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Cour
Pénale
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International
Criminal
Court

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No.: **ICC-01/04-01/10**
Date: **19/07/2011**

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

Confidential, *ex parte*, Defence Only
URGENT

Defence Challenge to the Jurisdiction of the Court

Source: **Defence for Mr. Callixte Mbarushimana**

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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. Nicholas Kaufman Ms. Yaël Vias-Gvirsman
Legal Representatives of the Victims	**Legal Representatives of the Applicants**
Unrepresented Victims	**Unrepresented Applicants (Participation/Reparation)**
The Office of Public Counsel for Victims	**The Office of Public Counsel for the Defence**
States' Representatives	**Amicus Curiae**

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Pursuant to Article 19(2)(a) of the Rome Statute, the Defence hereby argues that the International Criminal Court ("the Court") does not have jurisdiction to entertain the case against Mr. Callixte Mbarushimana.

Background

1. On 3 March 2004, pursuant to Article 14(1) of the Rome Statute, President Joseph Kabila of the Democratic Republic of the Congo ("the DRC") referred, by way of letter ("the Letter of Referral"), the situation in his country to the Court.

2. On 22 June 2004, pursuant to Article 18(1) of the Statute, the Prosecutor sent a letter dated 21 June 2004 to all State Parties inviting them to notify him if they were investigating or proposing to investigate the crimes alluded to in the Referral.[1]

3. On 23 June 2004, without waiting for a response from the State Parties petitioned pursuant to Article 18(1), the Prosecutor announced the opening of his investigation into the Situation in the DRC ("the DRC Situation").[2]

4. On 20 August 2010, the Office of the Prosecutor ("OTP") filed the "*Prosecution's Application under Article 58*" ("the Prosecution Application") whereby it sought a warrant for the arrest of Mr, Mbarushimana.[3]

5. On 6 September 2010, Pre-Trial Chamber I issued its "*Decision requesting clarification on the Prosecutor's Application under Article 58*", whereby the OTP was requested to submit observations on the link between the events detailed in its application and the crisis situation which prompted the DRC investigation.[4]

[1] Confidential Annex A.
[2] ICC-OTP-20040623-59.
[3] ICC-01/04-573-US-Exp and, thereafter , ICC-01/04-01/10-11-RED.
[4] ICC-01/04-575-US.

6. On 10 September 2010, the OTP submitted the "*Prosecution's Submissions on Jurisdiction*" addressing those matters concerning which the Chamber sought clarification.[5]

7. On 28 September 2010, after due consideration of the Prosecution Application, Pre-Trial Chamber I issued a warrant for the arrest of Mr. Mbarushimana.[6]

8. On 11 October 2010, pursuant to the aforementioned warrant, Mr. Mbarushimana was arrested at his residence in Paris, France.

Issues to be determined by the Court

9. Pre-Trial Chamber I has previously clarified the parameters of the Court's jurisdiction in the case against *Thomas Lubanga Dyilo*:

> *"[...] a case arising from the investigation of a situation will fall within the jurisdiction of the Court only if the specific crimes of the case do not exceed the territorial, temporal and possibly personal parameters defining the situation under investigation and fall within the jurisdiction of the Court."*[7]

10. In its decision issuing the warrant for Mr. Mbarushimana's arrest, Pre-Trial Chamber I endorsed the above-cited standard and defined the test for assessing jurisdiction in the present case as follows:

> *"In the view of the Chamber, for the case at hand not to exceed the parameters defining the DRC situation under investigation, the crimes referred to in the Prosecutor's Application must have occurred in the context of the ongoing situation of crisis that triggered the jurisdiction of the Court through the above mentioned referral. In the view of the Chamber, it is only within the boundaries of the situation of crisis for which the jurisdiction of the Court was activated that subsequent*

[5] ICC-01/04-01/10-12.
[6] ICC-01/04-01/10-2.
[7] ICC-01/04-01/06-8-Corr at para. 21.

> *prosecutions can be initiated. Such a situation can include not only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time,* ***in so far as they are sufficiently linked to the situation of crisis referred to the Court as ongoing at the time of the referral****.*[emphasis added[8] – NK]"[9]

11. More specifically, Pre-Trial Chamber I found and concluded as follows:

> "*Having analysed the additional information provided by the Prosecutor, the Chamber is satisfied that at least since 4 December 2002, hostilities involving regular forces and armed groups were ongoing in the east of the DRC, in particular in South Kivu and Ituri. The Chamber is further satisfied that, around the time of the referral, the FDLR were already actively involved in military activities in the eastern part of the DRC, with alleged involvement in the commission of crimes within the jurisdiction of the Court. The Chamber is therefore satisfied, on a prima facie basis, that the case against Callixte Mbarushimana falls within the context of the DRC situation of crisis encompassed by the referral that triggered the Prosecutor's investigation.*"[10]

12. In light of the aforementioned, the Defence will submit as follows:

(a) that the "situation of crisis that triggered the jurisdiction of the Court" at the date of Referral did not envisage the events then unfolding in the North and South Kivus ("the Kivus") but, rather, the "situation of crisis" in the Ituri region of the DRC alone;

(b) even if it be found that the crisis situation triggering the jurisdiction of the Court encompassed events in the Kivus, the OTP has not shown that the FDLR committed atrocity crimes prior to 3 March 2004 such that it contributed to the aforementioned "situation of crisis"[11], and;

(c) that, in the circumstances, there exists no "sufficient nexus" between the charges against Mr. Mbarushimana and the scope of the situation.[12]

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[8] **Emphasised because the crimes with which Mr. Mbarushimana is charged are NOT linked to the crimes forming the subject matter of the Referral.**
[9] ICC-01/04-01/10-1 at para. 6.
[10] ICC-01/04-01/10-1 at paragraph 7.
[11] For the purpose of this filing: crimes falling under Article 5 of the Rome Statute.
[12] Contrary to the Prosecution submission: ICC-01/04-577 at paragraph 22.

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Submission

(a) The situation of crisis which triggered the jurisdiction of the Court

13. In its decision issuing an arrest warrant against Mr. Mbarushimana, the Pre-Trial Chamber stated as follows:

> *"The situation under investigation, relating to the territory of the DRC, from which the case against Callixte Mbarushimana arises, was referred to the Prosecutor by the DRC in accordance with articles 13(a) and 14 of the Statute on 3 March 2004. In the letter of referral, the DRC President, Mr Joseph Kabila, requested the Prosecutor to investigate « la situation qui se déroule dans mon pays depuis le 1er juillet 2002, dans laquelle il apparaît que **des crimes relevant de la compétence de la Cour Pénale internationale ont été commis*** [emphasis added[13] – NK]''.[14]

14. The Prosecution has previously indicated that "where the exercise of jurisdiction is triggered pursuant to Article 13(a) or 13(b), it is for the referring party, in the first instance, to define any temporal or geographical delimitation to the referred situation".[15] In an attempt, therefore, to clarify the exact nature of "*la situation qui se déroule dans mon pays*" which President Kabila believed to exist at the time of the Referral, the Defence sought disclosure of contemporaneous notes retained by the OTP documenting its meetings with DRC authorities. The Defence had reason to believe that such contemporaneous notes would shed light on whether an investigation of the Kivus was either countenanced or discounted by the referring State Party. The Pre-Trial Chamber summarily refused the requested disclosure citing Rule 81(1) of the Rules of Procedure and Evidence and declining to rule whether the information sought could have been of material benefit to the Defence under Rule 77.[16]

15. Unsuccessful in its first request, the Defence then initiated *ex parte* proceedings under Article 57(3)(b) of the Rome Statute seeking disclosure of "any or all"

[13] **Emphasised because the Defence submits that the Pre-Trial Chamber found NO evidence that the FDLR was perpetrating atrocity crimes at the time of the Referral.**
[14] ICC_01/04-01/10-1 at paragraph 5.
[15] ICC-01/04-577 at paragraph 15.
[16] ICC-01/04-01/10-47 at paragraph 17. No request for leave to appeal was lodged since Counsel had decided to try the alternative route of seeking disclosure through the State Cooperation procedure under Article 57(3)(b) of the Rome Statute.

contemporaneous notes retained by the DRC Government which could shed light on the scope of the Referral.[17] The Single Judge initially approved of such a strategy[18] inviting the DRC authorities to state whether they possessed such materials. At a later stage, the Single Judge even recalled the provisions of Article 87(7) of the Rome Statute when the DRC authorities showed signs of neglecting to reply to the Court's invitation. Despite such a warning, the DRC authorities effectively evaded the Defence request by producing the Letter of Referral and nothing more. The DRC consistently failed to state whether it possessed any other materials relevant to the scope of the Referral despite the fact that the Defence had proved the existence of such materials in alternative disclosure litigation conducted with the Prosecution; namely, letters passing between the Prosecutor and the DRC dated 8 October 2003[19] and 14 November 2003.[20] Accordingly, the Defence made another application this time to convene a status conference at which a competent representative of the DRC would be invited to attend and clarify its position on the Defence request for State cooperation.[21] The Pre-Trial Chamber, this time in its full composition, rejected this request, refused to make any evidential finding from what the Defence perceived to be DRC non-compliance and declined to report the DRC to the Assembly of State Parties pursuant to Article 87(7).[22]

16. In light of the aforementioned judicial decisions, the Defence was effectively denied access to the source materials originating from the OTP and the DRC Government that it needed to prove the Ituri-centric nature of the situational referral. This lack of access to pertinent information was compounded by the fact that the DRC, as acknowledged by the OTP, did not supply any supporting information as mandated by Article 14(2) of the Rome Statute. There is no doubt, however, that both the OTP and the DRC Government possess contemporaneous materials pertinent to the scope of referral. As will be shown hereinafter, a series of meetings were

[17] ICC-01/04-01/10-30-Conf-Exp.
[18] ICC-01/04-01/10-56-Conf-Exp.
[19] Confidential Annex B.
[20] Confidential Annex C.
[21] ICC-01/04-01/10-270-Conf-Exp.
[22] ICC-01/04-01/10-282-Conf-Exp.

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conducted between the OTP and the DRC prosecuting authorities, in the latter half of 2005 and pursuant to a joint OTP/DRC initiative, which **predated** the Referral. These meetings were specifically convened to define the future scope of investigations in the Ituri and **not** the Kivus.[23]

17. To this end, this learned Pre-Trial Chamber is reminded of the information with which it had formerly been provided (albeit in its former composition) in the case against *Thomas Lubanga*:

> *"… the OTP received the letter of referral of the DRC Government, dated 3 March 2004. Since then, on a number of occasions, representatives of the OTP met with members of the Cabinet of the President of the DRC, members of the DRC Ministry of Justice, and members of both the office of the Procureur Général de la République and of the Auditeur Général Militaire. At such meetings, the DRC judicial system and its capabilities were repeatedly discussed. The DRC authorities never indicated that the developments in the DRC justified altering the statement made in the letter of referral. To the contrary, other than recent statements to the extent that the DRC authorities may be able to occasionally and with external support only investigate and prosecute smaller cases, they maintained their views as detailed in the letter of referral"*.[24]

18. In any event, the language of President Joseph Kabila's letter of 3 March 2004, in particular the purposeful use of the past tense, makes it clear that the Government of the DRC had no intention other than to confer jurisdiction over a specifically identifiable series of crimes which had been committed on DRC territory **prior** to the Date of Referral:

> "*Au nom de la République Démocratique du Congo, Etat partie au Statut de la Cour Pénale Internationale depuis le 1er juillet 2002, j'ai l'honneur de déférer devant votre juridiction, conformément aux articles 13, alinéa a) et 14 du Statut, la situation qui se déroule dans mon pays depuis le 1er juillet 2002,*

[23] *c.f.;* paragraph 24 hereinbelow.
[24] ICC-01/04-01/06-39-AnxC. See also at fn 19: "*Meetings and conversations between the OTP and the office of the competent DRC military prosecutors took place in August 2005, September 2005, December 2005 and, recently, in January 2006.*"

> *dans laquelle il apparaît que des crimes relevant de la compétence de la Cour Pénale Internationale* ***ont été commis***,..."[25]

19. What is more, the invitation extended to the Prosecutor by way of the Referral was specifically predicated on the expectation that he would enquire into those same crimes committed before the Date of Referral:

> "...*et de vous prier, en conséquence, d'enquêter sur cette situation, en vue de déterminer si une ou plusieurs personnes devraient être accusées de* ***ces*** *crimes*".[26]

20. The letter of referral goes on to clarify that the intervention of the International Criminal Court is required in order to prevent a potential state of impunity given that the DRC was, at the time, supposedly incapable of conducting the necessary investigations and/or prosecutions. Once again such alleged incapacity is specifically linked to those crimes which had been committed **prior** to the Referral:

> "*En raison de la situation particulière que connaît mon pays, les autorités compétentes ne sont malheureusement pas en mesure de mener des enquêtes* ***sur les crimes mentionnés ci-dessus*** *ni d'engager les poursuites nécessaires sans la participation de la Cour Pénale Internationale. Cependant, les autorités de mon pays sont prêtes a coopérer avec cette dernière dans tout ce qu'elle entreprendra à la suite de la présente requête.*"[27]

21. At the time of referral, the only crimes over which the DRC authorities had expressed their incapacity to exercise jurisdiction were those formerly committed in the Ituri region and not in the Kivus as, specifically, acknowledged by the DRC Government in the context of an admissibility challenge raised in the case of *Prosecutor v Germain Katanga*:

> *The Rome Statute [was] ratified on 30 March 2002. By that act, the DRC undertook to submit to the legal regime of the ICC by respecting the principle of*

[25] ICC-01/04-01/07-11-Anx2.1.
[26] ibid.
[27] ibid.

> *complementarity and the obligation to cooperate with the ICC. The principle of complementary presupposes that jurisdiction lies primarily with national courts in respect of international crimes, the ICC replacing them only where the State concerned is unwilling or unable genuinely to carry out the investigation or prosecution (Rome Statute, article 17(1)(a)).*
>
> *And a State's inability can be deduced from the total or substantial collapse or unavailability of its national judicial system, in particular where it is unable to obtain the necessary evidence and testimony or otherwise unable to carry out its proceedings (article 17(3)).*
>
> *In any event, the principle of complementarity in no sense gives the Defence the right to select a jurisdiction to the detriment of another lawfully seized of the case. Such an approach would empty the complementarity principle of all substance and undoubtedly encourage impunity in respect of serious crimes.*
>
> *…The referral of 3 March 2004 is consistent with these provisions of the Rome Statute. Thus, by that act the President of the DRC referred to the ICC the situation prevailing in the DRC since the entry into force of the Rome Statute. He justified his decision by the fact that the Congolese authorities were unable to conduct investigations into crimes falling within the jurisdiction of the ICC, or to institute the necessary proceedings, without the latter's participation…*
>
> *If we consider the factual circumstances at the time of the crimes (February 2003) – a country ravaged by rebel groups and armed gangs; generalised insecurity in Ituri, making victims and witnesses inaccessible, with the latter justifiably fearing for their safety in a country lacking any system for their protection; the unavailability of judicial structures, aggravated by the inadequacy of operational capacities; the uncertainties of the peace process, with a variety of politico-military agreements between ex-belligerents; the lack of expertise in dealing with mass crimes and in the collection and preservation of evidence of such crimes – all of these factors taken together show that the DRC was unable genuinely to investigate the crimes at Bogoro. Sadly, since then the situation has shown little improvement."*[28]

22. The Defence is aware that the drafters of the Rome Statute did not provide for a mechanism enabling the termination or deferral of the temporal scope of a situational referral once made. The same drafters of the Rome Statute, it is further submitted, never envisaged that the Appeals Chamber would endorse the practice whereby a

[28] ICC-01/04-01/07-1189-Anx-tENG, 16 July 2009; Observations Of The Democratic Republic of the Congo on the Challenge to Admissibility made by the Defence for Germain Katanga in the Case of the Prosecutor versus Germain Katanga and Mathieu Ngudjolo Chui.

State Party may refer itself. Whatever the case may be, the Defence suggests that it would be wholly antithetical to the concept of complementarity if a situational referral was to be understood as permitting a State to abdicate its responsibility for exercising jurisdiction over atrocity crimes for eternity. In its decision issuing the warrant for Mr. Mbarushimana's arrest, the Pre-Trial Chamber found an appropriate and meaningful solution to this conundrum by crafting a teleological and suitably liberal test for delineating the parameters of the situational referral:

> *"…for the case at hand not to exceed the parameters defining the DRC situation under investigation, the crimes referred to in the Prosecutor's Application must have occurred in the context of the ongoing situation of crisis that triggered the jurisdiction of the Court through the above mentioned referral. In the view of the Chamber, it is only within the boundaries of the situation of crisis for which the jurisdiction of the Court was activated that subsequent prosecutions can be initiated. Such a situation can include not only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, in so far as they are sufficiently linked to the situation of crisis referred to the Court as ongoing at the time of the referral."*

23. Adopting the above-cited reasoning of the Pre-Trial Chamber, therefore, the Defence maintains that, as of 3 March 2004, neither the OTP, nor the DRC Government, intended that the situation in the Kivus should be notionally included in the situation referral whereby "the jurisdiction of the Court was activated". This was indeed the case both before and after the Referral.

24. **<u>Before</u>** the Referral, the Prosecutor sent a letter to President Joseph Kabila on 8 October 2003 in which he invited the DRC Government to communicate information concerning "*des événements qui se seraient déroulés en Ituri après le 1er juillet 2002*". In this letter, the Prosecutor also clarified that if the Court were to seize itself of such a situation in **<u>Ituri</u>**, it would not be capable of prosecuting all potential suspects. Accordingly, the Prosecutor suggested that the OTP and the DRC authorities enter

into an agreement for the efficacious division of future prosecutions.[29] President Kabila replied to this letter on 14 November 2003[30] accepting that there should be no impunity for the perpetrators of the crimes referred to in the Prosecutor's letter of 8 October 2003 and endorsing the suggestion that an agreement be signed to facilitate their identification and prosecution. Nothing in either of these two letters – which were not before the Pre-Trial Chamber at the time it arrested Mr. Mbarushimana – suggests that either the OTP or the DRC authorities contemplated triggering the jurisdiction of the Court because of events in the Kivus.

25. A mere two weeks **after** the Referral, on 18-19 March 2004, the Prosecutor – Mr. Luis Moreno-Ocampo appeared before the Committee of Legal Advisers on Public International Law in Strasbourg and made the following remarks:

> *"Two situations - Uganda and Ituri - are now in an advanced stage of analysis and preparation, in order to gather all information necessary to prepare an investigation plan and to make sure we have the foundations for a successful investigation. I will take the decision to initiate an investigation once we have enough information to see that we have strong prospects for a successful investigation…*
> *…*
> *Ituri*
> *The situation in Ituri remains a priority for my Office. The Ugandan referral has received considerable media attention, but it has not altered the importance we place on the massive crimes in Ituri.*
> *We have proposed a consensual division of labour with the DRC. We would contribute by prosecuting the leaders who bear the greatest responsibility. National authorities, with the assistance of the international community, could implement appropriate mechanisms to address other responsible individuals. The DRC has responded with a letter affirming that such a division of labour would be welcomed.*
> *The situation on the ground in Ituri remains extremely complex. There are several groups operating in the territory that may be responsible for serious international crimes.*
> *There are also initiatives underway to promote a negotiated settlement to the conflict, demobilization and disarmament. I want to be sure that the timing of any announcement does not derail the current fragile stability in the region and*

[29] Confidential Annex B.
[30] Confidential Annex C.

> *therefore lead to further killings. Article 53 of the Statute requires that I consider the interests of victims. To avoid new killings is my basic duty. We can wait to choose the moment to start some of the cases. As a permanent court, the ICC can work on a situation for as long as needed."*[31]

26. The above cited comments make it clear that, as far as both the Prosecutor and the DRC Government were concerned, the contemporaneous events in the Kivus had no role whatsoever in triggering the jurisdiction of the Court. The Prosecutor did not even categorise the subject of the Referral as "the situation in the DRC" but rather "the Ituri situation"! Put quite simply, the Referral was not intended to encompass atrocity crimes committed in the Kivus – either in the mind of the DRC Government or in the mind of the Prosecutor. The fact that the Prosecutor now claims that the scope of the Referral was originally intended to catch IHL violations wherever they were committed on DRC territory is a later interpretation of the Referral which does not reflect the original subjective intent of the referring party.[32] It is not denied that the Prosecutor possesses the discretion to examine as many cases as he wishes within a situation. These cases, however, must bear some relevance to the situation as subjectively determined by the referring party at the time of referral.[33]

27. Counsel even petitioned the former Deputy-Prosecutor for Investigations and asked him whether he could shed light on the scope of the Referral and if there was any particular reason why the focus of the Referral could be said to have changed from the Ituri to other areas of the DRC including the Kivus. The former Deputy-Prosecutor replied that he had no such information. The most senior Prosecutor at the Court (apart from Mr. Luis Moreno-Ocampo himself) therefore, had no reason, so it would appear, to believe that the Referral was intended to encompass anything other than events unfolding in Ituri.[34]

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[31] http://www.iccnow.org/documents/ICCProsecutorCADHI18Mar04.pdf: Remarks by ICC Prosecutor Luis Moreno-Ocampo at the 27th meeting of the Committee of Legal Advisers on Public International Law (CADHI).
[32] *c.f.*; Prosecution's own submission: ICC-01/04-577 at paragraph 15.
[33] *c.f.*; Prosecution's own submission: ICC-01/04-577 at paragraph 19.
[34] Confidential Annex D.

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28. Indeed had the Prosecutor truly and genuinely intended to initiate an investigation in the Kivus, he would, it is submitted, have issued a letter of notification under Article 18(1) inviting interested State Parties to exercise primary jurisdiction over the crimes committed in the Kivus. As it was, the only discrete province mentioned in the Article 18(1) letter of notification was Ituri. The more nebulous and non-specific invitation to State Parties to assume jurisdiction over crimes committed in the territory of the DRC was meaningless, void of practical effect and offended the principle of complementarity (especially since the Prosecutor announced the opening of his investigation one day after sending the letter of notification).

29. **To conclude:** the very language of the Letter of Referral and the DRC's abjectly minimali approach to the Defence request for State cooperation makes it clear that President Joseph Kabila only intended the Court to investigate and prosecute crimes committed on his territory between 1 July 2002 and 3 March 2004 of which the perpetrators would be identified after the date of Referral. In addition, by referring the situation "*qui se déroule dans mon pays*" and the crimes committed therein, President Joseph Kabila was, as clarified above, purposefully referring no more than the situation in Ituri. The Prosecutor of the Court knew this to be the case endorsing it in his own words and subscribing to it by his own deeds.

b) No evidence has been provided of FDLR atrocity crimes prior to the Date of Referral

30. The Defence acknowledges that the Prosecution provided Pre-Trial Chamber I with sufficient *prima facie* evidence to support a finding that, at the end of 2002, "*hostilities involving regular forces and armed groups were ongoing in the east of the DRC, in particular in South Kivu and Ituri*".[35] This information is derived from the text of United Nations Security Council Resolution 1445 dated 4 December 2002 which, at paragraphs 8 and 13, states as follows:

[35] ICC-01/04-01/10-1 at paragraph 7.

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> *The Security Council […]*
> …
> *Welcomes the statement of 24 September 2002 of the Government of the Democratic Republic of the Congo banning the activities of the Forces Démocratiques de Libération du Rwanda throughout the territory of the Democratic Republic of the Congo and declaring the leaders of this movement persona non grata on its territory, and encourages it to implement further their commitments to advance the DDRRR of the armed groups in accordance with the Pretoria Agreement;…*
> …
> *Calls for a full cessation of hostilities involving regular forces and armed groups throughout the territory of the Democratic Republic of the Congo, in particular in South Kivu and in Ituri."*[36]

31. Notwithstanding, the Defence takes careful note of the fact that Security Council Resolution 1445 (2002) does not detail any activity in the Kivus which may be construed as crimes falling within the material jurisdiction of the Court pursuant to Article 5 of the Rome Statute. This, however, is in stark contrast to the situation in Ituri region mentioned at paragraph 15 of the very same Security Council Resolution as follows:

> *The Security Council […]*
> *[…]*
> *Expresses its deep concern over the intensification of ethnically targeted violence in the Ituri region, condemns all such violence or incitement to violence, requests all parties to take immediate actions to defuse these tensions, ensure the protection of civilians and end violations of human rights, calls on all parties, in particular the Union des Patriotes Congolais, to cooperate to set up the Ituri Pacification Commission…"*

32. The Defence thus asserts that not only did the DRC and the OTP lack subjective intent to trigger the jurisdiction of the Court with respect to the Kivus but that the contemporaneous events in the Kivus themselves lacked the objective criteria necessary to be incorporated within the scope of the Referral.

[36] S/RES/1445(2002), 4 December 2002; http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/723/18/IMG/N0272318.pdf?OpenElement.

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33. The Defence thus addresses, herein below, the authorities relied on by the Pre-Trial Chamber for showing hostile FDLR activity in the Kivus from 4 December 2002[37] and asserts that none of them supports the proposition that, **as of the Date of Referral**, the FDLR was committing atrocity crimes such that it could be said to have contributed to a state of crisis triggering the jurisdiction of the Court. A review of the same authorities also reveals that there is no support for the contention that, **as of the date of the Referral**, the FDLR *per se* constituted "*a threat to the peace and security of the Great Lakes Region*" and/or "*a threat to the local civilian population*".[38]

S/PRST/2004/15 of 14 May 2004

34. This statement by the President of the Security Council of 14 May 2004, while expressing concern at the military activity of the FDLR, makes no mention whatsoever of any criminal activity let alone atrocity crimes:

> *"The Security Council further expresses its concern at the reports of increased military activities of the Forces démocratiques de libération du Rwanda (FDLR) in the Eastern part of the Democratic Republic of the Congo and of incursions made by them on the territory of Rwanda."*[39]

S/PRST/2005/46 of 4 October 2005

35. This statement of the President of the Security Council makes reference to the Group of Experts report: S/2005/603 which is dated 26 September 2005. Although the statement exhorts the FDLR to disarm and repatriate its combatants while censuring its presence on the territory of the DRC, it makes no discrete reference whatsoever to events preceding the Referral or to any activity which may be deemed a crime under Article 5 of the Rome Statute.

UNSC Resolution 1649 (2005) of 21 December 2005

36. This resolution similarly deplores the FDLR for failing to disarm and repatriate its combatants and even condemns the perpetration of human rights violations by

[37] ICC-01/04-01/10-1 at paragraph 7 and footnotes 10 and 11 thereto.
[38] ICC-01/04-01/10-12 at paragraph 12.
[39] S/PRST/2004/15.

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militias and foreign groups operating in the eastern part of the DRC. The FDLR is not specifically identified, however, as such a militia and there is no evidence to suggest that these human rights violations were being committed at the time of the Referral or that they amounted to atrocity crimes under Article 5 of the Rome Statute.

S/PRST/2005/31 of 13 July 2005

37. This statement condemns the massacre of some 50 civilians at Ntulu-Mamba but does not identify the culprits of this attack which postdates the Referral by at least a year. The FDLR is, once again, mentioned in this document is so far as it is exhorted to abide by its "commitment made in Rome, on 31 March 2005" to renounce the use of force and settle without delay the issue of its combatants' return to Rwanda.

Annex 8 to the Prosecution Application under Article 58 at pages 38 & 90

38. This document comprises the Human Rights Watch Report entitled *"You will be punished" – Attacks on Civilians in Eastern Congo*. The pages cited by the learned Pre-Trial Chamber do not refer to alleged criminal activity of the FDLR at or prior to 3 March 2004.

c) the nexus between Mr. Mbarushimana and the Referral

39. Article 14(1) of the Rome Statute clearly stipulates that a referral is made "for the purpose of determining whether one or more specific persons should be charged with crimes". The language of this statutory provision, at first sight, suggests the referral of a contemporaneous activity for which perpetrators may be identifiable at the time of referral. In so far as future perpetrators, whose identification postdates the referral, are concerned, their offending criminal activity has, as a matter of logic, to be linked to the original offending activity which prompted the referral. As argued above, events in the Kivus and the activities of the FDLR prior to 3 March 2004 did not prompt President Joseph Kabila to seek the intervention of the Court. There is consequently no causal nexus to Mr. Mbarushimana in so far as he is allegedly a

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member of the FDLR. Moreover, the Prosecution has adduced no evidence to show that Mr. Mbarushimana was even a policy making member of the FDLR as of 3 March 2004.[40]

40. The terms of the letter written on behalf of President Joseph Kabila dated 14 November 2003 made it clear that he endorsed the Prosecutor's wish not to leave "*impunis les crimes odieux commis, de manière délibérée, par des personnes identifiables, en République Démocratique du Congo...*". President Kabila's subjective intent, therefore, was to investigate contemporaneous crimes committed by contemporaneously identifiable individuals. This could not have incorporated Mr. Mbarushimana who – at the time – was, for all intents and purposes, a virtually unknown entity.

Standard of Proof

41. The Defence asserts that jurisdiction, unlike admissibility, is not a matter which can be presumed unless demonstrated otherwise. Jurisdiction is an essential element of the Prosecution case and should be proved by the Prosecution on the normal standard of proof in criminal proceedings, *i.e.*; beyond a reasonable doubt. In so far, however, as the Defence should be deemed to bear the burden of proof, then the accepted rule is that the Defence should only be required to properly substantiate its factual assertions. There is no need for the Defence to produce "clear and convincing evidence" and should it, nevertheless, be required to satisfy a standard of proof – that standard should not be higher than a balance of probabilities. Whatever the case may be, and assuming that the Defence is required to bear the burden proof, the Pre-Trial Chamber should be convinced – in light of the aforementioned submissions – that it is more likely than not that the Referral was not intended to incorporate contemporaneous events in the Kivus.

[40] While the Prosecution asserts that Mr. Mbarushimana was appointed to the post of "commissaire des finances" in 2004, the exact date is not stipulated and the assertion is totally unsupported by evidence in the list of evidence produced for the purpose of the confirmation hearing.

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Confidentiality

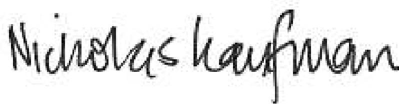
42. The Defence requests that this filing be reclassified as public once the learned Pre-Trial Chamber has ruled on the Defence request for reclassification of the documents forming the basis for the factual representations contained in paragraph 15 hereinabove. The Defence has, furthermore, filed this application "*ex parte* - Defence only" since paragraph 15 details proceedings which are currently confidential and unknown to the Prosecution. The Defence thus very respectfully requests an immediate order for reclassification so that the Prosecution is not prejudiced.

Urgency

43. The Defence has filed its challenge to the jurisdiction of the Court as soon as possible after the failure of its third request for a status conference. Given the upcoming confirmation hearing fixed for 17 August 2011 and the need to settle matters of jurisdiction in advance, the Defence submits that good cause has been shown to reduce drastically the time for a Prosecution response and, in the alternative, promptly to convene a hearing pursuant to Rule 58(2) of the Rules of Procedure and Evidence.

Relief Sought

44. In light of all the aforementioned, the learned Pre-Trial Chamber is respectfully requested to allow the Defence challenge under Article 19(2)(a) of the Rome Statute and to determine that there is no jurisdiction to entertain the case against Mr. Mbarushimana.



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Tuesday, July 19, 2011