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**PRE-TRIAL CHAMBER I**

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

***IN THE CASE OF  
THE PROSECUTOR v. CALLIXTE MBARUSHIMANA***

**Public Document**

**Prosecution's Application for Leave to Appeal the  
"Decision on the confirmation of charges"**

**Source:** Office of the Prosecutor

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

**The Office of the Prosecutor**

**Counsel for the Defence**

Mr Arthur Vercken

Ms Yael Vias-Gvirsman

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

Mr Mayombo Kassongo

Mr Ghislain M. Mabanga

**Unrepresented Applicants for**

**Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States Representatives**

**Amicus Curiae**

## **REGISTRY**

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## Introduction

1. On 16 December 2011, the Majority of Pre-Trial Chamber I (“Majority”) declined to confirm charges brought by the Prosecution against Callixte Mbarushimana (“Suspect”).<sup>1</sup> The Minority expressed a different view: “However, when viewing the totality of the evidence, I see a clear line of reasoning in the Prosecution’s case. ...The case against Mr Callixte Mbarushimana is not a conventional one, but what the Majority sees as ‘insufficient evidence’ I see as ‘triable issues’ deserving of the more rigorous fact finding that only a Trial Chamber can provide.”<sup>2</sup>
2. The Prosecution accordingly seeks leave to appeal the following issues:
  - 1) Whether the correct standard of proof in the context of Article 61 allows the Chamber to deny confirmation of charges supported by the Prosecution evidence, by resolving inferences, credibility doubts and perceived inconsistencies against the Prosecution and thereby preventing it from presenting its case at trial.
  - 2) Whether a proper interpretation of the scope and nature of a confirmation hearing, as defined by Article 61, allows the Pre-Trial Chamber to evaluate the credibility and consistency of witness interviews, summaries and statements without the opportunity to examine the witnesses that would be possible at trial.
  - 3) Whether a proper interpretation of Article 54(1)(a) forbids an investigator to prompt direct information that incriminates the Suspect and therefore justifies the Chamber’s refusal to give the witness statement full weight.

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<sup>1</sup> ICC-01/04-01/10-465-Red. (“Decision”).

<sup>2</sup> ICC-01/04-01/10-465-Red (“Dissenting Opinion”), para 134.

- 4) Whether the mode of liability under Article 25(3)(d) requires that the person make a “significant” contribution to the commission or attempted commission of the crime.
3. These Issues arise directly from the Majority’s Decision. They affect the fair and expeditious conduct of the confirmation proceeding and the outcome of the confirmation. They concern systemic errors of law pertaining to the role and functions of a Pre-Trial Chamber at the confirmation stage and are thus appealable issues. These Issues do not concern the individual factual findings entered by the Majority. On the issues regarding the standard of proof, the scope of the confirmation of charges to assess the credibility of the witnesses and the correct interpretation of Article 54, the Majority decreed that without additional evidence there can be no trial on these charges; on the issue regarding the interpretation of Article 25(3)(d), it determined that substantial grounds do not exist unless the contribution to the common plan satisfies requirements not set out in the statute. For all issues, therefore, intervention by the Appeals Chamber is *required* to advance the proceedings. If, as the Prosecution asserts, the Majority standards on evidence and mode of liability are erroneous, the evidentiary burdens imposed by the Majority have no basis in the core texts of this Court and are inconsistent with the purpose of confirmation, the Appeals Chamber alone is positioned to correct this error. The Prosecution accordingly seeks leave to appeal the Chamber’s Decision.
4. When determining whether these issues are appealable pursuant to Article 82(1)(d), the correctness of the decision is irrelevant. The sole question before the Chamber is whether the issues satisfy the criteria for leave to appeal.<sup>3</sup>

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<sup>3</sup> ICC-02/04-01/05-20, para. 22. In this application, the Prosecution makes reference to any errors contained in the Decision only when necessary to demonstrate the appealability of the Issue.

## Submissions

**ISSUE ONE: 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.**

5. Although the Majority recognised that the applicable standard for confirmation of charges is one of “substantial grounds to believe”, in effect it applied a higher standard of proof.
6. The Majority Decision correctly acknowledged the limited object and purpose of the confirmation hearing<sup>4</sup> and stated that, for purpose of confirmation, it would accept the premise that the Prosecution’s evidence was admissible, but it did not go further and accept that the evidence was also presumptively credible.<sup>5</sup> Rather, the Majority resolved inferences, credibility doubts and perceived inconsistencies against the Prosecution, which is tantamount to applying a “beyond reasonable doubt” standard at the preliminary confirmation of charges stage.<sup>6</sup> This was error.
7. The Prosecution has repeatedly asserted that the Chamber’s role at confirmation is to filter meritless charges, not to engage in a mini-trial of the case. It argued that “for purposes of confirmation, the Pre-Trial Chamber should accept as reliable the Prosecution’s evidence so long as it is relevant and admissible. [...] This standard means that the Pre-Trial Chamber should not reject or discount evidence because it is ambiguous, subject to more than one interpretation, or potentially inconsistent with other evidence. If the evidence is not incredible on its face, the

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<sup>4</sup> Decision, para.44.

<sup>5</sup> Decision, paras. 43, 44.

<sup>6</sup> Or, put another way, applying the *in dubio pro reo* principle.

Chamber must accept it and give it due weight”.<sup>7</sup> Such an approach would allow a full analysis of the evidence at trial.

8. The Chamber expressly rejected the Prosecution argument, finding instead that “There is no provision in the statutory framework of the Court which expressly states that inconsistencies, ambiguities or contradictions in the evidence should be resolved in favour of the Prosecution.”<sup>8</sup> Following such criterion the Majority gave great weight to apparent inconsistencies within the evidence and rejected, or failed to consider, the inferences or explanations that supported the Prosecution’s position.<sup>9</sup>
9. Thus, the Chamber applied an erroneous evidentiary test, effectively equal to that of “beyond reasonable doubt”, which is appropriate only at trial stage for a conviction of the Accused.
10. The Chamber reasoned that the Defence’s statutory right to present its own evidence “necessarily engages the Chamber in an assessment of the credibility and weight of this evidence in light of the whole of the evidence submitted for the purposes of the confirmation hearing.”<sup>10</sup>
11. The Prosecution does not dispute the Defence’s statutory rights or the Chamber’s duty to assess all the evidence before it. However, the Prosecution submits that when the Defence points out an inconsistency in the Prosecution evidence, or offers contrary evidence that raises a factual dispute that cannot confidently be resolved accurately by the Chamber, it creates trial issues unsuitable for pre-trial

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<sup>7</sup> ICC-01/04-01/10-448, para 33 – 34.

<sup>8</sup> Decision, para.45.

<sup>9</sup> See *for example*, Decision, paras. 313 and 315, where the Majority noted that the evidence was contradictory as to whether the Suspect was aware of the crimes and ultimately found no reasonable grounds to believe that he had the requisite knowledge. Cf Dissenting Opinion, paras. 70, 118-121, 124-125, 127 and 132, and to the sources relied on therein.

<sup>10</sup> Decision, para.46.

resolution and that instead should properly be determined by the Trial Chamber.<sup>11</sup>

12. The Statute and the Appeals Chamber acknowledge a difference between the evidentiary rules at the confirmation stage and at trial.<sup>12</sup> Moreover, the existence of limitations on the Chambers' free assessment of evidence is apparent from the Appeals Chamber's ruling in *Bashir* that the Pre-Trial Chamber in that matter erroneously applied the standards regarding "proof by inference" and "reasonable grounds to believe".<sup>13</sup>
13. The question posed by this application for leave to appeal is the stringency of the legal standard against which its evidence was effectively evaluated. The Issue is "essential for the determination of matters arising under the judicial cause under examination".<sup>14</sup> Regardless of the Chamber's view on the underlying merits of the Issue it should be accepted that this is an appealable issue whose merits can only be addressed by the Appeals Chamber.

(a) The Issue arises out of the Decision

14. The Issue clearly arises out of the Decision, because the basis for the Majority's decision not to confirm the charges was its conclusion that the evidence presented was insufficient to meet the Prosecution's burden of proof, having rejected the Prosecution's position that doubts and inferences should be resolved in the Prosecution's favour and consequently having rejected the incriminating evidence of most of the Prosecution's witnesses.

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<sup>11</sup> Thus, this is not a question of resolving ambiguities and inconsistencies in favour of the Prosecution, but rather not attempting to resolve them at all in circumstances where they cannot properly be resolved on the evidence before the Pre-Trial Chamber, which is a necessary corollary of the limited function and purpose of the confirmation hearing.

<sup>12</sup> Rome Statute, articles 61 (7) and 66 (3); *Prosecutor v. Lubanga, Judgment on Appeal against Second Redaction Decision*, ICC-01/04-01/06-774 OA6, 14 December 2006, para. 47; *Prosecutor v. Katanga, Judgment on Prosecution's Appeal against the First Redaction Decision*, ICC-01/04-01/07-475 OA, 13 May 2008, para. 68; *Prosecutor v. Lubanga, Judgment on Disclosure Restriction pursuant to Rule 81 (2) and (4)*, ICC-01/04-01/06-568 OA3, 13 October 2006, para. 56.

<sup>13</sup> ICC-02/05-01/09-73 OA, paras. 34, 39.

<sup>14</sup> ICC-01/04-168 OA3, para. 9.

(b) The Issue significantly affects the fairness of the proceedings

15. The Issue affects the fairness of the proceedings *vis-a-vis* the Prosecution. The Majority's approach led it to refuse to confirm the charges. Since the Issue concerns the standard of proof, the Prosecution's right<sup>15</sup> to offer additional evidence does not provide a remedy, as the Chamber will apply the same standard with any new evidence. The only way to remedy this error and provide fairness to the Prosecution is to allow the Appeals Chamber to enter an authoritative finding on the correct legal criteria for assessing evidence at the confirmation stage. Anything less is unfair to the Prosecution.
16. The Issue affects the fairness of the proceedings because it interferes with the Prosecution's ability to present its case.<sup>16</sup> If the Prosecution's standard of proof is correct it would be unfair to force it to offer more evidence to corroborate or overcome inconsistencies. This Chamber already held that the application of an incorrect standard for evaluating evidence would have "a direct and detrimental impact on the Chamber's ability to correctly assess the evidence".<sup>17</sup>
17. Finally, the Issue affects the fairness of the proceedings *vis-a-vis* the victims and witnesses.<sup>18</sup> If the Prosecution is forced to present live witnesses at the confirmation hearing in order to explain apparent contradictions in their statements, the risk to their safety and that of their families will unduly increase..<sup>19</sup> An incorrect evaluation of evidence that leads to the denial of confirmation also unfairly denies witnesses and victims a full hearing of the

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<sup>15</sup> See Article 61(8).

<sup>16</sup> ICC-02/04-01/05-90, 11 July 2006, para. 24.

<sup>17</sup> This Chamber already held that the application of an incorrect standard for evaluating evidence would have "a direct and detrimental impact on the Chamber's ability to correctly assess the evidence" (ICC-02/05-01/09-21, p. 7.) As demonstrated by the Dissenting Opinion, this evidence, if analysed correctly, would have demonstrated that there are substantial grounds to believe that the Suspect committed the crimes..

<sup>18</sup> ICC-01/04-01/06-2463, para. 30.

<sup>19</sup> Pre-Trial Chamber 2 has recently ruled that the parties should in the normal course, rely on witness statements and summaries at confirmation, rather than calling large numbers of witnesses. See ICC-01/09-01/11-221, paras. 8 – 9.

evidence, a judicial finding as to guilt or innocence, and the ability seek reparations following the conviction of the Suspect.

(c) The Issue significantly affects the expeditious conduct of the proceedings

18. The Issue affects the expeditious conduct of the proceedings by delaying the closure of the pre-trial phase of this case. In the case against *Bashir*, this Chamber held that the “production of further evidence in order to meet the standard espoused by the [Chamber] would affect the expeditiousness of the proceedings.”<sup>20</sup> In this case, the Prosecution may choose to renew its effort to bring charges and present additional evidence to satisfy the Chamber’s requirements. If that occurs, clearly there will be delay to the proceedings.

(d) The Issue affects the outcome of the trial

19. Firstly, by refusing to confirm the charges, the Majority has prevented (for now at least) the possibility of a trial. There thus will be no outcome. The Issue also fundamentally affected the outcome of the confirmation hearing – based on an erroneous standard of proof, it found the Prosecution’s case to be inadequate to permit confirmation. Should the Appeals Chamber hear and reverse this case, the outcome of confirmation will likely be very different.<sup>21</sup>

20. In *Lubanga*, Trial Chamber I noted that an issue affects the outcome of the trial where it “is likely to have consequences as regards the evidence which it is considered necessary to put before the Chamber”.<sup>22</sup> Though this statement was made in the context of trial, its logic equally applies at this stage as well. As the

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<sup>20</sup> ICC-02/05-01/09-21, p. 8.

<sup>21</sup> The Prosecution acknowledges that Article 82 sets out standards that are facially applicable only to “trial” issues. It would, however, be inappropriate to exclude issues that affect the fairness, expeditiousness, and outcome of pre-trial confirmation proceedings on the ground that the statute only says “trial,” given other provisions in the Rome Statute that say that rules regarding trial proceedings also apply to pre-trial matters, and vice versa. See, for example, Article 64 (6)(a).

<sup>22</sup> ICC-01/04-01/06-2107, para. 29; see also para. 33. See also ICC-01/04-01/06-1191, para. 42 (“the introduction of evidence touching on the issue of the guilt or innocence of the accused may materially affect the content and the substance of the evidence introduced during the trial”).

Issue directly impact the quality and kind of evidence that the Prosecution must put before a Pre-Trial Chamber at the confirmation stage, it affects whether, and which, charges will be confirmed against the Suspect, and consequently the outcome of the trial.

(e) Immediate resolution of the Issue will materially advance the proceedings

21. In *Bashir*, this Chamber found that resolution of the correct standard for evaluating evidence at the arrest warrant stage would materially advance the proceedings “by providing clarity on the law on proof by inference, particularly at the arrest warrant stage”.<sup>23</sup> In this case, the evaluation of the correct standard at the confirmation stage would also materially advance the proceedings. It will affect the correct assessment by the Chamber of evidence that has already been presented and any additional evidence that the Prosecution may submit.

22. Unless immediately resolved by the Appeals Chamber, future applications of the same approach to supplemental evidence adduced by the Prosecution will continue to affect the Chamber’s evaluation of that evidence. This will necessarily affect the Prosecution’s ability to satisfy its burden at the confirmation stage.

**ISSUE TWO: 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, statements and summaries, without the opportunity that would be possible at trial to examine the witnesses.**

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<sup>23</sup> ICC-02/05-01/09-21, p. 8.

(a) The issue arises from the decision

23. The Pre Trial Chamber erroneously evaluated at the confirmation of charges the credibility and consistency of the witness interviews, statements and summaries (collectively “statements”). The Prosecution submitted that Pre-Trial Chamber should not – and cannot reliably-- scrutinize the witness’ statements for their credibility, nor should it evaluate the strengths and weaknesses of contradictory or inconsistent witness statements before it. The Majority expressly rejected this Prosecution position.<sup>24</sup>
24. The erroneous interpretation of its role during Confirmation of Charges also caused the Pre-Trial Chamber to decide, with respect to the use of anonymous witnesses' statements and summaries of anonymous witnesses' statements, that even though it “is permitted at the pre-trial stage, such evidence may be taken to have a lower probative value in order to counterbalance the disadvantage that it might cause to the Defence.”
25. The fact that the Issue arises from the Decision is also demonstrated by the manner in which the Majority applied the enunciated principles on the assessment of evidence at the confirmation stage in this case. It spent substantial effort analysing reliability of witness statements,<sup>25</sup> and treated with special caution insider witness evidence *en masse* on the grounds that some of the insiders participated in the events alleged.<sup>26</sup> In so doing, it overlooked that these are archetypically trial issues, to be probed and resolved when witnesses are present to explain and when their credibility can be viewed and reliably assessed.

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<sup>24</sup> Decision, paras. 45-49.

<sup>25</sup> See for example, Decision paras. 255 and 257, where the Majority emphasised that none of the FDLR insiders “directly and spontaneously confirm the existence of an order emanating from the FDLR leadership” and that those that acknowledged the existence of an order did so after “explicit and insistent prompting by the investigator”, citing Witness 632 as an example. However, the fact that a witness is prompted does not require a conclusion that the evidence is untrue. As the Dissent made clear, whether prompting led a hesitant witness to offer his own knowledge or attempt to satisfy the investigator can only be reliably determined at trial; see Dissenting Opinion para. 13, which explains that if the witnesses “testified in court, questions could be asked to test their knowledge.”

<sup>26</sup> Decision, para. 50.

As noted in the Dissenting Opinion, the Majority did not take into account the possible reasons for what it identified as inconsistencies, particularly with respect to insider witnesses.<sup>27</sup>

(b) The Issue significantly affects the fairness of the proceedings

26. By imposing a burden on the Prosecution to explain inconsistencies or offer extensive evidence to neutralize challenges to credibility, and penalizing the Prosecution's case for relying on insiders – i.e., persons in the best position to know the common plan of the FDLR participants – the Decision affects the fairness of the proceedings to the Prosecution. This will also affect the fairness of proceedings *vis-à-vis* witnesses whom the Prosecution may be forced to call, who may unnecessarily be placed at risk.

(c) The Issue significantly affects the expeditious conduct of the proceedings

27. The Chamber's readiness to make negative credibility findings regarding witness statements will force the Prosecution to call *viva voce* witnesses at future confirmation hearings to explain the purported inconsistencies or contradictions. This would significantly and unnecessarily extend the duration of the confirmation hearing, and can also cause pre-confirmation delays to accommodate witness security issues.

(d) The Issue affects the outcome of the trial

28. The Issue affects the outcome of the trial by effectively preventing a trial. As demonstrated by the Dissenting Opinion, a less stringent approach to the analysis of the reliability of the Prosecution witnesses would have resulted in the confirmation of most of the Prosecution charges.

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<sup>27</sup> Dissenting Opinion, para. 12: "It is thus not unlikely that the fear of prosecution for the crimes attributed to their organisation affected their statements. They may have tried to disavow the suspicion of their involvement in the crimes. Those who were conscious of the impermissibility of attacking civilians may have tried to protect themselves by saying that the attackers only targeted combatants. There may also be differences between the statements of high-ranking officers and rank-and-file soldiers."

(e) Immediate resolution of the Issue will materially advance the proceedings

29. For the reasons set out with respect to Issue One, immediate resolution of this Issue will advance the proceedings.

**ISSUE THREE: Whether a proper interpretation of Article 54(1)(a) forbids an investigator to prompt direct information that incriminates the Suspect and therefore justifies the Chamber's refusal to give the witness statement full weight.**

30. This issue addresses the ability of an investigator to disbelieve a witness's answer and to ask probing questions without violating the obligation under Article 54(1)(a) to investigate incriminating and exonerating circumstances equally. The Chamber determined that it would give less credit to witnesses whose incriminating statements were elicited by investigators who probed witnesses, including by asking leading questions.

31. The issues relates to the proper interpretation of Article 54(1)(a) and the right of the Prosecution to probe more deeply when the investigator has suspicions that a witness is giving false or inaccurate information.

(a) The Issue arises out of the Decision

32. The Issue clearly arises out of the Decision. The Chamber concluded that investigators did not adhere to their duty under Article 54(1)(a) when they were sceptical about the truthfulness of witnesses' versions that appeared to exonerate the Suspect and discredited the evidence of insider witnesses because of the manner in which the Prosecution conducted its questioning.<sup>28</sup>

33. In the Prosecution's view, Article 54(1)(a) does not obligate investigators to accept as truthful any statements made by witnesses who appear to be falsely

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<sup>28</sup> See for examples, Decision, paras. 248, 251, 254 and 257.

exonerating the Suspect. If during diligent follow-up questioning an investigator obtains incriminating information, that information should not be excluded or discredited at confirmation.

*(b) The Issue significantly affects the fairness of the proceedings*

34. Issue Three affects the fairness of the proceedings in the same way and for the same reasons that are identified with respect to Issue One. Additionally, if the OTP investigators are obligated to accept exonerating information from witnesses and not probe further, by leading questions and otherwise, in an attempt to elicit what they believe is the truth, the Prosecution ability to investigate will be severely compromised.

35. Furthermore, the evidence of witnesses needs to be evaluated and probed in the light of other evidence in the possession of the Prosecution with which it is inconsistent. It is unfair to the Prosecution on the one hand to reject evidence which is inconsistent, but then on the other prevent it from probing such inconsistencies, including through leading questions.

*(c) The Issue significantly affects the expeditious conduct of the proceedings*

36. As with the previous Issues, this Issue affects the expeditious conduct of the proceedings by delaying the closure of the pre-trial phase of this case. If the Prosecution chooses to renew its effort to bring charges, it will have to present additional evidence, which clearly will cause delay to the proceedings.

37. Additionally, the Chamber's interpretation of investigators' obligations under Article 54 to accept an account that the experienced investigator believes to be untruthful will necessarily slow investigations, if it requires investigators to chase down false leads and to delay confronting the lying witness in an effort to ascertain the truth.

*(d) The Issue affects the outcome of the trial*

38. As noted previously, The Majority's refusal to confirm charges has prevented the case from proceeding and thus affects the outcome by ensuring that there will be no trial outcome. This decision was based largely on the Majority's rejection of the Prosecution witnesses, which was in turn based *inter alia* on the lower probative value accorded to witness evidence elicited through what it perceived to be improper interview techniques.

*(e) Immediate resolution of the Issue will materially advance the proceedings*

39. Should this case progress to trial, insiders will provide important evidence against the Suspect. It will be important that the parties obtain clarity in advance of trial on the investigators' ability to question insiders and more particularly their right to disbelieve witnesses' answers, even exonerating ones, and to ask leading questions during the investigation in order to elicit the truth.

**ISSUE FOUR: Whether the mode of liability under Article 25(3)(d) requires that the person make a "significant" contribution to the commission or attempted commission of the crime.**

40. The Chamber found that the contribution to the commission of a crime under Article 25(3)(d) of the Statute cannot be just "any" contribution, even though that is what the Statute provides, but need be at least "significant."<sup>29</sup> The Majority therefore concluded that the Suspect's role as a leader of the FDLR does not qualify as "a significant contribution to the commission of crimes by the FDLR in accordance with article 25(3)(d) of the Statute".<sup>30</sup> It also considered that the Suspect's radio communications and press releases, were not a significant contribution to the commission of crimes by the FDLR.<sup>31</sup> It also found that the

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<sup>29</sup> Decision, para. 283.

<sup>30</sup> Decision, para. 303.

<sup>31</sup> Decision, para. 315

performance of the Suspect as a point of contact for external actors and his active involvement in the Saint Egidio peace negotiations were not contributions in accordance with Article 25(3)(d).<sup>32</sup> It further adopted an implicit criterion that the contribution must achieve the desired result<sup>33</sup> and therefore considered that even if the Suspect tried to encourage troop morale, not all the foot soldiers were encouraged or knew him. Accordingly, the Majority of the Chamber found that that the Suspect could have not provided through his radio communications and press releases a “significant” contribution to the commission of crimes.<sup>34</sup>

41. This issue addresses the statutory requirements for criminal liability for a person who contributes to the commission of a crime by a group of persons acting with a common purpose. This is a purely legal issue of statutory construction. It does not constitute a factual dispute or a difference of opinion.

*(a) The Issue arises out of the Decision*

42. The Issue clearly arises out of the Decision. The Majority dismissed the Prosecution’s argument that the FDLR leadership constituted a group of persons acting with a “common purpose”,<sup>35</sup> based on its finding that the Prosecution had not established a policy of attacking civilians, and therefore Mbarushimana did not provide “any” contribution to the commission of the crimes.<sup>36</sup> But additionally, it concluded that the evidence presented was insufficient to establish that the Suspect had made a “significant” contribution to the crimes committed by the FDLR. The fact that the Chamber evaluated the “significance” of many Mbarushimana’s contributions shows that the issue arises from the decision.

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<sup>32</sup> Decision, para. 320

<sup>33</sup> Decision, para. 335.

<sup>34</sup> Decision, para. 339.

<sup>35</sup> Decision, para. 291.

<sup>36</sup> Decision, para. 292. If the Prosecution succeeds on appeal on either of the first two issues, this conclusion would also need to be revisited, as found in the Dissenting Opinion at para. 43.

*(b) The Issue significantly affects the fairness of the proceedings*

43. Issue Four affects the fairness of the proceedings in the same way and for the same reasons that are identified with respect to Issue One. Additionally, by imposing a higher standard for proving the Suspect's contribution than is statutorily specified, the Chamber has unfairly increased the Prosecution's burden for confirmation of the charges.

*(c) The Issue significantly affects the expeditious conduct of the proceedings*

44. As with the previous Issues, this Issue affects the expeditious conduct of the proceedings by delaying the closure of the pre-trial phase of this case.

*(d) The Issue affects the outcome of the trial*

45. As noted previously, The Majority's refusal to confirm charges has prevented the case from proceeding and thus affects the outcome by ensuring that there will be no trial outcome.

*(e) Immediate resolution of the Issue will materially advance the proceedings*

46. Unless immediately resolved by the Appeals Chamber, future applications of the same approach to supplemental evidence adduced by the Prosecution will continue to affect the Chamber's evaluation of that evidence. This will necessarily affect the Prosecution's ability to satisfy its burden at the confirmation stage.

## Conclusion

47. The Pre-Trial Chamber in *Bashir*, granting the Prosecution's Application for Leave to Appeal, explained that therefore the "production of further evidence in order to meet the standards espoused by the Majority would affect the expeditiousness of the proceedings"; and "an immediate resolution of these issues by the Appeals Chamber may materially advance the proceedings by providing clarity on the law on proof by inference"; "as a result, the two criteria provided for in article 82 (l)(d) of the Statute are met".<sup>37</sup>

48. For the reasons set out above the Prosecution requests that the Trial Chamber grant leave to appeal on the Issues presented pursuant to Article 82(1)(d).



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Luis Moreno-Ocampo

Prosecutor

Dated this 27<sup>th</sup> day of December 2011

At The Hague, The Netherlands

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<sup>37</sup> ICC-02/05-01/09-21, page 8. Although this was at Article 58 stage, the same principles apply *mutatis mutandis* to the confirmation stage.