

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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

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

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
 Ms Fatou Bensouda, Deputy Prosecutor
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Legal Representatives of Victims

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Legal Representatives of Applicants

Unrepresented Victims

**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

Registrar

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section**

Counsel Support Section

Pre-Trial Chamber I of the International Criminal Court (“Chamber” and “Court” respectively) hereby renders the following decision in the case of *The Prosecutor v. Callixte Mbarushimana*:

Procedural History

1. On 16 December 2011, the Chamber rendered the “Decision on the Confirmation of Charges” (“Confirmation Decision”),¹ whereby the Chamber by Majority, Presiding Judge Sanji M. Monageng dissenting, declined to confirm the charges against Mr Callixte Mbarushimana (“Mr Mbarushimana”).²

2. The Prosecution filed the “Prosecution’s Application for Leave to Appeal the ‘Decision on the confirmation of charges’” on 27 December 2011 (“Prosecution Application”),³ seeking leave to appeal the Confirmation Decision pursuant to article 82(1)(d) of the Rome Statute (“Statute”). The Defence responded to the Prosecution Application on 27 February 2012 (“Defence Response”)⁴ after having been notified of the French version of the Confirmation Decision.⁵

Applicable Law and Discussion

3. On the basis of article 21 of the Statute, the Chamber has considered of article 82(1)(d) of the Statute, rule 155 of the Rules of Procedure and Evidence and regulation 65 of the Regulations of the Court.

¹ ICC-01/04-01/10-465-Red.

² Confirmation Decision, p. 149.

³ ICC-01/04-01/10-480.

⁴ “Réponse de la Défense à ‘Prosecution’s Application for Leave to Appeal the Decision on the confirmation of charges’ (ICC-01/04-01/10-480)”, ICC-01/04-01/10-486.

⁵ The Chamber allowed the Defence Response to be filed within three days of being notified of the Confirmation Decision’s French translation. See regulation 65(3) of the Regulations of the Court; “Decision on the ‘Requête de la Défense en interprétation ou en demande de délai prolongé de réponse à un éventuel appel interlocutoire du Procureur contre la décision infirmant les charges (ICC-01/04-01/10-465-RED)’”, 28 December 2011, ICC-01/04-01/10-481. The French translation of the Confirmation Decision was notified to the Defence on 22 February 2012.

4. As identified in article 82(1)(d) of the Statute and the Court's jurisprudence,⁶ the following cumulative criteria must be met in order for a Chamber to grant leave to appeal ("82(1)(d) Criteria"):

- (i) there must be an appealable issue arising from the decision, namely an issue which is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination and which is not merely a question over which there is a mere disagreement or conflicting opinion;
- (ii) the issue must significantly affect either (a) both the fair and expeditious conduct of the proceedings or (b) the outcome of the trial; *and*
- (iii) in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

A. The First Issue Raised by the Prosecution

5. The first issue raised by the Prosecution is "[w]hether 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" ("First Issue").⁷

6. The Prosecution argues that, by not finding the Prosecution's evidence to be presumptively credible, the Majority improperly applied a standard of proof tantamount to "beyond a reasonable doubt" at the pre-trial stage.⁸ The Prosecution alleges that the Dissenting Opinion "correctly" analysed the evidence presented.⁹ The Prosecution argues that "when the Defence points out an inconsistency in the Prosecution evidence, or offers

⁶ Article 82(1)(d) of the Statute; *Situation in the Democratic Republic of Congo*, Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, OA 3, paras 9-14; *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on the Prosecutor's Application for Leave to Appeal the 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo'", 18 September 2009, ICC-01/05-01/08-532, paras 12-24; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the Applications for Leave to Appeal the Decision on the Admission of the Evidence of Witnesses 132 and 287 and on the Leave to Appeal on the Decision on the Confirmation of Charges", 24 October 2008, ICC-01/04-01/07-727, pp. 8-9; *Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, "Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges", 25 May 2007, ICC-01/04-01/06-915, paras 21-22.

⁷ Prosecution Application, para. 2(1).

⁸ Prosecution Application, para. 6.

⁹ Prosecution Application, para. 16, n. 17.

contrary evidence that raises a factual dispute that cannot confidently be resolved accurately by the Chamber, it creates trial issues unsuitable for pre-trial resolution and that instead should properly be determined by the Trial Chamber.”¹⁰ The Prosecution submits that the issue arises from the Confirmation Decision because, after rejecting the Prosecution’s position as to how doubts and inferences should be resolved at the pre-trial stage, the Majority consequently rejected the incriminating evidence of most of the Prosecution’s witnesses and declined to confirm the charges.¹¹

7. The Prosecution argues that, if the Prosecution’s position on the proper standard of proof is correct, then it would be unfair to force the Prosecution to offer more evidence to corroborate other evidence or overcome inconsistencies.¹² As to expeditiousness, the Prosecution argues that the production of further evidence which may be required to satisfy a higher standard of proof affects the expeditiousness of the proceedings.¹³ The Prosecution submits that the First Issue materially advances the proceedings because, “[u]nless 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.”¹⁴

8. The Defence describes the Prosecution’s arguments regarding the First Issue as a “logical fallacy” and argues that: (i) accepting the Prosecution’s arguments as to how the 82(1)(d) Criteria are met on this issue would amount to recognizing an automatic right to appeal any decision refusing to confirm the charges, (ii) the right of the Prosecution to present new evidence against Mr Mbarushimana cannot serve as a basis for granting leave to appeal, which is only supposed to be recognized in exceptional circumstances and (iii) it is pure speculation that the Prosecution is able to produce new evidence which would

¹⁰ Prosecution Application, para. 11.

¹¹ Prosecution Application, para. 14.

¹² Prosecution Application, para. 16.

¹³ Prosecution Application, para. 18, *citing to Prosecutor v. Omar Al Bashir*, Pre-Trial Chamber I, “Decision on the Prosecutor’s Application for Leave to Appeal the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’”, 24 June 2009, ICC-02/05-01/09-21 (“Bashir Decision”), p. 8.

¹⁴ Prosecution Application, para. 22.

affect the body of evidence in these proceedings.¹⁵ The Defence also argues that the First Issue is merely a disagreement with the Chamber's assessment of the evidence and that the Prosecution had plenty of opportunities to find and present proper evidence.¹⁶

9. Turning to the 82(1)(d) Criteria, the Chamber explicitly found in the Confirmation Decision that it would assess the intrinsic coherence of each item of evidence and that "[w]here 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."¹⁷ Many such inconsistencies, ambiguities and contradictions were relied upon by the Majority in declining to confirm the charges. A close reading of the entire Prosecution Application, bearing in mind the Prosecution's assertion that the Dissenting Opinion "correctly" assessed the evidence, shows that the Prosecution seems to contest three key factual findings where the Majority and Dissenting Opinions disagreed in how to resolve conflicting evidence, namely whether: (i) the Suspect was aware of the crimes committed,¹⁸ (ii) the evidence was sufficient to prove an order to commit a humanitarian catastrophe existed¹⁹ and (iii) the suspect contributed to the crimes by encouraging the troops in the field.²⁰ The Majority resolved these three key factual matters against the Prosecution,²¹ while the Dissent resolved these same matters in favour of the Prosecution.²²

10. For these reasons, the Chamber considers that the First Issue is not a mere disagreement with the Chamber, but rather that it arises from the Confirmation Decision

¹⁵ Defence Response, para. 48.

¹⁶ Defence Response, paras 40, 42.

¹⁷ Confirmation Decision, para. 47.

¹⁸ Prosecution Application, para. 8, n. 9.

¹⁹ Prosecution Application, para. 25, n. 25.

²⁰ Prosecution Application, para. 40.

²¹ See Confirmation Decision, paras 312, 315 (awareness of crimes; Majority considered that denying accusations of crimes leveled against the FDLR was *per se* neutral, unless it could be demonstrated that Mr Mbarushimana knew that he was denying the truth and that this denial was done in furtherance of an FDLR policy); 245, 255, 257, 263, 291 (order to create humanitarian catastrophe at core of Prosecution's submission on policy and of a group of persons acting with a common purpose; paragraphs referenced in Prosecution Application analyse why this order was found to be unproven); para. 339 (encouragement).

²² Confirmation Decision, dissenting opinion of J. Monageng, paras 133 (awareness of crimes); 18 (order to create humanitarian catastrophe); 101 (encouragement).

and that the key factual matters resolved against the Prosecution are essential for the determination of the Confirmation Decision.

11. By resolving conflicts in the evidence at the pre-trial stage, the Chamber required that the Prosecution's evidence presented be of a certain level of reliability and consistency in order for the charges to be confirmed. The Prosecution's assertions on the Majority's assessment of the evidence appear to be that they are being asked to present evidence to the Chamber above and beyond the burden of proof which, in the Prosecution's view, should be required at this stage of the proceedings. Applying an erroneous burden of proof can create a "direct and detrimental impact" on correctly assessing the evidence²³ and can affect the degree to which the Defence can effectively challenge the evidence presented, thus affecting the fairness of the proceedings.

12. Further, if the Prosecution is correct that conflicts in the evidence should not be resolved at the pre-trial stage, then the unnecessary evidence presentation required to resolve these conflicts would affect the expeditiousness of the proceedings.

13. For these reasons, the Chamber considers that this issue significantly affects both the fair and expeditious conduct of the proceedings.

14. The Prosecution's case is currently unable to proceed in large part due to the Majority's findings that the evidence presented was not reliable and/or consistent enough to justify confirming the charges against Mr Mbarushimana. The Chamber also notes that article 61(8) of the Statute allows the Prosecution to subsequently request the confirmation of the same charges which the Pre-Trial Chamber declined to confirm, so long as the subsequent request "is supported by additional evidence". Having the Appeals Chamber rule on this issue would confirm that these proceedings are properly stopped at the pre-trial stage and would assist the Chamber with any supplemental evidence presented against Mr Mbarushimana by the Prosecution. For these reasons, the Chamber considers that an immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings.

²³ See Bashir Decision, p. 7.

15. The Chamber is not persuaded by the arguments of the Defence for denying leave to appeal on this issue. The Chamber fails to see how the Prosecution's arguments would lead to an automatic grant for leave to appeal on a denial of confirmation of the charges; the party seeking leave to appeal is always required to make a showing as to why all three 82(1)(d) Criteria are met and these criteria do not change just because the impugned decision is a confirmation decision. The possibility of introducing additional evidence is speculative in the sense that the Prosecution has yet to introduce any such evidence pursuant to article 61(8) of the Statute, but this possibility is only a part of the Chamber's material advancement analysis. The Defence underemphasises the point that Appeals Chamber intervention is also important to confirm that the present proceedings are properly concluded based on the standard of proof challenged by the Prosecution. It is unconvincing to suggest that appellate review of the First Issue could not materially advance the proceedings when appellate review is the only way, short of additional evidence being presented, to ensure that the present proceedings should no longer advance at all. Finally, the Chamber considers that the Defence's argument as to the ample opportunities the Prosecution had to prepare and present its case is unrelated to the issue at hand, namely whether the Prosecution is being asked to satisfy a burden of proof at the pre-trial stage above and beyond what is required by the Statute.

16. On the basis of the analysis above, the Chamber finds that the 82(1)(d) Criteria are met and grants leave to appeal on the First Issue.

B. The Second Issue Raised by the Prosecution

17. The second issue raised by the Prosecution is "[w]hether 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" ("Second Issue").²⁴

²⁴ Prosecution Application, para. 2(2).

18. The Prosecution alleges that this issue arises from the Confirmation Decision because the Chamber erroneously evaluated the credibility and consistency of witness interviews, statements and summaries (collectively, “witness statements”).²⁵ The Prosecution argues that the Pre-Trial Chamber cannot reliably scrutinize witness statements to determine their credibility.²⁶ The Prosecution’s position is that such determinations are for trial, when witnesses are present and their credibility can be explored more reliably.²⁷

19. The Prosecution argues that the Second Issue affects the fairness of the proceedings because the Chamber is imposing an unwarranted burden on the Prosecution to explain inconsistencies or offer extensive evidence to neutralize challenges to credibility.²⁸ The Prosecution submits that the expeditiousness of the proceedings are affected because “[t]he Chamber’s readiness to make negative credibility findings regarding witness statements will force the Prosecution to call *viva voce* witnesses at future confirmation hearings” and that this will “significantly and unnecessarily extend the duration of the confirmation hearing, and can also cause pre-confirmation delays to accommodate witness security issues”.²⁹ The Prosecution’s submissions as to how the proceedings may be materially advanced are the same as for the First Issue.³⁰

20. The Defence argues that the Prosecution is free to call witnesses at the confirmation hearing and that the Chamber cannot be held responsible for the Prosecution’s strategic choice not to do so.³¹ The Defence thus submits that the Prosecution cannot claim injury on the basis of this issue.³²

21. The Chamber considers that the Second Issue is inextricably connected to the First Issue. Whereas the First Issue involves an alleged error of resolving conflicts in the evidence after considering the evidence’s consistency and credibility, the present issue

²⁵ Prosecution Application, para. 23.

²⁶ Prosecution Application, para. 23.

²⁷ Prosecution Application, para. 25.

²⁸ Prosecution Application, para. 26.

²⁹ Prosecution Application, para. 27.

³⁰ Prosecution Application, para. 29.

³¹ Defence Response, paras 51-53.

³² Defence Response, para. 53.

involves whether the Pre-Trial Chamber can consider consistency and credibility at all for witness statements at the pre-trial stage. Contrary to the Defence's line of reasoning, the Chamber considers that the issue presented is purely a question of law and is unrelated to the Prosecution's strategic choice to not call any of its witnesses during the confirmation hearing.

22. The reasoning applied when evaluating the 82(1)(d) Criteria for the First Issue is largely identical when analysing the Second Issue.

23. This issue arises from the Confirmation Decision, as the Majority relied on many credibility assessments and inconsistencies in declining to confirm the charges.

24. The issue of whether witness statements can be examined for credibility and consistency at the pre-trial stage affects the fairness of the proceedings because this issue can have a direct impact on the way the evidence is assessed and affects how the Defence can challenge the credibility and consistency of witness statements.

25. If the Prosecution is correct that credibility and consistency issues involving witness statements should not be addressed at the pre-trial stage, then the unnecessary evidence presentation required to satisfy the Chamber that the witnesses are credible and consistent would also affect the expeditiousness of the proceedings.

26. The Prosecution's case is currently unable to proceed in large part due to the Majority's findings that the witness statements presented were not credible and/or consistent enough to justify confirming the charges against Mr Mbarushimana. The Chamber also acknowledges that article 61(8) of the Statute allows for the Prosecution to introduce additional evidence in these proceedings, and Appeals Chamber intervention may change how this evidence would be assessed. Appeals Chamber intervention on the Second Issue may thus materially advance the proceedings.

27. For the above reasons, the Chamber considers that this issue arises from the Confirmation Decision, significantly affects the fair and expeditious conduct of the proceedings and resolution of this issue by the Appeals Chamber may materially advance

the proceedings. As such, the Chamber finds that the 82(1)(d) Criteria are met and grants leave to appeal on the Second Issue.

C. The Third Issue Raised by the Prosecution

28. The Third Issue raised by the Prosecution is “[w]hether 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.”³³

29. The Prosecution argues that Article 54(1)(a) of the Statute does not obligate investigators to accept as truthful any statements made by witnesses who appear to be falsely exonerating the suspect.³⁴ The Prosecution submits that, if during diligent follow-up questioning an investigator obtains incriminating information, that information should not be excluded or discredited at confirmation.³⁵ The Prosecution argues that Third Issue arises from the Confirmation Decision because “[t]he Chamber concluded that investigators did not adhere to their duty under Article 54(1)(a) when they were skeptical 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”.³⁶

30. In addition to cross-referencing to its submissions on the First Issue, the Prosecution argues that the fairness of the proceedings is affected because the Prosecution’s investigation would be “severely compromised” if its investigators were obligated to accept all exonerating information from witnesses.³⁷ The Prosecution argues that the expeditiousness of the proceedings is affected because the Chamber’s finding will necessarily slow investigations by requiring Prosecution investigators to chase down false leads and delay confronting lying witnesses in an effort to ascertain the truth.³⁸ The

³³ Prosecution Application, para. 2(3).

³⁴ Prosecution Application, para. 33.

³⁵ Prosecution Application, para. 33.

³⁶ Prosecution Application, para. 32.

³⁷ Prosecution Application, para. 34.

³⁸ Prosecution Application, para. 37.

Prosecution submits that the proceedings will be materially advanced because, should the case progress to trial, Appeals Chamber intervention would clarify in advance of trial how investigators may question witnesses.³⁹

31. The Defence responds that the Chamber rightly criticized the Prosecution investigators for showing no concern for the search for truth which is required of them under article 54(1)(a) of the Statute.⁴⁰ The Defence argues that the Prosecution has raised a mere disagreement with the Chamber and not an issue that qualifies under the 82(1)(d) Criteria.⁴¹

32. The Chamber considers that the issue raised by the Prosecution mischaracterizes the Confirmation Decision. The Chamber never found that the Prosecution was “forbidden” to ask follow-up questions for the purpose of gaining “direct information”, that asking leading questions always rendered the evidence thus obtained too unreliable to be accepted or even that the letter of article 54(1)(a) of the Statute was violated. In the Confirmation Decision, the Chamber quoted several instances where Prosecution investigators told witnesses who had given evidence which fell outside the Prosecution theory of the case that their answers were unsatisfactory.⁴² The Chamber considered that some of the questioning methods used in the present case were “utterly inappropriate when viewed in light of the objective, set out in article 54(1)(a) of the Statute.”⁴³ The Chamber indicated that these questioning techniques “may” significantly weaken the probative value of the evidence obtained.⁴⁴

33. The Chamber’s reasoning on this point was that the specific questioning techniques identified by the Chamber were so aggressive that they created a risk of distorting the witnesses’ answers. As the Chamber never articulated the general legal principle identified by the Prosecution, namely that prompting direct information from witnesses

³⁹ Prosecution Application, para. 39.

⁴⁰ Defence Response, para. 58.

⁴¹ Defence Response, para. 56.

⁴² Confirmation Decision, para. 51.

⁴³ Confirmation Decision, para. 51.

⁴⁴ Confirmation Decision, para. 51.

was forbidden, the proposed issue does not arise from the Confirmation Decision and leave to appeal is denied.

D. The Fourth Issue Raised by the Prosecution

34. The Fourth Issue raised by the Prosecution is “[w]hether 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” (“Fourth Issue”).⁴⁵

35. The Prosecution alleges that the Chamber imposed a threshold on the level of contribution to the commission of a crime higher than what is statutorily specified by requiring that “any” contribution is insufficient and that a “significant” contribution is required.⁴⁶ The Prosecution avers that this issue arises from the Confirmation Decision because the Majority evaluated the significance of many of Mr Mbarushimana’s contributions.⁴⁷

36. Similar to the reasons submitted for the First Issue, the Prosecution submits that the Chamber has unfairly increased the Prosecution’s burden for confirming the charges.⁴⁸ The Prosecution argues that the expeditiousness of the proceedings is affected because the significant contribution threshold delays the closure of the pre-trial phase of the case.⁴⁹ Relying on its previous submissions, the Prosecution again argues that the proceedings will be materially advanced because future evidence presented by the Prosecution will be evaluated under the significant contribution standard absent Appeals Chamber intervention.⁵⁰

37. The Defence counters that the Prosecution’s issue raises a “purely academic” question unsuitable for Appeals Chamber review because the Majority found that Mr

⁴⁵ Prosecution Application, para. 2(4).

⁴⁶ Prosecution Application, paras 40, 43.

⁴⁷ Prosecution Application, para. 42.

⁴⁸ Prosecution Application, para. 43.

⁴⁹ Prosecution Application, para. 44.

⁵⁰ Prosecution Application, para. 46.

Mbarushimana “did not provide any contribution to the commission of such crimes, even less a ‘significant’ one”.⁵¹

38. The Chamber found in the Confirmation Decision that, for liability under article 25(3)(d) of the Statute, the suspect must make a significant contribution to the crimes charged.⁵² This threshold was read into article 25(3)(d) of the Statute in order to prevent extending the reach of this mode of liability beyond reasonable interpretation.⁵³ While the Defence highlights how the Majority summarised at one point that the Suspect did not provide “any” contribution to the commission of the crimes charged,⁵⁴ a detailed reading of the Majority Opinion makes it clear that distinctions are made in the individual factual findings⁵⁵ between evidence establishing insignificant contributions to the crimes committed and evidence not found to establish any contribution at all. On a complete reading of the Confirmation Decision, the Majority Opinion did find that some of the suspect’s alleged contributions were in fact insignificant contributions. The Chamber is satisfied that the issue identified by the Prosecution both arises from the Confirmation Decision and constitutes a subject the resolution of which is essential for the determination of matters arising in the Confirmation Decision.

39. If the Prosecution is correct that it was an error to require a threshold of contribution in order to satisfy article 25(3)(d) of the Statute, then the Confirmation Decision required the Prosecution to prove, within the substantial grounds to believe standard of article 61 of the Statute, a level of contribution above and beyond what is required to prove the mode of liability charged. The Fourth Issue affects the fairness of the proceedings because this issue has a direct impact on whether the evidence presented would be sufficient to satisfy the Prosecution’s burden of proof and can affect the degree to which the Defence can challenge the Prosecution’s evidence of contributions to the crimes charged.

⁵¹ Defence Response, para. 65. *See also* Confirmation Decision, para. 292.

⁵² Confirmation Decision, paras 276-85.

⁵³ Confirmation Decision, paras 276-77.

⁵⁴ Confirmation Decision, para. 292.

⁵⁵ Confirmation Decision, paras 303, 315, 339.

40. If the Prosecution is correct that any contribution is enough for liability under article 25(3)(d) of the Statute, then the unnecessary pre-trial evidence presentation required to satisfy the Chamber's significant contribution standard would also affect the expeditiousness of the proceedings.

41. For these reasons, the Chamber considers that this issue significantly affects the fairness and expeditiousness of the proceedings.

42. The Prosecution's case is currently unable to proceed in large part due to the Majority's findings that Mr Mbarushimana did not make a significant contribution to the crimes charged. The Chamber also acknowledges that article 61(8) of the Statute allows for the Prosecution to introduce additional evidence in these proceedings, and Appeals Chamber intervention may change how this evidence would be assessed. For these reasons, the Chamber is satisfied that Appeals Chamber intervention on the Fourth Issue may materially advance the proceedings.

43. On the above reasoning, the Chamber finds that the 82(1)(d) Criteria are met and grants leave to appeal on the Fourth Issue.

E. Conclusion

44. For the reasons above, the Chamber Decides to grant leave for the Prosecution to appeal three of the four issues raised in the Prosecution Application.

FOR THESE REASONS, THE CHAMBER:

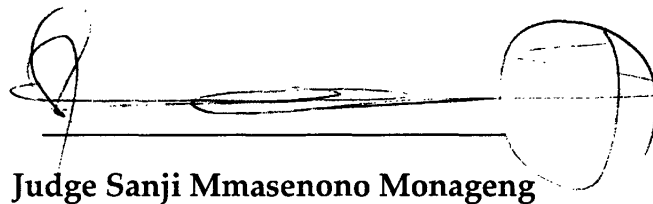
GRANTS the Prosecution Application with respect to the following issues:

- (i) 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;
- (ii) 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; and
- (iii) 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.

and

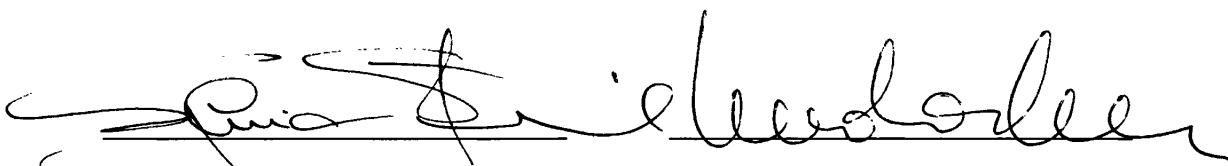
REJECTS the remainder of the Prosecution Application.

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



Judge Sanji Mmasenono Monageng

Presiding Judge



Judge Sylvia Steiner

Judge Cuno Tarfusser

Dated this Thursday, 1 March 2012

At The Hague, The Netherlands