Cour Pénale Internationale

International Criminal Court

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PRE-TRIAL CHAMBER I

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Under Seal

Prosecution's Submissions on Jurisdiction

Source: **Office of the Prosecutor**

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1. On 20 August 2010, the Office of the Prosecutor applied under seal to the Single Judge of Pre-Trial Chamber I for a warrant for the arrest of Callixte MBARUSHIMANA, Executive Secretary of the *Forces Démocratiques pour la Libération du Rwanda* (FDLR), for his responsibility for war crimes and crimes against humanity allegedly committed by the FDLR in North and South Kivu Provinces, Democratic Republic of the Congo (DRC), between January 2009 and the date of the Prosecution's application ("Prosecution's Application").[1]

2. On 6 September 2010 Pre-Trial Chamber I issued the "Decision requesting clarification on the Prosecutor's Application under Article 58" ("Decision").[2]

I. Introduction

3. The Prosecution submits that the incidents which form the subject matter of the Prosecution's Application are an integral part of the situation referred by the DRC authorities. The referral defined a territory and an open ended time period. The selection of cases inside the situation is a prerogative of the Prosecution. Additionally, the incidents presented by the Prosecution, FDLR attacks against civilians during an armed conflict in the Kivus, form part of a series of similar conduct alleged to have been committed from before the time of the referral and that continued in 2009 and 2010.

4. The Chamber must determine jurisdiction as part of its consideration of an Article 58 application. The Prosecution observes that there is no ostensible cause or self evident factor manifestly impelling the exercise of a specific review on the scope of the situation. In particular, the Prosecution notes that the DRC referred the situation defining an open ended time period. Additionally, the scope of the investigations into crimes committed in the Kivus that underpin the Prosecution's

[1] Prosecution's Application under Article 58, 20 August 2010, ICC-01/04-573-US-Exp.
[2] ICC-01/04-575-US.

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Application is a matter of public record and has been neither disputed nor challenged by the DRC Government. The DRC authorities have been cooperating with and supported the conduct of investigative activities into contemporary crimes committed in North and South Kivu Provinces. Moreover, in accordance with the statutory scheme, the Prosecution is not limited to investigating only those incidents or facts that were relied upon to trigger the opening of a situation, but may extend its investigations to any crime within the jurisdiction of the Court that is of relevance to the situation. For the reasons set out below, the events alleged in the Prosecution's Application form an integral part of the Situation in the DRC.

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, 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*".[3]

6. 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) of the Rome Statute were satisfied. Accordingly, on 16 June 2004, the Prosecutor decided to initiate an investigation. By letter of 17 June 2004, the decision was communicated to the President of the Court.[4]

7. On 19 April 2004, the Prosecutor announced that he had "received a letter signed by the President of the Democratic Republic of Congo (DRC) referring to him

[3] ICC-01/04-98-US-Exp-Anx1.
[4] ICC-01/04-1.

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".[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, which within the terms of Article 18(1) of the Rome Statute 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 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 the DRC situation, noting that the Office of the Prosecutor "will investigate grave crimes allegedly committed on the territory of the Democratic Republic of Congo (DRC) since 1 July 2002".[7] Following the notification, no information pursuant to Article 18(2) of the Rome Statute was received.

10. The scope of the situation was not geographically or temporally confined by the DRC authorities. Initially, the Office of the Prosecutor focussed its activities on crimes committed in Ituri district, Province Orientale.[8] And on 8 September 2008, the Prosecutor announced to States Parties that the focus of the next case arising from the

[5] Office of the Prosecutor, Press Release ICC-OTP-20040419-50, 19 April 2004.
[6] See Annex 1.
[7] Office of the Prosecutor, Press Release ICC-OTP-20040623-59, 23 June 2006.
[8] Office of the Prosecutor, Press Release ICC-OTP-20040623-59, 23 June 2006.

Situation in the DRC would be on recent reports of crimes 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 having been committed in the two provinces of North and South Kivu over the last years by individuals from all groups involved in the area, whether the CNDP, the FDLR, the FARDC itself, or other locally based armed groups.[10] The DRC authorities were aware of this focus, granted cooperation to the Prosecutor and supported the Prosecution's investigative activities in the Kivus.

III. Link between the events alleged in the Prosecution's Application and the situation in the DRC

Factual linkage

12. The Prosecution submits that the incidents which form the subject matter of the Prosecution's Application relate to alleged conduct committed by the FDLR at least since the official end of the second Congo war around September 2002.[11]

[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
[10] Office of the Prosecutor, Press Release ICC-OTP-20081104-PR369, 4 November 2008.
[11] See for example UNSC Presidential statement S/PRST/2004/15, 14 May 2004, DRC-OTP-2020-0043; UNSC Resolution 1649 (2005), 21 December 2005, DRC-OTP-0185-1917; UNSC Presidential statement S/PRST/2007/28, 23 July 2007, DRC-OTP-2020-0056; UNSC Resolution 1804 (2008), 13 March 2008, DRC-OTP-2020-0019; UNSC Resolution 1856 (2008), 22 December 2008, DRC-OTP-2014-0945; UNSC Resolution 1896 (2009), 30 November 2009; UNSC Resolution 1906 (2009), 23 December 2009, DRC-OTP-2020-0010; UNSC Resolution 1925 (2010), 28 May 2010, DRC-OTP-2020-0002, in which the UNSC denounces the FDLR for increased military activities in Eastern DRC and for its incursions on the territory of Rwanda and for violations of human rights and international humanitarian law including attacks on the civilian population, extrajudicial executions, the recruitment of children, widespread sexual violence

Between 2002 and 2010, the United Nations Security Council, among others, repeatedly expressed serious concerns about the conflict situation in the Eastern DRC regions of Ituri, North Kivu and South Kivu, with a particular focus on the illegal activities of armed groups in Ituri (the UPC-FPLC, the FNI and the FRPI) and in the Kivus (notably the FDLR). During this period, these various armed groups, and in particular the FDLR, started or continued committing crimes against civilians. The Security Council consistently characterised the FDLR as a threat to the peace and security of the Great Lakes region, as well as a cause of insecurity and instability there and as a threat to the local civilian population.[12]

13. As such, the Prosecution submits that the conduct which forms the subject matter of the Prosecution's Application is an integral part of the situation before the Chamber.

Circumstances compelling review

14. The Prosecution acknowledges that the Chamber must determine jurisdiction as part of its consideration of an Article 58 application. For the reasons set out below, however, the Prosecution observes that in relation to the issues raised by the Chamber on the scope of the situation, the Chamber is conducting its review in circumstances where there is no ostensible cause or self evident factor manifestly impelling the exercise of such review to render it appropriate in the circumstances of the case. No dispute has arisen between the DRC authorities and the Prosecution with respect to the scope of its investigative activities into contemporary crimes

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including rape and other forms of sexual abuse, illicit exploitation and trade in natural resources and proliferation and trafficking of arms.

[12] UNSC Resolution 1445 (2002), 4 December 2002, DRC-OTP-0131-0144; UNSC Presidential statement S/PRST/2004/15, 14 May 2004, DRC-OTP-2020-0043; UNSC Presidential statement S/PRST/2005/31, 13 July 2005, DRC-OTP-2020-0060; UNSC Presidential statement S/PRST/2005/46, 4 October 2005, DRC-OTP-0128-0148; UNSC Resolution 1649 (2005), 21 December 2005, DRC-OTP-0185-1917; UNSC Presidential statement S/PRST/2007/28, 23 July 2007, DRC-OTP-2020-0056; UNSC Resolution 1804 (2008), 13 March 2008, DRC-OTP-2020-0019; UNSC Resolution 1856 (2008), 22 December 2008, DRC-OTP-2014-0945; UNSC Resolution 1896 (2009), 30 November 2009; UNSC Resolution 1906 (2009), 23 December 2009, DRC-OTP-2020-0010; UNSC Resolution 1925 (2010), 28 May 2010, DRC-OTP-2020-0002.

committed in North and South Kivu Provinces. The DRC authorities have been informed of and have supported the investigations underpinning the Prosecution's Application and have actively cooperated with it pursuant to Part 9 of the Statute.

Scope of the referral

15. The Prosecution observes, firstly, that where the exercise of jurisdiction is triggered pursuant Articles 13(a) or 13(b), it is for the referring party, in the first instance, to define any temporal and geographical delimitation to the referred situation. In relation to the Situation in Darfur, for example, the referral by the Security Council was made in relation to the state of Darfur within the Republic of the Sudan.[13] Similarly, in relation to the former Yugoslavia, the geographical scope of the jurisdiction of the International Criminal Tribunal for the former Yugoslavia was defined by reference to the territory of those States, but the temporal jurisdiction was rendered open ended, given the ongoing nature of the crimes at the time.[14] In relation to Rwanda, the Security Council confined the temporal jurisdiction of the International Criminal Tribunal for Rwanda to events occurring in 1994.[15] In relation to the Situation in the DRC, when referring the situation on its territory, the DRC Government did not circumscribe the temporal scope of the situation.

Triggering Procedure and Jurisdiction

16. The Prosecution submits, moreover, that the triggering procedure, which establishes the legal basis for the exercise of jurisdiction by the Court and the opening of investigations, must be distinguished from the scope of subsequent investigations within an opened situation. As set out in Articles 13(a) and 14(1), a referral that seeks to trigger the exercise of jurisdiction by the Court must relate to a situation where a crime under the Rome Statute has occurred or is ongoing.

[13] UNSC Resolution 1593 (2005).
[14] UNSC Resolution 827 (1993).
[15] UNSC Resolution 955 (1994).

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Similarly, in considering whether there is a reasonable basis to proceed with an investigation pursuant to Article 53(1)(a), the Prosecutor must determine that "a crime within the jurisdcition of the Court has been or is being committed". These requirements serve as a threshold for the initiation of an investigation into a situation.

17. The provisions related to the triggering procedure should not be conflated with those related to the conduct of investigation. Neither the Statute nor the referral made by the DRC government limits the Court to investigating conduct occurring prior to the referral. Such an interpretation would affect the independence of the Prosecutor as well as that of the Chambers, by predetermining and constraining the scope of the future ICC activity to preliminary information obtained from external sources, well before the Prosecutor has even had the opportunity to conduct any investigations.

18. As such, the Prosecution submits that the information that forms the basis of a threshold determination under Article 53(1) does not circumscribe the future scope of the Prosecutor's investigations. This is reflected by Article 54(1)(a), whereby such investigation is to extend to "all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute…" This approach has also 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 jurisdcition of the Court had been committed, and the scope of the subsequent investigations by the Prosecutor:

> "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

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against humanity, incidents or persons, subject to the parameters of the present authorization …".[16]

19. The fact that a referral may refer to specific crimes or to particular incidents of violence, moreover, is without prejudice to the focus of subsequent investigations by the Prosecutor, which may examine other crimes or other incidents that are of relevance to the situation.[17] This is reflective of the drafting history of the Rome Statute, which rejected the idea that a referral party or an Article 15 petition could limit the scope of the Prosecutor's investigation to particular cases, persons or parties to a conflict.[18] The language of the Statute also indicates that the triggering of the jurisdiction applies with respect to any crimes referred to in Article 5 "of relevance to the situation".[19]

[16] 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.

[17] Similarly, 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 refer to all article 5 crimes of relevance to the situation. Letter from the Prosecutor to President Kirsch dated 17 June 2004, annexed to Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, ICC-02/04-1, 5 July 2004.

[18] *See* Report of the Preparatory Committee on the Establishment of an International Criminal Court Vol. I, 51 U.N. GAOR, Supp. No. 22, U.N. Doc.A/51/22 (1996) para. 146: "Some delegations were uneasy with a regime that allowed any State party to select individual suspects and lodge complaints with the Prosecutor with respect to them, for this could encourage politicization of the complaint procedure. Instead, according to these delegations, States parties should be empowered to refer "situations" to the Prosecutor in a manner similar to the way provided for the Security Council in article 23 (1). Once a situation was referred to the Prosecutor, it was noted, he or she could initiate a case against an individual. It was suggested, however, that in certain circumstances a referral of a situation to the Prosecutor might point to particular individuals as likely targets for investigation." Accordingly, Article 14(1) of the Statute provides that a state party referral concerning "a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed" results in a request to 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". Additionally, where a referral or an Article 15 communication is accompanied by supporting documentation that identifies potential perpetrators or implies guidance as to perpetrators, such information has no bearing on the preliminary examination process and does not influence the conduct of the Office of the Prosecutor's own investigations and prosecutions.

[19] *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.

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Link between cases and situation

20. The Prosecution submits that the Statute does not require a link to be established between the cases it has brought and the facts that led to the triggering the exercise of jurisdiction or the opening of an investigation into the situation, referred to by the Chamber as "the situation of crisis that triggered the DRC investigation".[20] Instead, the Prosecution must show that the case it has brought before the Chamber satisfies the jurisdictional requirements of Article 58(1) by being linked to crimes within the jurisdiction of the Court that are of relevance to the situation.

21. The distinction between the triggering procedure and the identification of cases for investigation and prosecution is also borne out by the practice of this Chamber. In particular, in the Situation in Darfur, Sudan, the Chamber issued warrants of arrest in the cases of *Abu Garda et al.* and *Al Bashir* for conduct and events that occurred after the opening of investigations into the situation in June 2005. The conduct was nonetheless related to the overall situation in Darfur, in same way that the conduct alleged in the Prosecutor's Application is related to the situation in the DRC, as described above. [21]

22. The Prosecution agrees with the Chamber that there must be a sufficient nexus between the cases brought forward for prosecution and the scope of a situation. As the principle set out in Rule 44 provides, the crimes investigated must be "of relevance to the situation". As stated above, the contextual parameters underpinning

[20] ICC-01/04-575-US, paras. 11 and 12 and page 6.
[21] The Prosecution respectfully disagrees in this regard with the position of Pre-Trial Chamber II in the Situation in the Republic of Kenya, which established an outer limit to the scope of the situation at the date of the Prosecutor's application (26 November 2009) since this was the last opportunity the Prosecutor had to assess the information available prior to its submission for the Chamber's examination. See ICC-01/09-19, paras. 201-207. Under the Chamber's interpretation, an Article 15 application can only extend to the date of the Prosecutor's request. This would mean that the Court could never authorise the Prosecutor to proceed with investigations in relation to situations of ongoing violence. Instead, the Prosecution would have to stop investigations and revert back to the Chamber at consecutive phases of the investigation. Such a piecemeal approach not only seems impracticable, but could potentially involve the Chamber in deciding investigative strategies, since each supplementary application would place before it new possible lines of inquiry.

the Prosecution's Application relate to the ongoing armed conflicts in Eastern DRC, dating from before the date of the referral, which have included a multiplicity of armed groups and armed forces over a protracted period of time and the commission of multiple criminal acts over this period of time, persisting to this day. The conduct attributed to the FDLR forms an integral part of the ongoing armed conflict in Eastern DRC, which formed the basis of the referral by the DRC Government.

23. The Prosecution recalls that neither the referral, nor the Prosecutor's prior position, nor the ruling of the Chamber have demarcated a temporal or territorial delimitation to the situation in the DRC such as to frustrate the Prosecutor's Application. For the Chamber to impose such limitations at this stage, absent a challenge by the referring State which is, on the contrary, supporting the work of the Prosecution in the Kivus, would impose restrictions that are not present in the Statute, nor sought by the referring party.

Complementarity

24. The Chamber invokes the principle of complementarity in paragraph 9 of its Decision, recalling *inter alia* that the relationship between the Court and national jurisdiction is meant to be complementary, rather than to replace national jurisdictions. The present case demonstrates complementarity at work through its collaborative and complementary efforts with national jurisdictions.[22] The FDLR are the first armed group whose leadership is being simultaneous prosecuted in complementary national and international courts (before the ICC and in Germany). At the same time, the Prosecution is continuing to explore avenues for cooperation with and assist the DRC authorities with the investigation and prosecution of other FDLR members as well as members of other armed groups and forces involved in the commission of serious crimes in the Kivus. The possibility for the Prosecutor to

[22] In relation to the Prosecution's cooperation with German authorities, see Prosecution's Application, paras. 172-172.

engage in such complementary activities flows both from the general goals contained in the preamble of the Statute as well as Article 93(10) of the Statute, in accordance with the Prosecution's policy of positive complementarity.

25. The Prosecution observes, in this regard, that the jurisdictional issues raised by the Chamber do not directly impact on the fundamental principle governing the primary responsibility of States to investigate and prosecute such crimes, nor affects the complementary relationship between the ICC and national jurisdictions.[23] The fact that the DRC authorities are currently inactive in relation to the present case is not impacted by the temporal proximity between the conduct alleged and the date of the referral. The Prosecution recalls that in relation to its investigations in the Kivus, no objection has been made by the DRC authorities contesting the scope of the Prosecutor's investigations. On the contrary, the authorities have actively supported the investigations by the Prosecution into contemporary crimes committed in the Kivus as part of its ongoing investigations into the Situation in the DRC, as triggered by their referral of the situation.

26. Moreover, insofar as the issues raised in paragraph 9 of the Chamber's Decision relate to admissibility, the Appeals Chamber has previously cautioned against the Court exercising its discretion under Article 19(1) to enter a ruling on admissibility in the context of an *ex parte* Article 58 application.[24]

Luis Moreno-Ocampo, Prosecutor

Dated this 10th day of September 2010
At The Hague, The Netherlands

[23] ICC-01/04-575-US, para. 9.
[24] ICC-01/04-169, para 52-53.