15 considerable delay from the confirmation of charges to now the position that we find
16 ourselves in, with no trial commencing, but with a constituted Trial Chamber.

17 The longer these proceedings delay, whilst we know, the Prosecution knows that we
18 don't have sufficient evidence to justify continuance, what is the impact on fairness of
19 proceedings?

20 And lastly, when we do make an application - and here the jury is out on whether we
21 can apply, with or without leave - for withdrawal, but if at any stage of the
22 proceedings -- and I'm not speaking here specifically of this stage, so throughout the
23 Rome Statute framework, whether we apply for leave or whether we inform the
24 Court that we wish to withdraw, how much information should we tell the Court?

25 How much information at granular level should we tell the Court, and is that decision

1 then influenced by how far in the proceedings we are?

2 So if we are halfway through a trial and we find we cannot proceed, how much
3 information should we give the Court, ensuring that we protect the integrity of the
4 process, ensuring the judges don't know too much so that they can continue if they
5 refuse leave, and ensuring that, given the public nature of our proceedings, that the
6 integrity of the Court is protected also?

7 These are important issues also for the integrity of the proceedings and the
8 administration of justice.

9 So that, in summary, is some of the ethical and policy issues that I wanted to bring to
10 your attention. But I'm now going to give the floor to Mr Nicholls, who's going to
11 provide a brief overview of the procedural background in this case, the contested
12 issues, the rigorous process followed by the Prosecution to assess the strength of the
13 case against Mr Banda, including by the use of internal and external review
14 processes. And he's also going to summarise the principal findings of
15 the Prosecution regarding the changes in the evidence which then led to our making
16 the request to withdraw the charges. And thereafter, after Mr Nicholls,
17 Mr Sachithanandan will discuss the key witnesses whose evidence have made a
18 difference to the way that we were approaching this case. And in particular, he's
19 going to talk about the evidence of P-477, P-441 and P-512 and the impact of what
20 they're saying on the rest of the evidence and the sufficiency of evidence. He will
21 also address the efforts taken by the Prosecution to collect additional evidence and
22 also the impact of the change in all the circumstances.

23 So, with your leave, I'll take my seat and I'll now give Mr Nicholls an opportunity to
24 address you.

25 PRESIDING JUDGE PROST: [9:44:55] Thank you, Madam Deputy Prosecutor.

1 Mr Nicholls, please.

2 MR NICHOLLS: [9:44:57] Good morning, Madam President. Good morning, your
3 Honours. I'll be fairly brief.

4 As the Deputy Prosecutor said, just first a quick background. As we all know, the
5 contested issues in this case were narrowed based on an agreement which was
6 accepted by the Trial Chamber on 28 September 2011. And the main issue before us,
7 we all know what the issues are, is issue 2: If the attack was deemed unlawful,
8 whether the accused was aware of the factual circumstances that established the
9 unlawful nature of the attack, the *mens rea* essentially.

10 As we were getting ready for trial, almost immediately after I arrived at this Court, *
11 the first trial date was in May 2014, Mr Banda made clear he was not going to appear.
12 That was continued to November 2014, and again, the Trial Chamber constituted at *
13 that time was clear that he was not going to appear, that he may not have been able to
14 appear and issued the arrest warrant and, at the same time, stayed all pending
15 litigation, of which there was quite a lot, but essentially stayed the case.

16 After the arrival of the Deputy Prosecutor, and looking carefully at this case, and after
17 having had some meetings with the new Defence counsel, we began renewed efforts
18 to investigate the gaps and strengthen the case. This was part of and followed an
19 intensive and really deep dive into the evidence that involved not just everybody you
20 see before you, but others brought in from the Prosecution.

21 So we recontacted 477, a critical witness who was interviewed after the confirmation
22 decision. We interviewed P-512, a witness we'd been seeking to interview for a very
23 long time, but this was the first opportunity that we were able to actually find him
24 and gain access to him. And we made extensive, not just investigative but also
25 analytical, efforts to try to figure out how we could fill these gaps which we'd

1 identified. And to do that, we borrowed analysts from other teams, some of what
2 we considered the best analysts in the building at our disposal.

3 There was a major evidence review, as I said, that was in February '23, and included,
4 as I say, what we thought were some of the top lawyers and investigators who could
5 help us go through this case.

6 The joint assessment that was written up after that review in March 2023 was
7 unanimous that there was no reasonable prospect of conviction, which is what we
8 were looking at during that review.

9 The Deputy Prosecutor decided that it would be a good idea to also engage an outside
10 expert to take a totally independent look at the case, the evidence as it stood, and the
11 prospects for success. And that was done by (Redacted) who, as you know, has long
12 prosecutorial experience as well in these types of cases. His assessment, the last
13 sentence of his report states that the Prosecutor will be unable
14 to establish Banda's criminal responsibility for the 29 September 2007 attack on
15 MGS Haskanita beyond reasonable doubt and he recommended that we seek to
16 terminate the case.

17 So consequently, in light of our investigation, in light of our analysis, it is eminently
18 clear to us in the Prosecution - and there is probably more years of experience here
19 than we'd like to admit in prosecution sitting at these tables - that 477 was not
20 credible, could not be used, and then he refused any further contact with us.

21 441, we'd already seen was not credible, had imploded as a witness and could not
22 feasibly be called under any circumstances.

23 P-512, who, again, (Redacted), weren't able to -- because we knew about him, but
24 weren't able to locate him and interview him.

25 In fact, we were able to locate him, excuse me, but we were not able to interview him

1 for various reasons, including that he was in (Redacted) and there was no cooperation,
2 provided credible and highly exculpatory evidence, which alone raises doubt as to
3 issue 2's provability.

4 In terms of the additional investigation - and Mr Sachithanandan will discuss this
5 more in a few moments - the approach we took was to look at the case, look at the
6 gaps and look at everybody who might be a witness who could fill those gaps, and
7 we used a sort of concept of concentric circles, so trying the closest to the events who
8 could provide that evidence. When we were not able to interview or get the
9 evidence from those people or fill the gaps, we went out another circle, and
10 eventually that circle was so big that we concluded it was impossible and not feasible
11 to continue further.

12 So, consequently, in our view, there were no substantial grounds to believe that
13 Banda is responsible and that we would be able to prove his responsibility for these
14 crimes. And again, this hinges mainly - I won't repeat it, it's in our filing - on
15 contested issue 2.

16 The degradation of this evidence, the loss of Witnesses 441, 477, and the exculpatory
17 credible evidence of P-512 cumulatively have eroded our ability to prove Mr Banda's
18 *mens rea*.

19 In our discussions with the Defence, I'll just say that regardless of -- it's speculative to
20 try to predict whether and when Mr Banda would voluntarily surrender, but they've
21 made it clear that they are investigating and that when he does surrender, he will
22 push for a speedy trial, that he will hope for a trial to start within three months, which
23 means if these gaps are unfillable -- are not able to be filled now, there is no way that
24 we'd be able to do it before a trial started, even if it wasn't three months.

25 I'll turn over the floor to Mr Sachithanandan now, but just in summary, we can't

1 prove the *mens rea*, we can't prove issue 2, and that means we can't make the case
2 under substantial grounds or any higher grounds. Thank you.

3 MR SACHITHANANDAN: [9:53:43] Just one minute, your Honour, I'm just setting
4 up my lectern.

5 Your Honour, I'll pick up where Mr Nicholls left and I'll begin by stressing again the
6 importance of viewing the changes cumulatively, because it's the cumulative impact
7 of these changes that has brought us below the threshold of substantial grounds to
8 believe; that is to say, the loss of 477, the loss of P-441, the new evidence of P-512 and
9 the exhaustion of investigative avenues.

10 Let me begin with P-477. P-477 is a key witness (Redacted)

11 (Redacted)

12 (Redacted). His evidence is important (Redacted)

13 (Redacted) because he provides direct evidence about the intent or reason for the
14 attack. He refers to the fact that the motive for the attack was the looting of vehicles
15 and he adds that the -- any idea of the AU housing or supporting the GoS, the
16 Government of Sudan, was merely a pretext. In that sense, his evidence directly
17 supports the Prosecution's theory -- or, at least, the previous Prosecution theory that
18 the attack had nothing to do with any perceived loss of protection by

19 MGS Haskanita, by the objects within MGS Haskanita, or the personnel within
20 MGS Haskanita.

21 That, however, your Honour, is not the sole significance of P-477. By the fact that he
22 was (Redacted) and by the fact that (Redacted), he is also in a position -- or he was in
23 a position to set on record the position of authority of Mr Banda, Mr Banda's general
24 control over aspects of the attack and, therefore, Mr Banda's access to information
25 regarding the nature of the attack.

1 As you can imagine, this would have been useful for the Prosecution in setting out an
2 argument by inference about what Mr Banda's mental element was and to support the
3 Prosecution's submissions at a trial with regard to contested issue 2.

4 So that is the dual significance of P-477. He could have testified about the reason for
5 the attack and he could have testified about Mr Banda's position of authority and the
6 consequent access that Mr Banda would have to knowledge or information about the
7 nature of the attack.

8 Moving on to P-477's credibility and reliability. We had had some difficulties with
9 P-477 before our recent reinvestigation, as it were, but as Mr Nicholls mentioned, we
10 made a comprehensive effort to recontact witnesses, rebuild rapport and see who was
11 willing to testify. And during the course of our interactions with P-477, it became
12 obvious to us that -- or there were a number of factors which indicated a financial
13 motive for cooperation. There were requests for funds with regard to (Redacted)
14 where P-477 requested funds to (Redacted) in order to come and see the Prosecution.
15 Then there were repeated requests (Redacted)
16 (Redacted) for the witness as a condition of cooperation.

17 And somewhat problematically, around the time that P-477 was in contact with us,
18 and discussing his own cooperation, a number of other witnesses -- a number of other
19 potential witnesses from the same group who were meant to speak to the Office of the
20 Prosecutor ceased cooperation or did not appear, which gave the Prosecution cause
21 for concern as to whether there was some collusion or some influence by P-477 upon
22 these other witnesses.

23 Taken cumulatively, considering P-477's apparent financial motivations and his
24 refusal to cooperate, the Prosecution found him unusable, which, as I've already said,
25 your Honour, has a significant impact on the Prosecution case because of the

1 important evidence that P-477 would have been able to provide.

2 Moving on to P-441, your Honour. P-441 has a similar profile to P-477 in the sense

3 that P-441 was (Redacted). Your Honours will recall Mr Abu Garda was another

4 commander within the same JEM-Splinter Group in which Mr Banda served.

5 Mr Banda and Mr Abu Garda were the principal commanders of that JEM-Splinter

6 Group. Therefore, P-441 (Redacted)

7 (Redacted) could

8 describe in detail Mr Banda's position of authority, control over the attack and access

9 to information about the attack.

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 So as you can imagine, your Honour, this is a witness who can testify as to the

20 reasoning behind the attack, as well as Mr Banda's capacity to control the attack and

21 obtain information about the nature of the attack, all of which are relevant to

22 contested issue 2.

23 Moving on to the credibility of P-441, your Honour, I will not repeat in detail the

24 information already set out in Prosecution's written submissions, but needless to say,

25 we discovered that P-441 had tampered with financial receipts in an attempt to

1 defraud the victim's unit. We discovered that P-441 had, in fact, orchestrated a false
2 (Redacted) in order to defraud the Court and, lest I forget, also blamed Mr Banda for
3 this (Redacted).

4 All of which to say that the Prosecution is not able as professional prosecutors to rely
5 on P-441, despite the importance of his evidence.

6 Now that I've described the loss of important evidence, your Honour, let me move on
7 to the new evidence that the Prosecution has obtained.

8 Your Honours, during the course of the confirmation hearing with regard to

9 Mr Banda and during our preparations for trial in 2013, '14, '15, the Prosecution

10 placed much weight on the fact that there was no apparent effort during the course of
11 the attack by the attackers to search for any particular Government of Sudan

12 representative. The Prosecution placed heavy emphasis on what this meant. The

13 fact that there is -- there was no support for the Defence case theory that the attack

14 was indeed an effort to remove a Government of Sudan spy within a tainted AU base

15 and this was in fact even noted by the Pre-Trial Chamber in its confirmation decision.

16 Now, this scenario changed dramatically with the interview of P-512 who describes

17 (Redacted), they were searching for the base commander but also,

18 importantly, the attackers were searching for Mr Bashir, the Government of Sudan

19 representative.

20 This was a significant blow to the Prosecution's theory that there was no attempt to

21 search for the Government of Sudan representative. Needless to say, as Mr Nicholls

22 already mentioned, there is no reason for the Prosecution to believe that P-512 is

23 lacking in credibility, he seems to be a credible witness, and therefore there is no

24 reason to disbelieve his evidence on this point.

25 We then come to the cumulative impact of all three of these witnesses. Your Honour,

1 we have lost the capacity to support the Prosecution's case theory about the reason for
2 the attack because we do not have direct evidence of the planning of the attack. We
3 have lost our principal witnesses who can talk about the position of authority of
4 Mr Banda, Mr Banda's access to information, all the ingredients needed for
5 supporting our arguments under contested issue 2.

6 We have also now lost the capacity to make an argument by inference basing it on the
7 nature of the attack. The Prosecution had previously intended to make submissions
8 about the nature of the attack as an indicator of Mr Banda's mental element, under
9 contested issue 2. However, these inferences can no longer be drawn to the standard
10 of substantial grounds to believe because of the evidence of P-512, and that is where
11 we are today, your Honour.

12 But let me discuss briefly the attempts we made to deal with this situation that we
13 were faced in late 2022, early 2023.

14 Having obtained significant analytical resources from across the office, we carried out
15 an extensive review of all persons of interest, all leads in our possession with regard
16 covering both insider leads, that is to say, insider -- potential insider witnesses

17 (Redacted)

18 (Redacted)

19 We made a comprehensive chart of all known individuals and commenced to identify
20 individuals who may have participated in a planning meeting or planning
21 discussions for the attack.

22 We sought to contact all such individuals and such individuals, we discovered, were
23 either deceased or (Redacted)

24 and therefore contradicted the Prosecution case theory, or were simply unreachable
25 or uncooperative.

1 Having done this, we also tried to identify persons who may not have been at the
2 planning meeting but may still have had some knowledge of the planning of the
3 attack. Here too we identified a number of individuals, tried to reach them and
4 discovered that several were deceased and some others were beyond contact.
5 One thing we realised during this new investigation was that members of groups
6 participating in the attack were not willing to cooperate with the Office of the
7 Prosecutor. Your Honours, if you look at the list of new witnesses we interviewed,
8 they are principally either * crime-base witnesses, such as P-512, (Redacted)
9 (Redacted)
10 (Redacted)
11 We failed in obtaining cooperation from witnesses from Mr Banda's group, that is to
12 say the * Justice and Equality Splinter Group that participated in the attack. We also
13 failed in obtaining cooperation from witnesses of the SLA Unity group, that is to say
14 the group that was run by Mr Jerbo at the time of the attack.
15 We were hampered by the fact that unlike many cases at the ICC, the attack on
16 MGS Haskanita is a small, contained attack that took place only over a few hours. It
17 is not a criminal campaign where we have dozens or hundreds of insiders; it is a
18 limited event with a limited number of witnesses who participated in the attack.
19 And this means that the pool of leads we could exploit was limited and we did not
20 obtain the results we wanted in order to replace the evidence of 441, 477 or to
21 counterbalance, if appropriate, the evidence of P-512.
22 Your Honour, this brings me back to the cumulative impact of these changes. The
23 cumulative impact of the loss of potential incriminating evidence and the gaining of
24 exculpatory evidence and the sheer exhaustion of * investigative avenues is that we
25 no longer have the ability to support the Prosecution's submissions under contested

1 issue 2. We cannot establish to the threshold of substantial grounds to believe that
2 Mr Banda was aware of the factual circumstances that established the unlawful
3 nature of the attack on MGS Haskanita. The inevitable consequence of this is that we
4 cannot establish to the confirmation standard, to the standard of substantial grounds
5 to believe, that Mr Banda is responsible for the charges.

6 Thank you, your Honours, I'll end here and hand over to the Deputy Prosecutor.

7 MS KHAN: [10:12:19] (Microphone not activated)

8 Let me repeat that again for the interpreters. We're happy to take any questions that
9 you might have and we are available for that.

10 PRESIDING JUDGE PROST: [10:12:33] Thank you very much, Madam Deputy
11 Prosecutor.

12 Well, I'll begin. I, for one, have a number of questions and I don't know how you're
13 going to decide this but I'm going to be putting a series of questions so you can decide
14 who is best placed to answer them. And, in particular, the questions from me are
15 going to focus on the issue which the Chamber requested to be addressed, which is
16 the basis for the request to withdraw in light of the standard and in light of the
17 decision of the Pre-Trial Chamber.

18 So that will be the focus of my questions, if it assists in terms of who should respond.

19 But let me begin, Madam Prosecutor, because I think there's still a lack of clarity here
20 from your opening comments regarding the issue of the approach that the Chamber
21 has asked the Prosecution to address.

22 This Court, as you are well aware, is not a common law court. This Court is not a
23 court where the Prosecutor remains solely responsible for the presentation of the case
24 throughout the proceedings. As you're well aware, the balance that was struck at
25 the Rome Statute negotiations was that there is a check and balance on the Prosecutor

1 in this system, which is not known in other systems, by the involvement of the
2 Pre-Trial Chamber.

3 So it is one thing for the Prosecutor to impose a standard, a higher standard if the
4 Prosecutor so chooses with respect to the Prosecutor's investigations, how the
5 Prosecutor chooses to prioritise cases or present cases, but what can't be done is for
6 the Prosecutor to impose that standard on the phases of the proceedings where a
7 Chamber is now responsible for the proceedings. So that's the position of the
8 Chamber.

9 And in this case, we have reached the stage where a Pre-Trial Chamber determined
10 that the case met evidentially the substantial grounds test. And so the sole issue for
11 this Chamber is not the impact of this evidence on - and I've heard a lot of
12 comments - on the Prosecution's theory of the case, but it is the impact of the change
13 of evidence on the finding of the Pre-Trial Chamber that this case was sufficient to
14 proceed to trial. Because whether that is agreed or not in other systems, the
15 standard which allows a case which the Prosecutor is then ethically completely valid
16 in presenting the case to a Trial Chamber in this Court is the substantial grounds to
17 believe standard. It is not a higher standard. And the concern of the Chamber was
18 that you were intervening with almost a review process that is imposing a higher
19 standard than that which is set in the Rome Statute. So I just want to be very clear
20 because that affects how the Chamber is approaching this case.

21 So, with that in mind, I want to focus then on the Pre-Trial Chamber's decision and on
22 issue 2, which you have been citing, which is very specifically if the attack is deemed
23 unlawful, whether the accused was aware of the factual circumstances that
24 established the unlawful nature of the attack.

25 So my first question is this: We need to focus on Mr Banda's knowledge of the facts,

1 and in respect of that, I would appreciate understanding what the Prosecution's
2 evidence -- this new evidence you've referred to, how that relates to Mr Banda. So
3 (Redacted), all that we have in your material is that he spoke
4 about some individuals who, in the course of the attack, were asking for Colonel
5 Bashir. I'd like to know more about that. Was it one? Was it more than one?
6 He also mentions that individuals were asking about the officer in charge. And we
7 have other evidence certainly cited by the Pre-Trial Chamber where there were a
8 number of things being shouted and questions being asked and we have the actions
9 that were taken, the looting which took place.
10 So I'd like to understand in what context this comment - he's the only one who has
11 made this comment - about someone looking for Bashir was made and I'd like to
12 know what connection that has to Mr Banda. Was Mr Banda present when that was
13 made? Did he specifically talk about that?
14 So I'd appreciate a little more information about that.
15 MS KHAN: [10:17:37] Thank you very much for that, Madam President.
16 On the first issue of the standard of proof, we have applied for these proceedings the
17 test as requested by you which is substantial grounds. And may I say at the outset
18 by setting higher standards for ourselves in the internal policy of the Office of the
19 Prosecutor, we do not wish to impose any higher standard on the Pre-Trial Chamber,
20 but we do wish to be rigorous with ourselves. We do wish to set ourselves higher
21 standards so that we do not come before the Court with cases that are bound to fail.
22 We think we owe the public a better standard of conduct than that. So it is really
23 with respect to our role in the Court proceedings that we set ourselves a higher
24 standard.
25 I will ask Mr Sachithanandan to address the issue of the witness. Thank you.

1 MR SACHITHANANDAN: [10:18:32] Thank you, your Honour, for that quite
2 granular question and I'm happy to address it at a granular level.
3 During the confirmation proceedings, the Prosecution did not have direct evidence
4 about the mental element of Mr Banda. So we had no direct, as to Mr Banda's
5 behaviour during the attack, for example, or the reporting that Mr Banda received
6 during the course of the attack. One of the bases for us believing that Mr Banda
7 must have known about the removal of the Government of Sudan representative was
8 the fact that the Government of Sudan representative flew out in a chopper, in a
9 helicopter, in the presence of some rebels at the helicopter pad. We could not at that
10 point connect Mr Banda directly to those persons, nor could we prove that Mr Banda
11 was present at the departure of the Government of Sudan representative, but we were
12 making a case by inference that Mr Banda, being a leader of some importance, would
13 have received that information about the removal of the GoS representative.
14 (Redacted)
15 (Redacted)
16 (Redacted)
17 (Redacted). But the result (Redacted) is
18 that we can no longer make an argument by inference that Mr Banda knew about the
19 removal of the GoS representative because the attackers are seeking the GoS
20 representative and Mr Banda is in a position of authority and would, presumably,
21 have at least joint control over the attackers who are seeking the GoS representative.
22 Now, I'm not trying to argue beyond reasonable doubt Mr Banda's innocence. That's
23 certainly not the attempt that the Prosecution is trying to do here, but the
24 consequence (Redacted) is that we no
25 longer have substantial grounds to believe.

1 Your Honour, you will recall the definition in Lubanga of substantial grounds, which
2 is something along the lines of a concrete and cogent line of reasoning supported by
3 evidence, and what we have now is not such a concrete line of reasoning because of
4 the contradictory evidence. I don't know whether that assists.

5 PRESIDING JUDGE PROST: [10:21:47] Yes, it does, but I have a follow-up question
6 on this.

7 So you've mentioned, and it's mentioned in your filing and you've mentioned it again,
8 that there's no direct evidence that Mr Banda was aware that Colonel Bashir had left.
9 I'm interested because I must -- I couldn't find it in the materials, but perhaps
10 certainly the Prosecutor knows the case far better than I, but what is the evidence that
11 Mr Banda knew the specific -- specifics about Colonel -- the allegations with respect to
12 Colonel Bashir? What is the evidence that Mr Banda himself knew that there had
13 been communication between Colonel Bashir and the Government of Sudan with
14 respect to information being transmitted regarding the bombings? What is the
15 evidence of that?

16 MR SACHITHANANDAN: [10:22:37] Right, we don't have direct evidence in terms
17 of somebody witnessing an utterance of Mr Banda regarding the GoS representative
18 Bashir. We have the complaints on 10 September by a number of rebels, to the base,
19 that intelligence is being sent out from MGS Haskanita and the threat to attack
20 MGS Haskanita if the situation is not remedied.

21 (Redacted) the attackers were searching for a GoS
22 representative. (Redacted) the rebels were suspicious of collaboration between the
23 African Union base and the Government of Sudan.

24 We have the evidence of Witness P-446, (Redacted), that
25 he also heard that the rebels were suspicious of such collaboration. So we have -- we

1 have a set of indirect evidence about this suspicion held by the rebels. We do not
2 have a direct utterance from Mr Banda that he said anything about the GoS
3 representative.

4 Yes, of course, there is the agreed fact -- agreed fact paragraph 18, where Mr Banda
5 agrees under the terms of an existing cooperation agreement to participate in the
6 attack.

7 PRESIDING JUDGE PROST: [10:24:33] But my difficulty here is there's no evidence
8 that Mr Banda was amongst the rebels who were present to make the complaint on
9 10 September, as far as I can see it. I take it that's the case?

10 MR SACHITHANANDAN: [10:24:46] That's correct.

11 PRESIDING JUDGE PROST: [10:24:48] So let me put it to you in a different way: If
12 there had been no incident involving Colonel Bashir, so there's no factual incident
13 that gives any aura of reality to the suspicion that the African Union mission was
14 cooperating -- involved in actively cooperating in the hostilities, would the
15 Prosecution be taking the position just on the basis that some commanders were
16 saying that they were suspicious, would you be taking the position that that is
17 sufficient to demonstrate a lack of knowledge that the attack was unlawful? Or is
18 it -- is it resting on that one factual situation that exists, which is there is some
19 evidence that perhaps this occurred? Because that's where I'm puzzled in terms of
20 the subjective *mens rea*.

21 MR SACHITHANANDAN: [10:25:46] Right, your Honour. And I'll begin by
22 saying there's no silver bullet, there's no single piece of evidence which provides
23 direct evidence about Mr Banda's mental element either one way or the other.
24 What we have is a series of -- well, a series of items of evidence which contribute to
25 muddying the waters. And I'll explain what they are.

1 (Redacted), which indicates that the attackers were looking for the GoS

2 representative.

3 We have the targeting, in the early phases of the attack, of the communications centre,

4 which in some way supports the idea that the rebels thought that there were

5 communications between the GoS representative and Sudanese aeroplanes which

6 were bombing the rebels.

7 We have the evidence (Redacted)

8 (Redacted) they were attacking the Government of Sudan during the

9 course of this attack.

10 We have the suspicions identified by P-446, (Redacted), about

11 the fact that the rebels thought that the AU base was tainted, that intelligence was

12 being taken out.

13 We have these complaints made on 10 September.

14 So it's the cumulative impact of all of these items of evidence, your Honour, which

15 makes us believe that we don't have substantial grounds to believe that Mr Banda

16 carried out these -- this attack for an illegal purpose.

17 PRESIDING JUDGE PROST: [10:27:23] But just back to my question, take out the

18 fact that Mr Bashir is alleged to have carried out this communication, there is no other

19 fact present that I'm aware of on the facts that have been presented which gives any

20 air of reality to whatever suspicions the rebel groups might have had. I take it the

21 Prosecutor's position is not that if you express a suspicion, that that's sufficient to

22 negate the subjective understanding of a protected African Union mission set up by

23 the United Nations.

24 MR SACHITHANANDAN: [10:28:02] Correct. That's not our position.

25 PRESIDING JUDGE PROST: [10:28:15] So your position is that that incident

1 involving Colonel Bashir is very significant, in terms of the subjective belief.

2 MR SACHITHANANDAN: [10:28:18] Yes, your Honour.

3 I can hear some conversation behind me, I'm just going to consult for a minute and I'll
4 respond.

5 PRESIDING JUDGE PROST: [10:28:28] Thank you.

6 Mr Nicholls.

7 MR NICHOLLS: [10:28:40] Your Honour, if you don't mind, I'll also weigh in.

8 I hope I understood your question, but if it's about other than the removal of Bashir, I
9 mean, there -- the evidence is strong that there was a genuine belief by the rebel
10 groups in the area that Captain Bashir was using that position in MGS Haskanita in
11 order to call in coordinates of rebel positions so they can be bombed. The worst
12 thing for the rebels in this war, total disparity in power, is the bombing from above.
13 So that's a major, major deal for them.
14 They've been bombed, they've noted this person is in the base, they've demanded his
15 removal on -- several times. They said if he's not removed, if he's not removed,
16 we're going to attack, because we know, in their mind, that he is responsible for our
17 soldiers being killed. It's the equivalent, from their perspective -- and if that was
18 happening, it's a very valid concern on their part that MGS Haskanita is essentially a
19 forward command post for the Sudanese Armed Forces. And the fact that it's one
20 person in there does not in any way mitigate the damage he's done. That if they are
21 correct, and we don't know for sure whether they are or not, but it is not impossible at
22 all to believe that Captain Bashir was in fact passing information that he learned at
23 AMIS briefings to the GoS which resulted in rebel forces being bombed, that that
24 would be a major contribution on the side of the GoS forces, that would be huge, even
25 though it's only one person, because it's telling the Government of Sudan where to

1 bomb and that's their -- one of their strongest allies.

2 So the rebels -- Banda is not there at the previous meetings, which hurts us because he

3 doesn't have all this background. He arrives at MGS Haskanita on the day of the

4 attack, according to the agreed facts, in the early morning and, according to the

5 agreed facts, essentially doesn't do much until -- and there's bombing that day and

6 that is the trigger for the rebels' attack in -- if you -- if you believe that they genuinely

7 had this concern. The amount of activity in demanding his removal suggests that

8 this is a real concern. They don't get anything out of just showing up, demanding

9 that Bashir be removed if they think it's not true. They're not getting anything out of

10 that in their previous demands.

11 And what they say, I believe on the 10th, but Mr Sachithanandan can correct me, is "If

12 we are bombed again, we're going to attack." And that suggests they believe it.

13 They are making that, which is a big assertion to make, to an AMIS base. Then, on

14 the 29th, they're bombed, and Banda sees that bombing. He comes -- according to

15 the agreed facts, he has a brief meeting at 5 p.m. where he meets with the

16 commanders who in the previous meeting discuss the attack and planned it and that's

17 where we would say the criminal agreement or plan was put together. We've lost

18 the evidence from (Redacted) -- just -- I'm sorry, your Honour, but if I just conclude,

19 the agreed fact on that brief 5 p.m. meeting when he arrives is that Mr Jerbo informed

20 Mr Banda of the decision that had been taken at the meeting described in paragraph

21 16 above to attack GS forces and the MGS Haskanita. Mr Banda agreed under the

22 terms of the previous -- of the existing, excuse me, cooperation agreement between

23 SLA-Unity and JEM to participate in the attack with his two vehicles and 47 men.

24 So the agreed fact shows that he arrives, he's told we're going to -- there's only one

25 attack. There's not attacking GoS here, * attacking Haskanita separately. He arrives,

1 he's told, "We're going to attack the GoS and the base" and so the logical
2 inference -- and there is going to be a defence in this case which we need to take into
3 account and think about even in the substantial grounds standard, is that he's told
4 "We're going to attack this base because the GoS is in there" and that "we've given
5 them the ultimatum". So presumably he's briefed on that planning meeting.

6 PRESIDING JUDGE PROST: [10:33:37] Thank you, Mr Nicholls, but I still come back
7 to my point. We're talking about the subjective knowledge of the accused, and just
8 your last comment, "we presume that he was told." And I'm just clarifying, but you
9 made it clear, you've made it clear what the evidence is you're relying on, but we
10 have no direct evidence that Mr Banda was aware of the facts which bring into
11 question the neutrality of AMIS which is the conduct of Colonel Bashir. That is clear
12 from what's been described by both of you. So that was the point I wanted clarity on,
13 which I have clarity on now.

14 MR NICHOLLS: [10:34:20] Other than the agreed fact, which the Court would not
15 need to accept. The agreed fact states "We're going to attack the GoS".

16 PRESIDING JUDGE PROST: [10:34:26] Yes, but that has -- "We're going to attack the
17 GoS" is what was communicated but, in addition, they're attacking the African Union
18 mission. That's what the attack was leveled at.

19 MR NICHOLLS: [10:34:40] Yes, but may I respond quickly?

20 PRESIDING JUDGE PROST: [10:34:44] Yes.

21 MR NICHOLLS: [10:34:44] The African Union base at that time, the AMIS base, is
22 shielding President Bashir. At that time he's gone. Previously -- no, I just
23 "president". That's a reflex from my other case. The AU base is where Bashir stays
24 and he's protected by AMIS. In the past -- and Mr Pubudu will correct me -- I'm
25 sorry, Mr Sachithanandan is more on top of the dates and details. In the past they

1 have demanded that the AMIS base turn over Bashir and AMIS has said no. AMIS is
2 armed, the base is defended, they have an APC, and prior to his removal, about two
3 weeks earlier, the AMIS base is protecting Bashir. So if there is a person in there
4 who called in the air strikes that morning on your forces, the only way to get to him is
5 to get through the AMIS base which has refused to turn him over in the past.

6 PRESIDING JUDGE PROST: [10:35:55] Thank you, Mr Nicholls. I'll leave the point
7 there, but I want to go back to an additional point related to the Pre-Trial Chamber's
8 decision.

9 In your filing you take the position that the Pre-Trial Chamber discounted the
10 evidence showing that the attackers believed that AMIS was giving information,
11 (Redacted)

12 In fact, the Pre-Trial Chamber does not discount that evidence, it specifically looks at
13 that evidence, but what the Pre-Trial Chamber did was compare that evidence to how
14 the attack actually took place and concludes that the evidence is stronger coming
15 from how the attack after took place.

16 None of the witnesses, the two witnesses that you indicate there's issues with, nor the
17 new witness, change those facts. They don't alter the nature in which the attack took
18 place, on my reading of it, but for one sentence from the Pre-Trial Chamber, which is
19 that the Pre-Trial Chamber did refer to the fact that no one was going around calling
20 for Bashir. It says there was no evidence of that. Now we have some evidence of
21 that. But we also still have all of the other evidence cited by the Pre-Trial Chamber
22 as to the nature of this attack, as to the facilities that were attacked - not just to
23 telecommunications but the other looting - as to the entire nature of the attack. So
24 you would agree that that finding of the Pre-Trial Chamber still stands only altered
25 by one fact which is the reference to Mr Bashir. I want to be clear that you would

1 agree with that position.

2 MR SACHITHANANDAN: [10:37:48] Well, your Honour, I think our assessment is
3 that the finding doesn't stand, in that the Pre-Trial Chamber was balancing the
4 evidence as it knew at the time and now the evidence is different.

5 So I would respectfully disagree, * your Honour. The Pre-Trial Chamber was carrying
6 out a balancing exercise and in fact explicitly noting that nobody was looking for GoS
7 representative Bashir, and now that situation has been changed by a credible witness.
8 So I would suggest that that balancing exercise is now -- would result in a different
9 decision.

10 PRESIDING JUDGE PROST: [10:38:29] Let me -- Mr Nicholls.

11 MR NICHOLLS: [10:38:34] I was just going to add, your Honour, that the
12 Pre-Trial Chamber also at that point had the evidence of 441 (Redacted)
13 (Redacted). And I know that doesn't fit exactly but they had that
14 evidence. I would also state that, you know, one has to cautious about relying --
15 although that is the Pre-Trial Chamber finding that that was relevant on just the
16 nature of the attack because again according to the -- I mean, Mr Banda agrees to
17 participate in the attack. The fact -- and he has the most minimal number of troops,
18 the most minimal number of vehicles and he is the last to know about this and to join,
19 according to the agreed facts. So it is a jump, I would say, that once -- and once the
20 attack unfolds, that Mr Banda knew or intended that that's how the attack would be
21 carried out in that indiscriminate nature. And the level of indiscriminate, we -- there
22 are 12 persons killed, 10 of them are members of the protection force and were firing
23 back. It's footnote 109 of the confirmation decision that the AMIS protection force
24 returned fire for one hour and so it was a -- there was combat. And once the
25 communication tower was taken out, yes, there is complete chaos, although the

1 attackers are searching for the object of the attack. The stated objective of the attack
2 is to find, by these persons who are searching, who are part of the attacking force, is
3 for Captain Bashir. So that is significant, but again, the fact that this chaos -- chaotic
4 attack breaks out, does not, I would say, impute that knowledge to Banda that this is
5 what was going to occur.

6 And finally, for this type of attack in that region at that time, I would say 12 deaths is
7 low for an attack on a group like this where many of the people are unarmed, in the
8 sense -- I'm not minimising that in any way, but -- and 10 of those persons who were
9 unfortunately murdered were armed at the time and so, yes, the mode of the -- the
10 manner of the attack is relevant, it is something we would want to use at trial, but we
11 do believe that that loss of evidence that we've talked about and the addition of the
12 evidence does make -- we would not agree that nothing has changed in the
13 confirmation decision.

14 PRESIDING JUDGE PROST: [10:42:07] Well, thank you, Mr Nicholls. Just on that,
15 it was going to be my next question but I see this is the Prosecution's position, you
16 acknowledge that in addition to Mr Bashir -- Mr Banda having to believe that the
17 African Union mission was cooperating, collaborating and participating in the
18 hostilities - and you base that on this incident involving Colonel Bashir - you also
19 would have to establish that in carrying out the response to that, it was proportionate.
20 And I take it from the statement you make in your filing that you highlight that this
21 was only military targets that were struck and that this was a proportionate attack,
22 that the Prosecution position is that you cannot establish that this was not a
23 disproportionate attack. You don't have to respond to this. You've said it's because
24 only 12 peacekeepers were killed and there was massive looting but that's still a
25 proportionate response, is the position that you're taking. This was not an issue, of

1 course, addressed by the Pre-Trial Chamber in the circumstances.

2 MR NICHOLLS: [10:43:28] I can't say I would agree that it's proportionate; I can't
3 prove it's disproportionate at this point. The camp is leveled. There's no question
4 about that. And the evidence does suggest, though, that there was armed resistance
5 by AMIS during this and there was a battle, so that forgetting the removal, if this had
6 been -- just assuming arguendo, if they had lost their protected status, the beginning
7 phase of that attack where these killings and injuries occur, we cannot say -- I won't
8 call it proportionate, but I wouldn't say that we can -- that the evidence shows that it's
9 disproportionate, that we can show that to the standard.

10 PRESIDING JUDGE PROST: [10:44:31] I just want to turn briefly, Mr Nicholls, to - or
11 whomever wishes - Witness 441, I believe. Witness P-0441, you've said that the
12 loss -- well, let me just clarify. He is still available, the issue is credibility. Whether
13 he's cooperative or not - I've rarely had an insider that was cooperative - what we're
14 talking about is that the Prosecution has concluded on his credibility. Though I take
15 it you would acknowledge that credibility at a trial stage is a function of the Trial
16 Chamber.

17 MR NICHOLLS: [10:45:20] Yes. However, it's not -- it is impossible as a Prosecutor
18 or a Defence lawyer, or any trial lawyer, to put on a witness without thinking hard
19 about their credibility and it would be misconduct and negligent and insane to put on
20 a witness that you knew was going to collapse. The cross for 441 writes itself.
21 He orchestrated a (Redacted), a serious crime,
22 and blamed Banda for it.

23 PRESIDING JUDGE PROST: [10:45:55] I don't dispute your assessment, Mr Nicholls.

24 MR NICHOLLS: [10:45:56] Okay, thank you.

25 PRESIDING JUDGE PROST: [10:45:57] I am simply making the point that in this

1 Court, as you know, in the search for the truth, it is also open for the Trial Chamber to
2 hear from witnesses who they think may contribute to the finding of the truth.

3 MR NICHOLLS: [10:46:13] I think that is correct, but --

4 PRESIDING JUDGE PROST: [10:46:15] That's all I'm --

5 MR NICHOLLS: Thank you.

6 PRESIDING JUDGE PROST: [10:46:12] That's the only point I'm making. Thank
7 you, Mr Nicholls.

8 But P-441, in terms of the subjective element, focussing just on the issue that you
9 indicate the evidence has been diminished by, the only evidence I can find where he
10 is cited by the Pre-Trial Chamber as the sole witness relates to his command
11 responsibility, but I think there's plenty of evidence as to the command role that
12 Mr Banda played, but also that of course he agreed to carry out the attack. That is
13 also, though, a part of the agreed facts. But I don't see that P-441 gives evidence
14 about the motivation, about the subjective element, but I could be wrong in that. So
15 I'm interested in knowing is there anything that -- I understand, you don't have repeat,
16 (Redacted)

17 (Redacted). But as to the specific motivation as to the mention of Bashir, as to the
18 mention of the previous cooperation, he doesn't give any evidence regarding that
19 issue; is that correct?

20 MR SACHITHANANDAN: [10:47:24] Your Honour, (Redacted)

21 (Redacted). He does not hear any reference to
22 there being a GoS representative in the base or information being shared by a GoS
23 representative with the GoS as a basis for the attack. So that in itself is somewhat
24 relevant.

25 He also says later in his statement that -- that he never saw any indication of the AU

1 being tainted or collaborating with the GoS and he -- so that's also indirect evidence
2 that we could have used to show that there was no understanding in that group that
3 the attack was for the reasons of the AU base having lost protection.

4 He also uniquely -- well, could have testified about (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 None of those, again, is a silver bullet, but all of those are parts of an argument we
10 could have made by inference regarding the knowledge of Mr Banda, and those
11 elements are now missing.

12 PRESIDING JUDGE PROST: [10:49:07] Thank you for that clarification.

13 And just -- I'm going to stop here, although I may have some further questions after
14 my colleagues, but P-477, from my review, is not cited by the Pre-Trial Chamber.

15 MR SACHITHANANDAN: [10:49:25] That's correct.

16 PRESIDING JUDGE PROST: [10:49:27] Thank you.

17 MR NICHOLLS: [10:49:29] Just on that, we hadn't interviewed him until after the
18 decision.

19 PRESIDING JUDGE PROST: [10:49:35] Thank you.

20 And, at this point, I will turn to Judge Alapini, my colleague, to see --

21 (Trial Chamber confers)

22 PRESIDING JUDGE PROST: [10:49:49] Thank you, Judge Alapini.

23 Judge Flores, do you have any questions?

24 JUDGE FLORES LIERA: [10:50:07] Thank you. Thank you very much, Judge Prost.

25 And thank you to the Prosecution for this briefing that has been very illustrative.

1 I don't have particular questions because I think Judge Prost has presented several of
2 the same issues that I have in my mind. I only just want to confirm that the analysis
3 that the Prosecution has presented so far is based on the analysis of three main -- of
4 three witnesses that are considered key for issue number 2. Because when I look at
5 the confirmation of charges, I know the existence of many, many witnesses that are
6 not mentioned in any of the documents that I have read as part of the analysis. I'm
7 taking information from what you have said, that you have considered a broad
8 analysis and you have considered different witnesses, but I just want to know if,
9 within the witnesses or the list of persons considered in the confirmation of charges,
10 there have been evaluations or witnesses of the AMIS side of the AU, because I think
11 it's important that in an analysis you consider the broad spectrum of evidence.
12 I understand from what you have said it has been considered, but it's very difficult to
13 know from what we have today that that has been done and I would like to have
14 more information on that. Thank you.

15 MR SACHITHANANDAN: [10:51:37] Absolutely, your Honour.

16 The way we carried out this investigation is we obtained what we call (Redacted),

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted).

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted). And then we interviewed people who were protection force members,

Status Conference

(Closed Session)

ICC-02/05-03/09

1 (Redacted)

2 (Redacted)

3 (Redacted)

4 And so our positions on the evidence are a cumulative assessment of all of these and

5 of course it's entirely correct that we have focussed on P-441, P-477 and P-512 and

6 that's because that's where the major changes have happened. But absolutely we

7 have viewed that evidence in the context of all the other evidence, (Redacted)

8 (Redacted)

9 (Redacted)

10 JUDGE FLORES LIERA: [10:53:40] Thank you. Thank you very much for your
11 response. But then on the basis of the analysis, can we conclude that only these three
12 witnesses, according to the Prosecution, change what was in the confirmation -- from
13 the confirmation of charges? Because I think this is very important. What we are
14 considering now is what has changed from the confirmation of charges to the
15 standard applicable by this Court, and I understand that is the analysis is based on
16 three witnesses that have been discussed during today.

17 So thank you. I have no more questions.

18 MR SACHITHANANDAN: [10:54:18] Just on that point, your Honour, other
19 witnesses -- we did lose contact with other witnesses, that is to say, Witness 304, 305,
20 306, who are (Redacted), and Witness 433, if memory serves.

21 We have just not made significant mention of those witnesses because their impact is
22 much less than the impact of the three witnesses I have been making submissions on.
23 And they are also mentioned in our written submissions, I believe.

24 PRESIDING JUDGE PROST: [10:54:53] Thank you very much, Judge Flores.

25 Judge Alapini, *vous avez la parole*.

1 JUDGE ALAPINI-GANSOU: [10:55:04] (Interpretation) Thank you, your Honour,
2 for making it possible for me to intervene in this case.
3 Mr Nicholls, I had a concern that I wanted to raise with regard to your presentation of
4 a moment ago where you were saying that in the possible case where there would be
5 a trial, the person being prosecuted here, you would propose having them come but
6 for a duration which would not be beyond three months.

7 Is that not the case?

8 MR NICHOLLS: [10:55:45] No, your Honour, I'm sorry, I was not clear. I was just
9 pointing out for the Chamber's knowledge that from our discussions with the current
10 Defence counsel, they have made it clear that they will wish for a speedy trial, that
11 they hope that the trial will begin within three months of his arrival and they will
12 push for the case to start as quickly as possible.

13 So that may not be particularly relevant and it's every accused's right to ask for the
14 speedy trial, but it does make us aware that this case being past confirmation, there
15 would not be much -- there would not be time for us to investigate and fill these gaps,
16 we believe, before the commencement of the trial. Although, of course, it would be
17 entirely within your discretion when the trial starts; however, that would be an
18 application by the Defence.

19 JUDGE ALAPINI-GANSOU: [10:57:00] (Interpretation) Very well. I've understood
20 it now.

21 So whatever the case, a possible accused is not going to impose a time frame for the
22 proceedings on the judges to the Chamber that we are made up of.

23 Now the other concern that I had was with regards to the evidence. Could you tell
24 us how many witnesses the Prosecution has presented.

25 (Speaks English) Do you want me to go in English?

1 THE INTERPRETER: [10:57:44] How many it expects.

2 MR SACHITHANANDAN: [10:57:46] Thank you, your Honour. I have weak
3 French, but I'm listening to the English interpretation.

4 Your Honour, we don't have a finalized witness list for a number of reasons. We
5 submitted a witness list in 2014, and then we actually asked for some witnesses to be
6 added to that witness list. Those decisions are still pending before the Chamber
7 because all litigation in this trial, as you know, has been frozen for a few years.

8 So we don't have a finalised witness list, but for the moment, what we have is the
9 witness list submitted originally before the Trial Chamber, plus the witnesses that we
10 have sought to add, but of course with the caveat that some of these witnesses are the
11 witnesses we're talking about right now, including 441 and 477.

12 JUDGE ALAPINI-GANSOU: [10:58:47] (Interpretation) So have no fear about it, no
13 concern about it. How many witnesses are you planning to have at the preliminary
14 stage? On this day, could I have an idea of the number of witnesses that you
15 envisage.

16 MR SACHITHANANDAN: [10:59:05] Your Honour, I'm afraid I don't have a
17 precise number, I think it's around (Redacted), but we can easily submit that before
18 the Chamber.

19 JUDGE ALAPINI-GANSOU: [10:59:15] (Interpretation) Very well.
20 I think that in your observations you referred of 303, 304, 305, if I am right. Are we
21 also taking into account these witnesses in your opinion, P-304, P-305?

22 MR SACHITHANANDAN: [10:59:49] Your Honour, they were mentioned in the
23 confirmation decision. (Redacted)

24 (Redacted)

25 (Redacted)

1 JUDGE ALAPINI-GANSOU: [11:00:10] (Interpretation) And the other point that I
2 wanted to know as well, at this stage where we are currently, is it possible for you
3 also to reach other witnesses, apart from 441, 447 -- well, 441 we know isn't credible if
4 my memory serves me well. But apart from these two witnesses that are remaining,
5 are you able -- do you have the capacity to get others to come or -- given that the
6 number that you have had with regards to the seizure of the body -- of the Chamber,
7 Trial Chamber?

8 MR SACHITHANANDAN: [11:00:58] No, your Honour. That is a challenge that
9 I was trying to articulate in my original submissions. We have tried to identify
10 alternative insider evidence and unfortunately failed in this context. And we don't
11 envision that level of cooperation or availability changing in the future.

12 JUDGE ALAPINI-GANSOU: [11:01:26] (Interpretation) I just wanted you to say that
13 once again, thank you very much.

14 Thank you, your Honour, I have concluded.

15 (Trial Chamber confers)

16 JUDGE ALAPINI-GANSOU: [11:01:44](Interpretation) No, terribly sorry. I do
17 have another concern.

18 I would like to ask you for your opinion, well, some advice really about a matter of
19 law. Can a judge oblige -- well, I'm just putting it out there quite bluntly. Can the
20 Chamber oblige the Prosecutor to call his own witnesses? One can learn at any age,
21 you see. So I'm asking you that. Can the Chamber oblige the Prosecutor to call his
22 own witnesses? Thank you.

23 MR SACHITHANANDAN: [11:02:45] Yes, your Honour. Our understanding is
24 that the Chamber has the ability to do that. Of course the Chamber can also call its
25 own witnesses. We are merely presenting our own assessment of these witnesses.

1 JUDGE ALAPINI-GANSOU: [11:03:03] (Interpretation) You haven't responded to
2 my concern. The Chamber can call its own witnesses, the Chamber can identify
3 witnesses and call them to the stand. But the Prosecutor, who decides to call
4 witnesses and then for various -- in this particular case, later on if the Prosecutor, for
5 reasons that you have set out to us already, no longer wishes to call a particular
6 witness or witnesses, can the Chamber - I'm not quite sure how to put it - should the
7 Chamber require the Prosecutor to call his own witnesses, your witnesses?

8 MR SACHITHANANDAN: [11:03:56] That's our understanding, your Honour. I'm
9 just going to read out Article 64(6) of the Rome Statute. This is a section relating to
10 the functions and powers of the Trial Chamber.

11 "In performing its functions prior to trial or during the course of a trial, the Trial
12 Chamber may, as necessary ... require the attendance and testimony of witnesses ..."
13 So I think that assists in this context, your Honour. So the Chamber does have that
14 power.

15 JUDGE ALAPINI-GANSOU: [11:04:50] (Interpretation) Okay. Duly noted.

16 PRESIDING JUDGE PROST: [11:05:02] Thank you very much. And I thank the
17 court officer -- Mr Nicholls?

18 MR NICHOLLS: [11:05:07] I'm very sorry. I just wanted to supplement my answer
19 to one of your questions, if you allow it. If not --

20 PRESIDING JUDGE PROST: [11:05:17] Certainly.

21 MR NICHOLLS: [11:05:18] It's just you asked about Witness 441 and his availability,
22 so, yes, (Redacted)

23 (Redacted), but I would be very surprised if he voluntarily agreed to testify based on
24 his past * behaviour, and the contact with our office was very contentious as we
25 accused him of basically criminally fraudulently disingenuously trying to defraud the

1 Court.

2 PRESIDING JUDGE PROST: [11:05:57] And just briefly then on that same point,

3 Mr Nicholls, the other witness, (Redacted)

4 MR NICHOLLS: [11:06:06] It was 441 I was speaking about.

5 PRESIDING JUDGE PROST: [11:06:09] Oh, sorry, 477.

6 MR NICHOLLS: [11:06:12] (Redacted).

7 PRESIDING JUDGE PROST: [11:06:16] Thank you very much.

8 I thank the court officers and our interpreters for indulging an extra few minutes. It

9 is time for the break, but I thought it would be best -- I think I can hold any further

10 questions, so I thought it would be best to break because we're going to move to the

11 second phase of today's hearing, which will be to hear from the Registry and the

12 Prosecution on updates with respect to the location of Mr Banda.

13 So we will recess until 11:35. Thank you.

14 THE COURT USHER: [11:06:45] All rise.

15 (Recess taken at 11.06 a.m.)

16 (Upon resuming in closed session at 11.35 a.m.)

17 THE COURT USHER: [11:35:38] All rise.

18 Please be seated.

19 PRESIDING JUDGE PROST: [11:36:06] So, we will proceed now, I thank the

20 Prosecution, and for all of the interventions and the answers to the questions from the

21 Chamber.

22 We'll now proceed to the second part to receive an update regarding efforts to locate

23 Mr Banda. I think it might be appropriate to commence with -- with the Registry,

24 and I just -- the same caveat, Ms Bertrand, that the Chamber has read the updates, the

25 written updates, which were provided by the Registry and the Prosecution, so you

Status Conference

(Closed Session)

ICC-02/05-03/09

1 needn't repeat information. You can comment on some, but it's basically to any
2 additional information or new information or a general update to the Chamber on
3 this issue.

4 You have the floor.

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 PRESIDING JUDGE PROST: [11:38:10] Thank you very much, Ms Bertrand.

15 Perhaps we'll hear from the Prosecution and then if the Chamber has any questions
16 for either, we can proceed that way. So Mr Nicholls.

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 PRESIDING JUDGE PROST: [11:39:12] Perhaps is that -- is that similar to the

25 information that the Registry has, Ms Bertrand, in terms of his current situation. Just

Status Conference

(Closed Session)

ICC-02/05-03/09

1 to make sure we're all on the same page, I think it's an opportunity to do that, since
2 we're all here.

3 MS BERTRAND: [11:39:28](Interpretation) Yes, indeed. We can confirm that.

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 PRESIDING JUDGE PROST: [11:41:10] Thank you very much. That's very helpful.

22 Mr Nicholls.

23 (Redacted)

24 (Redacted)

25 (Redacted)

Status Conference

(Closed Session)

1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 PRESIDING JUDGE PROST: [11:42:41] No; certainly, that's fine.

14 MR NICHOLLS: [11:42:44] Thank you.

15 PRESIDING JUDGE PROST: [11:42:45] And since we're in a status conference, it's an
16 opportunity to put forward ideas. And I leave it to you. You needn't report back to
17 the Chamber on that. I leave it to the Prosecutor - unless you wish to - and the
18 Registry to discuss. It's just simply a matter of demonstrating all possible efforts to
19 execute a Chamber's arrest warrant.

20 MR NICHOLLS: [11:43:07] Yes, thank you, your Honour.

21 PRESIDING JUDGE PROST: [11:43:08] Thank you.

22 Well, I have no further questions on the update, but I will check with my colleagues.
23 Judge Alapini.

24 (Trial Chamber confers)

25 PRESIDING JUDGE PROST: [11:43:19] Unless there are then any other comments or

Status Conference

(Closed Session)

- 1 submissions to be made.
- 2 Madam Deputy Prosecutor.
- 3 MS KHAN: [11:43:32] Nothing from me, thank you very much, Madam President.
- 4 PRESIDING JUDGE PROST: [11:43:38] Thank you.
- 5 Therefore, I believe that concludes the hearing for today, and I thank everyone for
- 6 their participation and for the information provided. Thanks to everyone and have a
- 7 good rest of your day. Thank you.
- 8 THE COURT USHER: [11:43:50] All rise.
- 9 (The hearing ends in closed session at 11.43 a.m.)