Cour
Pénale
Internationale

International
Criminal
Court

Original: **French**

No.: **ICC-01/04-01/10**
Date: **26 February 2012**

PRE-TRIAL CHAMBER I

Before: **Judge Sanji Mmasenono Monageng, Presiding Judge**
Judge Sylvia Steiner
Judge Cuno Tarfusser

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR v. CALLIXTE MBARUSHIMANA

Public Document

Defence Response to "Prosecution's Application for Leave to Appeal the 'Decision on the confirmation of charges'" (ICC-01/04-01/10-480)

Source: **Defence for Mr Callixte Mbarushimana**

Decision to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor
Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Anton Steynberg, Senior Trial Lawyer

Counsel for the Defence
Mr Arthur Vercken
Ms Yaël Vias Gvirsman
Mr Philippe Larochelle

Legal representatives of victims

Legal representatives of applicants

Unrepresented victims

Unrepresented applicants for participation/reparations

Office of Public Counsel for Victims

Office of Public Counsel for the Defence

States' representatives

Amicus curiae

REGISTRY

Registrar

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

The Defence hereby submits its response to the Prosecutor's application[1] ("Application") seeking leave to appeal against the decision declining to confirm the charges, issued on 16 December 2011 by Pre-Trial Chamber I.[2]

I – <u>PROCEDURAL BACKGROUND</u>

1. On 16 December 2011, Pre-Trial Chamber I ("the Chamber") issued its decision declining to confirm the charges brought by the Prosecution against Mr Callixte Mbarushimana ("Decision").

2. That same day, the Prosecutor filed a request for a stay of immediate release.[3] On 19 December 2011, the Chamber dismissed the Prosecutor's request on the grounds that there was no further legal basis for Mr Mbarushimana's detention.[4]

3. On 19 December 2011, the Prosecutor lodged a direct double appeal: the first against the decision of that same day dismissing his request for a stay of immediate release, and the second against the Decision on the charges.[5]

4. On 20 December 2011, the Appeals Chamber held that the Prosecutor's direct double appeal was inadmissible, stating that it would provide the grounds for the decision in due course.[6] On 24 January 2012, the Appeals Chamber issued the grounds for the dismissal of the appeal.[7]

5. On 23 December 2011, Mr Mbarushimana was released and transferred to Paris to return to his family.

[1] ICC-01/04-01/10-480.
[2] ICC-01/04-01/10-465-RED.
[3] ICC-01/04-01/10-466.
[4] ICC-01/04-01/10-469.
[5] ICC-01/04-01/10-470.
[6] ICC-01/04-01/10-476.
[7] ICC-01/04-01/10-483.

6. On 27 December 2011, the Prosecutor finally submitted to the Chamber his application ("Application") for an interlocutory appeal, raising therein four issues which, in his view, warrant a review of the Decision.

7. On 28 December 2011, the Chamber issued its decision ordering that the time limits prescribed by regulation 65(3) would not start running until the notification of the French translation of the Decision.

8. On 22 February 2012, the French translation of the Decision was notified to the parties.[8]

II – GENERAL OBSERVATIONS

The Prosecutor's Application is apparently structured around a plan relying on the conditions for appeal set out in article 82(1)(d) of the Statute. However, the Application is pervaded by a number of recurrent misapprehensions which warrant a response from the Defence to challenge them jointly in its general observations.

The Prosecutor has no automatic right of appeal against a decision on the charges

9. It can be seen from the procedural background in Part I that the Prosecutor considers that his will prevails over the Court texts, as illustrated by the direct appeal which he filed on 19 December 2011 against the Decision.

10. However, previous decisions have consistently established that:

> The drafters of the Statute intentionally excluded decisions confirming charges against a suspect from the categories of decisions which may be appealed directly to the Appeals Chamber.[9]

[8] ICC-01/04-01/10-465-Conf-tFRA.
[9] See, for example, ICC-01/04-01/06-915, para. 19.

Accordingly, an appeal may be filed against a decision on the charges only with the Pre-Trial Chamber's leave. The Pre-Trial Chamber considers whether the party's application fulfils the three cumulative conditions[10] set out at article 82(1)(d) and stipulated in previous decisions of the Court.[11] Thus, the Appeals Chamber held at paragraphs 9, 10 and 14 of its decision in the *Situation in the Democratic Republic of the Congo*:[12]

> 9. Only an "issue" may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.
>
> 10. Not every issue may constitute the subject of an appeal. It must be one apt to "significantly affect", i.e. in a material way, either a) "the fair and expeditious conduct of the proceedings" or b) "the outcome of the trial". The issue must be one likely to have repercussions on either of the above two elements of justice. [...]
>
> 14. Identification of an issue having the attributes adumbrated above does not automatically qualify it as the subject of an appeal. The issue must be one "for which in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings." Hence, the issue must be such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.

11. The Court's previous decisions do not distinguish between applications for leave to appeal against decisions confirming or declining to confirm the charges.[13] Hence the restrictive approach applies to both of these types of decision.

12. Thus, in respect of dismissing interlocutory appeals against a decision confirming only part of the charges, the Pre-Trial Chamber previously held in the case of *The Prosecutor v. Jean-Pierre Bemba*:

---

[10] Negative decision in the case of *The Prosecutor v. Lubanga*, ICC-01/04-01/06-915, para. 27.
[11] ICC-01/04-168.
[12] ICC-01/04-168, see paras. 9-20.
[13] See negative decision in the case of *The Prosecutor v. Abu Garda*, ICC-02-05/02-09-267, p. 5, and negative decision in the case of *The Prosecutor v. Bemba*, ICC-01/05-01/08-532, para. 12, which reads: "A decision confirming (or not) the charges may therefore only be appealed if the specific requirements under article 82(1)(d) of the Statute are met." [emphasis added]

> As has been stated by other chambers of this court, the remedy of article 82(1)(d) of the Statute reflects a restrictive approach, favouring "as a principle the deferral of appellate proceedings until final judgement, and limit interlocutory appeals to a few, strictly defined, exceptions.[14]

The grounds for appeal must be distinct from mere displeasure at the decision

13. The Prosecutor's first three grounds for appeal criticise the Chamber's method of evaluating the evidence. The Defence submits that these arguments do not fall within the purview of article 82(1)(d) of the Statute.

14. Firstly, the Prosecutor suggests that the Chamber erred in deciding that the weakness of the evidence presented would necessarily result in a decision declining to confirm the charges (**first ground**). He goes on to argue that the Chamber exceeded its responsibilities under the Statute by permitting itself to assess the credibility and consistency of Prosecution witness statements before those witnesses could be examined under trial conditions (**second ground**). Lastly, the Prosecutor contends that the Chamber cannot decide to attribute a lesser probative value to statements of witnesses to whom investigators put questions which directly incriminate Mr Mbarushimana (**third ground**).

15. In reality, these grounds constitute a veiled challenge to the power[15] of any pre-trial chamber of the ICC to analyse freely the evidence submitted to it by the parties at this stage of the proceedings. The power and discretion of the pre-trial chamber are enshrined in article 61(7) of the Statute as follows:

> The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. [...][16]

[14] ICC-01/05-01/08-532, para. 12.
[15] ICC-02/05-02/09-267.
[16] See also ICC-01/05-01/08-532, para. 52, where the Chamber considers its role at the pre-trial stage. This role is not restricted to a literal reading of article 61(7) of the Statute, but extends to safeguarding the rights of the Defence and ensuring an equilibrium between the parties.

16. Furthermore, this power has been reasserted in all of the cases brought before the Court.[17]

17. In spite of the Court texts and previous decisions, the Prosecutor maintains in his Application that the "substantial grounds to believe" which he was supposed to demonstrate to the Chamber were satisfied by the mere submission of *prima facie* evidence that the person had committed the crimes charged. This approach is clearly inconsistent with the Court instruments and the decisions which interpreted article 61(7) of the Statute.

18. Furthermore, on four occasions, the Prosecutor raises the spectre of the *Al Bashir* case to spread more confusion in an attempt to persuade the Chamber that the Application raises issues similar to those raised in the other case.

19. However, the parallel drawn with *Al Bashir* is patently erroneous, since in that case leave to appeal was granted to the Prosecutor on the grounds that the Pre-Trial Chamber had introduced a <u>new test</u> for the standard of proof required under the Statute for the issuance of a warrant (i.e. that the suspect's involvement in the commission of the crimes should be the <u>only</u> reasonable conclusion which may be drawn on the basis of the evidence in the case).[18] In those particular circumstances, it

---

[17] See decision dismissing the applications for leave to appeal against the decision on the charges in the *Abu Garda* case, ICC-02/05-02/09-267, 23 April 2010, paras. 8-10, wherein the Pre-Trial Chamber recalls that it has full discretion in assessing the credibility of the evidence, that there is no presumption as to the veracity of the incriminating evidence, and that the difference between the trial stage and the pre-trial stage lies instead in the standard which the evidence must attain: "Although the Statute allows the Prosecution, at the pre-trial stage of the case, to rely on documentary or summary evidence and not to call the witnesses expected to testify at trial, neither the Statute nor the Rules, contrary to the Prosecution's assertion, draws a distinction as to the way evidence shall be assessed before a Trial Chamber and a Pre-Trial Chamber. The free assessment of the evidence presented by a party is, pursuant to the Statute, a core component of the judicial activity both at the pre-trial stage of a case and at trial." Thus, the difference between the pre-trial stage and the trial lies instead in the standard which the evidence must attain at each stage ('substantial grounds to believe" versus "beyond reasonable doubt"); see also the Defence's arguments in its written observations ICC-01/04-01/10-450, paras. 39-45, as admitted by Pre-Trial Chamber I in its Decision ICC-0/04-01/10-465, paras. 42-48.

[18] ICC-02/05-01/09-73, para. 5.

was deemed necessary for the Appeals Chamber to intervene. In *Mbarushimana*, the situation is different because the Pre-Trial Chamber merely used the test specified by the Court instruments and confirmed by previous decisions.

20. The Prosecutor attempts to draw a parallel with *Al Bashir* by claiming that an assessment by the Chamber of the credibility and consistency of the evidence adduced by the Prosecutor is equivalent to applying the "beyond reasonable doubt" standard of proof rather than "substantial grounds to believe". This argument is unfounded.

21. Determining the existence of "substantial grounds to believe" something on the basis of a specific piece of evidence necessarily involves considering the probative value, credibility and consistency of that evidence.

22. When, as in this case, the Pre-Trial Chamber is invited to find that the evidence adduced implied the existence of substantial grounds to believe in the very indirect involvement of a person in crimes which took place thousands of kilometres from his home, it is legitimate and desirable that the Pre-Trial Chamber assess whether the evidence tendered in support of this theory is sufficiently consistent and credible to uphold the theory. In this instance, this was patently not the case.

23. The Prosecutor's **fourth ground** concerns the requisite extent of the suspect's contribution to a crime in order for it to meet the threshold set out in article 25(3)(d) concerning individual criminal responsibility. The Defence submits that the resolution of this issue will not affect the conduct of the proceedings, since the Chamber found that "the Suspect did **not** provide **any** contribution to the commission of such crimes, even less a 'significant' one".[19] This issue therefore falls outside the purview of article 82(1)(d) of the Statute.

---

[19] ICC-01/04-01/10-465-Conf, para. 292.

No "right to trial" exists

24. In his Application, the Prosecutor submits that the Decision infringes his right to a fair trial since he will not be afforded the opportunity to present his case to a trial chamber. This statement is strongly redolent either of a profound incomprehension of the Court's basic documents or a total disregard for the confirmation proceedings. In fact, on the basis of the Prosecutor's arguments, he appears to consider any decision dismissing the charges as an affront. The Prosecutor refers to a "fair trial", but his real meaning is that he is entitled to a trial regardless of the weaknesses in his case. This attitude, which is tantamount to a negation of the relevance of the confirmation proceedings, does not fall within the purview of the conditions set out in article 82(1)(d) of the Statute.

25. The basic texts of the ICC provide that the Prosecution's case must meet a certain standard before it can be submitted to the trial judges. Hence, granting the Prosecutor an automatic right to a trial would effectively negate the role of the pre-trial stage as a filter to distinguish those cases which will proceed for trial from those which must be terminated at this stage.[20]

26. Contrary to the Prosecutor's contention, the pre-trial stage is not a mere formality which he can blithely surmount under the presumption that he is immune to any criticism.[21]

27. The Chamber therefore quite rightfully considered that the Prosecution had failed to satisfy the conditions required by the Court instruments, that is, to provide "sufficient evidence to establish substantial grounds to believe that the person committed the crime charged".[22]

---

[20] ICC-01/04-01/06-803-tEN, para. 37; see also the Prosecutor's Application, ICC-01/04-01/10-480, para. 7, and decision ICC-01/04-01/10-465, paras. 41 and 44.
[21] ICC-02/05-02/09-267, paras. 8-10; ICC-01/05-01/08-532, para. 55.
[22] Article 61(7) of the Statute.

28. Acknowledging that the Prosecutor's rights were infringed merely because the charges which he submitted were not confirmed would be tantamount to granting him an automatic right to appeal against the Decision on the charges.

29. This approach was previously rejected in the *Abu Garda* case.[23] Similarly, in the case of *The Prosecutor v. Jean-Pierre Bemba*, the Prosecutor sought leave to appeal because part of the charges had not been confirmed. He argued then, as in the instant case, that the Prosecutor and the Victims had been deprived of a right to present their charges before the trial chamber. The Pre-Trial Chamber rejected this argument.[24]

<u>Effects on the parties' rights of a pre-trial judge's dissenting opinion</u>

30. The Prosecutor's submissions betray the illusion that the fact alone that a judge had expressed a dissenting opinion should justify granting him leave to appeal against the Decision. That is wrong.

31. Previously, in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, the Pre-Trial Chamber rejected the arguments of the Defence which were founded on the legal uncertainty allegedly arising from the existence of a dissenting decision.[25]

III – <u>OBSERVATIONS ON THE GROUNDS FOR APPEAL</u>

32. Without repeating the arguments set forth above, the Defence will now turn to the four grounds of appeal on which the Prosecutor relies in his Application.[26]

---

[23] See the decision dismissing the Prosecutor's interlocutory appeal against the decision on the charges in *Abu Garda*, ICC-02/05-02/09-267; see also in our case the Appeals Chamber's decision denying the Prosecutor's appeal against the Decision, ICC-01/04-01/10-476 and ICC-01/04-01/10-483.
[24] ICC-01/05-01/08-532.
[25] ICC-01/04-01/07-727.
[26] ICC-01/04-01/10-480, para. 2.

1 – Does article 61 allow the Chamber to decline to confirm the charges by negatively assessing in advance the case which the Prosecutor intended to submit to the trial judges? (paragraphs 5 to 22)

33. The very wording of this issue is problematic. The fact that the Prosecutor cannot proceed to trial certainly does not constitute an error which can be ascribed to the Pre-Trial Chamber. Nor can the Prosecutor call into question the Chamber's discretion in assessing the evidence in its quest for the "substantial grounds" referred to in article 61.

34. In fact, it would appear that here the Prosecutor faults the Chamber for not merely accepting his *prima facie* evidence. According to the Prosecution, that is the sole function of the confirmation of charges proceedings. On the basis of this simplistic and condescending stance, the Prosecutor faults the Chamber for having considered the substance of the evidence before it.

35. Yet the Chamber's approach was highly judicious. It is set out logically in paragraphs 46 and 47 of the Decision.

36. The Prosecutor's bad faith concerning this issue then compels him to argue that his case was presumptively credible. He even goes as far as to contend that the Chamber's consideration of the evidence runs counter to the limited objectives of the pre-trial stage. In his view, the Chamber applied a higher standard than that required at this stage ("beyond reasonable doubt" instead of "substantial grounds to believe").[27]

37. The Prosecutor's approach is erroneous with regard to the extent of the Pre-Trial Chamber's discretion, the principle of equality of arms, and the rights of the Defence.

[27] ICC-01/04-01/10-480, para. 6.

38. In actual fact, it is incumbent upon the Pre-Trial Chamber freely to assess any and all evidence[28] and there is no presumption in favour of the Prosecutor. Pre-Trial Chamber I echoed previous decisions of the Court in making this finding in its Decision.[29] Contrary to the Prosecutor's claims,[30] the Chamber did not only exercise its power to assess the incriminating and exculpatory evidence, but it also circumscribed this right in compliance with the objectives of the pre-trial stage.[31] Viewed in its proper context, the Prosecutor's assertion of presumed credibility is unreasonable. How then would a pre-trial chamber address the counter-evidence submitted by the Defence?

39. The pre-trial stage certainly does not permit the Prosecutor to circumvent his obligation to present a case which satisfies all of the requirements stipulated in the Court instruments. As indeed the Prosecutor himself confirms,[32] it is for the Pre-Trial Chamber to filter meritless charges. However, it can reasonably do so only by considering the evidence submitted to it by the parties.

40. The parties argued this issue at length in the written submissions filed after the confirmation hearing.[33] Hence the line of reasoning in the Prosecutor's Application is merely an exegesis of his disagreement with the Decision on the charges.

41. The Prosecution goes on in its Application to claim that the Pre-Trial Chamber's assessment of the credibility of the incriminating evidence constitutes interference with its ability to present its case properly. It alleges that this

---

[28] ICC-02/05-02/09-267: "this evidence is freely assessed by the Chamber and such assessment falls within its discretionary powers."
[29] ICC-01/04-01/10-465, paras. 44-48.
[30] ICC-01/04-01/10-480, paras. 5-13.
[31] ICC-01/04-01/10-465, para. 44.
[32] ICC-01/04-01/10-480, para. 7.
[33] ICC-01/04-01/10-448, paras. 30-35, and ICC-01/04-01/10-450, paras. 39-45.

interference compels it to provide more evidence to overcome inconsistencies in its case. Furthermore, it argues, this interference prejudices the victims and witnesses in that the Prosecutor is obligated to call *viva voce* witnesses in order to redress the balance.[34]

42. In response to both of these arguments, the Defence emphasises that it is for each of the parties to present its own case and supporting arguments. The appropriate time for this presentation was the confirmation hearing and the written observations supplementing the hearing. The Pre-Trial Chamber certainly cannot be held responsible for the Prosecutor's failure to present his case and evidence properly. The Prosecutor had been conducting investigations for three years prior to Mr Mbarushimana's arrest and he had all the requisite means at his disposal. The Defence recalls, moreover, that the Prosecutor's resources far exceeded those of the Defence, in terms of both time and staff. In fact, throughout the proceedings the Chamber took great care to ensure that the Prosecutor could present his case properly.[35]

43. By way of example, the Defence recalls that the Prosecutor was twice granted a postponement of the confirmation hearing.[36] The first was granted at the Prosecutor's request[37] on the grounds that it would provide the Prosecution with an opportunity to consider privileged material which is protected under the Statute. The second postponement was ordered by the Chamber to allow the Prosecution to present witness statements at the hearing.

---

[34] ICC-01/04-01/10-480, paras. 16 and 17.

[35] In *Lubanga*, document ICC-01/04-01/06-915, the Pre-Trial Chamber dismissed an application for leave to appeal on points of evidence in the record on the grounds that the participants had had ample opportunity to make observations on the impugned evidence. *A contrario*, in our case, the Prosecutor has had ample opportunity to defend his evidence when challenged by the Defence.

[36] *Decision on the Prosecution's request for the postponement of the confirmation hearing*, ICC-01/04-01/10-207; and *Decision on "Defence request to deny the use of certain incriminating evidence at the confirmation hearing" and postponement of confirmation hearing*, ICC-01/04-01/10-374, the grounds for which are set out in ICC-01/04-01/10-378.

[37] ICC-01/04-01/10-189.

44. Thus, the Chamber acted diligently and did not merely accept the brief analysis of the evidence proposed by the Prosecution. During the confirmation hearing, the Prosecutor announced that his written observations would contain a more detailed analysis.[38] Absent such analysis, the Pre-Trial Chamber, exercising its powers, freely considered the evidence without, however, exceeding its prerogatives. It was on the basis of a conscientious assessment that the Chamber found that there was insufficient evidence to establish substantial grounds to believe that Mr Mbarushimana had committed the crimes of which the Prosecutor had accused him.

45. In his Application, the Prosecutor complains that the Chamber's approach compels him henceforth to call witnesses during the confirmation hearing. Firstly, the Defence challenges the Prosecutor's assumption that such examination would have resolved the inconsistencies in his case. This is pure *speculation* which most assuredly cannot provide a basis for appeal. Furthermore, the Prosecutor relied on and acknowledged it in a recent filing in the Kenya I case.[39]

46. In any event, the Defence submits that the Prosecutor has the right to call witnesses in court without necessarily causing prejudice to the witnesses and victims. *A contrario*, an absence of witnesses at the confirmation hearing does not, however, prevent the charges from being confirmed. Thus in other cases, an absence of witnesses at the hearing did not prevent the charges from being confirmed, while the pre-trial chamber applied the same evidentiary standard as that applied by Pre-Trial Chamber I in the case against Mr Mbarushimana. Similarly, as a recent decision

[38] Transcript of 20 September 2011, ICC-01/04-01/10-T-8-RED2-ENG, p. 87, lines 19-24.

[39] A similar argument was submitted by the Prosecutor in the Kenya I case in his consolidated response to the application of Ruto and Sang for leave to appeal the decision on the charges, ICC-01/09-01/11-385, para. 14. A hypothetical issue cannot affect the fairness of the proceedings. See also, ICC-01/05-01/08-532, para. 17; ICC-01/04-01/07-1958, para. 20; ICC-02/04-01/05-367, para. 22.

of the pre-trial chamber in the Kenya cases confirms,[40] the appearance of witnesses does not always prevent the chamber from declining to confirm the charges.

47. Finally, on the issue of the expeditious conduct of the proceedings (paragraph 18 of the Application), the Prosecutor resorts to sheer blackmail by claiming that compliance with the Court documents would delay the proceedings.

48. Presuming the Chamber's decision to be erroneous, the Prosecutor submits that he is compelled to produce further evidence and thus to delay the proceedings. This false logic does not hold water for the following reasons:

(i) Firstly, to accept such reasoning would be tantamount to automatically granting the right to appeal against any decision declining to confirm the charges;

(ii) Secondly, the Prosecutor's right to submit fresh evidence against Mr Mbarushimana cannot serve as a basis for violating the Statute, which provides for an opportunity to appeal only in exceptional circumstances;

(iii) Lastly, the production of fresh evidence by the Prosecutor and its impact on the remainder of the case is mere speculation. To claim otherwise would be contrary to the principle of the presumption of innocence and would violate the rights of the Defence.

Second ground: Did the Chamber overstep its powers by assessing the credibility and consistency of witness interviews, statements and summaries, without the opportunity that would be possible at trial to examine the witnesses? (paragraphs 23-29)

49. This ground is, in actual fact, a variation on the first ground. Here again, the Prosecutor submits that at the confirmation stage, a pre-trial chamber has absolutely no power to evaluate the evidence. Once more, the Prosecutor calls into question the

[40] The charges were not confirmed against Mr Kosgey, ICC-01/09-01/11-373, and Mr Ali, ICC-01/09-02/11-382-Red.

modalities and functioning of the pre-trial stage as defined by the Statute, without raising any issues which would constitute grounds for appeal within the meaning of article 82(1)(d).

50. Under article 61(5) of the Statute:

> At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

51. It follows from this provision that the Prosecutor is free to call or not to call his witnesses at the confirmation hearing. His choice as to whether to exercise this prerogative in no way affects the pre-trial chamber's prerogative to assess the evidence tendered.[41]

52. The Chamber certainly cannot be held responsible for the Prosecutor's strategic choices in presenting his case. He chose, *inter alia*, to tender statements of anonymous witnesses; it is therefore wholly logical that the Chamber assigned them a lesser probative value, as it justifies at paragraph 49 of its Decision and in application of consistent precedents.[42]

53. It is incumbent upon each of the parties to present all of its arguments at the appropriate time in the proceedings. The Chamber did not fail in its duty to search for the truth and itself conducted an evaluation of the evidence. Hence the Prosecutor cannot claim to have been prejudiced on this basis.

---

[41] Article 67(1) of the Statute and the aforementioned precedents.

[42] 110 ICC-01/04-01/07-717, paras. 159-60; ICC-01/05-01/08-424, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, para. 49; ICC-02/05-02/09-243-Red, paras. 49-51; and ICC-02/05-03/09-121-Corr-Red, para. 41.

Third ground: Did the Chamber correctly apply article 54(1) by considering that a Prosecution investigator's use of leading questions to directly elicit incriminating evidence diminishes the probative value of such a statement? (paragraphs 30-39)

54. Here again, the Prosecutor contends that appellate proceedings may be used to challenge the Pre-Trial Chamber's discretion in evaluating the probative value of the evidence brought before it.

55. The Prosecutor appears desirous of replacing this stage of the proceedings by some sort of rubber-stamping where his assertions are accepted at face value, without an opportunity for the Pre-Trial Chamber to analyse them, since such analysis risks compromising the Prosecutor's sacred right to have all persons arrested brought before the trial judges.

56. At paragraph 51 of its Decision, the Pre-Trial Chamber quite rightly criticises the investigatory techniques used by the Prosecution and finds that the Prosecutor violated his obligation to investigate both incriminating and exonerating circumstances. Article 54(1) of the Statute is clear and concise and leaves no room for interpretation. The Chamber merely notes that the Prosecution did not fulfil its duty under the article. Hence the Prosecutor is simply voicing disagreement with the Chamber, not raising an appealable issue. It appears that the Prosecutor is challenging the article itself, not the Chamber's application of it.

57. Furthermore, the Defence notes that in submissions filed in the Kenya I case,[43] the Prosecutor took the appropriateness of this practice as a given.[44]

58. The Pre-Trial Chamber's appropriate evaluation of the evidence, only a few examples of which are provided in the Decision, shows clearly that direct information was put to witnesses for them to repeat only when a witness made

[43] See the Prosecutor's consolidated response to the application for leave to appeal in the Kenya I case, ICC-01/09-01/11-385, paras. 9 and 11.
[44] *Ibid.*, para. 11, interpreting a decision in *Lubanga*, ICC-01/04-01/06-2690-Red2, para. 204.

statements which were contrary to the Prosecution's case. The Chamber quite rightly expresses its concern, since such investigations show no interest in the search for the truth and clearly demonstrate a violation of the Prosecutor's obligations under article 54(1)(a). Thus, when a witness referred to other potential perpetrators, the investigator led the witness back to the 'correct path', that is, in line with the Prosecution's case, presuming that Mr Mbarushimana is indirectly guilty of the crimes allegedly committed by the FDLR.[45]

59. Lastly, the Prosecutor's Application confirms the Pre-Trial Chamber's finding and shows the Prosecutor's intention of perpetuating his dubious practices. This is apparent in paragraph 34 of the Application, where the Prosecutor expresses surprise that his investigators can be criticised for supporting their own version of events!

60. As in his previous grounds, after bad faith the Prosecutor resorts to threats. Thus, in paragraph 37 of his Application, he violates his obligations outright and dares to argue that his investigators' questionable practices have the advantage of accelerating the proceedings while the search for the truth wastes the Court's time...

61. Without needing to discuss further this strange conception which the Prosecutor appears to have of his mission, the Defence recalls that the proper application of article 54(1) of the Statute would be beneficial for all of the parties, since it would save the Suspect long periods of detention on the basis of incomplete, partial investigations; save the Court from investing significant budgetary resources in flimsy, if not fabricated, cases; and lastly, permit the Prosecutor to present much sounder cases at the pre-trial stage.

[45] See the statement of Prosecution Witness W-0559 in DRC-OTP-2033-1533, p. 0863.

62. The alleged 'right' of the Prosecutor to bring each case to trial[46] has already been discussed above and will not be revisited.

63. In the final analysis, at this point the Prosecutor merely calls into question the Chamber's finding that the investigation methods used by the Prosecution were inappropriate. The Defence recalls that this finding was not the only basis for the Decision; it constituted an additional element in support of the ultimate finding.[47] Accordingly, it is a hypothetical issue and not one warranting an appeal within the meaning of article 82(1)(d).

64. The Appeals Chamber has always declined to provide *advisory opinions* on hypothetical issues.[48] The appealable issue must be material to the outcome of the proceedings[49] and this does not apply to the third ground raised by the Prosecutor.

Fourth ground: Does the mode of criminal liability under article 25(3)(d) require that the person make a significant contribution to the alleged crimes?

65. Under this ground, the Prosecutor raises the issue of whether the contribution under article 25(3)(d) must be "significant" or "substantial". He challenges the Chamber's finding that the requisite threshold is a significant, rather than substantial, contribution.

66. In this case, this issue is purely academic, since the Chamber found in paragraphs 292 *et seq.* of the Decision that Mr Mbarushimana provided ***no*** contribution to the commission of the crimes alleged by the Prosecutor:

> As hereinafter explained, the Majority of the Chamber, with the Presiding Judge dissenting, finds that the Suspect did not provide any contribution to the commission of such crimes, even less a "significant" one.

---

[46] ICC-01/04-01/10-480, para. 36.
[47] ICC-01/04-01/10-465-Conf, paras. 39-51.
[48] ICC-01/04-01/07-1497 OA8, para. 38: "[…] The Appeals Chamber considers it inappropriate to pronounce itself on *obiter dicta*. To do so would be tantamount to rendering advisory opinions on issues that are not properly before it […]".
[49] ICC-01/04-168, para. 9.

67. Thus, the resolution of the issue raised by the Prosecutor is purely hypothetical and will not advance the proceedings within the meaning of article 81(2)(d). As recalled above in the analysis of the third ground, the Appeals Chamber has always held that it does not consider hypothetical issues and that it is not an advisory body.[50]

68. The Defence notes that, in his consolidated response in the Kenya I case,[51] the Prosecutor in fact validated the fact that an *abstract question*, in this instance the legal characterisation of the contribution in accordance with article 25(3)(d), cannot be appealable if it was not a determining factor in the outcome of the case.

69. Accordingly, the Defence will not enter into the discussion of what should constitute a contribution in accordance with article 25(3)(d). Besides, it has argued this point extensively at the confirmation hearing and in its previous written submissions.

FOR THESE REASONS

May it please the Pre-Trial Chamber to:

- DISMISS the Prosecutor's Application for leave to appeal against the Decision on the charges.

[signed]

Arthur Vercken

Counsel for Mr Callixte Mbarushimana

Done in Paris, France, this Sunday, 26 February 2012

[50] See ICC-01/04-01/07-1497 OA8, para. 38; Appeals Chamber decisions ICC-01/04 OA4 OA5 OA6, para.30; ICC-02/05 OA OA2 OA3, para. 19; ICC-01/04-01/06 OA8, para. 6.

[51] ICC-01/09-01/11-385, para. 43.