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Court

Original: **English**

No.**: ICC-01/04-01/10**

Date: **13 March 2012**

THE APPEALS CHAMBER

Before:

Judge Erkki Kourula, Presiding Judge
Judge Sang-Hyun Song,
Judge Akua Kuenyehia
Judge Anita Ušacka
Judge Daniel David Ntanda Nsereko

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF

THE PROSECUTOR v. CALLIXTE MBARUSHIMANA

Public Document

Corrigendum to the "Prosecution's Document in Support of Appeal against the 'Decision on the Confirmation of Charges' "

(ICC-01/04-01/10-465-Red)

Source: **Office of the Prosecutor**

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Introduction

1. On 16 December 2011, the Majority of Pre-Trial Chamber I ("Majority") declined to confirm charges against Callixte Mbarushimana ("Suspect") for his contributions to crimes committed by the Forces Democratiques pour la Liberation du Rwanda (FDLR).[1] The Majority found no substantial grounds to believe that the FDLR pursued a policy of attacking the civilian population, that its leadership (including the Suspect) constituted "a group of persons acting with a common purpose" to commit crimes, and that the Suspect sufficiently contributed to the commission of such crimes.

2. The Dissenting Judge disagreed and stated that "when viewing the totality of the evidence, I see a clear line of reasoning in the Prosecution's case. The case against Mr Callixte Mbarushimana is not a conventional one, but what the Majority sees as 'insufficient evidence' I see as 'triable issues' deserving of the more rigorous fact finding that only a Trial Chamber can provide."[2]

3. On 1 March 2012, the Chamber granted leave to appeal three issues, namely:

    1) Whether the correct standard of proof in the context of Article 61 allows the Chamber to deny confirmation of charges supported by the Prosecution evidence, by resolving inferences, credibility doubts and perceived inconsistencies against the Prosecution and thereby preventing it from presenting its case at trial.

    2) Whether a proper interpretation of the scope and nature of a confirmation hearing, as defined by Article 61, allows the Pre-Trial Chamber to evaluate the credibility and consistency of witness interviews, summaries and statements without the opportunity to examine the witnesses that would be possible at trial.

[1] ICC-01/04-01/10-465-Red. ("Decision" or "Majority Decision").
[2] ICC-01/04-01/10-465-Red ("Dissenting Opinion"), para 134.

4. Whether the mode of liability under Article 25(3)(d) requires that the person make a "significant" contribution to the commission or attempted commission of the crime.[3]

5. As the Chamber stated, the first two errors raised by the Prosecution "are intrinsically connected".[4] The Prosecution urged that, consistent with the Statute and the purpose of confirmation, the evidence it submitted should be credited, and ambiguities, conflicts, inconsistencies and inferences should be drawn in the Prosecution's favor. The Pre-Trial Chamber refused, reasoning that "there is no provision in the statutory framework of the Court which expressly states that inconsistencies, ambiguities or contradictions in the evidence should be resolved in favor of the Prosecution".[5]

6. In the Prosecution's submission, the statutory framework need not expressly state this. It is implicit in the provision authorizing the Prosecution to meet its burden at confirmation with documents, summaries, anonymous witness statements, and the like. At trial, *in dubio pro reo* will apply, but any analysis that expressly or implicitly requires resolution of doubt in favour of the Defence at confirmation misconstrues the threshold, purpose, and nature of evidence at the confirmation hearing. If, to persuade the Chamber to confirm charges, the Prosecution must (a) reconcile and explain inconsistencies or ambiguities, (b) offer direct (not hearsay) evidence, (c) abandon the protection of witness anonymity at this stage in order to permit witnesses' evidence to be fully credited, (d) answer contradictory evidence by the Defence and (e) establish that its own evidence is more credible, then it must in effect conduct a full-blown trial.

7. As the Prosecution argued before the Pre-Trial Chamber, the purpose of confirmation is to ensure that only sufficiently compelling charges – going

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[3] ICC-01/04-01/10-487, p.16.
[4] ICC-01/04-01/10-495OA4, para.5;Decision Granting Leave to Appeal, 21.
[5] Decision, para.45.

beyond mere theory or suspicion – proceed to trial. Chambers of this Court have consistently and repeatedly stressed that the confirmation hearing is not a mini-trial or a "trial before the trial". Without a mini-trial, however, it is impossible to resolve apparent contradictions, ambiguities and inconsistencies; such resolutions require a full airing of the evidence from both sides, an opportunity to question and to observe the witnesses, and the ability of the witnesses to clarify and explain. From these, the Chamber can carefully weigh and evaluate their credibility. These assessments simply cannot be done at confirmation based – as the Rome Statute authorizes – on documentary evidence and summaries.

8. It is impossible to reconcile the procedural and evidentiary burdens imposed by the Chamber with the intent and nature of the confirmation hearing. The Pre-Trial Chamber wrongly exceeded the scope and nature of a confirmation hearing by resolving conflicts, inconsistencies or ambiguities in written statements, by making credibility findings without an adequate record, by diminishing the credibility of categories of witnesses, by requiring corroboration, and by resolving presumptions and apparent conflicts in favour of the Defence.[6]

9. The third issue concerns the Chamber's effort effectively to amend article 25(3)(d) by adding a requirement that the contribution must be "significant" even though the text only requires ¨any¨ contribution. The Prosecution contends that, in the absence of any ambiguity in the plain language of the article, the demand that a contribution be significant was error.

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[6] *Lubanga* Confirmation Decision, ICC-01/04-01/06-803-tEN, para.37; *Abu Garda* Confirmation Decision, ICC-02/05-02/09-243-Red, para.39; *Banda and Jerbo* Confirmation Decision, ICC-02/05-03/09-121-Corr-Red, para.31; *see also* Decision, para.41.

Statement of Facts

The Charges

10. The charges center on the Suspect's contributions to the crimes committed by the Forces Democratiques pour la Liberation du Rwanda (FDLR), at various locations in the Kivu provinces of the DRC during the period of January to December 2009.

11. The FDLR is an armed group created by people allegedly involved in the Rwanda genocide in 1994, who fled Rwanda and relocated to the Democratic Republic of the Congo (DRC). From their base in the DRC they promoted the first and second Congo wars and are still seeking to return to Rwanda and overthrow the country's current government.[7] Military forces in the DRC and Rwanda have attempted to rout the FDLR. Given its inferior military power, the FDLR cannot effectively overcome those armies. Instead, it has attempted to pursue its objectives by waging war against civilians. [8]

12. The Suspect was the Executive Secretary of the FDLR and held a position on its Steering Committee, the highest functioning decision-making body of the group. It included both the political wing, based in Europe, and the military leadership commanding the operations in the Kivus.[9] In 2009 the Steering Committee decided to launch a "multi-dimensional" war including the sensitization and mobilisation front, the media, and diplomatic and military fronts.[10] Its plan was to create a humanitarian catastrophe by attacking civilians in the Kivus, DRC, to force the Governments of Rwanda and the DRC to halt their military offensive

[7] DCC, paras. 27 and 109. FDLR Statute, DRC-REG-0008-1507, at 1509, ninth and tenth paragraphs; DRC-OTP-2038-2233 at 2234 ("Exigence de départ 1 : départ de Kagame."), DRC-REG-0100-0960 at 01:07–01:20.
[8] As a consequence of its actions, the United Nations Security Council has issued repeated Resolutions since 2008 calling on the FDLR to cease their attacks against the civilian population. For a recent Security Council resolution identifying the FDLR as "a major obstacle to lasting peace in the Kivus" and as "one of the primary causes for the conflict in the region" see DRC-OTP-2014-0945 / EVD-PT-OTP-00305.
[9] FDLR Statute, DRC-REG-0008 ‐ 1507 at 1525, Article 39; Transcript of interview with W-632, DRCOTP-2034-0238 at 0241, lines 76-90; Transcript of interview with W-587, DRC-OTP-2034-1380 at 1385, DRC-OTP-2034-1448 at 1453; Interview PARIS BBC TV RADIO 2009-10-17-WAV, 17 Oct 2009, DRC-REG-0100-0960.
[10] DRC-REG-0008-0954 / EVD-PT-OTP-0069 at 0961, III, 86; at 0961, point 87.

against the FDLR and persuade the international community to pressure Rwanda to negotiate the FDLR return to Rwanda.

13. In furtherance of this common plan, the Suspect – from Europe – issued press releases and made public statements falsely denying the FDLR's direct involvement in the crimes immediately after they were reported and attributed to the FDLR. At the same time, the Suspect also insisted that the efforts to defeat the FDLR militarily would not succeed and would only promote continuing waves of civilian casualties. In order to stop the intolerable level of violence against civilians, he insisted, States had to negotiate with the FDLR in order to find a political solution.[11] The Suspect himself described his activities as a "war of information",[12] which he used to force a negotiation. He thus was responsible for concealing FDLR crimes and for using the humanitarian catastrophe to extort political concessions for the FDLR. He also validated the FDLR's actions to the soldiers, thus limiting the risk of desertion and encouraging the commission of further crimes.[13]

The Chamber's resolution of legal and evidentiary issues

14. The Decision stated that the confirmation hearing is not a mini-trial or a "trial before a trial",[14] and reiterated the limited purpose of confirmation. Consistent with the Statute, the Chamber agreed that the Prosecution "may rely on documentary evidence, including redacted versions of witness statements and

[11] See also Dissenting Opinion, para. 84.
[12] DRC-OTP-2038-2153, 25 January 2009 email from the Suspect referring to the "*guerre de communication / information contre l'ennemi qui nous a attaqué*" and proposing the publication of daily "situation reports" to complement the press releases.
[13] In this sense, see Dissenting Opinion, para. 104.
[14] ICC-02/05-02/09-243-Red, para. 39.

summaries of statements of anonymous witnesses, and need not call the witnesses expected to testify at trial"[15]

15. However, it disagreed that the documentary evidence should be accepted as presumptively credible or that ambiguities, inconsistencies, or contradictions in the evidence should be resolved in the Prosecution's favour.[16] The Chamber concluded that because the Suspect at confirmation may challenge Prosecution evidence and present his own evidence, it is both authorized and obliged to assess credibility and weight of all the evidence – Prosecution and Defence – and it is not required to draw inferences in favour of the Prosecution.[17] Rather, inconsistencies, ambiguities or contradictions would lead the Chamber to "exercise caution in using it to affirm or reject any assertion made by the Prosecution".[18]

16. The Majority also acknowledged that the Prosecution is entitled to use summaries and statements from witnesses whose identities are currently withheld from the Defence, but reiterated that such evidence may have lower probative weight "to counterbalance the disadvantage" that anonymity "may cause to the defence". [19] Further, it discounted hearsay generally[20] and concluded that anonymous hearsay contained in witness statements could be used only to corroborate other evidence, [21] explaining that information based on anonymous hearsay had low probative value "in view of the inherent difficulties in ascertaining the truthfulness and authenticity of such information". [22] And it determined that it would exercise

[15] Majority Decision, para. 43.
[16] It distinguished the process in the International Criminal Tribunal for the Former Yugoslavia (ICTY), whereby when an application for a judgment of acquittal is made after the close of the Prosecution's case at trial the Court will resolve the matter based solely on the Prosecution's evidence and with all inferences and presumptions drawn in favour of the Prosecution, but failed to address the underlying reasoning for that process. Majority Decision, para. 45.
[17] Majority Decision, para. 46 and footnote 108
[18] Majority Decision, para. 47.
[19] Majority Decision, para. 49.
[20] *See,* for example, Majority Decision, paras. 194, 221 and 232.
[21] Majority Decision, para. 49 and 78.
[22] Majority Decision, para. 78 (emphasis added)

caution in relying on statements from insiders, "*some of whom* participated in the events alleged".[23]

The Chamber's Decision to not confirm any of the charges against the Suspect

17. Following the enunciation of these general standards, the Chamber addressed the specific charges against the Suspect. As to each count, it found that the Prosecution's evidence failed to establish substantial grounds to believe that the Suspect committed the charged crimes. In its analysis of the sufficiency of the evidence on several of the counts, the Majority – as signaled in its earlier explanations of its approach to the evidence -- expressly discounted or rejected the Prosecution's evidence because it was hearsay,[24] because of purported inconsistencies or ambiguities[25] or concerns about credibility,[26] or even because of concerns with the manner in which questions were put to the witnesses.[27] Other evidence was discounted or rejected because it came from insiders[28] or witnesses[29] whose identities were withheld from the Defence.

The Dissenting Opinion

18. The Dissenting Judge stated her agreement with "the main legal principles" enunciated by the Majority in the Decision,[30] while explaining that in applying those principles she would confirm the charges contained in Counts 1, 2, 3, 4, 5, 6, 7, 8, 11, and 12.[31] The Dissent then explained at length why the Majority erred in

[23] Majority Decision, para. 50.
[24] Decision para. 49, 194, 221, 232 .
[25] Decision para. 114, 115, 116, 118, 248, 249, 250, 251, 333.
[26] Decision para. 50.
[27] Decision para. 51, 248, 251,257.
[28] Decision para. 50.
[29] Decision para. 117,
[30] Dissenting Opinion, para. 1.
[31] Dissenting Opinion, para. 135.

its approach to the assessment of the evidence, how it overlooked or ignored critical evidence and why the evidence did in fact suffice to confirm those charges.

19. The Dissent disagreed with the Majority's interpretation and application of the substantial grounds test and the conclusions it drew from the facts as established. The Dissent particularly noted that the Majority made credibility or reliability assessments that, in its view, could not be made based on written statements. As the Dissent explained, none of the "witnesses gave evidence in court. It is only in court that such aspects of reliability can be properly explored."[32]

20. The Dissent identified other findings by the Majority that, in its view, were contradicted by Prosecution evidence. For example, the Majority had relied on FDLR internal rules and instructions that proscribed attacks on civilians,[33] ignoring the Prosecution's evidence that these rules were not followed[34] and that the FDLR's definition of civilians excluded persons who supported the "enemy".[35] The Dissent also criticised the Majority's refusal to infer an intent to target civilians because the attacks instead were retaliatory,[36] explaining that both motivations were not mutually exclusive.[37] It also disagreed with the Majority's assumption that, if there was a strategy to attack civilians, the Steering Committee minutes would have stated as much; to the Dissenting Judge, the absence of such a direct admission in the minutes was not surprising.[38] Nor in any event should that absence have allowed the Chamber to reject the evidence of the strategy.

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[32] Dissenting Opinion, para. 12
[33] Majority Decision, para. 256.
[34] Dissenting Opinion, para. 14.
[35] Dissenting Opinion, para.15.
[36] Decision, paras.253-4.
[37] Dissenting Opinion para.17.
[38] Dissenting Opinion, para.44.

21. Finally, the Dissent disagreed with the Majority's refusal to draw certain inferences from the evidence in favour of the Prosecution[39] and its rejection of certain evidence as "isolated" or uncorroborated. [40]

The Prosecution's First and Second Grounds of Appeal: Whether the correct standard of proof in the context of Article 61 allows the Chamber to deny confirmation of charges supported by the Prosecution evidence, by resolving inferences, credibility doubts and perceived inconsistencies against the Prosecution and thereby preventing it from presenting its case at trial; and whether a proper interpretation of the scope and nature of a confirmation hearing, as defined by Article 61, allows the Pre-Trial Chamber to evaluate the credibility and consistency of witness interviews, summaries and statements without the opportunity to examine the witnesses that would be possible at trial.

22. As the Chamber stated the first two errors raised by the Prosecution "are intrinsically connected".[41] For clarity, therefore, the Prosecution presents them together.

I. <u>The Chamber's legal error impacted on the decision not to confirm the charges</u>

23. The Chamber found that "[t]he introduction of conflicting evidence by the Defence necessarily engages the Chamber in an assessment of the credibility and weight of this evidence in light of the whole of the evidence submitted for the

[39] Dissenting Opinion, para. 78.
[40] Dissenting Opinion, para. 94, 100.
[41] Decision Granting Leave to Appeal, 21.

purposes of the confirmation hearing".[42] It also concluded that it was not obligated to resolve inconsistencies, ambiguities or contradictions in the Prosecution's favor; rather, their existence would lead the Chamber to "exercise caution in using it to affirm or reject any assertion made by the Prosecution".[43]

24. These combined errors affected the Decision.[44] After rejecting or reducing the value of evidence proffered by the Prosecution, the Chamber found that the Prosecution did not meet its burden of establishing substantial grounds to believe the Suspect committed the charged crimes.[45] These are legal errors concerning the nature of confirmation, the process of finding the existence of substantial grounds to proceed to trial, and the assessment of evidence at the hearing. With respect to the standard applicable to the review of questions of law, the Appeals Chamber stated that "[it] will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law."[46]

II. The limited purpose and scope of the confirmation of charges hearing

25. The Appeals Chamber has held "[t]he right to challenge the evidence […] must be understood in the context of the confirmation hearing, which does not amount to a determination of the guilt or innocence of the suspect."[47] The purpose of the confirmation hearing is simply to make sure that there is sufficient evidence to justify trial proceedings. This is supported by the drafting history of the Rome

[42] Decision, para.46.
[43] Majority Decision, para. 47.
[44] ICC-01/04-01/07-1497OA8, para.37.
[45] ICC-01/04-01/10-495OA4, para. 5; Decision Granting Leave to Appeal, paras.9,23.
[46] ICC-02/05-03/09-295OA, para.20.
[47] ICC-01/04-01/06-774OA6, para.47.

Statute[48] and consistent with relevant analogous practice in other international criminal tribunals.[49]

26. Chambers of this Court have repeatedly emphasized the limited scope and purpose of the confirmation hearing. "[T]he purpose of a confirmation hearing is limited to committing for trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought. This mechanism is designed to protect the rights of the Defence against wrongful and wholly unfounded charges."[50] Further, "[t]he confirmation hearing has a limited scope and by no means can it be seen as an end in itself, but it must be seen as a means to distinguish those cases that should go to trial from those that should not go to trial."[51] Chambers all agree, moreover, that confirmation is not a mini-trial or a "trial before the trial".[52]

27. The Prosecution submits that the limited scope and purpose of confirmation has an impact on the manner in which the Chamber assesses the evidence at the hearing. Confirmation is not the forum within which to "pre-test" the credibility or clarity of Prosecution evidence, to resolve ambiguities or conflicts, and to make other discretionary judgments as if it were a trial, but under a lesser standard of proof. Rather, the fact that the Statute allows summaries, documentary evidence,

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[48] E.g.,1994 ILC Draft Statute for an International Criminal Court with Suggested Modifications (Updated Siracusa-Draft), prepared by a Committee of Experts and informally submitted to the 1996 Preparatory Committee on the establishment of an International Criminal Court by the International Association of Penal Law and others, DePaul University, 15 March 1996, art. 27(2), commentary ("As far as the introduction of an oral hearing -- prior to the confirmation of the indictment -- is concerned, it should be clear that this should not be a mini-trial in itself. The hearing aims at preventing someone from being tried in public when there are no sound reasons to justify this.").

[49] *See Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on defence motion requesting judgement of acquittal pursuant to rule 98 bis, 21 June 2004, para. 20; endorsed in *Prosecutor v. Hadzihasanovic*, Case No. IT-01-47-T, Decision on motions for acquittal pursuant to rule 98 bis of the rules of procedure and evidence, 27 September 2004, para. 20 ("While Rule *98bis* is an important procedural safeguard, the object and proper operation of the Rule should not be lost sight of. Its essential function is to separate out and bring to an end only those proceedings in respect of a charge for which there is no evidence on which a Chamber could convict, rather than to terminate prematurely cases where the evidence is merely weak").

[50] *Lubanga* Confirmation Decision, ICC-01/04-01/06-803-tEN, para.37; *Abu Garda* Confirmation Decision, ICC-02/05-02/09-243-Red, para.39; *Banda and Jerbo* Confirmation Decision, ICC-02/05-03/09-121-Corr-Red, para.31; *see also* Decision, para.41.

[51] ICC-01/04-01/07-428-Corr, paras.5-6 . See also Decision, para.41 and authorities cited therein.

[52] ICC-01/09-01/11-221, para.9; ICC-01/09-02/11-321, para.8; ICC-01/04-01/07-717, para.64; ICC-02/05-03/09-121-Corr-Red, para.31; ICC-01/04-01/06-803-tENG, para.37.

anonymity and out-of-court statements establishes and requires that the normal trial methods of assessing credibility cannot apply.

28. Thus, and contrary to Pre-Trial Chamber I's position in *Abu Garda*, the substantial grounds standard under article 61(5) and (7) is intrinsically linked to the manner in which the evidence is assessed: the Chamber will determine whether the threshold is met depending on its assessment of the evidence (Rule 63(2)).[53] In turn, this assessment will be necessarily conditioned by the particular manner in which evidence is presented at the confirmation hearing.[54] The Prosecution submits that the standard at confirmation prevents a Pre-Trial Chamber from delving into credibility and complicated weighing of the Prosecution's evidence, in particular because the Prosecution relied on witnesses' statements, some of them in summary and some of them anonymous.

III. Different evidentiary rules apply at the confirmation hearing

29. The Appeals Chamber has expressly stated that "while […] there is, and must be, a strong link between the two phases of the [pre-trial and trial] proceedings, this does not mean that the same evidentiary rules apply. On the contrary, the rules regarding orality in the pre-trial phase are more relaxed than in trial".[55]

30. In particular, and as the Appeals Chamber noted, the principle of orality – that evidence will be given by witnesses who testify in court -- enshrined in article 69(2) does not apply at confirmation, as article 61(5) prescribes that the

[53] A contrario, ICC-02/05-02/09-267, paras.8-10. In its decision denying leave to appeal its refusal to confirm charges against Abu Garda, Pre-Trial Chamber I stated that the various stages of the proceedings differ only in the threshold of proof and not in the manner in which the Chamber assesses the evidence. According to that Chamber the principle of free assessment of evidence under rule 63(2) applies at confirmation and that the principle authorized it to determine the reliability and weight of the evidence.
[54] See paras. 28-33.
[55] ICC-01/05-01/08-1386OA5 OA6, para.80.

Prosecution "may rely on documentary or summary evidence and need not call the witnesses expected to testify at trial".[56] Therefore, "although oral testimony is *permitted*, the evidentiary debate at the confirmation of charges hearing can be based on witnesses' written statements."[57] Indeed, article 68(5) and rule 81(6) permit both the Prosecutor and the Defence to rely on summaries. The allowance of written and summary evidence without in-court witnesses or the disclosure of witness identities, however, prevents a full evaluation of the credibility of the evidence or a competent resolution of competing versions, a consequence that is inevitable and, given the structure and purpose of confirmation, entirely acceptable.

31. As a result of these provisions (and the limited purpose of the confirmation hearing), the Prosecution is not required to present at this stage all the evidence it has gathered during the investigation. Nor need it present evidence that is amenable to explanation through further questioning. And by allowing statements and summaries, which by their nature cannot explain their inconsistencies or ambiguities or contradictions with other evidence, the Statute establishes a process whereby the offered evidence can only be taken at face value.

32. Thus, these provisions *necessarily* impact on the scope and nature of the evidentiary record before the Pre-Trial Chamber. The Chamber will not have before it all the evidence; confirmation is intended to meet a lower threshold, based on summaries and documents, to protect the safety of witnesses while preserving the right of the accused to avoid trial on unfounded charges. By contrast, all relevant evidence will be presented at trial, where the principle of orality prevails – along with the ability to test all the witnesses' accounts and assess their credibility. It is at trial that the Chamber will – *inter alia* - hear directly

[56] Ibid.
[57] ICC-01/09-01/11-153, para.8 (emphasis added).

the evidence of the witnesses under oath, observe their demeanour and composure, reconcile ambiguities or inconsistencies, and seek clarification if aspects of the witness testimony are unclear.[58]

33. Nor is the principle of free assessment of evidence under rule 63(2), as relied upon by the *Kenya* and *Abu Garda* Pre-Trial Chambers, an appropriate justification for weighing credibility at the confirmation stage.[59] This principle as provided for in article 69(4) and rule 63(2) enables the Chamber to determine the relevance and admissibility of evidence. However, the Appeals Chamber has clearly distinguished the determination of relevance and/or admissibility of evidence from the assessment of its weight.[60] Nothing in the "free assessment" provisions authorizes a Pre-Trial Chamber to "freely assess" the weight of the evidence in determining whether the Prosecution has met its burden of proof at the confirmation stage.

34. The Pre-Trial Chamber wrongly assumed for itself a trial function of assessing evidence and resolving conflicts and credibility issues that is not merely inconsistent with the Statute, but is also unworkable under it. It thereby diminished the value of the Prosecution´s evidence because of its form and presentation, though both were fully in accord with the process the Rome Statute established.

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[58] ICC-01/05-01/08-1386OA5OA6, para.76.
[59] ICC-01/09-01/11-373, paras.59-60; ICC-01/09-02/11-382-Red, paras.73-74; ICC-02/05-02/09-267, para.8.
[60] ICC-01/05-01/08-1386 OA5 OA6, para.37.

IV. The standard of "substantial grounds to believe" under article 61(7) does not entail an assessment of the credibility of the evidence

35. As a general rule, Pre-Trial Chambers should not enter into an assessment of inconsistencies and contradictions to assess the weight and credibility of the evidence presented at the confirmation hearing under article 61(7). This is unnecessary and inconsistent with the limited nature of the proceedings. It is also impossible to perform this operation in an adequate and safe fashion due to the limited amount and the nature of the evidence before the Chamber. Only Trial Chambers will be in a position to conduct this assessment when discussing their decision under article 74. [61]

(a) An assessment of credibility based on summaries and documents will result in defective decisions

36. "[A] fundamental rule in relation to determining issues of fact [is] that no conclusion should ever be reached in relation to the credit of a witness until *all* the evidence has been given".[62] As already noted, Pre-Trial Chambers holding confirmation hearings will *not* have all the evidence. Therefore, if the Chamber decides to conduct a full assessment of credibility issues based on the limited record before it, the result can only be unreliable: without in-court witnesses the Chamber cannot assess demeanor or view their reactions to questions from the

[61] This interpretation of the evidentiary standard at confirmation is consistent with the Appeals Chamber's jurisprudence in that: "*the Prosecutor may be able to convince the Pre-Trial Chamber that the threshold for the confirmation of the charges has been reached even if the reliability of the witnesses and other evidence was not fully tested*." ICC-01/04-01/06-774OA6, para.47. This ruling has also to be read in light of the defence submissions in that case; ie. the defence was asking for material that it considered necessary to exercise its right under art.61(6) but was unrelated to the charges.

[62] D.Hunt, "The Meaning of a 'Prima Facie Case' for the Purposes of Confirmation" in May et. al (eds) Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald (Kluwer: The Hague, 2001)., p. 147.

parties and the Chamber.[63] Without a full record, including demeanor, the Chamber also cannot fairly find particular motives or explanations for purported ambiguities or inconsistencies.[64] For instance, and as the Dissent noted, the reluctance of insider witnesses to concede their own criminality does not mean their evidence was presumptively unreliable in full; it is at least equally possible, that their evidence was truthful except when they were asked for self-incriminating information that could lead to their prosecution for the crimes attributed to their organizations.[65]

37. In short, a fair and accurate assessment of the credibility of the witnesses' evidence is not possible on the basis of written witness statements. Nor is it necessary at this stage. The Chamber in fact acknowledged this when it purported to refrain from assessing, pursuant to article 69(4), the admissibility of evidence that was not challenged by the Defence: "an in-depth assessment as to the admissibility of the evidence submitted for the purposes of the confirmation hearing is rendered essentially meaningless in view of the fact that the Prosecution may, for the purposes of the confirmation of charges, rely on documentary or summary evidence, […] and need not call the witnesses expected to testify at trial."[66] The Chamber further noted that "a wholesale assessment as to the admissibility of each item of evidence at this stage would […] give rise to an inappropriate pre-determination of evidentiary matters which should be properly decided in light of the whole of the evidence presented at trial".[67] However, and despite these recognized limitations, the Chamber undertook an in-depth assessment of alleged contradictions and inaccuracies with and without challenges from the Defence.[68]

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[63] ICC-01/05-01/08-1386OA5OA6, para.76.

[64] *A contrario*, ICC-01/09-01/11-373, para.83. The Pre-Trial Chamber in the Ruto and Sang case indicated that it "will evaluate whether motives cast doubt on the reliability and, by implication, on the probative of the witnesses".

[65] Dissenting Opinion, para.12.

[66] Decision, para.43.

[67] Ibid., para.44.

[68] See the examples provided above at fn. 25 and below at para. 47.

(b) An assessment of evidence credibility will change the nature of the confirmation hearing to the detriment of the fairness and efficiency of the Court's proceedings.

38. An insistence by the Pre-Trial Chambers on their right to assess the credibility of evidence at confirmation and to diminish the weight of documentary evidence that is challenged or contradicted will reduce the value of written statements.[69] The result will be that the Prosecution will be forced to call at least its main witnesses (if not substantially more) at confirmation to avoid potentially adverse credibility findings based on perceived deficiencies of the written statements. The Defence "right" to challenge credibility of Prosecution evidence or offer conflicting versions of the facts will also entitle it to call witnesses; both parties will then have a right of rebuttal. In other words, the confirmation hearing will become a "mini-trial" – with the "mini" component itself under assault – with seriously detrimental consequences for the efficiency of the Court's operations. Pre-Trial Chamber II in the *Ruto and Sang* case precisely noted that "[i]f all the witnesses indicated by the parties were permitted to testify orally, the confirmation of charges hearing would, ultimately, constitute a mere anticipation of the trial stage of the case, only distinguishable from the latter for the different standard of proof established by articles 61(7) and 66(3) of the Statute, respectively."[70]

39. The effect on efficiency is not the only consequence. Should the Prosecution be forced to identify and call witnesses the protective goals underlying article 68(5) will be defeated. Witnesses and their families will be prematurely exposed to

[69] In one of the Kenya cases, the Defence proposed to call 43 live witnesses at confirmation, arguing this was the Defence right and was essential because written evidence had less probative value. The Chamber expressly rejected their argument, stating that written evidence is "not accorded *a priori* lesser probative value". ICC-01/09-01/11-221, para.14.
[70] ICC-01/09-01/11-221, para.9.

risks and the Court will have to embark earlier into protective efforts, thereby placing increased demands on its already heavily taxed protection system.

(c) The credibility of the evidence is a triable issue; exclusion of these considerations before the trial does not deprive the Defence of the right to contest the charges at confirmation

40. As the Dissent indicated, matters regarding the weight and value of the evidence, including credibility of witnesses, are triable issues: "it is only in court that such aspects of reliability can be properly explored."[71]

41. The Prosecution nonetheless acknowledges that the Pre-Trial Chamber may exceptionally decide to exclude certain items of evidence that, either on their face or in light of the other evidence presented, are plainly incredible and unreliable. However, the mere presentation of impeaching or contradictory evidence (i.e. evidence which presents a factual dispute or disagreement with the Prosecution's submissions) or the argument that the evidence is ambiguous or inconsistent, is not sufficient to trigger an in-depth assessment of the quality of the Prosecution's evidence at the confirmation stage.

42. Contrary to the Chamber's analysis, the Prosecution's interpretation of the evidentiary standard at confirmation does not undermine the Defence's right to challenge the Prosecution's case or present evidence pursuant to article 61(6). Indeed, the Defence may argue that the Prosecution's case is facially inadequate or offer evidence to complement and explain away the Prosecution's evidence, to justify the Suspect's conduct, or to establish that Prosecution evidence cannot be believed as a matter of law. It is impossible, however, to reconcile the purpose and processes of confirmation with the conclusion that the Defence can present contradictory or impeaching evidence and require the Chamber to weigh the competing documentary versions and reach a reliably sound conclusion. As one

[71] Dissenting Opinion, para.12.

court explained in an analogous circumstance – in international extradition, to decide whether to surrender a fugitive for trial on particular criminal charges – "[w]hile the line between 'contradictory' and 'explanatory' evidence is not sharply drawn, the purpose of permitting explanatory evidence is to afford the relator 'the opportunity to present reasonably clear-cut proof which would be of limited scope and have some reasonable chance of negating a showing of probable cause.'"[72]. Thus, "[t]he introduction of conflicting evidence by the Defence" cannot require that the the Chamber engage in an assessment of the credibility and weight of this evidence in light of the whole evidence submitted for the purposes of the confirmation hearing.[73]

43. Indeed, some domestic jurisdictions similarly find it acceptable and consistent with the rights of the accused to credit the Prosecution's evidence and inferences when deciding whether to proceed to trial. Legal systems as diverse as the United Kingdom[74] and Mexico,[75] for example, share this approach.

44. Finally, the practice of the ad hoc Tribunals, dismissed as inapt by the Pre-Trial Chamber,[76] in fact illustrates how the court can screen the evidence – in the Tribunals, during trial -- to determine if the Prosecution established a *prima facie*

[72] Koskotas v. Roche, 931 F.2d 169, 175 (1st Cir. 1991), citation omitted.
[73] A contrario, Decision, para.46.
[74] For certain offences (those which are triable either in the Magistrates' Court or in the Crown Court) Examining Justices in the Magistrates' Court in England and Wales will consider whether there is sufficient evidence that a jury, properly directed, could find the accused guilty of the crimes charged.. If the accused is present, the Defence may make submissions as to whether there is sufficient evidence to put the accused on trial. However, there is no detailed examination of the evidence presented by the parties and the Prosecution evidence is assumed to be true. So long as the evidence submitted at the contested committal contains a prima facie case (i.e. the existence of a case to answer), an examination of the evidence and resolution of any factual or legal ambiguities are matters to be resolved at trial. See Magistrates' Courts Act 1980 (UK) – c. 43, Sections 6(1), at http://www.legislation.gov.uk/ukpga/1980/43/section/6.
[75] In Mexico, the confirmation of charges or "auto de vinculación a proceso" under articles 161 and 168 of the Federal Code of Criminal Procedure, requires that before proceeding to trial, the judge ensures the probable existence of a criminal offence (corpus delicti) and the "probable wrongdoing by the accused". David A. SHIRK, Director of the Trans-Border Institute of the University of San Diego uses the term "criminal indictment" as an equivalent of the term "auto de vinculacion a proceso". Although the suspects will provide evidence in their defence. Article 20, (B) (IV) of the Mexican Federal Constitution; Article 128 (III) (d), Article 154 par. 5 and Article 161 par. 5 of the Federal Code of Criminal Procedure, the judges do not assess the quality of the competing evidence.. Legal precedent XVII.1o.P.A.62 P, *Semanario Judicial de la Federación y su Gaceta XXXII,* October 2010, p. 2900. See also : SHIRK, David A., "Criminal Justice Reform in Mexico. An overview.", *in Mexican Law Review,* vol. III, no. 2, IIJ-UNAM, 2010
[76] Decision, para.45.

case, without undertaking a qualitative assessment of its credibility. Though the timing and statutory framework of the Tribunals' screening proceeding are different, the processes and purposes are analogous[77] and support the Prosecution's position.

(d) The standard of "substantial grounds to believe" under article 61(7) does not require the Chamber to dissipate all inconsistencies and doubts.

45. The differences between the evidentiary regimes applicable at confirmation hearing and at trial mean that Pre-Trial Chambers should not seek to import into the confirmation hearing rules and principles which can only be meaningfully applied at trial, including weighing alleged inconsistencies or doubts against the Prosecution.

46. The Chamber, however, followed the opposite route: in the Decision Granting Leave to Appeal, the Chamber acknowledged that "[b]y resolving conflicts in the evidence at the pre-trial stage, the Chamber required that the Prosecution's evidence presented be of a certain level of reliability and consistency".[78] It further agreed that "[m]any such inconsistencies, ambiguities and contradictions were

[77] Like confirmation, the Tribunals examine the evidence (including cross-examination of Prosecution witnesses and affirmative evidence offered by the Defence during the Prosecution's case) to determine "…whether there is evidence (if accepted) upon which a reasonable tribunal of fact could convict – that is to say, evidence (if accepted) upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question. .E.g., *Prosecutor v. Delalic et al.*,Case No. IT-96-21-A, Appeals Judgement, 20 Feb. 2001, para. 434 ("The test applied is whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question."); also *Prosecutor v. Jelisic,* Case No. IT-95-10-A, Appeals Judgement, 5 July 2001, para. 36. As a general rule the Court will not assess credibility, reliability, or inconsistencies in the evidence, leaving those matters to the final judgment, see *Prosecutor v. Milosevic*, T.Ch. III, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal: Application of Rule 98 bis, 16 June 2004, para. 13(3); *Prosecutor v. Brdjanin*, Case No. IT-99-36-R77, 19 March 2004, para. 9(b). However, the Court retains authority in extraordinary instances to conclude that "the Prosecution's case has completely broken down, either on its own presentation, or as a result of such fundamental questions being raised through cross examination as to the reliability and credibility of witnesses that the Prosecution is left without a case". *Prosecutor v. Kordic and Cerkez,* Case No. IT-95-14/2-T, 6 April 2000, para. 28. *See also Prosecutor v. Jelisic,* Case No. IT-95-10-A, Appeals Chamber, Judgement, 5 July 2001, para. 36..

[78] Decision Granting Leave to Appeal, para.11.

relied upon by the Majority in declining to confirm the charges"[79] and that "[it had] relied on many credibility assessments and inconsistencies in declining to confirm the charges".[80]

47. The Chamber purported to exercise "caution…to affirm or reject any assertion made by the Prosecution"[81] but in fact such caution was exercised to reject the credibility of the Prosecution`s evidence. For example, the Majority rejected evidence of an order to the FDLR troops to attack Congolese civilians in order to create a humanitarian catastrophe and its conclusion that there was no FDRL policy to attack the civilian population.[82] The Prosecution had relied on the evidence of "insider witnesses" to prove the existence and terms of the order, supported by a transcript of the relevant order annexed to the UN Group of Experts final report and other public reports.[83] Additionally, unimpeachable public reports such as the UN Security Council Resolutions confirm the goal of the FDLR to attack civilians. The Prosecution evidence sufficed to send the case to trial in order to properly evaluate the alleged contradictions. But the Majority viewed all insider evidence with "caution" and attributed less weight to it.[84] It also perceived inconsistencies among the evidence of relevant insiders.[85] It dismissed an important open source[86] as being "at best … indirect evidence, and on its own … not enough to contradict or outweigh the information contained in

[79] Decision Granting Leave to Appeal, para.9. The Prosecution did not submit in its application that the Dissent had correctly assessed the evidence. It noted instead that the Dissent had outlined the Majority's error by indicating that it had "attach too much weight to inconsistencies between the evidence" in reaching certain findings that led to the non-confirmation of charges (Dissent, para.3). Thus, if the evidence had been correctly assessed (according to the Prosecution's interpretation of the confirmation standard), the charges would have been confirmed. The Prosecution submits that the Dissenting Judge also erred in assessing reliability issues and weighing the competing evidence, although she reached different conclusions than the Majority, as she would have confirmed 10 counts.
[80] Decision Granting Leave to Appeal, para.23.
[81] Majority Decision, para. 47.
[82] Decision, para.246.
[83] A report by Human Rights Watch DRC-OTP-2014-0240 / EVD-PT-OTP-00282 at 0298 and a transcript of the relevant order annexed to the UN Group of Experts final report, DRC-OTP-2010-0045 / EVD-PT-OTP-00075 at 0168.
[84] Decision, para. 50.
[85] Decision, paras. 247-256
[86] Namely, a transcript of the relevant order annexed to a UN Group of Experts Report.

direct evidence gathered from insider witnesses".[87] Thus, the Majority concluded that "in light of the analysis of the evidence as a whole, and, in particular, several discrepancies between the Prosecution's allegations and the evidence submitted, the Majority is unable to be satisfied to the threshold of substantial grounds to believe that the FDLR pursued a policy of attacking the civilian population."[88] Having diminished or rejected the evidence of the existence of the alleged FDLR leadership's common purpose and policy because of inconsistencies or speculative credibility determinations, the Majority then found inadequate evidence to allow confirmation on any of the five charged crimes against humanity.[89] It also led the Majority to conclude that there were no substantial grounds to believe that the FDLR leadership constituted a "group of persons acting with a common purpose" containing an element of criminality that was essential for the war crimes counts.

48. Since this appeal is not directed against the Chamber's erroneous factual findings, the Prosecution need not present other examples. However, the Prosecution submits that the instance referred to above is illustrative that how the Chamber weighed alleged contradictions against the Prosecution's case, thereby effectively requesting a standard of evidence higher than the one required by article 61.

[87] Decision, paras. 259-260
[88] Decision, para.263.
[89] Decision, paras.266-267.

The Prosecution's Third Ground of Appeal: Whether the mode of liability under Article 25(3)(d) requires that the person make a "significant" contribution to the commission or attempted commission of the crime.[90]

49. The Pre-Trial Chamber erred in its finding that the mode of liability under article 25(3)(d) requires that the person make a "significant" contribution to the commission of the crime for criminal liability to arise.[91] The Chamber made this finding despite the clear and unambiguous language of article 25(3)(d) that "any" contribution[92] to a crime committed by a group of persons, when made with the required *mens rea,* is punishable.

50. This error materially affected the impugned Decision[93] since the Chamber declined to confirm specific components of the charges because it deemed the Suspect's contributions to be not "significant".[94] In the Decision Granting Leave to Appeal, the Chamber expressly acknowledged that the significance of the contribution "had a direct impact on whether the evidence presented by the Prosecution would be sufficient to satisfy the Prosecution's burden of proof. […] The Prosecution's case is currently unable to proceed in large part due to the Majority's finding that [the Suspect] did not make a significant contribution to the crimes charged".[95]

51. The Third Error is an error of law concerning the interpretation of the element of the "contribution" under article 25(3)(d). Accordingly, the Appeals Chamber

[90] ICC-01/04-01/10-487, para.44, p.16.
[91] Decision, paras.276-285.
[92] Other than a contribution envisaged under sub-articles (a)–(c).
[93] ICC-01/04-01/07-1497 OA8, para.37.
[94] Decision, paras.303, 315, 326, 339; see also Decision Granting Leave to Appeal, paras.38-39.
[95] Decision Granting Leave to Appeal, paras.39, 42.

should not defer to the Pre-Trial Chamber's interpretation of the law, but arrive at its own conclusions.[96]

I. Article 25(3)(d) criminalises "any" contribution to a group crime and does not permit the threshold of contribution to be elevated to a degree of "significant"

52. The Appeals Chamber has repeatedly stated that the process of interpretation "acknowledges no power and, far less, it allows no liberty to the Court to either refashion the terms of a legislative provision or add terms to its text that are not there."[97]

53. The language of article 25(3)(d) is incompatible with the finding of the Pre-Trial Chamber that the level of contribution under that provision must at a minimum be "significant". A plain reading of article 25(3)(d) shows that the provision does not qualify in any way the contribution, but rather states that criminal responsibility arises for those who in "*any*" way contribute to a crime by a group of persons acting with common purpose, as long as the contribution was intentional and satisfies the additional *mens rea* requirements under article 25(3)(d)(i) or (ii).

54. The finding of the Pre-Trial Chamber is also inconsistent with the object and purpose of article 25(3)(d). As determined by the Appeals Chamber, the aim of the Rome Statute is "to put an end to impunity" and to ensure that "the most serious crimes of concern to the international community as a whole must not go unpunished".[98] Article 25(3)(d), a residual mode of liability which covers "any"

[96] ICC-01/04-01/07-2259 OA10, para. 34.
[97] ICC-01/04-01/07-521 OA5, para.11 Diss Op; see also para.19.
[98] ICC-01/04-01/07-1497 OA8, para.79; ICC-01/04-01/06-2205 OA15 OA16, para.77.

contribution to common purpose that is not otherwise regulated in the Statute,[99] should accordingly be seen as a device to ensure that all intentional contributions to the most serious crimes of international concern are punishable.[100] The qualification of the word "any" with the word "other" makes it plain that the drafters intended the contribution required by article 25(3)(d) to be a residual "catch-all" provision that would include any type of contribution not enumerated in the preceding sub-articles. In this sense, the Prosecution submits that introducing caveats and provisos in the provision can easily lead to impunity gaps inconsistent with the enunciated goals of the Rome Statute.[101]

55. Under article 21(1) of the Statute, when "a matter is exhaustively dealt with by its text […] no room is left for recourse to the second or third source of law to determine the presence or absence of a rule governing a given subject."[102] As demonstrated above, the text of article 25(3)(d) is clear and unambiguous, it is consistent with the object and purpose of the statute, and it does not present any legal *lacunae* that requires, or even permits, amendment through "interpretation" by the Court. The Chamber erred by reading into article 25(3)(d) words that are not to be found in its text. The Prosecution further notes that the Appeals Chamber recently reversed a ruling from another Chamber of the Court that, as the Pre-Trial Chamber did in this case, had added qualifications not found in the Court's legal texts to an equally clear and unambiguous legal standard.[103]

56. Consistent with the above interpretation, article 25(3)(d) merely requires the existence of a link or causal *nexus* between the conduct of a suspect and the commission of a crime by a group of persons acting with common purpose. While

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[99] See ICC-01/04-01/06-803-tEN, para.337.

[100] The drafting history of Article 25(3)(d) as discussed below provides additional information on the object and purpose of that provision.

[101] The Prosecution notes that, conversely, the Appeals Chamber has noted with approval the gap-closing function of Regulation 55 of the Regulations of the Court in an appeal lodged during the *Lubanga* trial: the Chamber held that "a principal purpose of Regulation 55 is to close accountability gaps, a purpose that is fully consistent with the Statute". See ICC-01/04-01/06-2205 OA15 OA16, para. 77.

[102] ICC–01/04–01/06-772 OA4, para. 34; ICC-01/04-168 OA3, para. 22-24, 33-42.

[103] ICC-01/09-02/11-365 OA3, paras.65-70.

it is necessary that the conduct of the suspect *contributes* to the commission of the crime, *any* contribution will suffice to give rise to criminal responsibility. The contribution of a suspect may be part of the common criminal plan (as happened in this case) linked to a material element of a crime (for instance by facilitating in any way its occurrence), and it may also be linked to any of the subjective elements of the crime (for instance, as found in this case, by raising morale and encouraging the soldiers to committing the material elements of the crimes).[104] Moreover, the plain wording of article 25(3)(d) does not require that a contribution is provided directly to the physical perpetrators of a crime. It is sufficient that the contribution is made to "the commission … of … a crime by a group of persons acting with a common purpose", and can therefore be provided to any member of the group, regardless whether that member personally commits any element of the crime.[105]

57. Only where there is no nexus between the knowing and intended act of a suspect[106] and any of the elements of the crime can a Chamber conclude that the suspect did not contribute to its commission. If the conduct of the suspect cannot produce any causal effect on the commission of the crimes, it therefore will not qualify as a "contribution". If a contribution is made and has a causal nexus, however, then article 25(3)(d) liability fully applies. Concerns about the degree of relevance of the contribution are matters not for criminal liability, but for sentencing.[107]

58. Nor is the Chamber correct in concluding that "any" contribution to a criminal organisation would overextend the concept of criminal liability under the

[104] See Decision, paras 330, 339; see also Dissenting Opinion, paras.82, 100.
[105] See for instance, Dissenting Opinion, para.103; see also paras.86, 78.
[106] The Chamber concluded that "any" contribution to a criminal organisation would overextend the concept of criminal liability under the Statute (Decision, para.277; fn.656). This conclusion disregards the specific subjective requirements under Article 25(3)(d), that any such contribution shall be intentional and be made either with either the aim of furthering the criminal activity or purpose of the group, or in the knowledge of the intention of the group to commit the crime.
[107] See Rule 145, according to which "the degree of participation of the convicted person" is a factor to be considered for the purpose of sentencing.

Statute.[108] The specific subjective requirements under Article 25(3)(d) protect against overextension by requiring that the contribution shall be intentional and be made either to further the criminal activity or purpose of the group, or in the knowledge of the group's intention to commit the crime.

II. The drafting history of Article 25(3)(d) corroborates that "any" contribution suffices to give rise to criminal responsibility

59. The text of article 25(3)(d) presents a compromise between conspiracy provisions (in the Draft Codes of 1991 and 1996) and efforts to restrict a broad notion of responsibility. The 1996 Draft Code would have criminalised direct participation "in planning or conspiring to commit a crime which in fact occurs". Similar text is reflected in the 1998 Model Draft Statute. During the negotiations of the Rome Statute several proposals were advanced contemplating individual liability based on the existence of a conspiracy or an agreement to commit a crime plus an overt act.[109] However, a number of delegations opposed conspiracy as a mode of liability.[110] The final version of article 25(3)(d) adopted an intermediate solution, eliminating the term conspiracy and requiring at a minimum a contribution to a collective crime or attempt.[111] At the same time, all sorts of affirmative contributions were broadly intended, including in subparagraph (d), which established the lowest objective threshold for participation under articles25 by criminalizing "any other way" of contributing to the commission or attempted

[108] Decision, para.277; fn.656.
[109] *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II: Compilation of Proposals*, U.N. GAOR, 51st Sess., Supp. No. 22, 94, U.N. Doc. A/51/22 (1996).
[110] P. Saland, "International Criminal Law Principles", in R. S. Lee (ed.), *The International Criminal Court the Making of the Rome Statute*, The Hague, 1999, p. 199.
[111] Kai Ambos, "Article 25", in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (C.H.Beck-Hart-Nomos, 1999), pp.483-484, [20]; Albin Eser, "Individual Criminal Responsibility", in Cassese A., Gaeta P., Jones J.R.W.D., *The Rome Statute of the International Criminal Court,* Vol. I, (Oxford, Oxford University Press, 2002), p.802.

commission of a crime.[112] According to one commentator, this comparatively low requirement for objective participation in the crime under Article 25(3)(d) was counterbalanced by the specific subjective requirements included.[113]

60. The Prosecution further notes that the text of article 25(3)(d) is almost a verbatim copy of article 2(2)(c) of the International Convention for the Suppression of Terrorist Bombings of 1997,[114] an instrument aimed at requiring States to prevent, repress, and punish terrorist bombing in all its forms and manifestations. In order to impose the most comprehensive obligations, the Convention excluded any qualifiers for the element "contribution". The Rome Statute consciously patterned its mode of liability on that approach, confirming that the choice to criminalize "any" contribution to the equally grave crimes within this Court's jurisdiction was deliberate.

III. Other justifications underlying the Chamber's conclusion is flawed

61. The Chamber reached its conclusion in part by considering the gravity requirement in the Rome Statute, the structure of article 25 itself, and a mode of liability applicable in the ad hoc tribunals. None of these factors are appropriate here, and none suffices to override the statutory language and the drafters' intent.

[112] Kai Ambos, "Article 25", in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (C.H.Beck-Hart-Nomos, 1999), p.484, [21]; Albin Eser, "Individual Criminal Responsibility", in Cassese A., Gaeta P., Jones J.R.W.D., *The Rome Statute of the International Criminal Court,* Vol. I, (Oxford, Oxford University Press, 2002), pp.802-803.
[113] Albin Eser, "Individual Criminal Responsibility", in Cassese A., Gaeta P., Jones J.R.W.D., *The Rome Statute of the International Criminal Court,* Vol. I, (Oxford, Oxford University Press, 2002), p.803.
[114] U.N. Doc. A/RES/52/164 (1998), annex (37 I.L.M. 249 (1998)). The final text of Article 2(2)(c) of this Convention was reportedly taken from the Convention relating to extradition between Member States of the European Union of 1996 (Arsanjani, Mahnoush H., "The Rome Statute of the International Criminal Court," *American Journal of International Law* (1999), Vol. 93, No. 1 p. 37). It is further worth noting that the text of Article 25(3)(d) is reflected in Article 2(3)(c) of the International Convention for the Suppression of the Financing of Terrorism of 1999 (GA Resolution 54/109, 9 December 1999).

62. First, the Chamber relied in part on article 17(1)(d), which requires, as a component of admissibility, that a *case* (as opposed to a crime) be sufficiently grave. According to the Chamber, the gravity test clarifies that the contribution to a crime must reach a certain threshold of significance in order to be within the Court's ambit.[115] This argument is incorrect. The gravity of a case is independent of the individual criminal responsibility of a person. It was error to rely on article 17(1)(d), an explicit mechanism to filter out insignificant *cases*, as an interpretive guide to an unrelated and equally clear statutory provision on personal criminal liability.

63. At the same time, the very presence of a gravity requirement in fact corroborates the Prosecution's interpretation of article 25. It shows that had the drafters of the Statute intended to require a level of seriousness to describe the contribution to the crime, they would have done so expressly, as they did in requiring gravity of the case itself. Thus, the jurisdictional gravity requirement was improperly imported into article 25 and used to re-write that provision.

64. The Chamber also stated that article 25(3)(d) is aimed at combating group criminality "which usually involves the commission of comparably more serious crimes".[116] The Prosecution agrees. But it does not follow that "[t]his factor may also have a bearing on the required level of contribution".[117] To the contrary, it is illogical to assume that the drafters intended to proceed against the "more serious crimes" while also immunizing contributions to those crimes unless they reached a sufficiently substantial threshold. And indeed, the Appeals Chamber has rejected such a suggestion, ruling that "no category of perpetrators is per se excluded from potentially being brought before the Court [so as not to] hamper

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[115] Decision, para.276.
[116] Decision, para.178.
[117] Ibid.

the preventive, or deterrent, role of the Court which is a cornerstone of the creation of the International Criminal Court".[118]

65. The Pre-Trial Chamber further stated that the residual character of article 25(3)(d) has a bearing on the required level of contribution,[119] but failed to indicate the scope of or the reason for any such impact on the level of contribution. The Prosecution submits that the residual nature of article 25(3)(d), as expressed by the phrase "in any other way", corroborates that it is intended to include contributions not otherwise covered by articles 25(3)(a) through (c).[120] The Chamber acknowledged that "the modes of liability listed in article 25(3) [...] are arranged in accordance with 'a value oriented hierarchy of participation in a crime under international law', [...] where the control over the crime decreases as one moves down the sub-paragraphs".[121] Assuming that to be true, it then would make little sense to alter the structure of the Statute and the intent of its drafters, as the Chamber did below, through an interpretation that elevates the requisite participation in article 25(3)(d).".[122]

66. Finally, the Chamber relied on the jurisprudence of the UN *ad hoc* tribunals on joint criminal enterprise ("JCE"), a mode of liability not present in the Rome Statute.[123] This too was error. The Chamber extensively explained the differences between JCE and Article 25(3)(d) liability. Given these differences, there is no reason to selectively rely on JCE to define the required level of contribution in a statutory framework that excludes JCE.[124] Thus, notwithstanding the Majority's

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[118] ICC-01/04-169 OA, paras.73, 75.
[119] Decision, para.278.
[120] Kai Ambos, "Article 25", in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (C.H.Beck-Hart-Nomos, 1999), p.484, [21]; Albin Eser, "Individual Criminal Responsibility", in Cassese A., Gaeta P., Jones J.R.W.D., *The Rome Statute of the International Criminal Court,* Vol. I, (Oxford, Oxford University Press, 2002), p.803.
[121] Decision, para.279.
[122] Decision, para.279.
[123] Decision, paras.280-282.
[124] Decision, para.282.

approach, there is no rational reason to the concept of ¨Joint criminal enterprise¨ and there is no legal reason to use it to limit the express text of article 25(3)(d).

Conclusion

67. For the above referred reasons, the Prosecution requests that the Appeals Chamber

(a) allow both grounds of appeal and reverse the Impugned Decision;

(b) determine the correct applicable legal standards; and

(c) remand the matter to the Pre-Trial Chamber for a new determination.

Luis Moreno-Ocampo

Prosecutor

Dated this 13th day of March 2012

At The Hague, The Netherlands