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Date: 30 May 2012

THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. CALLIXTE MBARUSHIMANA

Public document

Judgment
on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges"

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

The Office of the Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence
Mr Arthur Vercken
Ms Yael Vias Gvirsman

Legal Representatives of Victims
Mr Ghislain M. Mabanga

REGISTRY

Registrar
Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "Decision on the confirmation of charges" of 16 December 2011 (ICC-01/04-01/10-465-Conf),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The "Decision on the confirmation of charges" of 16 December 2011 is confirmed. The appeal is dismissed.

I. KEY FINDINGS

1. In determining whether to confirm charges under article 61 of the Statute, the Pre-Trial Chamber may evaluate ambiguities, inconsistencies and contradictions in the evidence or doubts as to the credibility of witnesses.

II. PROCEDURAL HISTORY

A. Proceedings before Pre-Trial Chamber I

2. Between 16 and 21 September 2011, Pre-Trial Chamber I (hereinafter: "Pre-Trial Chamber") held the hearing on the confirmation of charges against Callixte Mbarushimana (hereinafter: "Mr Mbarushimana"). By order of 16 September 2011, the Pre-Trial Chamber allowed the parties and participants to file written submissions,[1] which the Prosecutor,[2] Mr Mbarushimana[3] and the participating victims[4] all filed.

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[1] Transcript of 16 September 2011, ICC-01/04-01/10-T-6-Red2-ENG (CT WT), p. 57, lines 4-12.
[2] "Prosecution's written submissions on the confirmation of charges", 6 October 2011, ICC-01/04-01/10-448-Red (hereinafter: "Prosecutor's Written Submissions on the Confirmation of Charges").

3. On 16 December 2011, the Pre-Trial Chamber rendered the "Decision on the confirmation of charges"[5] (hereinafter: "Impugned Decision"), declining, by majority, to confirm the charges against Mr Mbarushimana. The Presiding Judge appended a dissenting opinion (hereinafter: "Dissent") thereto.

4. On 27 December 2011, the Prosecutor filed the "Prosecution's Application for Leave to Appeal the 'Decision confirming the charges'"[6] (hereinafter: "Application for Leave to Appeal") in which he requested leave to appeal the Impugned Decision under article 82 (1) (d) of the Statute with respect to four issues. On 26 February 2012, Mr Mbarushimana filed his response[7] (hereinafter: "Response to Application for Leave to Appeal"), requesting the Pre-Trial Chamber to reject the Application for Leave to Appeal.

5. On 1 March 2012, the Pre-Trial Chamber rendered the "Decision on the 'Prosecution's Application for Leave to Appeal the "Decision on the confirmation of charges"'"[8] (hereinafter: "Decision Granting Leave to Appeal") in which it granted leave to appeal the Impugned Decision for three of the four issues in respect of which the Prosecutor had sought leave to appeal.

B. Proceedings before the Appeals Chamber

6. On 7 March 2012, the Appeals Chamber rendered the "Decision on the 'Prosecution's Request for an Extension of the Page Limit for its Document in Support of Appeal against the "Decision on the confirmation of charges" (ICC-01/04-01/10-465-Red)'",[9] extending the page limits for the Prosecutor's document in support of the appeal and Mr Mbarushimana's response thereto to 35 pages.

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[3] "Defence Written Submissions Pursuant to the Oral Order of Pre-Trial Chamber I of 16 September 2011", 21 October 2011, ICC-01/04-01/10-450 (hereinafter: "Defence Written Submissions").
[4] "Observations de victimes autorisées à participer à la procédure au terme de l'audience de confirmation des charges retenues contre M. Callixte Mbarushimana", 6 October 2011, ICC-01/04-01/10-446.
[5] ICC-01/04-01/10-465-Conf. A public redacted version was filed as ICC-01/04-01/10-465-Red. All references herein are to the public redacted version
[6] ICC-01/04-01/10-480.
[7] "Defence Response to 'Prosecution's Application for Leave to Appeal the "Decision on the confirmation of charges"' (ICC-01/04-01/10-480)", 26 February 2012, ICC-01/04-01/10-486-tENG.
[8] ICC-01/04-01/10-487.
[9] ICC-01/04-01/10-495 (OA 4).

7. On 12 March 2012, the Prosecutor filed the "Prosecution's Document in Support of Appeal against the 'Decision on the Confirmation of Charges' (ICC-01/04-01/10-465-Red)",[10] and he filed a corrigendum thereto on 13 March 2012[11] (hereinafter "Document in Support of the Appeal").

8. On 2 April 2012, upon being granted two extensions of the time limit,[12] Mr Mbarushimana filed the "Defence response to the Prosecution's document in support of the appeal"[13] (hereinafter: "Response to the Document in Support of the Appeal").

9. On the same day, the Appeals Chamber allowed 95 victims to express their views and concerns with respect to their personal interests in the issues raised on appeal.[14]

10. On 10 April 2012, the victims filed the "Observations des victimes autorisées à participer à la procédure sur l'appel du Procureur contre la 'Décision relative à la confirmation des charges' (ICC-01/04-01/10-465-Conf-tFRA)"[15] (hereinafter: "Victims' Observations").

11. On 16 April 2012, Mr Mbarushimana filed the "Defence response to the Victims' observations on the Prosecutor's appeal against the decision on the charges (ICC-01/04-01/10-510)"[16] (hereinafter: "Response to the Victims' Observations"). The Prosecutor did not respond to the Victims' Observations.

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[10] ICC-01/04-01/10-499 (OA 4).
[11] "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)", ICC-01/04-01/10-499-Corr (OA 4).
[12] On 9 March 2012, the Appeals Chamber rendered the "Decision on Mr Mbarushimana's request for time extension", ICC-01/04-01/10-497 (OA 4), extending the time limit for the filing of Mr Mbarushimana's response to the Prosecutor's document in support of the present appeal from 10 days to 15 days from the notification of the original version of that document. On 23 March 2012, the Appeals Chamber further extended the time limit for the filing of Mr Mbarushimana's response to the Document in Support of the Appeal to 2 April 2012, in its "Decision on the 'Requête urgente aux fins de reconsidération de la décision n°ICC-01/04-01/10 OA4, de protestation et de réserve'", ICC-01/04-01/10-505 (OA 4).
[13] ICC-01/04-01/10-508-tENG (OA 4).
[14] "Decision on the 'Requête tendant à obtenir autorisation de participer à la procédure d'appel contre la "Décision relative à la confirmation des charges" (ICC-01/04-01/10-465-Conf-tFRA)'", ICC-01/04-01/10-509 (OA 4).
[15] ICC-01/04-01/10-510-Red (OA 4).
[16] ICC-01/04-01/10-511-tENG (OA 4).

III. PRELIMINARY ISSUES

12. The Appeals Chamber notes that, in the corrigendum to the Document in Support of the Appeal, the Prosecutor added references in footnotes, which he explains were omitted in the original version because he encountered technical difficulties when finalising the document.[17] The Appeals Chamber recalls that the purpose of a corrigendum is to correct typographical errors.[18] Even though the Prosecutor's corrigendum goes beyond the correction of typographical errors, the Appeals Chamber has decided to accept it as the Document in Support of the Appeal because the changes did not add to the substance of the arguments but only corrected and added inadvertently omitted citations, and the participants to this appeal did not object to this document.

13. The Appeals Chamber notes that the Victims' Observations are 31 pages long, thereby considerably exceeding the limit of 20 pages laid down in regulation 37 (1) of the Regulations of the Court. In the Response to the Victims' Observations, Mr Mbarushimana requests the Appeals Chamber to reject them for this reason.[19]

14. The Appeals Chamber notes that the victims did not file any request to extend the page limit as is required under regulation 37 (2) of the Regulations of the Court, nor did the Appeals Chamber grant any such extension. Pursuant to regulation 29 of the Regulations of the Court, the Appeals Chamber therefore rejects the Victims' Observations in their entirety.

IV. MERITS

A. Standard of review

15. The Appeals Chamber's standard of review for appeals under article 82 (1) (d) of the Statute is a settled question. At issue in this appeal are exclusively errors of law. The Appeals Chamber stated recently with respect to such errors:

[17] Annex A to "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)", 13 March 2012, ICC-01/04-01/10-499-Corr-AnxA, paras 4-7.
[18] *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa'", 2 December 2009, ICC-01/05-01/08-631-Red (OA 2), para. 38.
[19] Response to the Victims' Observations, paras 2-5.

> The Appeals Chamber has repeatedly held that its review is corrective in nature and not *de novo*. On questions of law, the Appeals Chamber 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. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision. [footnote omitted].[20]

B. First and second grounds of appeal

16. The Prosecutor's first two grounds of appeal are:

a. "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";[21] and

b. "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]

17. The Prosecutor considers that the two grounds of appeal are "intrinsically connected", and he addresses the two grounds together in the Document in Support of the Appeal.[23] They are therefore examined together in this judgment.

1. Procedural context and relevant part of the Impugned Decision

18. In his Written Submissions on the Confirmation of Charges, the Prosecutor argued that, in determining whether there is sufficient evidence to establish substantial

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[20] Appeals Chamber, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus,* "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation'", 17 February 2012, ICC-02/05-03/09-295 (OA 2), para. 20.
[21] Document in Support of the Appeal, p. 11.
[22] Document in Support of the Appeal, p. 11.
[23] Document in Support of the Appeal, para. 22 (misquoting the Decision on Leave to Appeal, para. 21 as finding the two issues "intrinsically connected" whereas the Pre-Trial Chamber had found the issues "inextricably connected").

grounds to believe that Mr Mbarushimana committed the crimes charged, the Pre-Trial Chamber should base its decision solely on the Prosecutor's evidence "taken at face value".[24] He argued that the Pre-Trial Chamber "should accept as reliable the Prosecut[or]'s evidence so long as it is relevant and admissible"[25] and that it "should not reject or discount evidence because it is ambiguous, subject to more than one interpretation, or potentially inconsistent with other evidence".[26] Moreover, he contended that "the Pre-Trial Chamber should not weigh the evidence based on reliability or credibility assessments, nor should it evaluate the strengths and weaknesses of contradictory or different evidence before it".[27] According to the Prosecutor, so long as the evidence "is not incredible on its face" or "incapable of belief", the Pre-Trial Chamber should give it due weight or credence.[28] This standard, he argued, would be consistent with the common practice of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda (hereinafter: "ICTY" and "ICTR", respectively) with respect to motions for acquittal during trial.[29]

19. In the Impugned Decision, the Pre-Trial Chamber specifically rejected the arguments put forward in the Prosecutor's Written Submissions on the Confirmation of Charges.[30] The Pre-Trial Chamber noted that "[t]here 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 favour of the Prosecut[or]" and that the procedures of the *ad hoc* tribunals on which the Prosecutor relied were "so fundamentally different to the proceedings relating to the confirmation of charges that such a principle cannot be applied by analogy" (footnote omitted).[31] The Pre-Trial Chamber noted further that the right of the Defence under article 61 (6) of the Statute to challenge the Prosecutor's evidence and to present its own evidence "necessarily engages the Chamber in an assessment of the credibility and weight of

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[24] Prosecutor's Written Submissions on the Confirmation of Charges, para. 31. Mr Mbarushimana's response to the Prosecutor's arguments was set out before the Pre-Trial Chamber in the Defence Written Submissions, paras 39-43.
[25] Prosecutor's Written Submissions on the Confirmation of Charges, para. 31.
[26] Prosecutor's Written Submissions on the Confirmation of Charges, para. 32.
[27] Prosecutor's Written Submissions on the Confirmation of Charges, para. 33.
[28] Prosecutor's Written Submissions on the Confirmation of Charges, paras 32-33.
[29] Prosecutor's Written Submissions on the Confirmation of Charges, para. 31.
[30] Impugned Decision, paras 45-47.
[31] Impugned Decision, para. 45.

this evidence in light of the whole of the evidence submitted for the purposes of the confirmation hearing".[32] The Pre-Trial Chamber therefore concluded unanimously:

> Accordingly, and consistent with the approach adopted in other cases, the Chamber will assess the intrinsic coherence of each item of evidence in light of the whole of the evidence submitted for the purposes of the confirmation hearing. Where such evidence is found to contain inconsistencies, ambiguities or contradictions, the Chamber will exercise caution in using it to affirm or reject any assertion made by the Prosecution.[33]

20. On the basis of this legal determination, the Pre-Trial Chamber assessed whether the evidence was sufficient to establish substantial grounds to believe Mr Mbarushimana committed the crimes charged, with the majority and the dissenting judge reaching different conclusions on certain aspects of the charges.

2. Arguments of the parties

(a) Arguments of the Prosecutor

21. The Prosecutor does not take issue with the Pre-Trial Chamber's assessment of particular items of evidence. Rather, he challenges the legal determination which underpinned the assessment of this evidence. In his view, the Pre-Trial Chamber committed errors of law in finding that it had the power to assess the credibility or weight of each item of evidence or to take into account inconsistencies, ambiguities or contradictions therein.[34] He argues that these errors materially affected the Impugned Decision.[35]

22. With respect to the first ground of appeal, the Prosecutor argues that the Pre-Trial Chamber may not deny the confirmation of charges supported by the Prosecutor's evidence by resolving inferences, credibility doubts and perceived inconsistencies against the Prosecutor.[36] In other words, he avers that all inferences, doubts as to credibility and perceived inconsistencies should be resolved in the light most favourable to the Prosecutor.

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[32] Impugned Decision, para. 46.
[33] Impugned Decision, para. 47.
[34] Document in Support of the Appeal, para. 24.
[35] Document in Support of the Appeal, para. 24.
[36] Document in Support of the Appeal, p. 11.

23. With regard to the second ground of appeal, the Prosecutor argues that the Pre-Trial Chamber may not evaluate the credibility and consistency of witness interviews, summaries and statements without the opportunity to examine the witnesses that would be possible at trial.[37] In other words, such witnesses should be presumed credible and any inconsistencies in their interviews, summaries or statements should be resolved in the light most favourable to the Prosecutor.

24. Nevertheless, noting the rights of the charged person to challenge the evidence presented and to present his/her own evidence, the Prosecutor accepts that the Pre-Trial Chamber may exclude certain items of evidence, but he argues that this can only be done exceptionally where the items of evidence, "either on their face or in light of the other evidence presented, are plainly incredible and unreliable".[38] With this caveat, the Prosecutor's position with respect to the first two grounds of appeal can be stated more precisely as follows: all witnesses identified by the Prosecutor should be presumed to be credible and all inferences, doubts as to credibility and perceived inconsistencies in the evidence (including interviews or statements of witnesses or summaries thereof) should be resolved in the light most favourable to the Prosecutor unless such evidence is plainly incredible or unreliable, either on its face or in light of the other evidence presented.

25. The Prosecutor advances three arguments in support of his position with respect to the evaluation of evidence during the confirmation of charges hearing.[39]

26. First, the Prosecutor argues that the confirmation of charges hearing is of limited purpose and scope.[40] He notes that "[t]he purpose of the confirmation hearing is simply to make sure that there is sufficient evidence to justify trial proceedings" and that this interpretation is supported by the Statute's drafting history and is consistent with the analogous practice in other international criminal tribunals.[41] In light of the limited scope and purpose of the confirmation of charges hearing, the Prosecutor argues that the Pre-Trial Chamber should not evaluate the credibility or clarity of his evidence, resolve ambiguities or conflicts in the evidence or make

[37] Document in Support of the Appeal, paras 36-37.
[38] Document in Support of the Appeal, para. 41.
[39] Document in Support of the Appeal, pp. 12, 14, 17.
[40] Document in Support of the Appeal, paras 25-28.
[41] Document in Support of the Appeal, para. 25.

discretionary judgements in relation thereto.[42] In his view, "the standard at confirmation prevents a Pre-Trial Chamber from delving into credibility and complicated weighing of the Prosecut[or]'s evidence, in particular because the Prosecut[or] relied on witnesses' statements, some of them in summary and some of them anonymous".[43]

27. Second, the Prosecutor argues that different evidentiary rules apply at the confirmation of charges hearing as opposed to at trial.[44] He avers that the possibility of using written and summary evidence in lieu of live witnesses "prevents a full evaluation of the credibility of evidence or a competent resolution of competing versions".[45] According to the Prosecutor, statements and summaries can only be taken at face value.[46] Furthermore, in his view, the Prosecutor is not required to present all his evidence or to present evidence amenable to explanation through further questioning.[47] It is only at trial, he argues, that a Chamber has all the evidence and can appropriately evaluate the credibility of witnesses and reconcile ambiguities or inconsistencies in their testimonies.[48] The principle of the free assessment of evidence in article 69 (4) of the Statute and rule 63 (2) of the Rules of Procedure and Evidence, may enable the Pre-Trial Chamber to determine the relevance or admissibility of evidence, but it does not allow the Pre-Trial Chamber to assess its weight.[49]

28. Third, the Prosecutor argues that "[t]he standard of 'substantial grounds to believe' under article 61(7) [of the Statute] does not entail an assessment of the credibility of the evidence".[50] In support of this argument, he offers four sub-arguments.

29. First, the Prosecutor argues that any assessment of credibility based on summaries and documents will result in defective decisions.[51] Without a full record or

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[42] Document in Support of the Appeal, para. 27.
[43] Document in Support of the Appeal, para. 28.
[44] Document in Support of the Appeal, paras 29-34.
[45] Document in Support of the Appeal, para. 30.
[46] Document in Support of the Appeal, para. 31.
[47] Document in Support of the Appeal, para. 31.
[48] Document in Support of the Appeal, para. 32.
[49] Document in Support of the Appeal, para. 33.
[50] Document in Support of the Appeal, paras 35-48.
[51] Document in Support of the Appeal, paras 36-37.

the opportunity to evaluate witnesses in person, any conclusion will be unreliable.[52] He accepts that the Pre-Trial Chamber acknowledged this difficulty but contends that the Pre-Trial Chamber nevertheless "undertook an in-depth assessment of alleged contradictions and inaccuracies with and without challenges from the Defence".[53]

30. Second, the Prosecutor argues that assessing the credibility of evidence at the confirmation of charges hearing will negatively affect the fairness and efficiency of proceedings.[54] In his view, the Prosecutor will be forced to call more witnesses and the confirmation of charges hearing will become a "mini-trial" if not a full-blown trial.[55] The Prosecutor argues that this will also expose witnesses to security risks at an unnecessarily early stage.[56]

31. Third, he argues that the credibility of evidence can only be resolved at trial and that the exclusion of such matters at the confirmation of charges hearing does not deprive the person charged of the right to contest the charges against him/her.[57] He accepts that the Pre-Trial Chamber may exclude certain items of evidence, but he argues that this can only be done if the items of evidence, "either on their face or in light of the other evidence presented, are plainly incredible and unreliable".[58] He argues that the practices of the United Kingdom and Mexico, for example, support crediting the Prosecutor's evidence and inferences in deciding whether cases should proceed to trial[59] and that the ICTY adopts a similar approach under Rule 98 *bis* of the ICTY Rules of Procedure and Evidence when determining whether cases can proceed without evaluating the credibility of evidence.[60]

32. Fourth, the Prosecutor argues that "[t]he standard of 'substantial grounds to believe' under article 61(7) of the Statute does not require the Chamber to dissipate all inconsistencies and doubts".[61] He argues that he had presented sufficient evidence to proceed to trial but that the Pre-Trial Chamber erroneously diminished or rejected

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[52] Document in Support of the Appeal, para. 36.
[53] Document in Support of the Appeal, para. 37.
[54] Document in Support of the Appeal, paras 38-39.
[55] Document in Support of the Appeal, para. 38.
[56] Document in Support of the Appeal, para. 39.
[57] Document in Support of the Appeal, paras 40-44.
[58] Document in Support of the Appeal, para. 41.
[59] Document in Support of the Appeal, para. 43.
[60] Document in Support of the Appeal, para. 44.
[61] Document in Support of the Appeal, paras 45-48.

such evidence on the basis of inconsistencies or speculative credibility determinations.[62] In his view, the Pre-Trial Chamber thereby effectively applied a standard higher than that required under article 61 (7) of the Statute.[63]

(b) Arguments of Mr Mbarushimana

33. Mr Mbarushimana responds that the Pre-Trial Chamber may deny the confirmation of charges where the Prosecutor fails to support the charges with sufficient evidence to establish substantial grounds to believe a person committed the charged crimes.[64] He contends that the evaluation of inconsistencies, ambiguities and contradictions in the evidence is the very essence of the work of the judges and that the approach adopted by the Prosecutor would render the confirmation of charges hearing meaningless.[65] He argues that the judges' role in judicial proceedings involves evaluating the evidence presented by the Prosecutor at three successive stages with increasingly stringent standards of proof.[66] Mr Mbarushimana notes that the confirmation of charges hearing, at which the Prosecutor must present sufficient evidence to establish substantial grounds to believe, falls in between the arrest warrant, for which there need only be reasonable grounds to believe, and the conclusion of trial, at which point the Prosecutor must present evidence to convince the judges beyond a reasonable doubt.[67] He asserts that, at each stage, the role of the judges is to engage in "the same analytical endeavour [...]. Only the format of the evidence differs".[68]

34. Mr Mbarushimana further responds to the Prosecutor's more specific arguments. He contends that the Pre-Trial Chamber refused to confirm charges because of inconsistencies, ambiguities and contradictions not solely in the evidence but also in the Prosecutor's argumentation.[69] He notes that the fact that the Prosecutor may utilise summaries of witness statements does not forbid the Prosecutor from relying on other evidence.[70] Characterising the confirmation of charges as an

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[62] Document in Support of the Appeal, para. 47.
[63] Document in Support of the Appeal, para. 48.
[64] Response to the Document in Support of the Appeal, paras 1-5.
[65] Response to the Document in Support of the Appeal, paras 6-9.
[66] Response to the Document in Support of the Appeal, para. 10.
[67] Response to the Document in Support of the Appeal, para. 11.
[68] Response to the Document in Support of the Appeal, para. 12.
[69] Response to the Document in Support of the Appeal, para. 18.
[70] Response to the Document in Support of the Appeal, para. 19.

adversarial process intended to prevent cases going to trial where there is insufficient evidence to do so, he argues that the Prosecutor's position would lead to such cases going to trial.[71] He argues that the Prosecutor is responsible for choosing the evidence which will adequately satisfy the judges, but that this "does not undermine the freedom of the Pre-Trial Chamber to exercise its judicial prerogatives" (footnote omitted).[72]

35. With respect to the Prosecutor's argument that witnesses should be presumed credible, Mr Mbarushimana finds this argument to merely restate in a different form the Prosecutor's position that the Pre-Trial Chamber should not overly scrutinise the evidence, and he contends that the Prosecutor provides no legal basis for this presumption.[73] Mr Mbarushimana avers that the Prosecutor does not indicate where the Pre-Trial Chamber applied the wrong standard in evaluating the evidence.[74] In his view, the Prosecutor's appeal seeks to lower the standard applicable at the confirmation of charges hearing to that of the arrest warrant.[75]

36. Mr Mbarushimana observes that the Presiding Judge dissented only as to the evaluation of the evidence before the Pre-Trial Chamber but not as to the Pre-Trial Chamber's role in such evaluation in principle.[76] He submits that the Defence should be given the benefit of the doubt.[77] He contends that the Prosecutor seeks to render meaningless the confirmation of charges process through his appeal.[78]

3. Determination by the Appeals Chamber

37. The issue before the Appeals Chamber with respect to the first two grounds of appeal is one solely of law, namely whether the Pre-Trial Chamber erred in finding that it may evaluate the credibility of witnesses and that it may resolve inconsistencies, ambiguities or contradictions in the evidence for the purpose of determining whether to confirm the charges against a person. The Appeals Chamber is not called upon to consider, and it does not consider, whether the Pre-Trial

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[71] Response to the Document in Support of the Appeal, paras 22-23.
[72] Response to the Document in Support of the Appeal, para. 24.
[73] Response to the Document in Support of the Appeal, paras 25, 44-46.
[74] Response to the Document in Support of the Appeal, para. 29.
[75] Response to the Document in Support of the Appeal, para. 31.
[76] Response to the Document in Support of the Appeal, para. 32.
[77] Response to the Document in Support of the Appeal, para. 35.
[78] Response to the Document in Support of the Appeal, para. 39.

Chamber correctly assessed the evidence against Mr Mbarushimana or whether such evidence may have established substantial grounds to believe he committed the crimes charged.

38. Article 61 of the Statute provides, in pertinent part:

> 5. 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.
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> 6. At the hearing, the person may:
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> (a) Object to the charges;
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> (b) Challenge the evidence presented by the Prosecutor; and
>
> (c) Present evidence.
>
> 7. 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. [...]

39. This provision clearly shows that the confirmation of charges hearing exists to separate those cases and charges which should go to trial from those which should not, a fact supported by the drafting history.[79] It serves to ensure the efficiency of judicial proceedings and to protect the rights of persons by ensuring that cases and charges go to trial only when justified by sufficient evidence. It is by its nature an evidentiary hearing, with the Pre-Trial Chamber required to evaluate whether the evidence is sufficient to establish substantial grounds to believe the person committed each of the crimes charged. In order to make this determination as to the sufficiency of the evidence, the Pre-Trial Chamber must necessarily draw conclusions from the evidence where there are ambiguities, contradictions, inconsistencies or doubts as to credibility arising from the evidence. The Prosecutor accepts as much when he

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[79] *Cf.* Preparatory Committee on the Establishment of an International Criminal Court, Working Group on Procedural Matters, "Paper put forward by the Delegations of Argentina, Australia, Austria, Canada, France, Germany, Japan, Korea, Malawi, The Netherlands, South Africa, Sweden, the United Kingdom, and the United States, proposing a framework for the fundamental stages of the criminal process of the Court", 27 March 1998, UN Doc. A/AC.249/WG.4/DP.36, http://www.legal-tools.org/doc/c44e59/, p. 2 (introducing the confirmation of charges hearing as having the purpose of establishing whether there is a "prima facie case with respect to each of [the] charges", a phrase which was subsequently rejected in favour of "sufficient evidence to establish substantial grounds to believe the person committed each of the crimes charged).

acknowledges that the Pre-Trial Chamber may exclude evidence which is plainly unreliable or incredible.[80]

40. The Appeals Chamber attaches considerable significance to the fact that article 61 (6) of the Statute enshrines the rights of the person charged to challenge the evidence presented by the Prosecutor and to present his/her own evidence. If these rights are availed of, the evidence inevitably will be contested. For these rights to have any meaning, the Pre-Trial Chamber must therefore evaluate the contested evidence and resolve any ambiguities, contradictions, inconsistencies or doubts as to credibility introduced by the contestation of the evidence.

41. The Rules of Procedure and Evidence confirm this understanding of the Pre-Trial Chamber's powers. Rule 63 (2) of the Rules of Procedure and Evidence provides that any Chamber, including the Pre-Trial Chamber, "shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69 [...]". Rule 122 (9) of the Rules of Procedure and Evidence provides that "[s]ubject to the provisions of article 61, article 69 shall apply *mutatis mutandis* at the confirmation hearing". Article 69 (4) of the Statute states in particular that "[t]he Court may 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". These provisions all reflect a general authority on the part of the Pre-Trial Chamber to assess the evidence.

42. The Appeals Chamber is not convinced by the Prosecutor's argument that the Statute and the Rules of Procedure and Evidence grant the Pre-Trial Chamber the power to determine only the relevance or admissibility of evidence but not its weight.[81] While these provisions provide explicitly for a Chamber to decide on admissibility or relevance of evidence, they do not preclude the Chamber from evaluating the evidence as is required by article 61 (7) of the Statute or otherwise limit the Chamber's authority to freely assess evidence.

[80] Document in Support of the Appeal, para. 41.
[81] *See* Document in Support of the Appeal, para. 33.

43. The Appeals Chamber finds the Prosecutor's comparison to Rule 98 *bis* of the ICTY Rules of Procedure and Evidence to be inapposite. A more appropriate analogy is article 19 of the ICTY Statute (article 18 of the ICTR Statute) and Rule 47 of the ICTY/ICTR Rules of Procedure and Evidence governing the confirmation of the indictment. Under this rule, an indictment will be brought by the Prosecutor if "there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal"[82] and confirmed by the judges if a "*prima facie* case" is established.[83] The Appeals Chamber notes that article 61 of the Statute uses similar phrasing to the ICTY/ICTR rule, suggesting that the drafters of the Statute were aware of and drew linguistic inspiration from the ICTY/ICTR Rules of Procedure and Evidence.[84] However, article 61 of the Statute differs from the relevant ICTY/ICTR rule in two significant ways. First, article 61 imposes a higher evidentiary threshold of "substantial grounds" in place of the ICTY/ICTR's lower "reasonable grounds" which is used in the context of the issuance of a warrant of arrest under article 58 of the Statute. Second, and more important, the drafters of the Statute did not import the ICTY/ICTR procedures. The drafters of article 61 specifically rejected the idea of an indictment procedure which had appeared in earlier drafts of the Statute[85] and replaced it with a new confirmation of charges hearing, which constituted part of a new "single, straightforward procedural approach, acceptable to delegations representing different national legal systems".[86] The confirmation of an indictment at the ICTY/ICTR is an *ex parte* procedure,

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[82] Rule 47 (B) of the ICTY and ICTR Rules of Procedure and Evidence.
[83] Article 19 of the ICTY Statute; article 18 of the ICTR Statute.
[84] This inference is further supported by the fact that the language of article 61 of the Statute was adopted in place of the prior term "*prima facie* case" while the language of Rule 47 of the ICTY/ICTR Rules of Procedure and Evidence gives life to article 19 (1) of the ICTY Statute / article 18 (1) of the ICTR Statute which provides for confirmation of the indictment upon establishment of a "*prima facie* case". *See also,* Preparatory Committee on the Establishment of an International Criminal Court, Working Group on Procedural Matters, *Paper put forward by the Delegations of Argentina, Australia, Austria, Canada, France, Germany, Japan, Korea, Malawi, the Netherlands, South Africa, Sweden, the United Kingdom, and the United States, proposing a framework for the fundamental stages of the criminal process of the Court*, 27 March 1998, A/AC.249/1998/WG.4/DP.36, http://www.legal-tools.org/doc/c44e59/, p. 2.
[85] *See,* United Nations General Assembly, *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands*, 4 February 1998, A/AC.249/1998/L.13, p. 95.
[86] Preparatory Committee on the Establishment of an International Criminal Court, Working Group on Procedural Matters, *Proposal Submitted by the Delegations of Argentina, Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Japan, Lesotho, Malawi, Mexico, the Netherlands, New Zealand, Norway, the Republic of Korea, Singapore, South Africa, Sweden, United States of America, United Kingdom*, 1 April 1998, A/AC.249/1998/WG.4/DP.40, p. 1; http://www.legal-tools.org/doc/18aea9/.

conducted in the absence of the defence by one judge. The confirmation of charges hearing, in comparison, was deliberately established as a hearing before a Pre-Trial Chamber of three judges at which the person charged has the right to be present and to contest the evidence and following which the Pre-Trial Chamber must assess the evidence. Such a process clearly requires the Pre-Trial Chamber to go beyond looking at the Prosecutor's allegations "on their face" as is done in confirming an indictment at the ICTY or ICTR.[87]

44. The Appeals Chamber is not persuaded by the Prosecutor's argument that the Pre-Trial Chamber cannot properly evaluate the evidence because it lacks the full evidence.[88] As previously indicated by the Appeals Chamber, the investigation should largely be completed at the stage of the confirmation of charges hearing.[89] Most of the evidence should therefore be available, and it is up to the Prosecutor to submit this evidence to the Pre-Trial Chamber.[90] Where the Prosecutor requires more time to complete the investigation, rule 121 (7) of the Rules of Procedure and Evidence permits him to seek a postponement of the confirmation of charges hearing. If the evidence is found to be insufficient, article 61 (8) of the Statute provides that the Prosecutor is not precluded from subsequently requesting the confirmation of charges on the basis of additional evidence.

45. The Appeals Chamber is equally unpersuaded by the Prosecutor's argument that the Pre-Trial Chamber cannot evaluate the credibility of witnesses without their in-person testimony.[91] It is true that the Appeals Chamber has indicated that a Chamber's ability to assess the credibility of witnesses is limited when such witnesses do not testify in person.[92] However, the Appeals Chamber recognised in that same decision

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[87] *See* article 19 (1) of the ICTY Statute,; article 18 (1) of the ICTR Statute (defining the standard for review of indictment as whether a *prima facie* case has been established); *See also,* ICTY *Prosecutor v. Slobodan Milošević*, "Decision on Review of Indictment", 22 November 2001, IT-01-51-I.
[88] *See e.g.,* Document in Support of the Appeal, para. 36.
[89] *Prosecutor v. Thomas Lubanga Dyilo,* "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence'", 13 October 2006, ICC-01/04-01/06-568 (OA 3), para. 54 (acknowledging that the Prosecutor may continue his investigation beyond the confirmation hearing, but stating that "ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing").
[90] Article 61 (3) of the Statute; rules 121 (2) (c), 121 (10) of the Rules of Procedure and Evidence.
[91] *See* Document in Support of the Appeal, paras 7, 36.
[92] *See Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the

that Trial Chambers may nevertheless receive testimony other than in-person[93] and that "rules regarding orality in the pre-trial phase are more relaxed than at trial".[94]

46. For the aforementioned reasons, the Appeals Chamber finds that the Pre-Trial Chamber did not err with respect to the first two grounds of appeal. In determining whether to confirm charges under article 61 of the Statute, the Pre-Trial Chamber may evaluate ambiguities, inconsistencies and contradictions in the evidence or doubts as to the credibility of witnesses. Any other interpretation would carry the risk of cases proceeding to trial although the evidence is so riddled with ambiguities, inconsistencies, contradictions or doubts as to credibility that it is insufficient to establish substantial grounds to believe the person committed the crimes charged.

47. This is not to say that the Pre-Trial Chamber's ability to evaluate the evidence is unlimited or that its function in evaluating the evidence is identical to that of the Trial Chamber. The Appeals Chamber recalls that the confirmation of charges hearing is not an end in itself but rather serves the purpose of filtering out those cases and charges for which the evidence is insufficient to justify a trial. This limited purpose of the confirmation of charges proceedings is reflected in the fact that the Prosecutor must only produce sufficient evidence to establish substantial grounds to believe the person committed the crimes charged. The Pre-Trial Chamber need not be convinced beyond a reasonable doubt, and the Prosecutor need not submit more evidence than is necessary to meet the threshold of substantial grounds to believe. This limited purpose is also reflected in the fact that the Prosecutor may rely on documentary and summary evidence and need not call the witnesses who will testify at trial. As the Appeals Chamber has stated, the use of such summaries, even where the identities of witnesses are unknown to the defence and their underlying statements are not fully disclosed, is not necessarily prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.[95] However, in such circumstances, the Pre-Trial Chamber will need to consider on a case-by-case basis, bearing in mind the character of the

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admission into evidence of materials contained in the prosecution's list of evidence'", 3 May 2011, ICC-01/05-01/08-1386 (OA 5, OA 6) (hereinafter: "Bemba OA 5, OA 6 Judgment"), para. 76.

[93] Bemba OA 5, OA 6 Judgment, para. 77.

[94] Bemba OA 5, OA 6 Judgment, para. 80.

[95] *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'", 14 December 2006, ICC-01/04-01/06-773 (OA 5) (hereinafter: "Lubanga OA 5 Judgment"), para. 50.

confirmation of charges hearing, whether and what steps may need to be taken to ensure that the use of such statements is consistent with the rights of the accused and a fair and impartial trial.[96]

48. As the Appeals Chamber has acknowledged, the Prosecutor's reliance on documentary or summary evidence in lieu of in-person testimony will limit the Pre-Trial Chamber's ability to evaluate the credibility of witnesses.[97] While it may evaluate their credibility, the Pre-Trial Chamber's determinations will necessarily be presumptive, and it should take great care in finding that a witness is or is not credible. The Prosecutor's reliance on summary evidence may also mean that the Pre-Trial Chamber will not be presented with all details of the evidence in the possession of the Prosecutor. Where the evidence is insufficient in this regard, the Appeals Chamber recalls that the Pre-Trial Chamber need not reject the charges but may adjourn the hearing and request the Prosecutor to provide further evidence.[98]

49. Beyond these indications which derive directly from the Statute and from the purpose of the confirmation of charges proceedings, the Appeals Chamber finds that it would be inappropriate to provide any further guidance in the abstract as to how the Pre-Trial Chamber should evaluate the evidence. As stated above, the present appeal concerns solely the legal question of whether the Pre-Trial Chamber may evaluate ambiguities, inconsistencies, contradictions and doubts as to credibility. It does not concern whether evidence is sufficient to establish "substantial grounds to believe" or how the Pre-Trial Chamber assessed particular items or categories of evidence.[99] These are questions which can only properly be discussed in the context of an appeal thereon and which the Appeals Chamber cannot, and should not, attempt to answer in the abstract.

C. Third ground of appeal

50. In his third ground of appeal, the Prosecutor submits that the Pre-Trial Chamber misinterpreted article 25 (3) (d) of the Statute by imposing a higher level of

[96] Lubanga OA 5 Judgment, para. 51.
[97] *See,* Bemba OA 5, OA 6 Judgment, para. 76.
[98] Rule 121 (7) of the Rules of Procedure and Evidence.
[99] *See* Impugned Decision, paras 49-51.

contribution than actually required by that provision.[100] He submits that this amounts to an error of law.[101]

1. Procedural context and relevant part of the Impugned Decision

51. In the charges against Mr Mbarushimana, the Prosecutor alleged that Mr Mbarushimana was criminally responsible under article 25 (3) (d) of the Statute for crimes against humanity and war crimes committed by members of the *Forces Démocratiques de Libération du Rwanda* (hereinafter: "FDLR") in 2009 in the Kivu provinces of the Democratic Republic of the Congo (hereinafter: "DRC").[102] The Prosecutor submitted that the FDLR leadership conceived a common plan to commit such crimes in order to create a "humanitarian catastrophe" and to simultaneously conduct an international media campaign with the overall aim of extorting political concessions.[103]

52. As to Mr Mbarushimana's responsibility for these crimes, the Prosecutor alleged that, in his capacity as Executive Secretary of the FDLR, Mr Mbarushimana contributed to the common plan "by agreeing with [Mr] Murwanahsyaka [sic] and [Mr] Mudacumura to conduct an international media campaign as part of the Common Plan"[104] and that "[h]e personally orchestrated and led the implementation of the extortive international campaign".[105] The Prosecutor further alleged that "[a]s part of his contribution to the pursuit of the Common Plan, [Mr] Mbarushimana was intimately involved in the articulation of the FDLR's views and extortive message" and was "involved in their dissemination".[106] Mr Mbarushimana's contribution to the common plan was based on his position of "real authority and independence as one of only five elected civilian leaders in the FDLR"[107] and the fact that his "official duties as Executive Secretary and Steering Committee member required him to engage with

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[100] Document in Support of the Appeal, paras 48-49.
[101] Document in Support of the Appeal, para. 50.
[102] "English version of ICC-01/04-01/10-311-Conf-Anx A Prosecution's document containing the charges submitted pursuant to Article 61(3) of the Statute", 3 August 2011, ICC-01/04-01/10-330-Conf-AnxA-Red (hereinafter: "Document Containing the Charges"), para. 106.
[103] Document Containing the Charges, para. 110.
[104] Document Containing the Charges, para. 115.
[105] Document Containing the Charges, para. 115.
[106] Document Containing the Charges, para. 116.
[107] Document Containing the Charges, para. 117.

the Common Plan".[108] The Prosecutor alleged that Mr Mbarushimana "played a central role in the leadership structure that adopted the Common Plan"[109] and the "implementation of the international campaign publicly fell to [Mr] Mbarushimana alone during 2009".[110] Mr Mbarushimana allegedly "also contributed to the commission of criminal activity of the FDLR by his encouragement of FDLR troops, through his contribution to the drafting of FDLR press releases".[111]

53. In the Impugned Decision, the Pre-Trial Chamber found that there were substantial grounds to believe that FDLR troops committed some of the alleged war crimes.[112] As to the alleged crimes against humanity, the Pre-Trial Chamber found that it had not been established to the required threshold that the alleged crimes were committed "pursuant to or in furtherance of an organisational policy to commit an attack directed against the civilian policy, as set out in article 7(1) and (2)(a) of the Statute"[113] and, as a consequence, concluded that there were no substantial grounds to believe that the alleged crimes against humanity had been committed.[114]

54. As to Mr Mbarushimana's responsibility, the Pre-Trial Chamber set out its interpretation of the elements of article 25 (3) (d) of the Statute.[115] In respect of the requisite contribution under article 25 (3) (d) of the Statute, the Pre-Trial Chamber explained:

> 277. [...] [a] threshold is necessary to exclude contributions which, because of their level or nature, were clearly not intended by the drafters of the Statute to give rise to individual criminal responsibility. For instance, many members of a community may provide contributions to a criminal organisation in the knowledge of the group's criminality, especially where such criminality is public knowledge. Without some threshold level of assistance, every landlord, every grocer, every utility provider, every secretary, every janitor or even every taxpayer who does anything which contributes to a group committing international crimes could satisfy the elements of 25(3)(d) liability for their infinitesimal contribution to the crimes committed. For these reasons, the Chamber considers that 25(3)(d) liability would become overextended if *any* contribution were sufficient.

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[108] Document Containing the Charges, para. 117.
[109] Document Containing the Charges, para. 118.
[110] Document Containing the Charges, para. 121.
[111] Document Containing the Charges, para. 122.
[112] Impugned Decision, paras 108 *et seq.*
[113] Impugned Decision, para. 266.
[114] Impugned Decision, para. 267.
[115] Impugned Decision, paras 270-289.

> [...]
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> 285. For the reasons above, the Chamber finds that, in order to be criminally responsible under article 25(3)(d) of the Statute, **a person must make a significant contribution to the crimes committed or attempted**. The extent of the person's contribution is determined by considering the person's relevant conduct and the context in which this conduct is performed. [Emphasis added, footnotes omitted.] [116]

55. The Pre-Trial Chamber found that this conclusion reflected the intention of the Statute's drafters that only crimes of sufficient gravity should be prosecuted.[117] At the same time, the Pre-Trial Chamber rejected the idea that the contribution should be more than significant, that is, essential or substantial.[118]

56. Turning to the case at hand, the Pre-Trial Chamber noted, with reference to its finding regarding crimes against humanity, that there was not sufficient evidence to establish substantial grounds to believe that a group of persons acting with a common purpose existed.[119] Despite this finding, the Pre-Trial Chamber analysed the alleged contributions of Mr Mbarushimana, concluding "that the [Mr Mbarushimana] did not provide any contribution to the commission of such crimes, even less a 'significant' one".[120]

57. The Pre-Trial Chamber then summarised its assessment of the evidence before it,[121] making four separate findings in respect of the four ways in which the Prosecutor had argued that Mr Mbarushimana had contributed to the common plan, namely: (a) Mr Mbarushimana's role as a leader of the FDLR and his alleged contribution to the common plan;[122] (b) the alleged articulation and dissemination of an international media campaign seeking to conceal the crimes committed by the FDLR on the ground and to extort political concessions;[123] (c) Mr Mbarushimana's

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[116] Impugned Decision, paras 276-285.
[117] Impugned Decision, para. 276.
[118] Impugned Decision, paras 278-82.
[119] Impugned Decision, para. 291, referring to Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo,* "Décision sur la confirmation des charges", dated 29 January 2007 and registered on 2 February 2007, ICC-01/04-01/06-803, para. 344.
[120] Impugned Decision, para. 292.
[121] Impugned Decision, paras 293-339.
[122] Impugned Decision, para. 303 (building on a sub-finding in paragraph 299 that the evidence did not provide "substantial grounds to believe that the Suspect contributed to the FDLR's alleged plan of attacking civilians by agreeing to conduct an international media campaign in support of it").
[123] Impugned Decision, para. 315.

role in peace negotiations;[124] and (d) his alleged encouragement of troops on the ground through press releases and speeches.[125]

58. In her Dissent, the Presiding Judge considered that "the Majority's conclusions [were] largely predicated on marginal considerations and [were] sometimes made without discussing critical pieces of evidence presented by the Prosecut[or]".[126] In her view, Mr Mbarushimana's "actions did facilitate the commission of crimes to such an extent that they can be classified as a significant contribution",[127] and she concluded that she "would find that there are substantial grounds to believe that the Suspect's contribution is sufficiently significant to the crimes committed to deem that the Prosecut[or] has satisfied [his] burden on this element".[128]

2. Arguments of the parties

(a) Arguments of the Prosecutor

59. The Prosecutor submits that the Pre-Trial Chamber committed an error of law in its interpretation of the threshold of the contribution required under article 25 (3) (d) of the Statute.[129] He argues that this error materially affected the Impugned Decision "since the [Pre-Trial] Chamber declined to confirm specific components of the charges because it deemed the Suspect's contributions to be not 'significant'",[130] and he refers the Appeals Chamber to specific paragraphs of the Impugned Decision. He requests that the Appeals Chamber "determine the correct applicable legal standards; and remand the matter to the Pre-Trial Chamber for a new determination".[131]

60. The Prosecutor's submission that the Pre-Trial Chamber misinterpreted article 25 (3) (d) of the Statue is three-fold: (i) a plain reading of article 25 (3) (d) of the Statute criminalises "any" contribution to a crime by a group of persons acting with a common purpose;[132] (ii) the drafting history of that provision corroborates that "any"

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[124] Impugned Decision, para. 320.
[125] Impugned Decision, para. 339.
[126] Dissent, para. 65.
[127] Dissent, para. 105.
[128] Dissent, para. 112.
[129] Document in Support of the Appeal, para. 51.
[130] Document in Support of the Appeal, para. 50.
[131] Document in Support of the Appeal, para. 67.
[132] Document in Support of the Appeal, paras 52-58.

contribution suffices to give rise to criminal responsibility;[133] and (iii) the Pre-Trial Chamber considered inappropriate factors which do not suffice to "override the statutory language and the drafters' intent".[134]

(b) Arguments of Mr Mbarushimana

61. Mr Mbarushimana submits that the question of whether, under article 25 (3) (d) of the Statute, a contribution must be "significant" is "purely academic" because, in the Impugned Decision, the Pre-Trial Chamber found that Mr Mbarushimana did not contribute *at all* to the alleged crimes.[135] He recalls that, in the Decision Granting Leave to Appeal, the Pre-Trial Chamber rejected this argument.[136] However, in Mr Mbarushimana's view, this amounted to an impermissible *a posteriori* re-interpretation of the Impugned Decision.[137] He maintains on appeal that the issue raised under the third ground of appeal has no bearing on the outcome of the trial[138] and that this ground of appeal should therefore be rejected.[139]

62. To support his argument, Mr Mbarushimana analyses the specific findings of the Pre-Trial Chamber in respect of his alleged contributions.[140] Mr Mbarushimana submits that, with regard to his alleged role within the FDLR leadership, the Pre-Trial Chamber indicated that it could not see any link between his role and an alleged common plan.[141] As to the Pre-Trial Chamber's finding regarding his alleged participation in an international media campaign, Mr Mbarushimana submits that a plain reading of the relevant paragraph shows that the Pre-Trial Chamber found that the Prosecutor failed to establish the requisite intent to contribute to the alleged FDLR crimes.[142] As to his alleged encouragement of FDLR troops on the ground, Mr Mbarushimana submits that a plain reading of the relevant paragraph of the Impugned

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[133] Document in Support of the Appeal, paras 59-60.
[134] Document in Support of the Appeal, paras 61-66.
[135] Response to the Document in Support of the Appeal, para. 56.
[136] Response to the Document in Support of the Appeal, para. 54.
[137] Response to the Document in Support of the Appeal, paras 55-57, referring to *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, "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'", 8 December 2009, ICC-01/04-01/06-2205 (OA 15, OA 16), para. 92.
[138] Response to the Document in Support of the Appeal, para. 56.
[139] Response to the Document in Support of the Appeal, paras 62 *et seq.*
[140] Response to the Document in Support of the Appeal, paras 57-61.
[141] Response to the Document in Support of the Appeal, para. 57.
[142] Response to the Document in Support of the Appeal, para. 58.

Decision shows that the Pre-Trial Chamber found that no contribution, significant or otherwise, could be established.[143] He also recalls that the Pre-Trial Chamber concluded that the Prosecutor failed to establish that he had encouraged the troops in the field.[144]

63. As to the substance of the Prosecutor's arguments, Mr Mbarushimana notes that they are based on the drafting history of the Statute.[145] He recalls, *en passant*, that during the confirmation hearing, Professor Kai Ambos explained to the Pre-Trial Chamber why, in his opinion, article 25 (3) (d) of the Statute did not criminalise every contribution.[146]

3. Determination by the Appeals Chamber

64. Article 25 (3) (d) of the Statute provides 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:
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> [...]
>
> (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;

65. The issue raised under the third ground of appeal is whether the Pre-Trial Chamber erred when finding that, under article 25 (3) (d) of the Statute, the contribution of the person must be "significant". However, the Appeals Chamber will not address the merits of the third ground, since, under article 25 (3) (d) of the Statute, the question of whether there was a "significant" contribution only arises when there was a crime committed or attempted by a group acting with a common purpose. The

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[143] Response to the Document in Support of the Appeal, para. 61.
[144] Response to the Document in Support of the Appeal, para. 60.
[145] Response to the Document in Support of the Appeal, footnote 12.
[146] Response to the Document in Support of the Appeal, footnote 12 (referring to Transcript of 20 September 2011, ICC-01/04-01/10-T-8-CONF-FRA (ET), p. 4, lines 10-13).

Pre-Trial Chamber found that there were no "substantial grounds to believe that the FDLR leadership constituted a 'group of persons acting with a common purpose' within the meaning of article 25(3)(d) of the Statute, in particular in light of the requirement that the common purpose pursued by the group must have at least an element of criminality".[147] The Pre-Trial Chamber further explained:

> The absence of one critical constitutive element of the form of responsibility enshrined under article 25(3)(d) of the Statute would *per se* exempt the Majority from the need to analyse whether the Suspect provided a significant contribution to the commission of the crimes by the FDLR and, in the affirmative, whether such contribution satisfies the requirements of article 25(3)(d) of the Statute.[148]

66. Thus, the Pre-Trial Chamber found that a fundamental element of article 25 (3) (d) of the Statute, namely the existence of a group acting with a common purpose, had not been established. Even if the Pre-Trial Chamber had adopted a different interpretation of "contribution" under article 25 (3) (d), it would not have confirmed the charges against Mr Mbarushimana. Accordingly, even if the Appeals Chamber would agree with the Prosecutor that the Pre-Trial Chamber erred in its interpretation of article 25 (3) (d) of the Statute, it would not reverse the Impugned Decision because the error would not have materially affected the decision.[149]

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[147] Impugned Decision, para. 29 (referring to *Prosecutor v. Thomas Lubanga Dyilo,* Décision sur la confirmation des charges", dated 29 January 2007 and registered on 2 February 2007, ICC-01/04-01/06-803, para. 344).

[148] Impugned Decision, para. 292.

[149] *See*, footnote 24 *supra*; *See* also *Prosecutor v. Jean-Pierre Bemba Gombo,* "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled 'Decision on the defence's 28 December 2011 "Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo"'", 5 March 2012, ICC-01/05-01/08-2151-Red (OA 10), para. 29; *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus,* "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation'", 17 February 2012, ICC-02/05-03/09-295 (OA 2), para. 20; *Prosecutor v. Jean-Pierre Bemba Gombo,* "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled 'Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence'", 19 November 2010, ICC-01/05-01/08-1019 (OA 4), para. 69; *Prosecutor v. Jean-Pierre Bemba Gombo, "Corrigendum to* Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges'", dated 19 October 2010 and registered on 26 October 2010, ICC-01/05-01/08-962-Corr (OA 3), para. 102; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* "Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled 'Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings'", 12 July 2010, ICC-01/04-01/07-2259 (OA 10), para. 34; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", 25 September 2009, ICC-01/04-01/07-1497 (OA 8) (hereinafter: "Katanga OA 8 Judgment"), para. 37; *Prosecutor v. Joseph Kony and others,*

67. The Appeals Chamber notes that despite the finding that there was no "group of persons acting with a common purpose", the Pre-Trial Chamber analysed "the evidence relating to the role of the Suspect within the FDLR, with a view to determining whether his actions may amount to the requisite level of contribution under article 25(3)(d) of the Statute with respect to the war crimes which the Chamber found substantial grounds to believe were committed by the FDLR troops in the field".[150] However, the Impugned Decision is, to say the least, ambiguous as to what contributions the Pre-Trial Chamber considered Mr Mbarushimana made but which fell below the threshold of being "significant" contributions. The Pre-Trial Chamber's specific findings regarding his alleged contributions suggest that there was no link between Mr Mbarushimana's conduct and the alleged crimes of the FDLR[151] and therefore no contribution at all. The Pre-Trial Chamber said as much when summarising its findings in the Impugned Decision.[152] In contrast, in the Decision Granting Leave to Appeal, the Pre-Trial Chamber made a general statement that it "did find [in the Impugned Decision] that some of the suspect's alleged contributions were in fact insignificant contributions".[153] However, in the Decision Granting Leave to Appeal, the Pre-Trial Chamber did not indicate which of his alleged actions it considered to be *insignificant*, as opposed to no contribution.

68. In light of these ambiguities which arose in the context of merely hypothetical findings, if the Appeals Chamber were to address the merits of the third ground of appeal in such circumstances, it would be doing so in a vacuum and thereby be engaging in what would be a purely academic discussion. The Appeals Chamber has previously not addressed alleged errors that do not materially affect the Impugned

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"Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", 16 September 2009, ICC-02/04-01/05-408 (OA 3), paras 48, 80; *Prosecutor v. Joseph Kony and others,* "Judgment on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06' of Pre-Trial Chamber II", 23 February 2009, ICC-02/04-179, para. 40 *Situation in the Democratic Republic of the Congo,* "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'", 16 July 2006, ICC-01/04-169 (OA), para. 84.

[150] Impugned Decision, para. 292.

[151] Impugned Decision, paras 293-339.

[152] Impugned Decision, para. 292.

[153] Decision Granting Leave to Appeal, para. 38.

Decision.[154] As the Appeals Chamber has stated, it "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" (footnote omitted).[155]

69. In conclusion, the Appeals Chamber decides not to analyse the merits of this ground of appeal but to reject it.

V. APPROPRIATE RELIEF

70. Under rule 158 (1) of the Rules of Procedure and Evidence, in an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed. In the present case it is appropriate to confirm the Impugned Decision because, in relation to the first and second grounds of appeal, no error has been identified, and in relation to the third ground of appeal, the alleged error did not materially affect the Impugned Decision.

Judge Fernández de Gurmendi appends a separate opinion.

Done in both English and French, the English version being authoritative.

Judge Erkki Kourula
Presiding Judge

Dated this 30th day of May 2012
At The Hague, The Netherlands

[154] *See* Katanga OA 8 Judgment, para. 38; *Prosecutor v. Jean-Pierre Bemba Gombo*, "*Corrigendum to* Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges'", dated 19 October 2010 and registered on 26 October 2010, ICC-01/05-01/08-962-Corr (OA 3), paras 103-104; *Prosecutor v. Joseph Kony and others,* "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", 16 September 2009, ICC-02/04-01/05-408 (OA 3), para. 51.
[155] Katanga OA 8 Judgment, para. 38.

Separate Opinion of Judge Silvia Fernández de Gurmendi

1. I issue this separate opinion to the Judgment because I would have found it necessary for the Appeals Chamber to address the legal error alleged by the Prosecution under the third ground of appeal. I disagree only with this limited point that affects the reasoning of the Judgment. Otherwise, I fully agree with the Judgment.

2. Under the third ground of appeal, the majority of the Appeals Chamber chose not to address the alleged legal error because it did not materially affect the Impugned Decision.[1]

3. I note that the Majority of the Pre-Trial Chamber analysed the evidence "with a view to determining whether the [the Suspect's] actions may amount to the requisite level of contribution under article 25 (3) (d) of the Statute with respect to the war crimes [...] committed [...]".[2] However, before undertaking that analysis, it found at paragraph 292 "that the Suspect did not provide any contribution to the commission of such crimes, even less a 'significant' one".[3] This suggests that the standard of "significant contribution" was not applied by the Chamber in its analysis of Mr Mbarushimana's contributions.

4. However, a careful reading of the Chamber's subsequent analysis at paragraphs 293 to 340 indicates that it effectively applied the significant contribution standard.[4] The Pre-Trial Chamber did not consider that the evidence was insufficient to establish that Mr Mbarushimana had made *any* contribution to the crimes. To the contrary, it rejected Mr Mbarushimana's responsibility under article 25 (3) (d) for a variety of objective and subjective reasons, which included that he did not make, objectively, a significant contribution. Therefore, as unanimously expressed by the Judges who granted leave to appeal the Impugned Decision, "a detailed reading of the majority opinion makes it clear that distinctions are made in the individual factual findings

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[1] *See* Judgment, paras 66-68.
[2] Impugned Decision, para. 292.
[3] Impugned Decision, para. 292.
[4] *See* e.g, Impugned Decision, paras 304-315.

between evidence establishing insignificant contributions and to the crimes committed and evidence not found to establish any contribution at all".[5]

5. This standard could have implications on the proceedings as a whole since article 61 (8) of the Statute allows the Prosecutor to bring "additional evidence" based on the same charges. The requirement that a contribution to a crime under article 25 (3) (d) of the Statute has to be "significant" would be important for the Prosecutor in deciding what additional evidence, if any, needs to be brought. Certainty as to the definition of a legal provision on which the jurisprudence of the Court provides little guidance would help to streamline and expedite further proceedings in the same case.

6. As I do not agree with the decision of the majority of the Appeals Chamber not to address the merits of the third ground of appeal, I feel obliged to address the merits of this ground of appeal. The prosecution alleges that the Pre-Trial Chamber misinterpreted article 25 (3) (d) of the Statute by imposing a higher level of contribution than actually required by that provision.[6] It bases this ground of appeal on the wording of the provision and the drafting history and provides arguments why the reasoning of the Pre-Trial Chamber is not convincing.[7] Mr Mbarushimana contends that not any contribution should fall within the scope of article 25 (3) (d) of the Statute and points to the pre-trial hearing at which the matter was discussed.[8]

ANALYSIS

7. The Pre-Trial Chamber found that, "in order to be criminally responsible under article 25 of the Statute, a person must make a *significant* contribution to the crimes committed or attempted" (emphasis added).[9] By this finding the Pre-Trial Chamber has added a criterion to the wording of article 25 (3) (d) of the Statute, that reads:

> 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: [...]

[5] Decision Granting Leave to Appeal, para. 38.
[6] Document in Support of the Appeal, para. 52.
[7] Document in Support of the Appeal, paras 52-66.
[8] Response to the Document in Support of the Appeal, footnote 12.
[9] Impugned Decision, para. 285.

> (d) In any other way contributes to the commission of such 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;

8. In this provision, the contribution is only qualified by the phrase "in any other way". This phrase, which refers to the other forms of criminal responsibility mentioned earlier in paragraph 3, has led Pre-Trial Chamber I, in the case *Prosecutor v. Thomas Lubanga Dyilo,* as well as commentators to state that article 25 (3) (d) of the Statute is rather a residual form of accessory liability, applicable if other forms of responsibility are not at issue.[10]

9. The phrase "in any other way" indicates that there should not be a minimum threshold or level of contribution under this mode of liability. As a commentator held: "Any contribution to the group crime ("in any other way contributes") not covered by another form of participation, especially assistance, establishes the criminal liability of the accessory".[11] However, the Pre-Trial Chamber established a minimum threshold whereby it would be necessary for the suspect to have made a "significant contribution". The arguments of the Pre-Trial Chamber in support of such threshold which contradicts the wording of article 25 (3) (d) of the Statute are not convincing.

10. The first argument of the Pre-Trial Chamber is based on article 17 (1) (d) of the Statute. This provision states that "a case is inadmissible where [...] [t]he case is not of sufficient gravity to justify further action by the Court". The Appeals Chamber has not yet entered into a positive definition of article 17 (1) (d) of the Statute but has rejected the application of a high threshold in defining gravity.[12] In referring to article 17 (1) (d) of the Statute, the Pre-Trial Chamber argues that also "*contributions* to

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[10] *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the confirmation of charges", 27 March 2007, ICC-01/04-01/06-796-Conf, para. 337; G. Werle "Individual Criminal Responsibility in Article 25 ICC Statute", *Journal of International Criminal Justice 2007,* pp. 953-975, at p. 971.
[11] G. Werle, *Principles of International Criminal Law*, (T.M.C. Asser Press 2009), para. 365.
[12] *Situation in the Democratic Republic of Congo*, "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'", 16 July 2006, ICC-01/04-169 (OA), para. 72, *see* also paras 68-84.

crimes need to reach a certain threshold of significance in order to be within the Court's ambit".[13] However, the threshold of gravity under article 17 (1) (d) of the Statute relates solely to the decision on the admissibility of a case, as a prerequisite for the exercise of the Court's jurisdiction. The Statute clearly distinguishes the definition of the crimes and forms of responsibility from questions relevant to the admissibility of a case. Indeed, if a Chamber considers that a case is not of sufficient gravity, it has the discretion to address the admissibility of the case under the procedural mechanisms established by article 19 of the Statute. Adding limitative criteria to a form of responsibility under the Statute because of the gravity threshold would transfer matters of gravity into the area that determines the individual criminal responsibility of a person, *i.e.* into the confirmation hearing and trial proceedings.

11. The second argument is concerned with what the Pre-Trial Chamber refers to as "infinitesimal" contribution:

> Without some threshold level of assistance, every landlord, every grocer, every utility provider, every secretary, every janitor or even every taxpayer who does anything which contributes to a group committing international crimes could satisfy the elements of 25(3)(d) liability for their infinitesimal contribution to the crimes committed.[14]

12. I am not persuaded that such contributions would be adequately addressed by adding the requirement that a contribution be significant. Depending on the circumstances of a case, providing food or utilities to an armed group might be a significant, a substantial or even an essential contribution to the commission of crimes by this group. In my view the real issue is that of the so-called "neutral" contributions. This problem is better addressed by analysing the normative and causal links between the contribution and the crime rather than requiring a minimum level of contribution.

13. Similarly, I am not convinced by subsequent arguments of the Pre-Trial Chamber on the need to establish "a threshold of significance".[15] The Pre-Trial Chamber argues that article 25 (3) (d) of the Statute requires a lesser contribution than aiding and abetting under article 25 (3) (c) and that it should therefore be a lesser

[13] Impugned Decision, para. 276.
[14] Impugned Decision, para. 277.
[15] Impugned Decision, paras 278, 279.

contribution than, according to the Pre-Trial Chamber, a *substantial* one.[16] This argument alone does not support the need for establishing an additional minimum threshold. However, the Pre-Trial Chamber argues in favour of establishing a threshold between "any" contribution and a "substantial" contribution.

14. In so holding, the Pre-Trial Chamber borrows from joint criminal enterprise concepts as applied by the *ad hoc* Tribunals and argues that contributing to a crime committed by a group of persons acting with a common purpose requires a "significant" contribution. The Pre-Trial Chamber finds that the threshold of significant contribution is relevant to the present discussion because both modes of liability emphasise group criminality and because at the *ad hoc* Tribunals, joint criminal enterprise requires a lower threshold of contribution than aiding and abetting.[17] However, in my view, the reference to joint criminal enterprise is irrelevant to the interpretation of the term "contributes" in Article 25 (3) (d) of the Statute. Both modes of liability pertain to statutory systems that are different from each other. Indeed, the Pre-Trial Chamber itself pointed to the relevant differences between Article 25 (3) (d) of the Statute and joint criminal enterprise.[18] Given these differences, the level of contribution required by members of a joint criminal enterprise cannot be "imported" into Article 25 (3) (d) of the Statute.

15. The Pre-Trial Chamber does not indicate any further arguments for establishing the threshold of a significant contribution. I am not persuaded by the arguments of the Pre-Trial Chamber for establishing the threshold. I would have held that the Pre-Trial Chamber erred in finding that the contribution to the crimes must be significant.

Judge Silvia Fernández de Gurmendi

Dated this 30th day of May 2012
At The Hague, The Netherlands

[16] Impugned Decision, para. 279.
[17] Impugned Decision, para. 282.
[18] Impugned Decision, para. 282.