

1 International Criminal Court

2 Appeals Chamber - Courtroom 1

3 Situation: Democratic Republic of the Congo

4 In the case of The Prosecutor v. Callixte Mbarushimana - ICC-01/04-01/10

5 Presiding Judge Erkki Kourula

6 Appeals Judgment

7 Wednesday, 30 May 2012

8 (The hearing starts in open session at 11.30 a.m.)

9 THE COURT USHER: All rise. The International Criminal Court is now in session.

10 PRESIDING JUDGE KOURULA: Please be seated.

11 So do we -- as I said, good morning, everyone. Court officer, would you be so kind

12 as to call the case, please.

13 THE COURT OFFICER: Thank you, your Honour. Situation in the Democratic

14 Republic of the Congo, in the case of The Prosecutor versus Callixte Mbarushimana,

15 ICC-01/04-01/10.

16 PRESIDING JUDGE KOURULA: Thank you very much. May I ask counsel to

17 introduce themselves for the record, starting with the Prosecutor, please.

18 MR GUARIGLIA: Good morning, your Honour. It's Fabricio Guariglia, senior

19 appeals counsel in the Office of the Prosecutor, and appearing with me today is

20 Mr Anton Steynberg, senior trial lawyer in the Mbarushimana case.

21 PRESIDING JUDGE KOURULA: Thank you very much. And counsel for

22 Mr Mbarushimana.

23 MR VERCKEN: (Interpretation) Good morning, your Honour. My name is

24 Arthur Vercken, counsel for Mr Mbarushimana, and with me Daniel

25 Ntawumenyumunsi, my case manager.

1 PRESIDING JUDGE KOURULA: And victims' representative.

2 THE INTERPRETER: Microphone.

3 MR MABANGA: (Interpretation) Good morning your Honour. My name is

4 Ghislain Mabanga. I represent 95 victims in these proceedings. Thank you.

5 PRESIDING JUDGE KOURULA: Thank you. Today, ladies and gentlemen, the

6 Appeals Chamber is delivering its judgment on the appeal brought by the Prosecutor

7 against the decision of Pre-Trial Chamber I of 16 December 2011, as already indicated,

8 entitled "Decision on the confirmation of the charges" and I will refer to this decision

9 as the "impugned decision."

10 I shall summarise the judgment of the Appeals Chamber and the reasons for it. The

11 judgment is unanimous, with a separate opinion by Judge Silvia Fernández de

12 Gurmendi, which I shall also briefly summarise in the end. Please note that, as usual,

13 the actual judgment which will be filed and notified to the parties and participants

14 shortly is authoritative and not this summary. I shall start with a brief procedural

15 history. The impugned decision was issued as I indicated on 16 December 2011. In

16 this decision, the Pre-Trial Chamber declined by majority to confirm the charges

17 against Mr Mbarushimana. The Presiding Judge appended a dissenting opinion.

18 After a lot of translation work on 1 March 2012, the Pre-Trial Chamber granted the

19 Prosecutor leave to appeal the decision for three of four issues which the Prosecutor

20 had sought leave to appeal.

21 On appeal, the Prosecutor raises three grounds of appeal. Two of those grounds

22 relate to the Pre-Trial Chamber's power to evaluate the evidence in the impugned

23 decision. The third ground of appeal challenges the Pre-Trial Chamber's

24 interpretation of Article 25(3)(d) of the Statute.

25 As to the first two grounds of appeal, they are closely related and concern the

1 Pre-Trial Chamber's power to assess the evidence. First, the Prosecutor argues that
2 the Pre-Trial Chamber may not deny the confirmation of charges by resolving
3 inferences, credibility doubts and perceived inconsistencies against him, against the
4 Prosecutor. His second argument is that the Pre-Trial Chamber may not evaluate the
5 credibility and consistency of witnesses without the opportunity to examine the
6 witnesses at trial.

7 So long as the evidence submitted by the Prosecutor is not credible on its face, or
8 incapable of belief, the Prosecutor argues that it should be accepted.

9 The Appeals Chamber disagrees with the Prosecutor and rejects his argument under
10 the first two grounds of appeal. The Appeals Chamber finds that in determining
11 whether to confirm charges under Article 61 of the Statute, the Pre-Trial Chamber
12 may evaluate ambiguities, inconsistencies, contradictions or credibility doubts in the
13 evidence.

14 Any other interpretation would carry the risk of cases or charges going to trial
15 although the evidence is so riddled by as I said ambiguities, inconsistencies,
16 contradictions or doubts as to the credibility that is insufficient to establish substantial
17 grounds to believe a person committed the crimes charged.

18 The confirmation of charges hearing exists to ensure that cases and charges go to trial
19 only when justified by sufficient evidence. It is by its nature an evidentiary hearing.
20 Article 61(7) of the Statute clearly provides that the Pre-Trial Chamber is required to
21 evaluate whether the evidence is sufficient to establish substantial grounds to believe
22 that the person committed each of the crimes charged.

23 In order to make this determination as to the sufficiency of the evidence, the Pre-Trial
24 Chamber must necessarily draw conclusions from the evidence where there are
25 ambiguities, contradictions, inconsistencies arising from the evidence or doubts as to

1 the credibility of witnesses.

2 Furthermore, Article 61(6), para. 6 of the Statute, enshrines the rights of the charged
3 person to challenge the evidence presented by the Prosecutor and to present his or her
4 own evidence. If these rights are availed of, the evidence inevitably will be
5 contested. For these rights to have any meaning, the Pre-Trial Chamber must
6 therefore evaluate the contested evidence and resolve any ambiguities, contradictions,
7 inconsistencies or credibility doubts introduced by the contestation of the evidence.

8 The confirmation of charges hearing thus represents a significant departure from the
9 indictment practice of the ad hoc tribunals as it clearly requires the Pre-Trial Chamber
10 to go beyond looking at the Prosecutor's allegations on their face, as is done in
11 confirming an indictment at the ICTY or ICTR.

12 As previously indicated by the Appeals Chamber, the investigation should largely be
13 completed at the stage of the confirmation of charges hearing. Most of the evidence
14 should therefore be available and it is up to the Prosecutor to submit this evidence to
15 the Pre-Trial Chamber.

16 Where the Prosecutor requires more time to complete the investigation, Rule 121(7) of
17 the Rules of Procedure and Evidence permits him to seek a postponement of the
18 confirmation of charges hearing. If the evidence is found to be insufficient,
19 Article 61(8) of the Statute provides that the Prosecutor is not precluded from
20 subsequently requesting the confirmation of charges on the basis of additional
21 evidence.

22 I would like to emphasise that the present appeal concerns solely the legal question of
23 whether the Pre-Trial Chamber may evaluate ambiguities, inconsistencies and
24 contradictions in the evidence or doubts as to the credibility of witnesses. It does not
25 concern whether the evidence is sufficient to establish substantial grounds to believe

1 or how the Pre-Trial Chamber assessed the evidence. These are questions which can
2 only properly be discussed in the context of an appeal thereon and which the Appeals
3 Chamber can't and should not attempt to answer in the abstract.

4 The judgment should, therefore, not be seen as endorsing the Pre-Trial Chamber's
5 factual findings on the basis of the evidence or its general statements with respect to
6 certain categories of the evidence.

7 I now move to the third ground of appeal. In his third ground of appeal, the
8 Prosecutor submits that the Pre-Trial Chamber misinterpreted Article 25(3)(d) of the
9 Statute by imposing a higher level of contribution than actually required by that
10 provision. He submits that this amounts to an error of law. At issue is whether the
11 contribution to the commission or attempted commission of a crime by a person
12 acting with a common purpose needs to be significant as held by the impugned -- in
13 the impugned decision, or whether any contribution is sufficient as argued by the
14 Prosecutor.

15 Mr Mbarushimana, for his part, argued that the question whether a contribution must
16 be significant is purely academic because the Pre-Trial Chamber found that
17 Mr Mbarushimana did not contribute at all to the alleged crimes. He therefore
18 maintains that the issue raised under the third ground of appeal should be rejected.
19 The Appeals Chamber decides to reject this ground of appeal, because the alleged
20 legal error does not materially affect the impugned decision. The question whether
21 the Pre-Trial Chamber erred when finding that the contribution has to be significant
22 under Article 25(3)(d) of the Statute only arises when there is a crime committed or
23 attempted by a group acting with a common purpose.

24 The Pre-Trial Chamber found that there were no substantive grounds to believe that
25 the FDLR leadership constituted a group of persons acting with a common purpose

1 within the meaning of Article 25(3)(d) of the Statute, in particular, in light of the
2 requirement that the common purpose pursued by the group must at least have an
3 element of criminality.

4 This means that even if the Pre-Trial Chamber had adopted a different interpretation
5 of the term "contribution" under Article 25(3)(d), it would not have confirmed the
6 charges against Mr Mbarushimana. Thus even if the Appeals Chamber were to
7 agree with the Prosecutor that the Pre-Trial Chamber erred in its interpretation of
8 Article 25(3)(d), it would not reverse the impugned decision because the error did not
9 materially affect the decision.

10 The Appeals Chamber notes that the ambiguities in the impugned decision as to the
11 question whether the Pre-Trial Chamber found that Mr Mbarushimana's contribution
12 was insignificant or non-existent. It's also aware that in the decision granting leave
13 to appeal, the Pre-Trial Chamber made a general statement that it did not find in the
14 impugned decision that some of the suspect's alleged contributions were in fact
15 insignificant contributions. However, in this decision the Pre-Trial Chamber did
16 also not indicate which of his alleged conducts it considered to be insignificant as
17 opposed to no contribution.

18 In light of these ambiguities in the Pre-Trial Chamber's findings, the Appeals
19 Chamber would have to address the merits of the third ground of appeal in a vacuum
20 and thereby become engaged in what would be a purely academic discussion. Thus
21 in the end the Appeals Chamber decided not to analyse the merits of this ground of
22 the appeal, but rejects it.

23 Turning to the separate opinion, Judge Fernández de Gurmendi disagrees with the
24 Appeals Chambers' approach to the third ground of appeal only insofar as she would
25 have addressed the alleged legal error. Otherwise, she agrees with the judgment.

1 In her view, the Pre-Trial Chamber rejected the suspect's responsibility under
2 Article 25(3)(d) for a variety of objective and subjective reasons which included that
3 he did not make objectively a significant contribution.

4 In addition, she considers that certainty as to his standard -- as to this standard is
5 important for future proceedings, if any, in the case of The Prosecutor versus Callixte
6 Mbarushimana. She recalls in this context that the Prosecutor may bring before the
7 Pre-Trial Chamber additional evidence under Article 61(8) of the Statute.

8 In addressing the legal -- the alleged legal error, Judge Fernández finds that the
9 Pre-Trial Chamber erred in adopting a threshold for the level of contribution under
10 Article 25(3)(d) of the Statute. In her opinion, the interpretation of this provision
11 does not require a contribution that is significant; any contribution is sufficient. This
12 conclusion is based on the clear wording of the subparagraph and its reading in the
13 context of other forms of responsibility contained in the Article. She's not persuaded
14 by the argument of the Pre-Trial Chamber for establishing a threshold contrary to the
15 wording of the provision. In conclusion, Judge Fernández de Gurmendi would have
16 found that the Pre-Trial Chamber erred in holding that a contribution to a crime
17 committed by a group of persons acting with a common purpose needs to be
18 significant.

19 For the aforementioned reasons, the Appeals Chamber unanimously delivers the
20 following judgment:

21 The decision on the confirmation of charges of 16 December 2011 is confirmed. The
22 appeal is dismissed.

23 This concludes my summary of the judgment. Thank you all.

24 THE COURT USHER: All rise.

25 (The hearing ends in open session at 11.50 a.m.)