Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/04-01/10**

Date: **26 October 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

Public

Decision on the "Defence Challenge to the Jurisdiction of the Court"

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
Ms Fatou Bensouda
Mr Anton Steynberg, Senior Trial Lawyer

Counsel for the Defence
Mr Nicholas Kaufman
Ms Yael Vias-Gvirsman

Legal Representatives of Victims
Mr Mayombo Kassongo
Mr Ghislain Mabanga Monga Mabanga

Legal Representatives of Applicants
Mr Jean-Louis Gilissen
Mr Joseph Keta
Ms Paolina Massidda

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massidda
Ms Sarah Pellet

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Deputy Registrar
Mr Didier Preira

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

PRE-TRIAL CHAMBER I of the International Criminal Court (respectively, "Chamber" and "Court");

NOTING the "Defence Challenge to the Jurisdiction of the Court" ("Challenge"), submitted on 19 July 2011; [1]

NOTING the "Decision on the 'Defence Request for Reclassification' dated 14 July 2011 and on the request for reclassification of the 'Defence Challenge to the Jurisdiction of the Court'" dated 20 July 2011;[2]

NOTING the "Order to the Prosecutor requesting observations on the 'Defence Challenge to the Jurisdiction of the Court'" dated 20 July 2011, requesting the Prosecutor to submit his views on the Challenge by Thursday 28 July 2011;[3]

NOTING the "Prosecution's response to Defence Challenge to the Jurisdiction of the Court ICC-01/04-01/10-290" ("Prosecutor's Response"), submitted on 28 July 2011;[4]

NOTING the "Defence request for leave to reply to the Prosecution's response to the Defence challenge to the jurisdiction of the Court and Defence request to adduce oral testimony" dated 1 August 2011 ("Defence Request for Leave to Reply");[5]

NOTING the "Prosecution response to Defence request for leave to reply ICC-04/01-01/10-323" dated 2 August 2011 ("Prosecutor's Request for Leave to Respond");[6]

---

[1] ICC-01/04-01/10-290.
[2] ICC-01/04-01/10-293.
[3] ICC-01/04-01/10-297.
[4] ICC-01/04-01/10-320.
[5] ICC-01/04-01/10-323.
[6] ICC-01/04-01/10-328.

NOTING the "Defence request for a hearing pursuant to Rule 58(2) of the Rules of Procedure and Evidence" dated 14 August 2011 ("Defence Request for a Hearing") [7] and the Prosecution's response thereto dated 15 August 2011[8];

NOTING the "Decision requesting observations on the 'Defence challenge to the jurisdiction of the Court'" dated 16 August 2011, whereby the Chamber *inter alia* invited the Democratic Republic of the Congo ("DRC") and the representatives of the victims having already communicated with the Court with respect to the case to submit their observations on the Challenge by 12 September 2011;[9]

NOTING the "Observations de victimes autorisées à participer à la procédure sur l'«Exception d'incompétence de la Cour soulevée par la Défense (ICC-01/04-01/10-290-tFRA) »" dated 9 September 2011[10] and the Corrigendum thereof dated 12 September 2011[11] ("Observations by Victims authorised to participate in the proceedings ");

NOTING the "Observations sur l'exception d'incompétence de la Cour soulevée par la Défense ICC-01/04-01/10-290"[12] dated 12 September 2011, submitted on behalf of victims a/2902/11 to a/2911/11; a/2932/11 to a/2958/11; a/2990/11 to a/3014/11 represented by Me Keta and Me Gilissen ("Observations by Victims represented by Me Keta and Me Gilissen");

NOTING the "Observations on behalf of victims on the Defence Challenge to the Jurisdiction of the Court (ICC-01/04-01/10-417)" dated 12 September 2011[13], submitted by the Office of Public Counsel for Victims ("OPCV") as legal representative of

---

[7] ICC-01/04-01/11-365.
[8] ICC-01/04-01/11-367.
[9] ICC-01/04-01/10-377.
[10] ICC-01/04-01/10-406.
[11] ICC-01/04-01/10-406-Corr+Annex.
[12] ICC-01/04-01/10-411.
[13] ICC-01/04-01/10-417-Red.

unrepresented victim applicants and on behalf of victims who have communicated with the Court;

NOTING the "Décision modifiant le délai pour le dépôt par la République démocratique du Congo des observations concernant l'Exception d'incompétence de la Cour soulevée par la Défense" dated 14 September 2011, whereby the Chamber extended until 30 September 2011 the deadline for the DRC to submit its observations on the Challenge ;[14]

NOTING the "Rapport du Greffe relatif aux observations de la République Démocratique du Congo concernant l'exception d'incompétence soulevée par la Défense" and the submssions by the DRC attached as confidential Annex 1 thereto ;[15]

NOTING articles 19(2) and 57(2)(a) of the Statute of the Court, rule 58(1) and 58(3) of the Rules of Procedure and Evidence ("Rules"), regulation 17 and 24 of the Regulations of the Court ("Regulations");

HEREBY RENDERS THE FOLLOWING DECISION.

A. Submissions by the parties

Preliminary issue: the "standard of proof"

1. The Defence asserts that jurisdiction, as an essential element of the Prosecutor's case, "should be proved by the Prosecution on the normal standard of proof in criminal proceedings, i.e., beyond a reasonable doubt", whereas the Defence should only be required to "properly substantiate its factual assertions" and, at the most, to satisfy a standard of proof which is "not… higher than a balance of probabilities"[16].

---

[14] ICC-01/04-01/10-422.
[15] ICC-01/04-01/10-440 and ICC-01/04-01/10-440-Conf-Anx 1.
[16] ICC-01/04-01/10-290, paragraph 41.

2. The Prosecutor observes 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"[17].

3. The Chamber believes that the argument raised by the Defence, although appearing at the end of its Challenge, is of a preliminary nature, and as such has to be addressed by the Chamber before turning its attention to the substantive arguments submitted by the parties.

4. The Chamber observes that, pursuant to rule 58(1) of the Rules, "a request or application made under article 19 shall be in writing and *contain the basis for it*" (emphasis added). It is therefore the responsibility of the defence to set out the basis for its jurisdictional challenge. As also noted by the OPCV in its observations, "placing the burden of proof on the party raising the challenge to the jurisdiction of the Court is supported by the widely-accepted legal principle that the party raising a motion before a court should provide the proof upon which his/her motion is based"[18].

5. By the same token, the Chamber observes that the present challenge is based, and its determination will thus depend, much more on issues of a legal nature than on whether a given fact can or cannot be considered by the Chamber as properly established. There is thus no need for the Chamber to address the issue as to the nature of the "standard of proof" to be satisfied by the party bringing a jurisdictional challenge.

Arguments submitted by the Defence

6. In its Challenge, the Defence argues that the Court does not have jurisdiction to entertain the case against Mr Callixte Mbarushimana. After recalling some case law of the Chamber in respect of the parameters defining the scope of the jurisdiction of the Court[19], in particular the "Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana"[20], the Defence submits the following:

---

[17] ICC-01/04-01/10-320, paragraph 29.
[18] ICC-01/04-01/10-417-Red, paragraph 24.
[19] ICC-01/04-01/06-8-Corr, paragraph 8.
[20] ICC-01/04-01/10-1, paragraph 6.

(i) that "the 'situation of crisis that triggered the jurisdiction of the Court' at the date of [the] Referral [of the DRC situation, hereinafter "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" ("Defence First Argument");

(ii) that "even if it be found that the crisis situation triggering the jurisdiction of the Court encompassed events in the Kivus", the Prosecutor has not shown that the *Forces Démocratiques de Libération du Rwanda* ("FDLR") "committed atrocity crimes prior to 3 March 2004 such that it contributed to the aforementioned 'situation of crisis'" ("Defence Second Argument"), and

(iii) that, "in the circumstances, there exists no 'sufficient nexus' between the charges against Mr. Mbarushimana and the scope of the situation" ("Defence Third Argument")[21].

Arguments submitted by the Prosecutor

7. According to the Prosecutor, the Challenge "has no basis". First, the Government of the Democratic Republic of the Congo ("DRC") "did not geographically or temporally limit the scope of the situation"; second, the DRC Government "did not subsequently contest the temporal or geographic scope of the current investigations relating to events during 2009 in the Kivus" and is "actively cooperating with such investigations; third, and accordingly, "the conduct which forms the subject matter of the case is an integral part of the situation in DRC and falls squarely within the jurisdiction of the Court". On the basis of these arguments, the Prosecutor requests the Chamber to dismiss the Challenge and to declare that the case against Callixte Mbarushimana remains within the jurisdiction of the Court.[22]

The Defence Request for Leave to Reply

[21] ICC-01/04-01/10-290, paragraph 12.
[22] ICC-01-04-01/10-320, paragraphs 1-4.

8. In its Request for Leave to Reply, the Defence seeks leave to reply with a view to showing that the Prosecutor provided no evidence demonstrating "that atrocity crimes were being committed in the Kivus 'at or around the time of referral'"[23]. It also requests the Chamber "to receive oral testimony from a suitable representative of the OTP – formerly involved with negotiations with the DRC – who can testify as to whether the OTP and the DRC authorities contemporaneously (i.e. not ex post facto) viewed the **situation of crisis *'qui se déroule'***[24] as encompassing events in the Kivus",[25] or, in the alternative, to "order the Prosecution to disclose the contents of any Kivus orientated meetings the OTP may have held with international NGOs (such as UN/DDRRR) or DRC agencies in the weeks prior to and following the referral"[26]. Finally, based on the Prosecutor's statement that Mr Mbarushimana was "within the jurisdiction of France, at the time of his arrest, not the DRC", the Defence seeks leave to file further submissions as to the impact which the fact of Mr Mbarushimana's presence in France at the time of the Referral might have on the determination of the scope of such Referral and hence the jurisdictional boundaries of the case.[27]

Arguments submitted by the victims

Observations submitted by victims authorised to participate in the proceedings

9. In their Observations, the victims authorised to participate in the proceedings submit two arguments: first, as a matter of procedure, the Challenge amounts to a request for reconsideration of the Chamber's Decision on the Prosecutor's Application and, accordingly, request the Chamber to dismiss it *in limine* ("Victims' First Argument"); second, and only in the event that the Chamber decided to consider the Challenge as admissible and, accordingly, to address the substantive arguments brought therein, they request the Chamber to dismiss it on the merits ("Victims' Second Argument").

---

[23] ICC-01-04-01/10-323, paragraph 3.
[24] Emphasis in the original.
[25] ICC-01-04-01/10-323, paragraph 4.
[26] ICC-01-04-01/10-323, paragraph 5.
[27] ICC-01-04-01/10-323, paragraph 6.

10. The procedural and preliminary nature of the Victims' First Argument makes it necessary for the Chamber to address it before turning to the merits of the Challenge. The Victims submit that, by bringing its Challenge, the Defence is actually seeking reconsideration of the matter decided by the Chamber in its Decision on the Prosecutor's Application under article 58, which result the Defence should rather have sought by way of appealing such Decision within the statutory time frame.

11. The Chamber observes that a suspect's right to challenge the jurisdiction of the Court is a special remedy enshrined in article 19 of the Statute, as such autonomous and independent from any other remedy which the suspect might have by virtue of other statutory provisions. In particular, it is a remedy which, pursuant to article 19(4) of the Statute, may be only brought once, provided that it is brought "prior to or at the commencement of the trial". The Chamber takes the view that the Challenge was brought under the parameters of article 19 of the Statute and, accordingly, declines to dismiss it *in limine*.

12. As regards the Victims' Second Argument, the Chamber will make reference to it insofar as necessary and appropriate within the context of its determinations of the merits of the Challenge.

Observations submitted by victims represented by Me Keta et Me Gilissen

13. In their Observations, the victims represented by Me Keta and Me Gilissen request that the Chamber (i) acknowledge the filing of the observations and (ii) reject the Challenge, since ill-founded on the merits.

Observations submitted by the OPCV

14. In its observations, the OPCV argues *inter alia* (i) that, according to the *travaux préparatoires* of the Statute, "the content of a State party's referral, specifying the relevant circumstances, and that of the supporting documentation had never been envisaged to serve as some form of limitation to the Court's jurisdiction"; (ii) that "such specific information, mentioning, for example, particular geographical areas, should only provide a starting point for the Prosecutor's investigation"; (iii) that the term "situation" "covers

the entire territory of the State making the referral" and that, accordingly, "the Prosecutor has wide discretion to investigate the crimes falling under the Court's jurisdiction in any parts of the State's territory"[28]. It further summarises the views and concerns expressed by the victims and requests the Chamber to dismiss the Challenge.

Observations submitted by the DRC

15. In its observations, the DRC submits that the wording of the Referral confirms that the Court has jurisdiction over any and all crimes committed in the entirety of the territory of the DRC, including those allegedly committed by Mr Mbarushimana. Although the DRC observations were submitted as a confidential annex, the Chamber takes the view that the information submitted in such annex was not of a confidential nature. Accordingly, whilst preserving the current confidential classification of the submissions, this decision will make reference to the information contained therein as appropriate.

B. Determination by the Chamber on the merits

16. The issue at stake is to determine whether the facts underlying the charges brought by the Prosecutor against Mr Mbarushimana can be said not to exceed the territorial, temporal and possibly personal parameters defining the situation under investigation. More specifically, according to the test developed by the Chamber in the present case, it is required that the crimes referred to in the Prosecutor's application for a warrant of arrest for Mr Mbarushimana occurred in the context of the ongoing situation of crisis that triggered the jurisdiction of the Court through the Referral by the DRC[29]. As already clarified by the Chamber, 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 which was ongoing at the time of the referral. This link is necessary, precisely with a view to avoiding that referrals become instruments "permitting a State to abdicate its responsibility for

[28] ICC-01/04-01/10-417-Red, paragraph 43.
[29] ICC-01/04-01/10-1, paragraph 6.

exercising jurisdiction over atrocity crimes for eternity", which – as the Defence correctly points out - "would be wholly antithetical to the concept of complementarity"[30].

17. The Chamber wishes to reiterate the principle set forth in the preceding paragraph. The Defence raises no issue as to the correctness of such test (on the contrary, it describes it as "appropriate and meaningful", as well as "teleological and suitably liberal"[31]) and the grounds on which its Challenge is based are limited to the application of such test to the relevant facts of the case. Accordingly, the Chamber will limit itself to consider those facts, in light of the relevant submissions and documents.

18. It is uncontested that all of the events referred to in the charges brought against Mr Mbarushimana occurred (i) after the date of the Referral and (ii) in North Kivu and South Kivu, two regions situated in the Eastern part of the DRC. For such facts to still fall within the boundaries of the situation in the DRC, it is necessary to determine that they can be said to be sufficiently linked to the facts which led the DRC to refer the situation to the Court.

19. The Defence denies that such sufficient and adequate link exists, based on the First, Second and Third Arguments summarized above. The Chamber will address these three arguments separately.

The Defence's First Argument: the situation of crisis that triggered the jurisdiction of the Court only envisaged events unfolding in the Ituri region of the DRC at the time of the Referral

20. As regards its First Argument, the Defence submits that on the date of the Referral (i.e. on 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 activating the jurisdiction of the Court" [32], since such situation only envisaged events unfolding in the DRC region of Ituri.

21. The Chamber takes note of the DRC Observations, clarifying that; in submitting the Referral, the competent authorities did not intend to limit the Court's jurisdiction to one or

[30] ICC-01/04-01/10-290, paragraph 22.
[31] ICC-01/04-01/10-290, paragraph 22.
[32] ICC-01/04-01/10-290, paragraph 23.

more particular provinces within its territory. As already determined by the Chamber, the territorial and temporal scope of a situation is to be inferred from the analysis of the situation of crisis that triggered the jurisdiction of the Court through the referral. Crimes committed after the referral can fall within the jurisdiction of the Court when sufficiently linked to that particular situation of crisis. The existence of this link is made necessary by the principles governing the relationship between the Court and the criminal jurisdictions of the States, whereby the primary responsibility for investigating and prosecuting the most serious crimes remains vested in States. The Statute cannot be interpreted as permitting a State to permanently abdicate its responsibilities by referring a wholesale of present and future criminal activities comprising the whole of its territory, without any limitation whether in context or duration,. Such an interpretation would be inconsistent with the proper functioning of the principle of complementarity. As the DRC itself puts it, "*il revien[t] à la Cour de tirer les conséquences juridiques des observations des Autorités de la République Démocratique du Congo*".

22. In light of this, the Chamber deems it appropriate to engage in a thorough analysis of the relevant facts and documents and to address the arguments brought by the parties and participants in support of their respective views.

23. The first element on which the Defence relies is the language of the Referral, as contained in the letter dated 3 March 2004 sent by the DRC President to the Prosecutor. The Defence highlights that the DRC President refers to the Court "*la situation qui se déroule dans mon pays depuis le 1er juillet 2002, dans laquelle il apparait que des crimes relevant de la compétence de la Cour Pénale Internationale ont été commis*"; requests the Prosecutor to investigate such crimes "*en vue de déterminer si une ou plusieurs personnes devraient être accuses de ces crimes*"; and regrets that the DRC authorities "*ne sont malheureusement pas en mesure de mener des enquêtes sur les crimes mentionnés ci-dessus*". In the Defence's view, this language, "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**[33] to the Date of Referral".[34]

24. Additional elements referred to by the Defence are the following: (i) submissions made by the DRC in the case *The Prosecutor v Germain Katanga,* which specifically mentioned a situation of "generalised insecurity" in the DRC region of Ituri, which leads the Defence to argue that "the only crimes over which the DRC authorities had expressed their incapacity to exercise jurisdiction were those formerly committed in the Ituri region"[35]; (ii) a letter addressed by the Prosecutor to the DRC President dated 8 October 2003, whereby the Prosecutor invited the DRC Government to communicate information concerning *"des événements qui se seraient déroulés en Ituri après le 1er juillet 2002"* and otherwise making reference to the region of Ituri[36]; (iii) the DRC President's response to this letter dated 14 November 2003, whereby, in the view of the Defence, the DRC President accepted "that there should be no impunity for the perpetrators of the crimes referred to in the Prosecutor's letter of 8 October 2003"[37]; (iv) a series of remarks addressed by the Prosecutor to the Committee of Legal Advisers on Public International Law in Strasbourg on 18-19 March 2004, in which he mentioned the "situation in Ituri" as one of the two situations on which his Office was focussing[38]; (v) the fact that a former high official of the OTP, the ICC Deputy Prosecutor for Investigations at the time of the Referral, replied to Counsel for the Defence that he had no information which might either "shed light on the scope of the referral" or clarify the 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"[39]; (v) finally, the fact that the Prosecutor only made specific reference to the Ituri and not to either of the Kivus in his letter of notification under article 18(1) of the Statute[40].

25. The Chamber is not persuaded by the conclusions drawn by the Defence with respect to the meaning of the documents referred to above.

---

[33] Emphasis in the original.
[34] ICC-01/04-01/10-290, paragraph 18.
[35] ICC-01/04-01/07-1189-Anx-tENG.
[36] ICC-01/04-01/10-290-AnxB.
[37] ICC-01/04-01/10-290-AnxC.
[38] ICC-01/04-01/10-290, paragraph 25.
[39] ICC-01/04-01/10-290-AnxD.
[40] ICC-01/04-01/10-290, paragraph 28.

26. As regards the wording of the Referral, the Chamber notes that it makes explicit reference to the DRC country as a whole ("*situation qui se déroule* ***dans mon pays***"- emphasis added). The reference to crimes which ***have been*** committed, using the past tense ("*il apparaît que des* ***crimes*** *relevant de la compétence de la Cour Pénale Internationale* ***ont été commis***" – emphasis added), does not seem to be a deliberate temporal limitation to the situation referred to the Court. Conversely, the terms of the referral simply recite those of article 14(1) of the Statute and appear merely instrumental to explaining the reasons leading the DRC to seek the intervention of the Court. By saying that this language would make it clear that the DRC Government "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" the Defence entertains an argument of a speculative nature, which does not appear justified by the relevant wording, which is *per se* neutral. Furthermore, other temporal expressions employed in the Referral clearly indicate the object of such referral to be an ongoing situation of crisis ("*situation qui* ***se déroule*** *dans mon pays* ***depuis*** le 1er juillet 2002" – emphasis added).

27. In addition, the Chamber recalls that, pursuant to articles 13 and 14 of the Statute, a State Party may only refer to the Prosecutor an entire "situation in which one or more crimes within the jurisdiction of the Court appear to have been committed". Accordingly, a referral cannot limit the Prosecutor to investigate only certain crimes, e.g. crimes committed by certain persons or crimes committed before or after a given date; as long as crimes are committed within the context of the situation of crisis that triggered the jurisdiction of the Court, investigations and prosecutions can be initiated.[41] In the case at

[41] Triffterer, O. *Commentary on the Rome Statute of the International Criminal Court*, 2 ed., 2008, p. 579. See also in the case of *The Prosecutor v. Omar Al Bashir*, ICC-02/05-01/09-3 para. 45 where in similar terms the Chamber stressed that the referring party (the Security Council in that case) when referring a situation to the Court submits that situation to the entire legal framework of the Court, not to its own interests: "[...] by referring the Darfur situation to the Court, pursuant to article 13(b) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the rules as a whole". The same has been the position of the Prosecutor, as regards the situation in Uganda: although the State referral referred to the "situation concerning the Lord's Resistance Army", the Prosecutor disregarded the limitation and, consistently with the Principles of the Rome Statute, opened an investigation "into the situation concerning Northern Uganda", regardless of who had committed the crimes. See Press Release, Prosecutor of the International Criminal Court opens an investigation into Nothern Uganda, ICC-OTP-20040729-65.

hand, as the situation of crisis referred was ongoing at the time of the Referral (*"situation qui **se déroule** dans mon pays)*, the boundaries of the Court's jurisdiction can only be delimited by the situation of crisis itself.

28. As regards the submission regarding the specific reference to Ituri made by the DRC within the context of the case against *Germain Katanga*, the Chamber is not persuaded that such submission may be of significance to the purposes of the present decision. Since the case against *Germain Katanga* refers to events that occurred in Ituri, it appears only natural that a submission made in the context of that case would make reference to its specific territorial circumstances, rather than leaving room for inference for any broader conclusions regarding the territorial scope of the Referral.

29. As regards the letter addressed by the Prosecutor to the DRC President dated 8 October 2003, the Chamber acknowledges that it does indeed make a number of specific references to Ituri. However, the same letter also clarifies that Ituri is situated *"dans la province Orientale de la République Démocratique du Congo"*, on the one hand; and, on the other hand, it contains no language which may support the inference that the Prosecutor positively intended to exclude other critical regions likewise located in the eastern DRC from the scope of his forthcoming investigation. At the most, as observed by the victims authorised to participate in the proceedings[42], the reference to Ituri is to be read as signalling the priority that OTP investigations in that region had taken or were going to take within the broader context of the overall investigation in the DRC.

30. Furthermore, the Chamber is of the view that the Prosecutor's Letter dated 8 October 2003 has to be assessed jointly with the DRC's President's response thereto, dated 14 November 2003. Contrary to what the Defence states, the DRC President's Letter does not simply "accept" that "there should be no impunity for the perpetrators of the crimes referred to in the Prosecutor's letter of 8 October 2003". It specifically refers to *"les crimes odieux commis, de manière délibérée, par des personnes identifiables, **en République Démocratique du Congo**, en violation du droit international et du droit national"* (emphasis added). As is apparent from the Referral they would submit a few months later, from the outset of their contacts with the ICC Prosecutor the DRC authorities affirmed their view

[42] ICC-01/04-01/10-406, paragraph 33.

that the referral should encompass the DRC as a whole, rather than one or more of its regions. It appears significant – as highlighted by the victims authorised to participate in the proceedings[43] - that both Ituri, on the one hand, and North and South Kivu, on the other hand, appeared as source of concern for the DRC President as early as September 2003, in the context of his speech before the UN General Assembly. Their constant cooperation in the OTP investigations in the Kivus likewise witnesses to the intention of the DRC authorities to consider the whole country as included in the Referral.

31. The Defence seems to attach great significance to the fact that the ICC Deputy Prosecutor at the time of the early investigations in the DRC said that he had no information which might "shed light on the scope of the referral"[44] when responding to a request from the Defence. The Chamber notes that ICC former officials and staff members are still bound by confidentiality obligations notwithstanding the expiry of their mandate or contract. The former Deputy Prosecutor was thus obligated not to provide information to the Defence and therefore his response cannot and should not be interpreted as indicating a particular understanding of the scope of the Referral.

32. Finally, the Defence relies on the letter of notification sent by the Prosecutor to States on 21 June 2004 pursuant to article 18 of the Statute[45] ("Letter of Notification"), which indeed mentions "a particular focus given to the Ituri district" in the context of the OTP analysis and search for information on the DRC[46].

33. The Chamber observes that the Prosecutor does not deny having initially focused his DRC investigations on crimes committed in the Ituri district.[47] By the same token, the Chamber underscores that the reference to Ituri contained in the Letter of Notification appears isolated when considered alongside the other statements contained in the same letter, where the Prosecutor *inter alia* (i) notifies having determined the existence of a reasonable basis to commence an investigation into "crimes allegedly committed in the territory of the Democratic Republic of the Congo"[48]; (ii) states that the DRC referred to his

---

[43] ICC-01/04-01/10-406, paragraph 35.
[44] ICC-01/04-01/10-290, paragraph 27.
[45] ICC-01/04-01/10-290-AnxA.
[46] ICC-01/04-01/10-290, AnxA, page 1 (third paragraph).
[47] ICC-01/04-01/10-320, paragraph 10.
[48] ICC-01/04-01/10-290, AnxA, page 1 (first paragraph).

Office "the situation of crimes committed in its territory"[49]; (iii) refers to having evaluated the information available on issues of jurisdiction, admissibility and the interests of justice "with respect to the entire territory of the DRC"[50]; (iv) states that he found a reasonable basis to believe that crimes within the ICC jurisdiction have been or are being committed "in the DRC"[51]; (v) invites States to inform the Court whether they are investigating or have investigated their nationals or others within their jurisdiction with respect to criminal acts committed "in the territory of the DRC"[52]; (vi) clarifies his intent to focus investigative and prosecutorial efforts and resources on those bearing the greatest responsibility for crimes within the jurisdiction of the Court "committed in the DRC"[53].

34. Accordingly, the Chamber takes the view that the isolated reference to Ituri contained in the Letter of Notification is of an explanatory nature, aimed as it is at providing details of the background of the Prosecutor's affirmative decision to open an investigation rather than at determining the scope of either past research or forthcoming investigative activities. This isolated reference cannot be considered as dispositive in determining the jurisdictional scope of the Referral: the broader geographical references to the DRC as a whole contained in other parts of the Letter of Notification appear far more significant.

35. Even more fundamentally, the Chamber wishes to highlight that, contrary to what is stated by the Defence, the regions of Ituri and the Kivus are often mentioned jointly as regions situated in the eastern part of the DRC providing reasons for "deep concern" in a number of UN documents dating back at least as early as 2002.

36. Reference to a few of these documents will suffice. UN Security Council Resolution 1445 dated 4 December 2002 *inter alia* determined "that the situation in the Democratic Republic of the Congo continue[d] to pose a threat to international peace and security in the region" and "call[ed] for a full cessation of hostilities involving regular forces and armed groups throughout the territory of the Democratic Republic of the Congo, in

---

[49] ICC-01/04-01/10-290, AnxA, page 1 (second paragraph).
[50] ICC-01/04-01/10-290, AnxA, page 1 (fourth paragraph).
[51] ICC-01/04-01/10-290, AnxA, page 1 (fifth paragraph).
[52] ICC-01/04-01/10-290, AnxA, page 2 (second paragraph).
[53] ICC-01/04-01/10-290, AnxA, page 2 (third paragraph).

particular South Kivu and Ituri"[54]. Of particular interest and relevance is also Resolution 1565 (2004), dated 1 October 2004, whereby the Security Council *inter alia* (i) affirmed being "deeply concerned by the continuation of hostilities in the eastern part of the Democratic Republic of the Congo, particularly in the provinces of North and South Kivu and in the Ituri district, and by the grave violations of human rights and of international humanitarian law that accompany them" and (ii) noted "that the situation in the Democratic Republic of the Congo continues to constitute a threat to international peace and security"[55].

37. Similar joint references to the Kivus, either North or South or both of them, and Ituri would continue to appear in UN resolutions and statements for several years. On 13 July 2005, the President of the Security Council stressed, on behalf of the Council, "the need to bring an end, particularly in the Kivus and Ituri, attacks by armed groups on local populations"[56]. In 2008 the Security Council condemned both the "massive displacement of populations in North Kivu" and "the resumption of hostilities by illegal armed groups in Ituri"[57]; in 2009, it reiterated its serious concern regarding the presence of armed groups and militias in the eastern part of the DRC, "particularly in the provinces of North and South Kivu, Ituri and the Orientale Province, which perpetuate a climate of insecurity in the whole region"[58].

38. More broadly, both Ituri and the Kivus are encompassed by references made by UN organs to the "Eastern part of the Democratic Republic of the Congo" as being the part of the country most seriously affected by ongoing hostilities, so seriously as to require the deployment of the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC)[59].

39. In light of the above, the Chamber is satisfied that the case against Mr Mbarushimana is sufficiently linked to the situation of crisis existing in the DRC at the

---

[54]UNSC Resolution 1445 (2002) (S/RES/1445 (2002) dated 4 December 2002.
[55] UNSC Resolution 1565 (S/RES/1565) dated 1 October 2004.
[56] Statement of the President of the Security Council dated 13 July 2005 (S/PRST/2005/31).
[57] UNSC Resolution 1856 (2008) (S/RES/1856) dated 22 December 2008.
[58] UNSC Resolution 1896 (2009) (S/RES/1896) dated 7 December 2009.
[59] Statement of the President of the Security Council dated 14 May 2004 (S/PRST/2004/15).

time of and underlying the Referral. Accordingly, it dismisses the Defence's First Argument.

The Defence's Second Argument: the OTP failed to show that the FDLR committed atrocity crimes prior to the date of the Referral (3 March 2004)

40. The Defence Second Argument centres on the fact that "no evidence has been provided of FDLR atrocity crimes prior to the date of the referral". More specifically, the Defence argues that the events in the Kivus "contemporaneous" to the Referral "lacked the objective criteria necessary to be incorporated in the Referral" and that none of the authorities relied upon by the Chamber at the time of the issuance of the warrant of arrest for Mr Mbarushimana supports the proposition that the FDLR was committing atrocities, or constituted a threat to the peace and security of the region, or a threat to the civilian population at the time of the Referral.

41. The Defence's analysis of the authorities relied upon by the Chamber at the time of the issuance of the warrant of arrest, and the challenge thereto, relies on a mischaracterization of the jurisdictional test developed and adopted in the present case. The Chamber recalls that, according to that test, crimes committed after the time of a referral may also fall within the jurisdiction of the Court, provided only that they are sufficiently linked to the situation of crisis which was ongoing at the time of the referral and was the subject of the referral. It is the existence, or non-existence, of such link, and not the particular timing of the events underlying an alleged crime, that is critical in determining whether that crime may or may not fall within the scope of the referral.

42. Accordingly, the Chamber's determination that the crimes underlying the charges against Mr Mbarushimana are indeed linked to the crimes which prompted the Government of the DRC to refer the country's situation to the Court is affected neither by the fact that ongoing events in the Kivus at the time of the Referral allegedly "lacked the objective criteria" necessary for them to be incorporated in the scope of the Referral, nor by whether or not the FDLR in particular was at that same time committing crimes which might have contributed to the crisis triggering the referral to (and hence the jurisdiction of) the Court. If this sufficient link exists, then it is irrelevant whether particular individuals

or events subsequently charged by the Prosecutor could not have been charged at the time of the original referral for crimes within the jurisdiction of the Court.

43. As said above[60], the Chamber believes that the events underlying the crimes against Mr Mbarushimana are sufficiently linked to the factual scenario of crisis which prompted the DRC Referral.

44. In addition, the Chamber notes that the Defence's claim that "no evidence has been provided of FDLR atrocity crimes prior to the date of the referral" appears contradicted by at least two UN documents. In particular, the Chamber recalls that

(i) violations and abuses of human rights and international humanitarian law were alleged by the Security Council as happening in the territory of the DRC as early as 2000[61];

(ii) the DRC decisions to ban the activities of the FDLR throughout its territory and to declare the FDLR's leaders persona non grata on its territory were welcomed by the Security Council as early as in 2002, through Resolution 1445 which determined the situation in the DRC to be a threat to international peace and security in the region and called for a full cessation of hostilities in South Kivu and Ituri[62].

45. The Chamber likewise recalls that the FDLR continued to be a source of concern for the UN in the following years. More specifically, the Chamber notes that:

(i) the "increased military activities of the *Forces démocratiques de libération du Rwanda* (FDLR) in the Eastern part of the Democratic Republic of the Congo" were reasons for concern to the Security Council as early as 14 May 2004[63];

(ii) in its statement dated 13 July 2005, the President of the Security Council mentioned the "Democratic Forces for the Liberation of Rwanda" as one of those armed groups attacking local populations in the Kivus and Ituri, demanding that they renounce the use of force;

---

[60] Paragraphs 24-28.

[61] UNSC Resolution 1291 (2000) (S/RES/1291) dated 24 February 2000.

[62] UNSC Resolution 1445 (2002) (S/RES/1445) dated 4 December 2002 (see above, footnote 29).

[63] Statement by the President of the Security Council dated 14 May 2004 (S/PRST/2004/15).

(iii) the failure of the FDLR "to proceed with the disarmament and repatriation of their combatants" was deplored by the Security Council, concerned "over the presence of foreign armed groups, which continue to pose a serious threat to stability in the eastern part" of the DRC, in October[64] and December[65] 2005, when the Security Council linked the call upon the FDLR to lay down their arms with its deploring of "the violations of human rights and international humanitarian law" committed by militias and foreign armed groups waging hostilities in the eastern part of the DRC;

(iv) in July 2007, the FDLR resurfaced as one of those "foreign armed groups" whose "violent actions" entailed "serious humanitarian consequences", and hence as a reason of the Security Council's deep concern "at the deteriorating security situation in the east of the Democratic Republic of the Congo, in particular in North and South Kivu"[66];

(v) in March 2008, "the persistence of violations of human rights and international humanitarian law carried out by the FDLR" and other groups in the eastern DRC was once again deplored by the Security Council[67] ;

(vi) in December 2008, by the same resolution extending the deployment of MONUC until 31 December 2009 and requesting it to "concentrate progressively ... its action in the eastern part of the Democratic Republic of the Congo", the Security Council expressly considered the presence and activity on Congolese territory of illegal armed groups "including the FDLR", as "a major obstacle to lasting peace in the Kivus" and as "one of the primary causes for the conflict in the region"[68].

46. In light of the above, the Chamber dismisses the Defence Second Argument.

The Defence's Third Argument: there is no 'sufficient nexus' between the charges against Mr. Mbarushimana and the scope of the situation

---

[64] Statement by the President of the Security Council dated 4 October 2005 (S/PRST/2005/46).
[65] UNSC Resolution 1649 (2005) (S/RES/1649) dated 21 December 2005.
[66] Statement by the President of the Security Council dated 23 July 2007 (S/PRST/2007/28).
[67] UNSC Resolution 1804 (2008) (S/RES/1804) dated 13 March 2008.
[68] UNSC Resolution 1856 (2008) (S/RES/1856) dated 22 December 2008.

47. The Defence Third Argument is closely related to its First and Second Argument. By its Third Argument, the Defence submits that, since "contemporaneous" events in the Kivus and the activities of the FDLR did not prompt the Referral, "there is consequently no causal nexus to Mr Mbarushimana in so far as he is allegedly a member of the FDLR" and also since the Prosecutor has not adduced evidence "to show that Mr. Mbarushimana was even a policy making member of the FDLR as of 3 March 2004".

48. Insofar as it tends to show that the Referral did not include the Kivus, or that the FDLR was not committing crimes at the time of the Referral, the Defence's Third Argument is to be dismissed on the basis of the same arguments developed in respect of the Defence's First and Second Arguments[69].

49. Insofar as it may be regarded as separate and autonomous, the Defence Third Argument seems to submit that failure by the Prosecutor to allege that Mr Mbarushimana's involvement in crimes allegedly committed by the FDLR dates back to the time of the Referral should entail that the case against him falls outside the scope of the Court's jurisdiction.

50. The Chamber observes that, as the Defence itself puts it, the "offending criminal activity" alleged on the part of individuals who were not identifiable at the time of the Referral "has, as a matter of logic, to be linked to the original activity which prompted the referral". The considerations developed and the UN documents referred to above[70] show that the crimes allegedly perpetrated by FDLR forces, which form the basis of the charges against Mr Mbarushimana, are indeed inextricably linked to the situation of crisis in the DRC which has been under the constant examination by, and a continuing source of deep concern for, the United Nations since at least the early 2000s. By its very nature, the link required for an event to be encompassed in the scope of a situation can stretch over a number of years; accordingly, it cannot be required that the person targeted by the Prosecutor's investigation be active throughout the duration of the relevant time-frame.

51. In light of the above, the Chamber dismisses the Defence Third Argument.

---

[69] Respectively, paragraphs 13 to 28 and 29 to 34.

[70] Paragraphs 25 to 27 and paragraph 33.

Arguments submitted by the Defence in its Request for Leave to Reply

52. The Defence asserts that, if leave to reply were granted, the reply would serve a twofold purpose: it would allow the Defence (i) to show that the Prosecutor failed to prove that "atrocity crimes" were being committed in the Kivus at or around the time of the Referral[71] and (ii) to argue that, since Mbarushimana was a refugee in France at the time of the Referral, "the situational referral could not have then encompassed war crimes committed by French-protected people", given that France had made at that time a reservation pursuant to Article 124 of the Statute[72].

53. In his Request for Leave to Respond, the Prosecutor requests that either the Defence Request for Leave to Reply be dismissed "in its entirety" or, if it is granted, that he be granted leave in turn to respond to new arguments contained therein after the confirmation hearing[73].

54. In light of the considerations developed so far, as well as of the content of the Defence Request for Leave to Reply, the Chamber takes the view that such reply would not bring any valuable addition for the purposes of Chamber's decision, and that its subject matter, as envisaged and detailed by the Defence, would exceed the purpose and scope of a "reply to a response" within the meaning of regulation 24(5) of the Regulations.

55. As regards the Defence's wish to expose the alleged lack of evidence on crimes being committed in the Kivus at the time of the Referral, the Chamber observes that the Defence seeks to reopen an issue which it sufficiently explored in its Challenge. The Chamber reiterates the findings made in this Decision: based on the relevant documents (including UN documents), it is satisfied that not only Ituri, but also the Kivus featured as a region of crisis at the time of the DRC Referral and therefore that there exists a link between the events which led to such referral and the charges brought against Mr Mbarushimana in this case.

56. The Chamber also observes that a similar attempt at reopening issues already discussed in the Challenge, or at gathering new and additional material in its support, quite independently from the Prosecution's Response, underlies the Defence's request to

---

[71] ICC-01/04-01/10-323, paragraph 3.
[72] ICC-01/04-01/10-323, paragraph 6.
[73] ICC-01/04-01/10-328, paragraph 12.

adduce the oral testimony "of a suitable OTP official", which testimony would be required to determine whether the OTP and the DRC authorities viewed the situation as encompassing the Kivus at the time of the Referral[74].

57. Furthermore, and more fundamentally, the Chamber notes that such request for oral testimony clearly exceeds the scope of a request for leave to reply (which, by its very nature, should be limited to addressing arguments raised in a response which the party did not have the opportunity to address in its first submission) and, as such, should be rejected *in limine*.

58. Equally exceeding the scope of a request for leave to reply is the Defence's request that the Pre-Trial Chamber "order the Prosecution to disclose the contents of any Kivus orientated meetings the OTP may have held with international NGOs ... or DRC agencies in the weeks prior to and following the referral"[75]. Accordingly, such request is also rejected *in limine*.

59. As regards the second purpose that the Defence's reply might serve (i.e., to argue that the Referral could not have encompassed crimes committed by "French-protected people" like Mr Mbarushimana, who had refugee status in France , given that France had at that time made a reservation pursuant to Article 124 of the Statute), the Chamber observes that the wish to raise this topic stems from the Defence's reading of a sentence contained in the Prosecutor's Response, stating that Mr Mbarushimana was "within the jurisdiction of France, at the time of his arrest, not the DRC"[76]. In the view of the Defence, this sentence "apparently expresses the Prosecution's view that France could have investigated Mr Mbarushimana for the crimes committed in the Kivus"[77].

60. The Chamber takes the view that the interpretation given by the Defence to that sentence (and its viewing it as raising "a new issue") is not justified by the context in which the sentence was used by the Prosecutor in his Response, which was to challenge some Defence assertions (precisely, in the words of the Prosecutor's Response, "the Defence assertions that the DRC abdicated its responsibilities to investigate and

---

[74] ICC-01/04-01/10-323, paragraph 4.
[75] ICC-01/04-01/10-323, paragraph 5.
[76] ICC-01/04-01/10-320, paragraph 55.
[77] ICC-01/04-01/10-323, paragraph 6.

prosecute" the relevant crimes) by arguing that they pertained to admissibility rather than jurisdiction. The view that "France could have investigated Mr. Mbarushimana for the crimes committed in the Kivus", which the Defence reads in the sentence quoted above, is nowhere to be found in the Prosecutor's Response and appears entirely the result of speculation by the Defence. Accordingly, it cannot be regarded as an issue arising from the Prosecutor's Response and, as such, is not a suitable subject matter for a reply within the meaning of regulation 24(5) of the Regulations.

61. In light of the above, there is no need for the Chamber to analyse the arguments submitted by the Prosecutor in his Request for Leave to Respond.

The Defence request for a hearing

62. On 14 August 2011, the Defence requested the Chamber to hold a hearing for the purposes of hearing testimony from an OTP representative on factual issues of relevance to its Challenge. In his response, the Prosecutor noted that no ambiguity could be detected in either the Referral or the conduct of the DRC authorities and that, more broadly, the relevant facts were fully addressed by evidence fully on the record.

63. The Chamber believes that the foregoing analysis, based on the relevant facts and documents, addresses in full the arguments supporting the Challenge and that, accordingly, no need for a supplementary hearing arises.

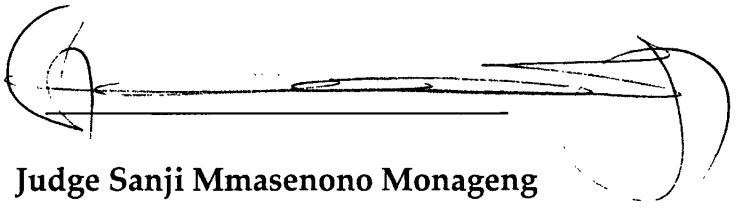
FOR THESE REASONS,

REJECTS the Defence Request for Leave to Reply and the Prosecutor's Request for Leave to Respond;

REJECTS the Defence Request for a Hearing;

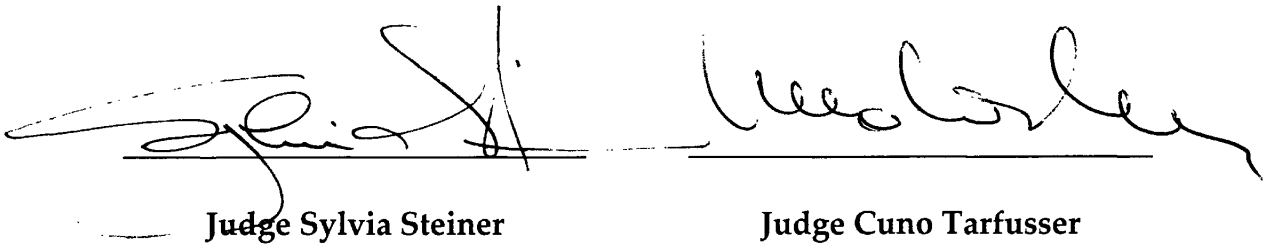
REJECTS the Defence Challenge to the Jurisdiction of the Court.

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



Judge Sanji Mmasenono Monageng

Presiding Judge



Judge Sylvia Steiner **Judge Cuno Tarfusser**

Dated this Wednesday, 26 October 2011

At The Hague, The Netherlands