Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/04-01/10**
Date: **02/04/2012**

THE APPEALS CHAMBER

Before: **Judge Erkki Kourula, Presiding Judge**
Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Anita Ušacka
Judge Silvia Fernandez de Gurmendi

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

Public Document

Defence response to the Prosecution's document in support of the appeal

Source: **Defence for Mr Callixte Mbarushimana**

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

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Other

The first issue

1. The first issue on which the Prosecutor was granted leave to appeal reads as follows:

> [TRANSLATION] Whether the standard of proof defined by article 61 of the Statute empowers the Chamber to decline to confirm the charges brought before it by the Prosecutor on a finding that the evidence tendered contained inconsistencies, ambiguities or contradictions, thereby depriving the Prosecutor of the possibility of bringing his case to trial.

2. In the Defence's view, the wording of this issue itself betrays its consistency.

3. By virtue of its very purpose, the confirmation hearing may entail depriving the Prosecutor of the possibility of bringing his case to trial.

4. Such a situation will arise where the Prosecutor fails to "support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged" (article 61(5)).

5. Hence, it follows clearly from the Statute that the task of the Prosecutor at the confirmation stage is "to support his charges".[1]

6. Yet, until otherwise proven, the intellectual exercise performed by the Bench in adjudging the charges *sub judice* consists of determining whether they contain "inconsistencies, ambiguities or contradictions". Therein lies the very essence of criminal judicial activity.[2]

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[1] For the duties of the Prosecutor at the confirmation stage, see, for example, the Decision on the charges of the Pre-Trial Chamber in *Lubanga*, ICC-01/04-01/06-803-tEN, para. 39 "Accordingly, the Chamber considers that for the Prosecution to meet its evidentiary burden, it must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations […]"

[2] Regarding judicial activity and discretion with respect to the analysis of evidence, see also article 69(4) of the Statute, which empowers the Pre-Trial Chamber to: "rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence." Although this article is found in the part of the Statute entitled "The Trial", rule 63(1) of the Rules of Procedure and Evidence provides that "[t]he rules of evidence set forth in this chapter, together with article 69 of the Statute, shall apply in

7. Accordingly, the sole argument which the Prosecutor may still propound is to assert that the exercise of inquiring into "inconsistencies, ambiguities or contradictions" does not amount to an inquiry into "substantial grounds to believe the person committed the crimes charged".[3]

8. Such an argument is manifestly preposterous insofar as it renders the confirmation stage before the Pre-Trial Chamber wholly meaningless.[4]

9. An inquiry into "inconsistencies, ambiguities or contradictions" is the sole means of performing the judicial activity at issue here.

10. In fact, the ambiguity in the Prosecutor's arguments is wholly engendered by the fact that the applicable texts before the ICC provide for the gradual elevation of the standard of credibility applicable to those charges which he must bring before the Bench in order to proceed to the subsequent stage.

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proceedings before all Chambers". See the decision in *Abu Garda*, ICC-02/05-02/09-267, para. 7: "Furthermore, the general provisions relating to evidence are encapsulated in rule 63 under Chapter 4 of the Rules, under the heading 'Provisions relating to the various stages of the proceedings'. Rule 63(1) states that '[t]he rules of evidence set forth in this chapter, together with article 69, shall apply in proceedings before all Chambers', thus including a Pre-Trial Chamber when dealing with confirmation of charges proceedings. In addition, pursuant to rule 63(2) of the Rules, the Chamber has a broad discretion to freely assess all the evidence submitted." In this respect, see the settled jurisprudence, in particular the Pre-Trial Chambers' decisions concerning the charges in *Bemba,* ICC-01/05-01/08-424; *Katanga and Ndgujolo,* ICC-01/04-01/07-717, at paragraphs 71 to 224; *Lubanga,* ICC-01/04-01/06-803-tEN, in particular paragraph 61.

3 However, the jurisprudence asserts the contrary. See, for example, ICC-02/05-02/09-243-Red, para. 43: "The Chamber is of the view that inconsistent, ambiguous or contradictory evidence may result in the Chamber reaching a decision not to confirm the charges. Such a conclusion would not, however, be based on the application of the principle of *in dubio pro reo* to the assessment of the probative value of the evidence presented by the Prosecution at this stage of the proceedings. A conclusion such as this would rather be based on a determination that evidence of such a nature is not sufficient to establish substantial grounds to believe that the suspect committed the crimes with which he is charged and thus that the threshold required by article 61(7) of the Statute has not been met."

4 Concerning the judicial activity of and discretion vested in the Pre-Trial Chamber to assess the evidence, see the Decision of the Pre-Trial Chamber in *Abu Garda* denying leave to appeal the Decision to dismiss the charges, ICC-02/05-02/09-267, para. 8: "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."

11. Thus, at the arrest warrant stage, the Bench must find that the evidence led by the Prosecution establishes "reasonable grounds to believe", and then "substantial grounds to believe" at the confirmation hearing. Lastly, by the close of the trial, the evidence must have evinced "guilt beyond reasonable doubt".

12. Yet, each of the standards set for the three key stages in ICC proceedings clearly requires the same analytical endeavour by the Bench regarding the evidence brought before it by the Prosecutor. Only the format of the evidence differs.[5]

13. By its very essence, a "substantial ground" concerns the content or substance of a piece of evidence and, in this sense, inquiry into this species of ground necessarily entails analysis. Furthermore, a "substantial" ground contrasts, perforce, with a superficial and light *prima facie* ground, which need not be analysed.

14. However, the first appellate issue raised by the Prosecutor does not concern the format of the incriminating evidence which he introduced but solely the intellectual analysis undertaken by the Bench.

15. In brief, the Prosecutor moves the Appeals Chamber to prohibit the Pre-Trial bench from giving full rein to its intellectual capacity at the confirmation hearing.

16. **The three arguments** advanced by the Prosecutor in an attempt to persuade the Appeals Chamber to mete out such an act of intellectual castration are as follows.

[5] *Ibid*., *Abu Garda,* ICC-02/05-02/09-267, para. 9: "The difference between the various stages of the proceedings lies instead in the threshold of proof to be met during the respective stages of the proceedings: for the charges to be confirmed by the Pre-Trial Chamber, there needs to be 'sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged'; for the accused to be convicted, the Trial Chamber must be 'convinced of the guilt of the accused beyond reasonable doubt'."

17. **The first argument** asserted by the Prosecutor consists in claiming that proof that the Pre-Trial Bench ought not to dwell overmuch on the evidence presented by the Prosecution lies in the statutory possibility afforded him to submit his incriminating evidence in a format which, to his mind, is less onerous. This possibility is contemplated by the second part of article 61(5): "The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial".

18. Firstly, it must be noted that this passage of the Statute only addresses evidence brought by the Prosecutor to sustain his charges (and not the charges *per se*). This distinction may not be insignificant insofar as, in the case at bar, part of the Prosecutor's case did not rely on conventional evidence but on the Prosecution's reasoning and inferences instead. However, the impugned decision of 16 December 2011 shows that not only was the Prosecution evidence found to contain "inconsistencies, ambiguities or contradictions" but that the same also holds true for its reasoning.

19. Returning to the second half of article 61(5) on evidence, reference to the text suffices to show that it merely envisions a possibility. Nowhere is it stated that the Prosecutor may always simply ground his case "on documentary or summary evidence" and/or that he is prohibited from calling witnesses.

20. Accordingly, the text at issue must necessarily be read as a whole, with due consideration afforded to its spirit.

21. Conversely, it is manifest that in contrast to the hearing at which the Prosecutor applies for the issuance of a warrant of arrest, which, by its very nature, is *ex parte*, the confirmation stage is envisaged by the texts as a veritable judicial and adversarial proceeding.

22. Thus, article 61 provides for the Defence to be present, to be afforded notice of the charges and their supporting evidence prior to the hearing, to challenge the charges and evidence and even to tender exculpatory evidence. The confirmation hearing is therefore more than a mere record of the Prosecution case – it is an adversarial proceeding. In fact, the objective of this stage of the proceedings is quite plain: to obviate both the undue incarceration of persons for a prospective trial and the cluttering of the schedule of the Court with incomplete and defective cases.[6]

23. Hence, based on a mere possibility, the Prosecutor is seeking to contrive a right to be "incoherent, ambiguous and contradictory", irrespective of the weakness of his evidence, and to litter the docket of the Court with a further case.

24. Yet, it is self-evident that the text affords the Prosecutor the unfettered discretion to determine how best to substantiate his case with a view to persuading the Pre-Trial Chamber that there are indeed substantial grounds to believe that the person committed the crimes charged. By the same token, the choice made by the Prosecutor does not undermine the freedom of the Pre-Trial Chamber to exercise its judicial prerogatives.[7]

25. **The second argument** raised by the Prosecutor to induce the Appeals Chamber to pervert the texts is actually not unrelated to the first argument, despite

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[6] In relation to prosecutorial abuse and judicial economy, see for example the Pre-Trial decision in *Bemba*, ICC-01/05-01/08-424, at para. 28: "This threshold is higher than the one required for the issuance of a warrant of arrest or summons to appear, thus protecting the suspect against wrongful prosecution and ensuring judicial economy by allowing to distinguish between cases that should go to trial from those that should not." See, for a similar approach, the "Decision on the charges" in the *Kenya I* case, ICC-01/09-01/11-373, para. 40.

[7] See, for example, *Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges'"* in *Abu Garda*, ICC-02/05-02/09-267, paragraph 8: "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."

the legal veneer employed on this occasion. In fact, the second argument could even be said to be consequent upon the first. Thus, to lend support to the textual perversion in which he is engaged, the Prosecutor proceeds to argue that the evidence which he tendered at the confirmation hearing enjoys a "presumption of credibility".[8] At no time does the Prosecutor specify the source of such presumption, which, however, offends all of the fundamental principles of criminal procedure and impels the conclusion that, in his eyes, the presumption quite simply is derived, once again, from the possibility open to him under article 61(5) to desist from presenting all of his evidence to the Pre-Trial Chamber. Once more, the Prosecutor neglects that he is master of his case and that he alone bears responsibility for determining whether the format in which his evidence is to be brought at the confirmation stage will suffice to persuade the Bench of the existence of "substantial grounds to believe".

26. This baseless theory has already been addressed: it is manifestly the result of a perversion of the proceedings and their spirit.

27. In its 1 March 2012 decision granting the Prosecutor leave to appeal, the Pre-Trial Chamber held that appeal on the first issue could be granted insofar as it would be instructive to obtain the opinion of the Appeals Chamber as to whether the Pre-Trial Chamber had acted *ultra vires* by applying an unduly stringent filtration standard in its adjudication of the charges. The Pre-Trial Chamber thereby accorded leave to appeal since it considered that the issue may be consonant with the requirements of article 82(1)(d). At paragraph 9 of its decision to grant leave, the Pre-

[8] The jurisprudence rejects such a presumption: see "Decision on the charges" in the case at bar, ICC-01/04-01/10-465, paragraphs 45 and 46; see also, *Abu Garda*, *Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges'"*, ICC-02/05-02/09-267, paragraphs 1 to 12, wherein the Prosecutor requested that at the pre-trial stage, his evidence be viewed "in the light most favourable" and wherein the Pre-Trial Chamber rejected his request, reaffirming its discretion to adjudge the evidence brought by the parties during the confirmation of charges; see also, *Bemba*, paragraph 59: "[…] The Chamber gives the evidence the weight that it considers appropriate. Therefore, the Chamber is not bound by the parties' characterisation of the Disclosed Evidence, but makes its own assessment thereof."

Trial Chamber even identified three points which, in its view, could be affected by the resolution of the issue (whether the Suspect was informed of the crimes committed in the Congo; whether the evidence tendered was sufficient to demonstrate the existence of an order to cause a humanitarian catastrophe; whether the actions of the Suspect encouraged the troops based in the Congo).

28. However, in his appeal, the Prosecutor fails to address the three points raised by the Pre-Trial Chamber. At no time does he explain where in the impugned decision the Bench exceeded the filtration standard laid down by the texts.

29. The Defence sees two underlying causes for such silence. Firstly, as previously stated, part of the Prosecutor's case was grounded not in conventional evidence but in the Prosecution's reasoning or inferences. However, the impugned 16 December 2011 decision shows that not only was the evidence tendered found to contain "inconsistencies, ambiguities or contradictions" but that the same also holds true for the Prosecutor's reasoning. In the Defence's view, this explains why the Prosecutor wasted the entire first part of his appeal in reiterating his case against Mr Mbarushimana whereas that argument is irrelevant.

30. Secondly, prosecutorial silence on the three points set out by the Pre-Trial Chamber is due to the fact that the evidence which enabled the Pre-Trial Chamber to adjudge the case was mainly documentary (computer evidence and documents seized at Mr Mbarushimana's home, newspaper articles, press releases) and unlikely to change during a prospective trial. Clearly, the content of a press release will be the same before a pre-trial or trial bench. Similarly, the "inconsistencies, ambiguities or contradictions" which appear in a witness's written testimony may already serve to evince the substantive weakness therein, not necessarily in respect of witness credibility, but, for example, as regards the fact that the testimony does not extend to the precise facts advanced by the Prosecutor.

31. This state of affairs and the learned endeavours of the Pre-Trial Bench left the Prosecutor with no choice but to move the Appeals Chamber to rule that the standard of inquiry required of the Bench at the confirmation hearing is the same as the lesser standard prescribed for arrest warrant hearings. In that way, no matter how abject the quality of his case, the Prosecutor would be assured of bringing it to trial, unfettered by considered scrutiny of his evidence and his reasoning. Such a preposterous petition will naturally be dismissed.

32. **The third argument** put forward by the Prosecutor concerns the existence of a dissenting opinion. The Prosecutor would like to believe that the dissenting opinion upholds his case. This is incorrect and in fact quite the contrary. Without entering into the detail of Judge Monageng's dissent, it is apparent therefrom that at no point did she criticise the endeavours of the Majority in her finding that the dismissal of the charges was the result of overzealous filtration. Therefore, although she drew a different conclusion to the Majority, Judge Monageng performed the same type of analysis as the two other members of the Pre-Trial Bench.

33. Accordingly, this argument is invalid and, in any event, linked to the fact that in five out of the 25 incidents alleged by the Prosecution, the Majority of the Pre-Trial Chamber found that war crimes had been committed by the FDLR.

34. Bizarrely, the Prosecutor does not contest this aspect of the impugned decision. However, the fact that, on account of documentary evidence and summaries of testimony, five of the alleged incidents were accepted by the Pre-Trial Chamber as constituting war crimes shows that confirmation on the basis of the evidence formats authorised under article 61(5) is possible. This specifically shows that it is fully established that this article authorises the Prosecutor merely to avail himself of "documentary or summary evidence" and that he "need not call the witnesses expected to testify at the trial" where he considers that such evidence suffices to attain the requisite standard ("substantial grounds to believe"). It is this

principle of the proper administration of justice and certainly not a presumption of credibility which may absolve the Prosecutor from substantiating his charges.

35. Further still, and contrary to the Prosecutor's assertion at paragraph 5 of his appeal, the Defence is entitled to have the benefit of any weakness in the case, this principle applying to both the trial and pre-trial stages.[9]

36. Moreover, in the impugned decision, the Pre-Trial Chamber frequently relies on arguments of a purely logical nature when ruling whether the attacks *sub judice* were carried out as part of a large organised campaign (see, for example, paragraph 265). Such reasoning by the Pre-Trial Chamber did not in any way hinge on the quality and format of the evidence tendered by the Prosecutor: it was guided by common sense, for which the Pre-Trial Chamber must be commended in that it did not perfunctorily endorse the case as submitted by the Prosecutor.

37. In fact, the Pre-Trial Chamber's reasoning in its 16 December 2011 decision does not pertain solely to what has or has not been demonstrated by evidence but also to the issue of whether, through his proven activities, Mr Mbarushimana contributed to the crimes which have been established in five out of the 25 incidents alleged by the Prosecutor.

38. All of the foregoing furnishes further explanation of why at no point in his appeal does the Prosecutor address the substance of the matter. Nowhere does he provide even an infinitesimal example of any passages in the decision which applied an excessively stringent filtration standard to the evidence presented. Nowhere does

[9] See the decision on the charges in *Bemba,* ICC-01/05-01/08-424 at paragraph 31: "Lastly, in making this determination the Chamber wishes to underline that it is guided by the principle *in dubio pro reo* as a component of the presumption of innocence, which as a general principle in criminal procedure applies, *mutatis mutandis*, to all stages of the proceedings, including the pre-trial stage."

he specify the conclusion which ought to have been drawn from his rejected evidence and the reasons therefor.

39. Ultimately, the appeal mounted by the Prosecutor can clearly be traced back to his attempt on 19 December 2011 to raise a direct appeal against the decision on the charges and circumvent the interlocutory appeal filter. In reality, the campaign pursued by the Prosecutor is clearly a protest, a drive to change or subvert the rules applicable before the ICC, and not a substantive pleading. It consists of purely and simply denying the value of the confirmation of charges process established by the Statute.

40. The 16 December 2011 decision illustrates the caution exercised by the Chamber in its reasoning. The Bench did not exceed the standard prescribed by the texts and the Prosecutor fails to show otherwise.

41. As regards this first issue, the response to the Prosecutor should therefore be that the Pre-Trial Chamber duly exercised the powers with which it is vested.

The second issue

42. The second issue on which the Prosecutor was granted leave to appeal is the following:

> 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.

43. Whilst pertaining to a narrower aspect of the confirmation hearing, this issue is necessarily connected to the first.

44. Accordingly, the Defence restates the argument made hereinabove in response to the Prosecutor on the issue of whether by virtue of the second sentence of article 61(5) his evidence is protected by a presumption of credibility.

45. The fact that article 61(5) authorises the Prosecutor to support his charges with "documentary or summary evidence" and "not call the witnesses expected to testify at the trial" does not mean that a chamber which has the temerity to dismiss the charges brought by the Prosecutor automatically incurs a sanction from the Appeals Chamber, since the Prosecutor will have used the opportunity afforded to him to attempt to support his charges with documentary or summary evidence without calling witnesses.[10] Interpreting the texts in the manner being demanded by the Prosecutor would amount to rendering them ineffective and entirely useless. Were the Prosecutor to have his way, he would henceforth be able to adduce the barest minimum of evidence in support of his charges to be certain of advancing to the trial stage. The cost to international justice would be inestimable.

46. Not only could the Prosecutor have decided to call certain key witnesses to speak to certain particularly weak aspects of his case, but in its 16 December 2011 decision, rather than distorting the content of the evidence provided by the Prosecutor himself (however it was presented), the Pre-Trial Chamber, also properly analysed it! The Defence is at a loss to determine on what legal instrument the Prosecutor relies in asserting that the judges, acting within the legal framework of the Statute of the Court, should be prohibited from performing this judicial task.

[10] *The Prosecutor v. Abu Garda*, *Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges'"*, ICC-02/05-02/09-267, para. 8: "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."

47. Moreover, the Defence notes that there is settled jurisprudence which serves to alert the Prosecutor to his responsibilities in selecting the manner in which he will submit evidence to the Pre-Trial Chamber.[11]

48. Here again, the response to the Prosecutor should be that the Pre-Trial Chamber properly exercised its discretion.

The third issue

49. The third issue on which the Prosecutor was granted leave to appeal is the following:

> 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 crimes.

50. Article 25(3)(d) reads as follows:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> [...]
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime;

[11] Whilst acknowledging that the Prosecutor is at liberty to determine the form of his evidence, the consistent findings of the Pre-Trial Chamber have attributed lesser probative value to certain evidence, such as summaries of witness statements and anonymous witnesses. See *Abu Garda*, ICC-02/05-02/09-243-Red, paras. 50-52: "The Chamber is of the view that the Prosecution should not be unduly disadvantaged as a result of the use of evidence in a form that is expressly allowed by the governing legal provisions of the Court. However, the Prosecution's right to rely on summary evidence in accordance with article 61(5) of the Statute must be balanced with the right of the Defence, in accordance with article 61(6) of the Statute, to challenge the evidence presented by the Prosecution. 51. Accordingly, the Chamber 'may [...] determine that the evidence will have a lower probative value if the Defence does not know the witness's identity and only a summary of the Statement, and not the entire statement, may be challenged or assessed'." See also, in this respect, *Katanga*, ICC-01/04-01/07-717, paras. 118, 120, 159 and 160; *Bemba*, ICC-01/05-01/08-424, para. 50; *Kenya II*, ICC-01/09-02/11-382-RED, para. 90.

51. The Prosecutor claims that, in finding that Callixte Mbarushimana's contribution was not "significant", the Pre-Trial Chamber applied too high a standard to evidence which, if the lesser standard (that is, no standard at all!) had been applied, would have enabled the Prosecutor to proceed to trial.

52. The Prosecutor claims that no contribution threshold exists which can be applied by a Pre-Trial Chamber in order to assess evidence submitted by the Prosecutor. All contributions, regardless of their nature, must be considered.

53. He is of the view that article 25(3)(d) quite specifically encompasses any contributions not specified in the other provisions (25(3)(a), 25(3)(b), 25(3)(c)) in order "to put an end to impunity" and ensure that "the most serious crimes of concern to the international community as a whole must not go unpunished" (paragraph 53 of his appeal). The Prosecutor is thus of the view that the Pre-Trial Chamber has added a qualification to an article where none is found.[12]

54. This issue raised by the Prosecutor is discussed at paragraphs 34 to 43 of the 1 March 2012 decision granting leave to appeal. The Pre-Trial Chamber rejected the Defence argument that this issue was purely academic, since at paragraph 292 of the decision on the charges, the Majority found that "the Suspect did not provide any contribution to the commission of the crimes, even less a 'significant' one". Furthermore, this summary of the Chamber's opinion is reproduced in paragraph 103 of Judge Monageng's dissenting opinion, in which she highlights "the Majority's finding that the Suspect did not make *any* contribution to the crimes committed".

[12] The Defence notes that in his appeal, the Prosecutor relies on the writings of Professor Kai Ambos, in particular on the *travaux préparatoires* for article 25(3)(d) – see footnotes 111 and 112 – whom he thus acknowledges as an authority on the issue. The Defence recalls that at the confirmation hearing from 16 to 21 September 2012, ICC-01/04-01/10-T-8-CONF-FRA ET 20-09-2011 4/79, lines 10-13, Professor Ambos stated: **"[TRANSLATION] I looked at the Prosecution's document containing the charges, and having read it, I came to the conclusion that the Prosecution was working from a flawed interpretation of the mode of liability which underpins this case, particularly article 25(3)(d) of the Rome Statute."**

55. However, in paragraph 38 of its 1 March 2012 decision granting leave to appeal, the Pre-Trial Chamber abandons this conclusion, stating that a close reading of paragraphs 303, 315 and 339 of its 16 December 2011 decision shows that it found a number of immaterial, that is, insignificant contributions in the Prosecutor's evidence. The Chamber thus appears to be interpreting its own decision on the charges in this instance.

56. The Defence objects to any post-factum interpretation, even one performed by the Chamber which issued the 16 December 2011 decision.[13] The Defence maintains that the issue on which leave to appeal has been granted has no bearing on the resolution of the trial, since in the paragraphs referred to, either no act constituting a contribution has been proved or no causal link between an act and the common outcome has been proved. Accordingly, the issue of the contribution threshold is secondary. The Pre-Trial Chamber has entered into a purely academic discussion, one which the Prosecutor now wishes to take before the Appeals Chamber.

57. A "contribution" is defined as the support provided to a collective endeavour. However, in article 303 of the impugned decision, the "role" played by Mr Mbarushimana is what is declared insignificant or unimportant. Accordingly, what the Chamber is saying in this paragraph is that this role does not constitute a contribution, that it does not constitute support for a collective endeavour, that it does not fall within the scope of article 25(3)(d), and that there is no causal link between the role and the alleged collective endeavour. Whatever the terms

[13] In *Lubanga*, the Appeals Chamber noted the **illegality of such a practice** of altering the substance of an impugned decision by means of a subsequent decision. See *Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court"*, ICC-01/04-01/06-2205, para. 92, in which the Pre-Trial Chamber altered the content of its Decision by means of "a clarification": "In this context, the Appeals Chamber notes that the Clarification substantially modified the Impugned Decision. The Appeals Chamber disapproves of the use of such clarifications to alter, or to add to, the substance of a decision. Clarifications of this kind are of questionable legality and are undesirable, because they affect the finality of judicial decisions."

employed by the Chamber in seeking to contribute to the development of case law ("significant contribution"), they do not, in the instant case, affect the content and outcome of its deliberations and, therefore, the trial. They should be considered as falling outside the scope of article 82(1)(d).

58. The same applies to paragraph 315 of the impugned decision. Whilst the Pre-Trial Chamber does use the term "significant contribution" therein, when read in its entirety, it is immediately clear from the paragraph that this expression has no particular importance there, since the Chamber begins by stating that "the evidence submitted by the Prosecution is not sufficient to establish substantial grounds to believe that the Suspect denied crimes committed by the FDLR with knowledge of them and in furtherance of a policy of the organisation". Thus, in the instant case, both the requirement set forth in article 25(3)(d) that the commission of a crime must be intentional and the requirement set forth in 25(3)(d)(ii) are manifestly not met. This is the reason for the dismissal of this charge. If there is no intent and the requirement of 25(3)(d)(ii) is not met, then there is absolutely no evidence of any contribution, regardless of whether the Chamber states that there was no "significant" contribution. Accordingly, since (1) the Prosecutor has never on appeal disputed that commission of a crime is contingent upon the existence of intent; (2) he has challenged the requirements set forth in article 25(3)(d)(ii); and (3) the third issue raised on appeal has no bearing on these points, the use of the term "significant contribution" has no effect on the reasoning of the Chamber and the proceedings do not satisfy the conditions listed in article 82(1)(d).

59. Before proceeding to examine paragraph 339, it is worth commenting on paragraph 236 of the impugned decision, since the Prosecutor asserts that here, too, the Chamber applied the criticised "significant contribution" threshold (see footnote 94 of his appeal).

60. In paragraph 326, the Chamber outlines the findings it makes from the statements of Witness 587. It notes that this witness claimed to remember hearing Mr Mbarushimana speaking on the BBC and stating that it was unknown whether any civilians had been killed in Busurungi. However, elsewhere the same witness stated that he had never heard Mr Mbarushimana speaking on the radio and that the troops were not encouraged to listen to the radio. Even more importantly, the witness stated that Mbarushimana was not kept abreast of the events by the person on the ground (Mudacumura), because Mudacumura reported to Murwanashyaka. Here again, even though at the end of the paragraph the Chamber mentions the absence of a "significant contribution", it is evident from a reading of the paragraph *in toto* that the Chamber found no evidence of any contribution on Mr Mbarushimana's part. Indeed, even the radio interview which might have constituted such a contribution was not demonstrated to have taken place by the testimony examined.

61. The final point is article 339 of the 16 December 2011 decision. This is the penultimate paragraph of the Majority's decision before "For these reasons". This paragraph does not examine any particular piece of evidence. It merely recalls that the Majority has found no evidence of substantial grounds to believe that the Suspect encouraged the troops' morale and that, accordingly, as the alleged acts have not been proved, there could not have been any contribution. The Chamber again uses the expression "significant contribution", which it defines in paragraphs 276 to 285 of its decision, but as no positive act or intent on the part of Mr Mbarushimana has been demonstrated, the use of this term has no impact on the Chamber's reasoning. Even if it had not used this expression, the evidence would not have been different, and the Chamber would have had to render the same decision.

62. Accordingly, contrary to what the Pre-Trial Chamber wrote in its 1 March 2012 decision granting leave to appeal, the response to the authorised issue will have no effect on the outcome of the trial within the meaning of article 82(1)(d).

63. In conclusion, what the Prosecutor should do at the confirmation hearing is demonstrate the existence not only of substantial grounds to believe that certain acts were committed but also of a causal link between such acts and the crime. The Prosecutor does not challenge this requirement. (See paragraphs 55 and 56 of the 12 March 2012 appeal.)

64. However, it is clear from an analysis of the Majority's findings that this is precisely what it has done. In vain it sought evidence of such acts or even sometimes a causal link between Mr Mbarushimana's acts and the crimes committed by the FDLR in the field: it found neither. Naturally, therefore, it dismissed the charges.

65. In his appeal brief, the Prosecutor again avoids the substantive issue: not once does he offer an example of a situation in which an act considered to be unproven should have been confirmed, any more than he does for any causal links.

66. His arguments are intentionally academic.

67. His silence speaks volumes.

68. His appeal should be rejected in its entirety.

[signed]

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Arthur Vercken
Counsel for Mr Callixte Mbarushimana

Dated this Monday, 2 April 2012

At Paris, France