

**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

**Prosecution's response to Defence Challenge to the Jurisdiction of the Court
ICC-01/04-01/10-290**

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The Office of the Prosecutor

Counsel for the Defence
Nicholas Kaufman

Legal Representatives of Victims

Legal Representatives of Applicants

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The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

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I. Introduction

1. The Defence's jurisdictional challenge questions the manner in which the present case has been brought before the Court. The Defence alleges that the present proceedings do not fall within the scope of the situation referred by the Government of the Democratic Republic of the Congo (DRC), and required either a separate referral or a *proprio motu* request by the Prosecutor to the Pre-Trial Chamber for authorization to open a new situation.

2. The Defence argument has no basis. In its referral the Government of DRC did not geographically or temporally limit the scope of the situation.¹

3. Furthermore, the Government of DRC did not subsequently contest the temporal or geographic scope of the current investigations relating to events during 2009 in the Kivus. On the contrary, it is actively cooperating with such investigations.

4. Accordingly, the conduct which forms the subject matter of the case is an integral part of the situation in the DRC and falls squarely within the jurisdiction of the Court.

II. Statement of Facts

5. On 3 March 2004, the Government of the DRC referred the situation in the DRC to the Office of the Prosecutor. As per the referral, the DRC authorities, through the President of the Republic, referred to the Prosecution "*la situation qui se déroule dans [le] pays depuis le 1^{er} juillet 2002, dans laquelle il apparaît que des crimes relevant de la compétence de la Cour Pénale Internationale ont été commis*" and asked it "*en conséquence,*

¹ The letter of referral speaks of "*la situation qui se déroule dans mon pays depuis le 1^{er} juillet 2002*"; .

d'enquêter sur cette situation, en vue de déterminer si une ou plusieurs personnes devraient être accusées de ces crimes".² The Government did not geographically or temporally limit the scope of the referred situation.³

6. On 19 April 2004, the Prosecutor announced publicly that he had "received a letter signed by the President of the DRC referring to him the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002".⁴

7. Following detailed analysis of the information concerning the situation referred pursuant to Article 53 of the Rome Statute and Rule 104 of the Rules of Procedure and Evidence, the Prosecutor concluded that all requirements of Article 53(1) were satisfied. By letter of 17 June 2004, he communicated to the President of the Court his decision to initiate an investigation with respect to crimes within the jurisdiction of the Court committed within the territory of the DRC since 1 July 2002.⁵

8. On 22 and 23 June 2004, the Prosecutor sent letters of notification, dated 21 June 2004, to the States Parties to the Rome Statute, as well as to other states that within the terms of Article 18(1) would normally exercise jurisdiction over the crimes concerned. The Prosecutor stated:

"Having carefully evaluated this information in accordance with article 53(1)(a) of the Statute, I have found that there is a reasonable basis to believe that crimes within the ICC jurisdiction have been or are being committed in the DRC. The available information indicates that massacres have been

² ICC-01/04-01/06-32-AnxA1.

³ The letter of referral speaks of "*la situation qui se déroule dans mon pays depuis le 1er juillet 2002*" (emphasis added); see below paras. 41-53.

⁴ Office of the Prosecutor, Press Release ICC-OTP-20040419-50, 19 April 2004.

⁵ ICC-01/04-1, page 4.

perpetrated against unarmed civilian populations since 1 July 2002, resulting in thousands of unlawful killings and showing a potentially widespread pattern of victimization, including but not limited to rape and other sexual violence, torture, child conscription, and forced displacement.”⁶

9. On 23 June 2004, the Prosecutor publicly announced the commencement of an investigation into “grave crimes allegedly committed on the territory of the Democratic Republic of Congo (DRC) since 1 July 2002”.⁷ Neither the DRC nor any other State thereafter provided information as to its own investigation, pursuant to Article 18(2) of the Rome Statute.

10. Initially, the Office of the Prosecutor focussed its investigation on crimes committed in Ituri district, Province Orientale.⁸ On 8 September 2008, the Prosecutor announced to States Parties that the next case arising from the situation in the DRC would focus on recent reports indicating a sharp increase in criminal activity allegedly committed by a multiplicity of perpetrators and groups in the North and South Kivu Provinces.⁹

11. On 14 November 2008, the Prosecutor issued a statement expressing concern over reports of ongoing violence in the Kivus. The Prosecutor recalled that the ICC has jurisdiction to investigate and prosecute war crimes, crimes against humanity and genocide committed in the territory of the DRC or by Congolese nationals since 1 July 2002, and that it had started looking into the alleged commission of such crimes in the two provinces of North and South Kivu over the last years by members of all groups involved in the area, whether the CNDP, the FDLR, the FARDC itself, or

⁶ See ICC-01/04-01/10-290-AnxA.

⁷ Office of the Prosecutor, Press Release ICC-OTP-20040623-59, 23 June 2006.

⁸ *Ibid.*

⁹ Fourteenth Diplomatic Briefing, Compilation of Statements, 8 September 2008, available at <http://www.icc-cpi.int/NR/rdonlyres/90ED4A0B-029E-49BA-8AA2-9DA59BE3EB09/278643/ICCDB14IPENG.pdf>

other locally based armed groups.¹⁰ The DRC authorities were aware of this focus, promised cooperation to the Prosecutor and supported the Prosecution's investigative activities in the Kivus.¹¹

III. Procedural History

12. On 20 August 2010, the Prosecutor applied for a warrant for the arrest of Callixte MBARUSHIMANA ("Suspect").¹²

13. On 6 September Pre-Trial Chamber I ("Chamber") issued the Decision requesting clarification on the Prosecutor's Application under Article 58.¹³ On 10 September the Prosecution filed the Prosecution's Submissions on Jurisdiction.¹⁴

14. On 28 September the Chamber granted the Prosecution's application for a warrant of arrest, finding the case against the Suspect to fall within the jurisdiction of the Court.¹⁵

15. On 31 October, the Defence indicated its intention to challenge the jurisdiction of the Court and requested disclosure of:

"[...] any material formulated or retained by the OTP from before 3 March 2004 and up to the delivery of the Article 18(1) letter of notification whereby it may be understood that the OTP had decided to focus exclusively on the Ituri region and/or had concluded that there was insufficient evidence to

¹⁰ Office of the Prosecutor, Press Release ICC-OTP-20081104-PR369, 4 November 2008.

¹¹ See below para 44.

¹² ICC-01/04-01/10-11-Red2.

¹³ ICC-01/04-575.

¹⁴ ICC-01/04-01/10-12.

¹⁵ ICC-01/04-01/10-1, para. 8.

investigate any alleged FDLR or other organised criminal activity in the Kivus.”¹⁶

16. The Prosecution responded on 8 November, indicating that it would consider disclosure requests at the appropriate time.¹⁷ As a result of the Defence’s proposed challenge to the scope of the referral of the situation,¹⁸ however, the Prosecution also sought the consent of the DRC to disclose correspondence preceding the referral of the situation to the Court, including a letter from the DRC dated 14 November 2003. The DRC refused to consent to the disclosure of the 14 November 2003 letter on the ground that it was a confidential communication not intended for disclosure to third parties.

17. On 14 December the Defence asked the Chamber to order disclosure of the requested material¹⁹ as well as “any other exculpatory and/or materially relevant information necessary for the pursuit of challenges under Article 19(2)(a) of the Rome Statute and Rule 117(3) [...]”²⁰

18. On 27 January 2011, the Chamber refused the Defence’s request for “material formulated or retained by the OTP”²¹ and deferred the request for disclosure of the other Rule 77 material pending a decision on the modalities of disclosure.²²

19. On 30 March, the Chamber ordered the Prosecution to disclose Rule 77 information relating to jurisdiction and admissibility,²³ and on 13 April the

¹⁶ A copy of this letter was filed as ICC-01/04-01/10-31-Conf-Anx2, 5 January 2011.

¹⁷ A copy of the Prosecution reply was filed as ICC-01/04-01/10-31-Conf-Anx5.

¹⁸ See para. 1 above.

¹⁹ The request is quoted in para 15 above.

²⁰ ICC-01/04-01/10-29.

²¹ ICC-01/04-01/10-47, para. 17.

²² *Ibid.*, para. 19.

²³ ICC-01/04-01/10-87, page 14.

Prosecution disclosed the documents which it determined to be material.²⁴ In the accompanying disclosure letter, the Prosecution referred to the existence of the DRC's 14 November 2003 letter. It explained that it was not disclosing that letter because (i) the DRC had refused to consent to share it and (ii) it would not assist the Defence with its challenge.²⁵ However, the Prosecution offered to place the letter before the Chamber, if necessary, for its decision.²⁶

20. At the same time, however, the Defence was pursuing an *ex parte* process to try to obtain the same material from the DRC.

21. On 28 December the Defence sought, *ex parte*, an order requesting the DRC to cooperate with the Court by providing "all contemporaneous records and documents, including official records and documents, which specifically comprise the "supporting documentation" envisaged under Article 14(1) of the Rome Statute and which may shed light on the scope of the Referral of the situation in the DRC to the Court".²⁷ The Defence submitted that its strategy, in making this request, was to test "the integrity of Prosecution disclosure with respect to an issue which concerns the legitimacy of the Prosecution's invitation and receipt of the Referral".²⁸ On 20 July the Defence "clarified" that it had not used the word "integrity" in "its ethical sense" and that the Defence strategy was to "test" whether any resort by the Prosecution to Rule 81(1) as grounds for non-disclosure of the information it had requested disclosure of would be "justified in the circumstances".²⁹

²⁴ ICC-01/04-01/10-160, Annex 5.

²⁵ ICC-01/04-01/10-227-AnxA, page 3.

²⁶ *Ibid.*.

²⁷ ICC-01/04-01/10-30. Emphasis in the original.

²⁸ ICC-01/04-01/10-30, para. 14.

²⁹ ICC-01/04-01/10-45, page 4.

22. On 15 February 2011 the Chamber acceded to the Defence's request and ordered the Registry to send the relevant request for the DRC's cooperation ("Request for Cooperation").³⁰

23. On 27 May the DRC transmitted the referral letter to the Registry in response to the Request for Cooperation.³¹

24. On 10 June the Defence requested the Chamber to order the Prosecution to disclose the letter dated 14 November 2003 ("the Letter") written to the Prosecutor by the DRC³² and on 15 June, the Chamber ordered the Prosecution to submit its observations.³³ On 22 June the Prosecution opposed the disclosure of the Letter on the basis that it was not relevant to the Defence's jurisdictional challenge, it was a confidential communication with the DRC and that the DRC had declined permission to disclose it to the Defence.³⁴ On 28 June the Defence replied³⁵ to the observations and on 8 July the Chamber ordered the Prosecution to disclose the Letter.³⁶

25. On 17 June, the Chamber invited the DRC to specify whether the referral letter was the only document in their possession relevant to the Request for Cooperation.³⁷ On 4 July the DRC transmitted a *note verbale* which, according to the information available to the Prosecution,³⁸ "confirm[ed] that the Letter of Referral referred the

³⁰ See ICC-01/04-01/10-282, page 4.

³¹ See ICC-01/04-01/10-204, para. 2. The Referral letter was transmitted together with a *note verbale* from the DRC authorities which remains *ex parte*, Defence only.

³² ICC-01/04-01/10-227.

³³ ICC-01/04-01/10-236, page 4.

³⁴ ICC-01/04-01/10-245.

³⁵ ICC-01/04-01/10-253.

³⁶ ICC-01/04-01/10-275.

³⁷ ICC-01/04-01/10-240, page 6.

³⁸ The *note verbale* itself remains *ex parte*, Defence only.

situation in the DRC to the Court with respect to crimes within its jurisdiction committed across the territory of the DRC from 1 July 2002³⁹ (emphasis added).

26. On 20 July the Chamber rejected a Defence request to convene a status conference with the DRC, stating “that the authorities of the DRC have responded to the Chamber's Request for Cooperation to the effect that the relevant document is the Letter of Referral and have reiterated the terms of this letter in clarifying its scope” and that “the Chamber has no basis to infer that the authorities of the DRC retain relevant documentation which may shed light on the scope of the referral of the situation in the DRC”.⁴⁰

27. On 19 July 2011 the Defence filed, *ex parte*, the Defence Challenge to the Jurisdiction of the Court⁴¹ (“Defence Challenge”). On 20 July the Defence Challenge was reclassified as public and became accessible to the Prosecution.⁴²

28. On 20 July the Chamber ordered the Prosecution to submit its observations on the Defence Challenge by 28 July.⁴³

IV. Burden of proof

29. Chambers of the Court have previously held, in the context of admissibility, that the burden of proof falls on the challenging party.⁴⁴ The Prosecution submits

³⁹ ICC-01/04-01/10-282, pages 6-7.

⁴⁰ ICC-01/04-01/10-282, page 8.

⁴¹ ICC-01/04-01/10-290-Conf-Exp.

⁴² See ICC-01/04-01/10-293 and ICC-01/04-01/10-290.

⁴³ ICC-01/04-01/10-297.

⁴⁴ Trial Chamber II has held that the party challenging admissibility bears the burden to demonstrate that the case is inadmissible; *Prosecutor v. Bemba*, Decision on the Admissibility and Abuse of Process Challenges, ICC-01/05-01/08-802, 24 June 2010, paras. 201-202. As Trial Chamber II observed, although this issue was not directly addressed in the Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, the Appeals Chamber similarly “approached the appeal throughout on the basis of whether the accused had

that, as with admissibility, the party challenging jurisdiction pursuant to Article 19 bears the burden to demonstrate that a case does not fall within the jurisdiction of the Court.⁴⁵

V. The Defence Challenge to Jurisdiction is Meritless

30. The Defence's jurisdiction challenge rests on three prongs:

- The DRC's referral in 2004 was limited to past events, i.e. those pre-dating the referral, and was restricted to crimes within Ituri district;
- The Prosecution failed to show that the FDLR committed atrocity crimes prior to 3 March 2004 that contributed to the "situation of crisis" on which the referral is said to be based; and
- The charges are not related to the allegedly limited scope of the situation.

31. The Prosecution submits that the arguments advanced by the Defence on the legal parameters of the situation are misconceived. The Defence's factual assertions misrepresent the clear pronouncements of the DRC authorities and the Prosecution.

A. Whether the referral was limited to past events or to one district

32. Nothing in the Statute limits the scope of a situation, as a matter of law, to (i) conduct occurring prior to the referral of the situation by a State Party, and (ii) specific persons, acts or incidents identified by the referring party.⁴⁶

'persuaded' the Chamber by his arguments", and noting "[t]here was no suggestion raised in counsel's arguments or in the judgment that the prosecution bore the burden of proving that the proceedings were admissible"; ICC-01/05-01/08-802, para. 202, citing ICC-01/04-01/07-1497, paras. 85 and 111.

⁴⁵ Rule 58 further provides that a request or application under Article 19 must "contain the basis for it", which suggests that the challenging party bears the burden to prove its argument.

⁴⁶ The same considerations apply to Security Council referrals or an application by the Prosecutor to the Pre-Trial Chamber pursuant to Article 15.

33. A distinction must be made between the information that forms the basis of a threshold determination to open a situation under Article 53 and the direction of the Prosecutor's future investigations under Article 54. A close reading of Article 14, dealing with referral of a situation by a State Party, together with Article 53(1), on the initiation of investigations, shows that a State Party may refer a situation in which "one or more crimes within the jurisdiction of the Court appear to have been committed".⁴⁷ The referral invites the Prosecutor "to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes".⁴⁸ Upon receipt of the Article 14 referral, the Prosecutor will initiate a preliminary examination as to whether there is "a reasonable basis to believe a crime within the jurisdiction of the Court has been or is being committed".⁴⁹

34. The purpose of the preliminary examination is not to identify which particular persons, acts or incidents should be the target of investigations, but to assess whether an investigation should be initiated.

35. The Defence appears to suggest that the information relied upon to satisfy the threshold for the opening of investigations circumscribes also which persons can be charged. It suggests that the triggering threshold at the Article 14 and Article 53(1) stage is meant to delimit also the future focus of investigations by restricting the Prosecution temporally and substantively to only those events that occurred prior to the referral and were known and identified by the referring party.

36. With respect to temporal parameters, neither the Statute itself nor the referral limits the Court to the investigation of conduct occurring prior to a referral. Furthermore, the existing case law of the Court has demonstrated that the

⁴⁷ Article 14(1).

⁴⁸ Article 14(1).

⁴⁹ Article 53(1)(a).

Prosecution may bring cases forward for prosecution concerning conduct occurring after the date of the referral of a situation to the Court.⁵⁰

37. In relation to the substantive focus of an investigation, the Court's legal instruments indicate that the triggering of the jurisdiction applies with respect to any of "the crimes referred to in article 5 of relevance to the situation".⁵¹

38. The fact that a referring party may mention specific persons, acts or incidents is therefore without prejudice to the focus of subsequent investigations by the Prosecutor, which may examine other persons, acts or incidents that are relevant to the situation.⁵²

39. This approach has been followed by Pre-Trial Chamber II in the Situation in the Republic of Kenya, which distinguished between the information available to provide a reasonable basis to believe that a crime(s) within the jurisdiction of the Court had been committed and the scope of the subsequent investigations by the Prosecutor:

⁵⁰ For example, in the Situation in Darfur, Sudan, the Pre-Trial Chamber issued warrants of arrest in the cases of Abu Garda, Banda and Jerbo, and Al Bashir for conduct occurring after referral of the situation by Security Council resolution 1593 (31 March 2005). A similar approach was followed in the situation in the Libyan Arab Jamahiriya, concerning conduct alleged in the case against Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, following the referral of the situation by UN Security Council resolution 1970 (26 February 2011).

⁵¹ See Rule 44, clarifying the scope of application of Article 12(3). As the drafting history reveals, the provision was adopted to ensure consistency in the exercise of jurisdiction in relation to a situation under Articles 12(2)-(3), 13 and 14; see John Holmes, 'Jurisdiction and Admissibility' in R. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), pp. 326-327.

⁵² For example, in the situation in Uganda, the referral from the Government of Uganda made reference to the "situation concerning the Lord's Resistance Army". Consistent with the statutory scheme, the Office informed the Government of Uganda that it interpreted the referral to encompass all Article 5 crimes; Letter from the Prosecutor to President Kirsch dated 17 June 2004 annexed to Decision of the Presidency, *Situation in Uganda*, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, ICC-02/04-1, 5 July 2004.

“The Chamber also underlines that in the development of the proceedings the Prosecutor is neither bound by his submissions with regard to the different acts constituting crimes against humanity, nor by the incidents and persons identified in the annexes appended to the Prosecutor's Response. Accordingly, upon investigation, the Prosecutor may take further procedural steps provided for in the Statute in respect of these or other acts constituting crimes against humanity, incidents or persons, subject to the parameters of the present authorization ...”⁵³

40. For the above reasons, the Defence argument that a referral would necessarily be viewed as being limited to the “*situation of crisis*” (emphasis added), the existence of which is determined to have impelled the referral is misplaced.⁵⁴

41. The referral by the DRC in its letter of 3 March 2004 is not restricted geographically (such as to the Ituri district, as the Defence argues) or temporally. The letter explicitly requests the Prosecutor to investigate alleged crimes occurring in the DRC, without limitation, and it does not even hint at an intent to limit the investigations to a particular time.

42. The Defence either misconstrues or intentionally mischaracterises the factual scope of the referral by the DRC. First, as to the alleged temporal limitation, the Defence relies on the referral letter which mentions the existence of crimes that have

⁵³ Decision Pursuant to Article 15 of the Rome Statute on the Authorization on an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19, paras 73, 75. See also Regulation 49 which requires the Prosecution, in the context of an Article 15 application, to set out, to the extent identified, a description of the persons or groups of persons involved. As Pre-Trial Chamber II clarified, such information is for the limited purpose of the Article 15 proceedings and is without prejudice to the subsequent conduct of future investigations; ICC-01/09-19, para. 50.

⁵⁴ Defence Challenge, para. 12 *et seq.* As the Defence notes, the Chamber has itself previously relied on this notion in its Article 58 Decision, ICC-01/04-01/10-1, para 6.

occurred (“*ont été commis*”).⁵⁵ Specifically, the DRC authorities, through the President of the Republic, refer to the Prosecution “*la situation qui se déroule dans [le] 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*” and ask it “*en conséquence, d’enquêter sur cette situation, en vue de déterminer si une ou plusieurs personnes devraient être accusées de ces crimes*”.⁵⁶ What the Defence characterises as a deliberate and express limitation on the ceding of jurisdiction to this Court only with respect to past crimes is instead a recitation of the terms of Article 14 of the Statute, which provides: “*Tout État Partie peut déférer au Procureur une situation dans laquelle un ou plusieurs des crimes relevant de la compétence de la Cour paraissent avoir été commis, et prier le Procureur d’enquêter sur cette situation en vue de déterminer si une ou plusieurs personnes identifiées devraient être accusées de ces crimes.*”

43. In other words, the temporal reference was not intended to set an ending date – that is, to prevent an investigation into post-March 2004 events (the date of the letter) – but to clarify that the referral encompassed only crimes occurring after a specified starting date (1 July 2002), the date the Rome Statute entered into force.⁵⁷ That it did not restrict the referral to pre-March 2004 is further substantiated by its description of the situation as ongoing (“*se déroule*”).⁵⁸

44. That this is the intent of the referral is substantiated by subsequent actions and utterances of the DRC that the Government itself does not consider the referral to be

⁵⁵ Defence Challenge, para 18. There are further examples of the Defence appearing to mislead the Chamber or overstate its evidence or its case. The Defence presents a statement by the former Deputy Prosecutor for Investigations according to which the former has “no information to provide” in response to questions put to him by the Defence as corroborative proof of the Defence’s own contention that there is no reason to believe that the referral extended beyond Ituri (Defence Challenge, Annex D and Defence Challenge para 18). The Prosecution notes that the Deputy Prosecutor did not respond that there were no reasons but merely that he had “no information to provide”.

⁵⁶ ICC-01/04-01/06-32-AnxA1.

⁵⁷ The DRC deposited its instrument of ratification of the Rome Statute on 11 April 2002.

⁵⁸ The Prosecution notes, moreover, that in French the reference applies equally to a situation that takes place / is taking place / has taken and continues to take place.

limited to pre-March 2004 crimes. The DRC has consistently cooperated with the Office of the Prosecutor in its investigations in the Kivus, as demonstrated in particular by their continued implementation of requests for assistance in relation to this case.

45. The following statement the Minister of Justice on behalf of the DRC, delivered during the general debate of the Assembly of State Parties on 7 December 2010, is illustrative of its support for this investigation:

*"En effet, la Cour pénale internationale a été justement créée pour prendre en charge ce type de situations. C'est pourquoi, la formulation du Statut de Rome qui relève d'une simple théorie pour certains, est une réalité que les populations congolaises, particulièrement celles du Nord- Kivu et du Sud-Kivu et celles de l'Ituri vivent au quotidien. [...] A cet effet, ma délégation salut l'arrestation récente à Paris sur mandat d'arrêt de la Cour pénale internationale, du Secrétaire exécutif des Forces démocratiques pour la libération du Rwanda (FDLR). Monsieur Callixte Mbarushimana doit répondre de crimes de guerre et crimes contre l'humanité, notamment meurtres, viols, tortures, persécutions et destructions de biens commis en République démocratique du Congo en 2009."*⁵⁹

46. The notification letters sent by the Prosecutor in June 2004 pursuant to Article 18 at the time of the opening of the situation, moreover, stated that the Prosecutor had "determined that there is reasonable basis to commence an investigation into crimes allegedly committed in the territory of the Democratic Republic of Congo (DRC) since the entry into force of the Rome Statute on 1 July 2002". The notification went on to note that though the Office of the Prosecutor had received and sought additional

⁵⁹ *Discours de Monsieur le Garde des Sceaux, Ministre de la Justice et Droits Humains de la République Démocratique du Congo à la 9ème Session de l'Assemblée des Etats Parties au Statut de la Cour pénale internationale*; available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/Statements/ICC-ASP9-GenDeba-DRC-FRA.pdf, last accessed on 28 July 2011

information “on the DRC, with a particular focus given to the Ituri district”, the Office also had “evaluated the information available on issues of jurisdiction, admissibility and the interests of justice *with respect to the entire territory of the DRC*”, and that it had found there is a reasonable basis to believe that crimes within the Court’s jurisdiction “*have been or are being committed in the DRC*”.⁶⁰

47. Contrary to the Defence assertion,⁶¹ this is not an *ex post facto* interpretation of the scope of the referral or the opened situation, but the clear and explicit terms of the Prosecutor’s official notification to States Parties as to the scope of the situation. The district of Ituri is identified as the first focus of the preliminary examination within the overall situation, but the letter expressly sets out that the situation itself pertains to the DRC and that the Office evaluated issues of jurisdiction, admissibility and the interests of justice “with respect to the entire territory of the DRC”. This is confirmed by the request in the notification letter inviting each State to inform the Court whether it “is investigating, or has investigated, its nationals or others within its jurisdiction with respect to criminal acts committed *in the territory of the DRC* which may constitute crimes referred to in article 5 of the Rome Statute” (emphasis added), as well as the letter’s assertion that the Office “will focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility for crimes within the jurisdiction of the Court committed *in the DRC*” (emphasis added). The Presidency of the Court, in similar vein, assigned the situation to Pre-Trial Chamber I with respect to the Democratic Republic of the Congo.⁶²

⁶⁰ See ICC-01/04-01/10-290-AnxA. Emphasis added.

⁶¹ Defence Challenge, para. 26.

⁶² Presidency, *Decision Assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I*, ICC-01/04-1 (05 July 2004). The situation was assigned following the letter of the Prosecutor to the President of 17 June 2004 informing the Presidency, pursuant to Regulation 45 of the Regulations of the Court, that “[t]he referral includes crimes within the jurisdiction of the Court committed within the territory of the DRC since 1 July 2002”; ICC-01/04-1, Annex.

48. The one purportedly new fact relied upon by the Defence as decisive information which would have altered the Chamber's previous determination is the exchange of letters between the Office of the Prosecutor and the DRC authorities.⁶³ In particular, the letter of 8 October 2003⁶⁴ from the Office notes that it has received a number of reports concerning crimes in Ituri and that the situation in Ituri is currently for the Office "*la plus immédiatement préoccupante*". The main focus of the letter is to note that a State referral would facilitate the work of the OTP and to suggest that the Office and the DRC authorities conclude a memorandum of understanding to enable a burden sharing approach to combat impunity by combining international and national responses. In its response dated 14 November,⁶⁵ the DRC states that it welcomes the proposal to conclude an *accord* to enable a division of labour and indicates a focal point for issues of cooperation and assistance.

49. The Prosecution has previously disputed the relevance of this correspondence.⁶⁶ At most the letter from the Office of the Prosecutor demonstrates its interest in obtaining additional information during the course of its preliminary examination on events in Ituri, a focus that is recalled in the Article 18 notification letters to States Parties. The Defence suggests that this reference is significant enough to counteract the fact that the actual referral letter and the Prosecutor's official Article 18 notification both refer to the parameters of the situation as encompassing the entirety of the DRC. The Prosecution disputes that this inference is reasonable, far less probable.

⁶³ Defence Challenge, paras 15 and 24 *et seq.*

⁶⁴ Defence Challenge, Annex B.

⁶⁵ Defence Challenge, Annex C.

⁶⁶ ICC-01/04-01/10-245, para. 13.

B. Whether the FDLR committed atrocity crimes prior to 3 March 2004 that contributed to the “situation of crisis” on which the referral is said to be based

50. The Defence alleges that in order for the Court to have jurisdiction, it must find that the FDLR as an entity existed and committed atrocity crimes prior to 3 March 2004, when the DRC referred the “situation of crisis”.⁶⁷

51. This is, indeed, merely a variation of the Defence argument that the DRC intended to limit its referral temporally to crimes that, as of 3 March 2004, created the situation of crisis.

52. For the reasons set forth above, this claim is not factually correct; nothing in the referral or subsequent action by the DRC suggests that it understood and intended that this Court’s jurisdiction be limited to crimes committed between 1 July 2002 and 3 March 2004 or to potential wrongdoers who were responsible for those crimes.

C. Whether there is a sufficient nexus between the charges and scope of the situation

53. The Prosecution observes that the relief the Defence seeks is essentially procedural. There is no doubt as to the substantive competence of the Court to examine alleged war crimes and crimes against humanity occurring on the territory of a State Party after the entry into force of the Statute. Rather, the Defence’s question in essence pertains to whether the present proceedings fall within the scope of the situation referred by the DRC or should have required either a separate referral or a request by the Prosecutor to the Pre-Trial Chamber for authorization to open a new situation.

⁶⁷ Defence Challenge, paras. 30-40.

54. The challenge therefore relates to the object and purpose of the referral procedure and the scope of the instant referral. The Prosecution observes that a State Party referral is the expression of State consent to the exercise of jurisdiction by the Court. In this instance, the DRC neither initially limited the scope of its referral in the manner suggested by the Defence, nor later contested the investigations related to events during 2009 in the Kivus. To the contrary, the DRC has been aware of and actively cooperated with the investigations of the Prosecutor in relation to the entire territory of the DRC. Absent contestation of such consent by the referring State and given, instead, its demonstrable support and cooperation with the Prosecutor's investigations in the Kivus, there is no reason to conclude that the Prosecution should have either declined to investigate alleged crimes arising from events during 2009 in the Kivus, or predicated such investigation on a request to the Pre-Trial Chamber for authorization to open a new situation.

55. Neither do the Defence assertions that the DRC abdicated its responsibilities to investigate and prosecute such crimes merit consideration. Although the Defence has not brought an admissibility challenge and as such its arguments in this regard appear to fall outside the scope of the present challenge, the Appeals Chamber has observed that the relinquishment of jurisdiction by a State with respect to a particular case does not render a case inadmissible.⁶⁸ In the instant case, the suspect was in any event within the jurisdiction of France at the time of his arrest, not the DRC.

56. The Defence suggestion that the drafters of the Statute never envisaged the possibility for a State Party to refer a situation concerning crimes occurring on its own territory is similarly without merit and unsupported.⁶⁹ To the contrary, the

⁶⁸ ICC-01/04-01/07-1497, paras. 85-86.

⁶⁹ Defence Challenge, para.22. For explicit reference to such a possibility under the category of "concerned States" during the negotiating history see *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UN Doc. A/50/22, 1995, at § 112; *Summary of the*

drafting history shows that it was expressly contemplated that States with a direct stake in a situation, such as the territorial State, the custodial State or the State of nationality of perpetrators (so-called “concerned States”), would have a particular interest in referring a situation. The draft texts leading up to Rome in fact considered initially that *only* “concerned States” could refer situations. The drafters’ final text expanded the referral provision by removing the narrowing limitation to “concerned States” and enabling referrals by any State Party.⁷⁰

57. The Prosecution submits, therefore, that it has demonstrated a sufficient nexus between the cases brought forward for prosecution and the scope of a situation.

IV. Relief

58. The Prosecution therefore respectfully requests the Pre-Trial Chamber to dismiss the Defence’s jurisdictional challenge and declare that the case against Callixte Mbarushimana remains within the jurisdiction of the Court.



Luis Moreno-Ocampo, Prosecutor

Dated this 28th day of July 2011
At The Hague, The Netherlands

Proceedings of the Preparatory Committee During the Period 25 March -12 April 1996, UN Doc. A/AC.249/1, 7 May 1996, at § 163. See also ICC-01/04-01/07-1497, paras 85-86.

⁷⁰ Darryl Robinson, ‘The Controversy over Territorial State Referrals and Reflections on ICL Discourse’, *J Int Criminal Justice* (2011) 9 (2): 355-384.