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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 REDACTED VERSION
With public redacted Annexes 1 to 5**

**Observations on behalf of victims on the Defence Challenge
to the Jurisdiction of the Court (ICC-01/04-01/10-417)**

Source: Office of Public Counsel for Victims

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
 Ms Fatou Bensouda, Deputy Prosecutor
 Mr Anton Steynberg, Senior Trial Lawyer

Counsel for the Defence

Mr Nicholas Kaufman
 Ms Yael Vias-Gvirsman

Legal Representatives of the Victims

Mr Mayombo Kassongo
 Mr Ghislain Mabanga Monga Mabanga

Legal Representatives of the Applicants

Mr Jean-Louis Gilissen
 Mr Joseph Keta
 Ms Paolina Massidda

Unrepresented Victims

**Unrepresented Applicants
 (Participation/Reparation)**

**The Office of Public Counsel for
 Victims**

Ms Paolina Massidda
 Ms Sarah Pellet
 Mr Dmytro Suprun

**The Office of Public Counsel for the
 Defence**

States' Representatives

Democratic Republic of the Congo

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr Didier Preira

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section**

Other

I. PROCEDURAL HISTORY

1. On 19 July 2011, the Defence of M. Mbarushimana introduced a Challenge to the Jurisdiction of the Court requesting Pre-Trial Chamber I to determine, in accordance with article 19(2)(a) of the Rome Statute that “*there is no jurisdiction to entertain the case against the suspect*” before the International Criminal Court (“the Defence Jurisdictional Challenge”).¹

2. On 20 July 2011, the Single Judge of Pre-Trial Chamber I issued a “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'”, granting the reclassification of the Defence Jurisdictional Challenge and related documents.²

3. On 28 July 2011, the Prosecution submitted its response to the Defence Jurisdictional Challenge.³

4. On 16 August 2011, Pre-Trial Chamber I issued a Decision requesting the Office of Public Counsel for Victims (the “OPCV” or the “Office”) to represent the unrepresented victim applicants for the purpose of their participation in the article 19 proceedings and to submit its observations on the Defence Jurisdictional Challenge, by 12 September 2011.⁴

¹ See the “Defence Challenge to the Jurisdiction of the Court”, No. ICC-01/04-01/10-290, 19 July 2011 (“the Defence Jurisdictional Challenge”).

² See 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'” (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/10-293, 20 July 2011.

³ See the “Prosecution’s response to Defence Challenge to the Jurisdiction of the Court ICC-01/04-01/10-290”, No. ICC-01/04-01/10-320, 28 July 2011.

⁴ See the “Decision requesting observations on the 'Defence Challenge to the Jurisdiction of the Court'” (Pre-Trial Chamber I), No. ICC-01/04-01/10-377, 16 August 2011, pp. 4 to 5.

5. On 18 August 2011, the Office submitted an urgent request to access documents in the case record in relation to the Defence Jurisdictional Challenge.⁵ In particular, the Office requested to be notified of (i) annexes B and C to the Defence Jurisdictional Challenge, currently classified as confidential; (ii) annexes 1 to 5 to the “Prosecution Response to the ‘Defence Request for Disclosure’” (ICC-01/04-01/10-31), currently classified as confidential and mentioned in the “Prosecution’s response to the Defence Challenge to the Jurisdiction of the Court ICC-01/04-01/10-290” (ICC-01/04-01/10-320); (iii) any other relevant documents in relation to article 19 proceedings; and (iv) un-redacted version of the Document Containing the Charges.⁶ Furthermore, the Office requested the Chamber to order the Registry to systematically notify the OPCV with any document submitted by the parties, participants and/or the Democratic Republic of the Congo related to the Defence Jurisdictional Challenge and which might be classified confidential.⁷

6. In its decision dated 18 August 2011, Pre-Trial Chamber I granted the OPCV request to access documents in relation to the requested notification of annexes B and C to the Defence Jurisdictional Challenge only.⁸

7. Accordingly, the Principal Counsel of the OPCV as Legal Representative of unrepresented victim applicants (the “Legal Representative”) respectfully submits her observations on the Defence Jurisdictional Challenge on behalf of her clients; and generally on behalf of victims who have communicated with the Court in the present case.

⁵ See the “Request to access documents in the case record in relation to the Defence Challenge to the Jurisdiction of the Court”, No. ICC-01/04-01/10-380, 18 August 2011, p. 7.

⁶ *Idem*.

⁷ *Ibid*.

⁸ See the “Decision on the Office of the Public Counsel for Victims’ ‘Request to access documents in the case record in relation to the Defence Challenge to the Jurisdiction of the Court’” (Pre-Trial Chamber I), No. ICC-01/04-01/10-382, 18 August 2011, p. 4.

II. PRELIMINARY OBSERVATIONS

8. On a preliminary basis, the Legal Representative wishes to express the victim applicants' concern in respect of the manner and the form in which the Defence has, to date, raised questions and challenges on the jurisdiction of the Court as well as on the admissibility of the present case.

9. In particular, with its "Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana" issued on 28 September 2010,⁹ the Chamber stated *inter alia* that it is "*satisfied that the case against Callixte Mbarushimana falls within the jurisdiction of the Court*"¹⁰ and decided therefore to issue a warrant of arrest for Mr. Mbarushimana for his alleged criminal responsibility with regard to eleven counts of war crimes and crimes against humanity.¹¹ In its Challenge to the Validity of the Arrest Warrant dated 9 January 2011,¹² the Defence raised the inadmissibility of the case as the only basis to challenge the validity of the warrant of arrest, but did not raise or even allude to the jurisdiction of the Court either at that time or later in the course of the proceedings. Instead, the Defence Jurisdictional Challenge was only submitted on 19 July 2011 – one month before the initially scheduled date of start of the confirmation of charges hearing.

10. The Legal Representative recalls the jurisprudence according to which "[a] party to a proceeding who claims to have an enforceable right must exercise due diligence in asserting such a right. This is as it should be in order for the Trial Chamber to take account of the interests of the other parties to and participants in the proceedings and of the statutory injunction for fairness and expeditiousness. The Appeals Chamber agrees with the Trial Chamber's conclusion that parties must submit motions that have repercussions on the

⁹ See the "Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana" (Pre-Trial Chamber I), No. ICC-01/04-01/10-1, 28 September 2010.

¹⁰ *Idem.*, par. 8.

¹¹ *Ibid.*, pp. 27 and 28.

¹² See the "Defence Challenge to the Validity of the Arrest Warrant", No. ICC-01/04-01/10-32, 9 January 2011.

*conduct of the trial in “a timely manner”. The Appeals Chamber interprets ‘timely manner’ to mean that the parties must act within a reasonable time. However, what is reasonable or unreasonable in relation to time always turns on all the circumstances of the case, including the conduct of the person seeking the Court’s assistance.”*¹³ The principle has been reaffirmed in subsequent judicial decisions citing a defendant’s failure “to exercise due diligence in asserting its right to receive witnesses’ statements in a language which the suspect fully understands and speaks. The request for exclusion of the evidence affected by the issue identified by the Defence was not filed in a timely manner.”¹⁴

11. The Legal Representative argues that filing a jurisdictional challenge – a motion with potentially major repercussions for the conduct of proceedings – just one month before the initially scheduled start of the confirmation hearings, is a remarkable failure of due diligence.

12. The Defence has hitherto asserted the inadmissibility of the case, on the basis that the alleged contemporaneous German investigation was ongoing at the moment of the issuance of the warrant of arrest, in a variety of different submissions, including the Defence Challenge to the Validity of the Arrest Warrant dated 9 January 2011,¹⁵ the Defence request for a permanent stay of proceedings dated 24 May 2011,¹⁶ the Defence request for leave to appeal decision ICC-01/04-01/10-264

¹³ See the “Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled ‘Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings’” (Appeal Chamber), No. ICC-01/04-01/07-2259, 19 July 2010, par. 54.

¹⁴ See the “Decision on “Defence request to deny the use of certain incriminating evidence at the confirmation hearing” and postponement of confirmation hearing” (Pre-Trial Chamber I), No. ICC-01/04-01/10-378, 16 August 2011, par. 19.

¹⁵ See the “Defence Challenge to the Validity of the Arrest Warrant”, *supra* note 12.

¹⁶ See the “Defence request for a permanent stay of proceedings”, No. ICC-01/04-01/10-177, 24 May 2011.

dated 5 July 2011¹⁷ and the Second Defence request for interim release dated 20 July 2011,¹⁸ while reiterating each time identical arguments.

13. The Legal Representative submits that the Court's legal framework provides for a clear structure which requires making a distinction between different stages and phases of the proceedings in accordance with relevant provisions of the Rome Statute and the Rules of Procedure and Evidence. The distinction between different stages and phases of the proceedings is deemed to be necessary to comply with the principle of integrity of the proceedings as well as with the proper administration of justice.

14. In particular, pursuant to rule 58-1 of the Rules of Procedure and Evidence, any question or challenge of the admissibility of a case under article 19 of the Statute *"shall be in writing and contain the basis for it."* Given the importance of any challenge to the admissibility of a case, such a challenge should in principle be articulated in a distinct motion along with relevant legal reasoning. Here, the Defence has instead systematically raised questions related to the admissibility as a supplemental element to support other contentions, rather than as a distinct request challenging admissibility pursuant to article 19 of the Rome Statute.

15. The Legal Representative contends that the submission of admissibility issues in conjunction with other substantial or procedural issues deprives the proceedings of their clarity, coherency and predictability and, therefore, contravenes the essential requirements of the integrity of the proceedings and the proper administration of justice.

¹⁷ See the "Defence request for leave to appeal decision ICC-01/04-01/10-264", No. ICC-01/04-01/10-266, 5 July 2011.

¹⁸ See the "Second Defence request for interim release", No. ICC-01/04-01/10-294, 20 July 2011.

16. Furthermore, the Defence allegations in respect of the inadmissibility of the case were examined by the Chamber on multiple occasions and subsequently dismissed for different reasons, and in particular because: (i) those matters have already been examined by the Chamber in its previous rulings;¹⁹ (ii) the Defence arguments cannot be considered ‘changes circumstances’ which would warrant the Chamber’s exercise of its discretion to conduct an earlier review or to modify its ruling under article 60-3 of the Statute;²⁰ and (iii) the Defence allegations are non-founded and/or are of a speculative nature.²¹

17. It appears that by submitting repetitively its allegations on the inadmissibility of the case, without providing either new factual elements or legal grounds, the Defence sought, and continues to seek, reconsideration of matters which had already been examined by the Chamber in its previous rulings. This violates basic pleading principles, as well as the Chamber’s previous rulings that reconsideration is not permitted, particularly in the absence of any compelling justification. This principle is reflected in the Court’s statutory instruments which, as the Chamber has previously held, contains “*no statutory basis [...] accommodating such a motion for reconsideration and that other Chambers have allowed such motions only exceptionally.*”²²

¹⁹ See the “Decision on “Second Defence request for interim release”” (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/10-319, 28 July 2011, p. 6.

²⁰ *Idem.*, pp. 5 and 6.

²¹ See the “Decision on the “Defence request for a permanent stay of proceedings”” (Pre-Trial Chamber I), No. ICC-01/04-01/10-264, 1st July 2011, pp. 5 to 6. See also the “Decision on the Defence request for leave to appeal the “Decision on the ‘Defence request for a permanent stay of proceedings’” (ICC-01/04-01/10-264)” (Pre-Trial Chamber I), No. ICC-01/04-01/10-288, 15 July 2011, pp. 6 and 7.

²² See the “Decision on “Second Defence request for interim release”” *supra* note 19, p. 6. See also the “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (Pre-Trial Chamber II), No. ICC-01/09-02/11-96, 30 May 2011, par. 38; the “Decision on the ‘Prosecution’s Application for Extension of Time Limit for Disclosure’” (Pre-Trial Chamber II), No. ICC-01/09-01/11-82, 10 May 2011, par. 11; the “Decision on the Defence for Mathieu Ngudjolo Chui’s Request concerning translation of documents” (Pre-Trial Chamber I), No. ICC-01/04-01/07-477, 15 May 2008, p. 5; the “Decision on the Prosecution Motion for Reconsideration and, in the alternative. Leave to Appeal” (Pre-Trial Chamber I), No. ICC-01/04-01/06-166, 23 June 2006, par. 10; the “Decision on the Prosecution Motion for Redaction” (Pre-Trial Chamber I), No. ICC-01/04-01/06-123, 23 May 2006, p. 3 and the “Decision on the Prosecutor’s Position on the Decision of Pre-Trial Chamber II To Redact Factual Description of Crimes from the Warrant of Arrests, Motion for Reconsideration, and Motion for Clarification” (Pre-Trial Chamber II), No. ICC-02/04-01/05-60, 28 October 2005, par. 18.

Moreover, motions for reconsideration are in principle not consistent with legal certainty and finality in judicial decisions which serve important purposes in achieving the orderly administration of justice,²³ legal principles which are consistent with internationally recognised human rights.²⁴

III. OBSERVATIONS ON LEGAL ISSUES RAISED BY THE DEFENCE

18. The Legal Representative notes that the OPCV was not provided with access to the entirety of the confidential materials that might be of relevance for consideration of the Defence Jurisdictional Challenge.²⁵ It follows that the Legal Representative's capacity to fully investigate the factual circumstances related to the Defence Jurisdictional Challenge may be undermined. The Legal Representative submits in this regard that the Office of the Prosecutor is in a better position than the OPCV to carry out such an investigation since it has had access to all the relevant documents.

19. Furthermore, the Legal Representative supports in full the Prosecution's response to the legal grounds of the Defence Jurisdictional Challenge.²⁶ In particular, the Legal Representative supports the Prosecution's submissions that: (i) the referral by the Government of the DRC to the ICC was not improper as it was not subject to any geographic or temporal limitation;²⁷ (ii) the Government of the DRC did not subsequently contest, and indeed actively cooperated with, the temporal or geographic scope of the current investigations relating to events during 2009 in the

²³ See the "Decision on "Second Defence request for interim release"", *supra* note 19, p. 6.

²⁴ See ECHR, *J.A. Pye (Oxford) Ltd. and J.A. Pye (Oxford) Land Ltd. v. United Kingdom*, Application No. 44302/02, 30 August 2007, par. 68; *Stubbings and others v. United Kingdom*, Applications No. 22083/93 and 22095/93, 22 October 1996, par. 51.

²⁵ See the "Decision on the Office of the Public Counsel for Victims' "Request to access documents in the case record in relation to the Defence Challenge to the Jurisdiction of the Court"", *supra* note 8.

²⁶ See the "Prosecution's response to Defence Challenge to the Jurisdiction of the Court ICC-01/04-01/10-290", *supra* note 3.

²⁷ *Idem.*, paras. 32 to 49.

Kivus;²⁸ (iii) 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;²⁹ (iv) nothing in the referral or subsequent action by the DRC suggests that it understood and intended that the Court's jurisdiction be limited to crimes committed between 1st July 2002 and 3 March 2004 or to potential wrongdoers who were responsible for those crimes;³⁰ and (v) the Prosecution has demonstrated a sufficient nexus between the cases brought forward for prosecution and the scope of a situation.³¹

20. In addition to the legal analysis provided by the Prosecution, the Legal Representative submits the following observations.

1) *Regarding the burden of proof to establish lack of jurisdiction*

21. The Defence argues that it does not bear the burden of proof for a challenge to the jurisdiction of the Court under article 19 of the Rome Statute, and that the jurisdiction of the Court should be proved by the Prosecution beyond a reasonable doubt.³²

22. The Legal Representative submits that in the procedure related to the issuance of a warrant of arrest or summons to appear, it is the Prosecution who carries the initial burden of providing the Chamber with sufficient information and evidence to establish reasonable grounds to believe that the person named in the application for a warrant of arrest or summons to appear committed the crimes alleged therein, and that the case falls within the jurisdiction of the Court.³³ After the issuance of a

²⁸ *Ibid.*, paras. 44 to 49.

²⁹ *Ibid.*, par. 4.

³⁰ *Ibid.*, paras. 50 to 52.

³¹ *Ibid.*, paras. 53 to 57.

³² See the Defence Jurisdictional Challenge, *supra* note 1, par. 41.

³³ See, *inter alia*, the "Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo" (Pre-

warrant of arrest or a summons to appear, however, the *travaux préparatoires* related to article 19 of the Rome Statute show that the burden of proof for a challenge to the jurisdiction of the Court shifts from the Prosecution to the party bringing said challenge forward.

23. In particular, the French draft of article 36 (Verification of Jurisdiction) specified that “[a]ny State Party competent to institute proceedings in connection with all or part of the acts brought before the Court and any person named in the document of submission to the Court may challenge the jurisdiction of the Court.”³⁴ France’s article 39 on challenges of submissions to the Court further stated that “[i]n every case, the State or person challenging a submission to the Court [...] shall provide all information concerning the conduct of the investigations and the judicial procedures which may support a finding of inadmissibility in the case submitted to the Court.”³⁵ This approach was shared by other delegations.³⁶ Furthermore, during the Rome Conference, Amnesty International recommended that “[s]tate challenges [should] fully address state concerns, since if the state can demonstrate that the court lacks jurisdiction or that the case is inadmissible because it is able and willing to conduct a prompt, vigorous, thorough and fair investigation, then the

Trial Chamber I), No. ICC-01/04-01/06-8-Corr (reclassified as public pursuant to the decision No. ICC-01/04-01/06-37), 24 February 2006. See the “Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005” (Pre-Trial Chamber II), No. ICC-02/04-01/05-53, 27 September 2005, para. 38; the “Warrant of Arrest for Vincent Otti” (Pre-Trial Chamber II), No. ICC-02/04-01/05-54, 8 July 2005, para. 38; the “Warrant of Arrest for Laska Lukwiya” (Pre-Trial Chamber II), No. ICC-02/04-01/05-55, 8 July 2005, para. 26; the “Warrant of Arrest for Okot Odhiambo” (Pre-Trial Chamber II), No. ICC-02/04-01/05-56, 8 July 2005, para. 28 and the “Warrant of Arrest for Dominic Ongwen” (Pre-Trial Chamber II), No. ICC-02/04-01/05-57, 8 July 2005, para. 26. See also the “Decision on the evidence and information provided by the Prosecution for the issuance of a warrant to arrest for Germain Katanga” (Pre-Trial Chamber I), No. ICC-01/04-01/07-4 (reclassified as public pursuant to oral decision dated 12 February 2008), 6 July 2007.

³⁴ See the Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. II, Compilation of Proposals, U.N. Doc. A/51/22, 13 September 1996, pp. 154, 155, 157 and 158.

³⁵ *Idem.*

³⁶ See, for instance, the proposals of Austria and Switzerland and the Spring Session Preparatory Committee on draft article 34 (Challenges to Jurisdiction), in the Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. II, Compilation of Proposals, UN Doc. A/51/22, 13 September 1996, p. 158.

suspect or accused and any evidence seized can be transferred to the state."³⁷ Similarly, Lawyers Committee for Human Rights recommended that "[s]tates who wish to challenge the competence of the court [should] have the earliest possible occasion to establish their ability and willingness to investigate the case in their own national systems."³⁸

24. As can be inferred from the *travaux préparatoires*, the burden of proof to establish lack of the jurisdiction of the Court under article 19 of the Rome Statute was intended to fall on the party or State alleging such a lack. Placing the burden of proof on the party alleging lack of the jurisdiction, after the Prosecution has satisfied its initial burden of proof that the case falls within the jurisdiction of the Court for purposes of article 58(1) of the Rome Statute, is consistent with the universally-accepted principle of fairness in criminal proceedings. Furthermore, 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.

25. This principle, also known as *actori incumbit probatio*³⁹, is relevant in the present instance since article 21 of the Rome Statute allows the Court to apply general principles of law derived from national and international law. Therefore, according to this principle, it is necessary for the party who alleges a fact to prove the truth of its claim, if not accepted by the other party, before the authority which is charged with the duty to adjudicate the dispute.⁴⁰ Said principle has been upheld before international courts such as the Iran-United States Claims Tribunal, the European Court of Justice, the International Court of Justice and the International

³⁷ See AMNESTY INTERNATIONAL, *The International Criminal Court – Making the Right Choices, Part V, Recommendations to the Diplomatic Conference*, 1st May 1998, p. 37 (emphases added).

³⁸ See LAWYERS COMMITTEE FOR HUMAN RIGHTS, "The Accountability of an *Ex Officio* Prosecutor", *International Criminal Court Briefing Series*, vol. 1, No. 6, 1 February 1998, p. 14.

³⁹ See TRAYNER (J.), *Latin Phrases and Maxims*, Harvard University, 1861, p. 15.

⁴⁰ See KAZAZI (M.), *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals*, Kluwer Law International, 1996, pp. 221 and 222.

Criminal Tribunal for the former Yugoslavia (the “ICTY”).⁴¹ In particular, the ICTY held in the case of *The Prosecutor v. Zejnil Delalić* that, although the burden of proving the allegations in an indictment against an accused rests on the Prosecution, “*there are situations in a case where the accused himself makes allegations or denies the accepted situation [...]*.”⁴² The ICTY went on to explain that “[w]here the obligation of either party at trial is to satisfy the requirement of a rule of law that a fact in issue be proved or disproved, either by a preponderance of the evidence or beyond reasonable doubt, there is a legal burden on such party [and further that] [i]t is a fundamental requirement of any judicial system that the person who has invoked its jurisdiction and desires the tribunal or court to take action on his behalf must prove his case to its satisfaction.”⁴³

26. Consequently, the Legal Representative submits that it is therefore not only appropriate but indeed necessary for the Chamber to require the Defence to present proof that the criteria under article 19 of the Rome Statute have been fulfilled in order for the latter to hold that the case against Mr. Mbarushimana does not fall within the jurisdiction of the Court.

2) *Regarding the scope of a State Party’s referral and alleged limits of Prosecution investigation*

27. The Defence Jurisdictional Challenge questions the manner in which the present case has been brought before the Court. In particular, the Defence assumption appears to operate on two legal levels: (i) when making referral pursuant to article 14 of the Rome Statute, the State Party must explicitly and precisely name or mention the geographical areas and the temporal limits of the situation, within which certain crimes have been committed; and (ii) the Prosecutor is prohibited to

⁴¹ *Idem*. See also KOKOTT (J.), *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems*, Kluwer Law International, 1998, p. 149.

⁴² See ICTY, *The Prosecutor v. Zejnil Delalić*, Case No. IT-96-21-T, Trial Judgment, 16 November 1998, p. 212.

⁴³ *Idem* (emphases added).

conduct its investigation outside of those specific geographical areas and strict temporal limits.

28. The Legal Representative submits that the analysis of the relevant *travaux préparatoires* to the Rome Statute leaves no doubt as to the lack of merits of the Defence assertions in this regard.

29. One of the very early drafts of the Rome Statute of the International Law Commission (the “ILC”) suggested that the Court’s jurisdiction can be triggered by a State Party’s referral to the Prosecutor of a complaint regarding the commission of a crime within the jurisdiction of the Court.⁴⁴ In particular, the ILC proposal read as follows:

*Article 28 Complaint: Any State Party to the Statute with jurisdiction over a particular offence [falling under the Statute]; may by submission to the Registrar bring to the attention of the Court in the form of a complaint, with such supporting documentation as it deems necessary, that a crime, within the jurisdiction of the Court, appears to have been committed.*⁴⁵

30. The term “complaint” was employed throughout the early drafts of the Rome Statute and was even used in the final drafts adopted by the Preparatory Committee for the Establishment of the ICC (the “Preparatory Committee”) that formed the basis of negotiations at the Rome Conference.⁴⁶ As for the purpose of this term, the ILC commented as follows:

The complaint, which is to be submitted to the Registrar, is intended to bring to the attention of the [ICC] the apparent commission of a crime within its jurisdiction. The complaint must be accompanied by supporting documentation for the following reasons. First, the Tribunal is envisaged as a mechanism that should be available whenever necessary, but which should not be activated unless there is reason to do so. Given the personnel required and the costs involved in a criminal prosecution, the

⁴⁴ See ILC, Report of the Working Group on the Draft Statute for an International Criminal Court, UN Doc. A/CN.4/L.488/Add.1, 12 July 1993, pp. 2-3.

⁴⁵ *Idem*.

⁴⁶ See SCHABAS (W.A.), *The International Criminal Court, A Commentary on the Rome Statute*, Oxford University Press, 2010, p. 310.

*institution should not be invoked on the basis of frivolous, groundless or politically motivated complaints. Second, the Prosecutor must have the necessary information to begin an investigation. This is not to suggest that the complaint should establish a prima facie case, but rather that it should include sufficient information and supporting documentation to demonstrate that a crime has apparently been committed and to provide a starting point for the investigation.*⁴⁷

31. According to the commentators, the drafters of the Rome Statute were aware of the fact that, at the time a complaint (currently referred to as “a situation” in the Statute) is submitted to the Court by a State Party, it will not be necessarily clear which crimes have been committed, or by whom, and thus the Prosecutor may have to initiate investigation before knowing whether the Court will be able to exercise its jurisdiction.⁴⁸

32. Therefore, the content of the 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. Rather, the specific information contained in the State Party’s referral should only provide a starting point for the Prosecutor’s preliminary examination.

33. During the negotiations held within the Preparatory Committee, various proposals were made in order to add a list of mandatory information or documentation which the State Party’s referral must contain.⁴⁹ For example, Australia and The Netherlands proposed that: “(A) *The complaint shall provide as much information as possible to assist the Prosecutor in deciding whether an investigation should*

⁴⁷ See ILC, Report of the Working Group on the Draft Statute for an International Criminal Court, UN Doc. A/CN.4/L.488/Add.1, 12 July 1993, pp. 2 and 3 (emphases added). See also in this regard the Report of the Working Group on a Draft Statute for an International Criminal Court, UN Doc. A/48/10, 1st September 1993, pp. 111 and 112; and Report of the International Law Commission on the work of its forty-sixth session, UN Doc. A/49/10, 1st September 1994, pp. 89 and 90.

⁴⁸ See WILMSHURT (E.), “Jurisdiction of the Court”, in ROY (L.) (Ed.), *The Making of the Rome Statute*, Kluwer Law International, The Hague/London/Boston, 1999, p. 139.

⁴⁹ See the German Delegation non-paper, 1st April 1996, p. 2; the Proposal by the Czech Republic on cluster II (trigger mechanism), 25 March 1996, p. 2; the Thailand’s proposed text of amendment for Articles 21 and 25 of the draft Statute, 4 April 1996, p. 1; and the U.S. Non-Paper on Rules of Investigation, Procedure and Evidence for the International Criminal Court, 21 August 1995, p. 21.

be initiated, including: (i) The basis of jurisdiction relied upon in making the complaint; (ii) The circumstances of the alleged crime; (iii) The identity and whereabouts of any suspects, if known; (iv) The identity and whereabouts of any witnesses, if known; (v) The location of evidence; (vi) Details of any investigation carried out by the complaining State party or, to its knowledge, any other State. (B) The Prosecutor may seek clarification of any matter contained in the complaint or further information from the complainant State party.”⁵⁰ But the intention of the drafters at that juncture was solely to facilitate the investigation of the Prosecutor by obliging the State Party making the referral to submit any useful information at its disposal to the Court⁵¹, rather than instituting additional admissibility criteria. In this regard, the Preparatory Committee noted that “[concerns] were expressed about stipulating a mandatory list of requirements for a complaint, because such a list might make it more difficult for States with fewer resources to lodge a bona fide complaint. For that reason, some support was expressed for the words ‘as far as possible’ [contained in the ILC’s Draft Statute], for they allowed a degree of flexibility. [...] [Therefore], [a]s regards the role of the Prosecutor, the following points were made: (a) the Prosecutor should be able to ask for clarifications of a complaint; (b) the prosecutor should not be bound by allegations in the complaint about who is or should be a suspect or accused; (c) the Prosecutor should be able to pursue criminal acts that are closely related to those in the complaint or which form a continuing pattern of criminal activity; but (d) if the complaint is to serve as a trigger, the investigation should not stray into unrelated or clearly collateral matters.”⁵²

34. It appears that the condition that a referral should specify the relevant circumstances *as far as possible*, and be accompanied by supporting documentation,

⁵⁰ See in this regard the Working paper submitted by Australia and The Netherlands, Draft Set of Rules of Procedure and Evidence for the International Criminal Court, UN Doc. A/AC.249/L.2, 26 July 1996, pp. 29-30.

⁵¹ See KIRSCH (P.) & ROBINSON (D.), “Referral by States Parties”, in CASSESE (A.), GAETA (P.) & JONES (J.R.W.D) (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 624.

⁵² See the Draft Report of the Preparatory Committee, UN Doc. A/AC.249/L.15, 23 August 1996, pp. 3 and 4 (emphasises added.) See also the Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, UN Doc. No. A/51/22, 13 September 1996, p. 48.

was considered by the Preparatory Committee to be a sensible procedural requirement, which should not change much from the formulation initially conceived by the ILC.⁵³ This approach was also in line with the some States' preference for a generic provision on the matter.⁵⁴ For example, the South African delegation stated that a referral must not be "*prescriptive in nature*", while the Norwegian delegation stated that "[t]he threshold requirements for such a referral must not be too high."⁵⁵

35. At the same time, when the Draft Statute prepared by the ILC was reviewed by the *Ad Hoc* Committee and by the Preparatory Committee, many delegations shared a particular uneasiness about the lodging of complaints with respect of one particular offence/crime as this was considered likely to create an excessive politicisation of the complaint procedure.⁵⁶ For example, the delegation of the United States stated as follows:

The complaint mechanism set forth in [the ILC's Draft Statute] is premised on the right of any State party under certain conditions to lodge a complaint with the Prosecutor alleging that a crime "appears to have been committed." We have some concern about any State party picking and choosing among individual suspects and lodging a complaint that points to one or more of them with the Prosecutor. This will encourage politicalization of the complaint procedure, as the complainant State will have to select an individual or group to face charges. Apart from politicization, determining who should be investigated may be extremely difficult for a complainant State given the often scarce information about individuals who may be involved in a core crime. This could result in one crime being submitted to the Court's jurisdiction while another, perhaps more serious crime that is part of the same conflict, is not. (Further, the lodging of a complaint targeting an individual could lead to unwarranted character assassination in the public arena prior to any investigation by the Prosecutor.) We recommend for the Committee's consideration that State parties only be empowered to refer situations to the Prosecutor, in a manner similar to the Article 23(1) power of the Security Council, [...] Once a situation is referred to the

⁵³ See KIRSCH (P.) & ROBINSON (D.), *op. cit. supra* note 51, p. 624.

⁵⁴ See the Statement of the delegation of the South Africa, Press Release - Proposed International Court Should Have Inherent Criminal Jurisdiction, Legal Committee Told, UN Doc. GA/L/2878, 1st November 1995, p. 8; and the Statement by Ms. Hilde F. Johnson, Minister for International Development and Human Rights Norway, 15 June 1998, p. 5.

⁵⁵ *Idem.*

⁵⁶ See KIRSCH (P.) & ROBINSON (D.), *op. cit. supra* note 51, p. 621.

*Prosecutor, then he or she can initiate a case against an individual without a separate complaint against that individual being filed by the complainant State [...] Of course, it is entirely possible that a referral of a situation to the Prosecutor could point to particular individuals as likely targets for investigation. In that manner, the complainant State could put one or more individuals squarely before the Prosecutor for investigation within the Prosecutor's larger determination about the situation itself.*⁵⁷

36. Thus, the Preparatory Committee noted as follows:

*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.*⁵⁸

37. Moreover, Human Rights Watch expressed its concern in the following terms:

*[The ILC's Draft Statute] would appear to restrict the Court's jurisdiction to the crimes or individuals specified in the complaint. For example, should the Prosecutor in the course of investigating a State complaint that individual X committed genocide discover that individual Y committed crimes against humanity, it is unclear whether s/he would be entitled under the present statute to proceed to prosecution on this basis.*⁵⁹

38. Similarly, Amnesty International also observed that:

[U]nder the ILC draft statute, even if the prosecutor were to become aware during the course of an investigation or prosecution that crimes had occurred which were not

⁵⁷ See in particular the United States Delegation, Preparatory Committee on ICC "Trigger Mechanism," Second Question The Role of the Security Council and of Complaints by States Articles 23 and 25, 1st April 1996, pp. 5 and 6 (emphases added).

⁵⁸ See the Proceedings of the Preparatory Committee during the Period 25 March-12 April 1996, UN Doc. A/AC.249/CRP.5, 8 April 1996, pp. 7 and 8 (emphases added). See also the Summary of the Proceedings of the Preparatory Committee during the Period 25 March-12 April 1996, UN Doc. A/AC.249/1, 7 May 1996, p. 43; the Report of the Preparatory Committee on the Establishment of an International Criminal Court Vol. I, UN Doc. No. A/51/22, 13 September 1996, p. 34.

⁵⁹ See HUMAN RIGHTS WATCH, Commentary for the August 1997 Preparatory, Committee Meeting on the Establishment of an International Criminal Court, 1st August 1997, p. 11 (emphases added).

mentioned in a state complaint or Security Council referral of individual cases, the prosecutor could not initiate an independent investigation or prosecution. [...] [Therefore] The referral must not limit the power of the prosecutor to investigate on his or her own initiative individual cases within the natural geographic and temporal scope of the situation or to suspects of a particular nationality, in contrast to the geographic limits on the Prosecutor with regard to former Yugoslavia and Rwanda and the temporal and nationality limits with regard to Rwanda.⁶⁰

39. Therefore, within the context of a State Party's referral or that of the Security Council, it became clear in the negotiations that general situations shall be referred to the Prosecutor, who, in turn, shall have the authority to decide to pursue specific charges within the scope of those situations, in line with the principle of complementarity.⁶¹ It was further envisaged that the referral mechanism of a situation rather than a specific case/crime would reduce the prospect of States Parties making referrals against specific individuals, which, at the end, might create the perception of using the Court "to settle scores".⁶² It follows that this mechanism requiring a referral of a situation protects and preserves the independence and the impartiality of the Prosecutor, by extension, that of the Court. Indeed, in relation to the Security Council's referrals, the *Ad Hoc* Committee noted in particular that "[referring] a general matter or situation to the court, as opposed to bringing a case against a specific individual [would] preserve the independence and autonomy of the court in the exercise of its investigative, prosecutorial and judicial functions."⁶³

40. Since the relevant *travaux préparatoires* do not contain any express or implied qualifications, this term "situation" appears to cover the entire territory of the State Party making the referral. In particular, a proposal on the judicial supervision over

⁶⁰ See AMNESTY INTERNATIONAL, *The International Criminal Court, Making the right choices – Part 1, Defining the crimes and permissible defences and initiating a prosecution*, 1st July 1997, pp. 110 and 111 (emphases added).

⁶¹ See KIRSCH (P.) & ROBINSON (D.), *op. cit. supra* note 51, p. 623. See also MARCHESI (A.), "Article 14", in TRIFFTERER (O.) (Ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd Edition, Baden-Baden: Nomos Verlagsgesellschaft, 2008, p. 579.

⁶² *Idem*.

⁶³ See the Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22, p. 27.

the Prosecutor's investigation, submitted by the Austrian delegation, simply stated that: "[p]rior to the commencement of the trial, a State requested by the Prosecutor to carry out investigations or a State on the territory of which the Prosecutor intends to conduct investigations may challenge the decision of the Prosecutor to initiate investigation before the Indictment Chamber on the grounds of lack of sufficient basis for a prosecution under this Statute."⁶⁴ In the same way, the Amnesty International urged that "the statute should provide that court orders are directly enforceable against an individual within the territory or jurisdiction of any state party when the investigation or prosecution is based on a state complaint or on the prosecutor's own motion, based on information from any source; court orders when the investigation or prosecution is based on a Security Council referral should be directly enforceable in all UN Member States."⁶⁵ Similarly, regarding the specific role of the Prosecutor, the Preparatory Committee considered that:

*The Prosecutor should conduct an independent and impartial investigation on behalf of the international community and should collect incriminating and exonerating information to determine the truth of the charges and to protect the interests of justice; [...], [Thus, the Prosecutor's] investigations would be conducted in accordance with the Statute and the rules of the Court as well as the national law of the State in whose territory the investigation was conducted; [and] the Prosecutor should be able to seek cooperation directly from States or could be authorized to conduct direct investigations in exceptional situations in which there were concerns regarding the objectivity of the national authorities.*⁶⁶

41. In other words, in the absence of any qualification, in the sense of geographical and temporal limits, of the term "situation", the Prosecutor is granted a wide discretion to conduct its investigation on the entire territory of the State once a referral is made by a State Party. In particular, the delegation of the United States explained as follows:

⁶⁴ See the Proposal Submitted by Austria for Articles 26, 27, 28, 29, 34, 36 and 51, UN Doc. A/AC.249/WP.10, 19 August 1996, p. 1 (emphases added).

⁶⁵ See AMNESTY INTERNATIONAL, The International Criminal Court, Making the right choices – Part III, Ensuring effective state cooperation, 1st November 1997, p. 25 (emphases added).

⁶⁶ See the Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, UN Doc. No. A/51/22, 13 September 1996, p. 34 (emphases added).

The United States Government believes that the Prosecutor should initiate investigations and prosecutions of individuals provided the court is seized with an overall situation or matter (meaning, conflict or atrocity) for adjudication. [...] An individual State should not be able to pick and choose whom to investigate and then dictate this to the Prosecutor by filing a selective complaint. Individual complaints by States Parties can only lead to highly politicized behavior by governments as they target individual suspects following cursory investigations or no investigations at all. Our proposed procedure for State Parties would be similar to the referral [of a situation] procedure for the Security Council, which is acceptable to a wide range of governments. [...] The Prosecutor would have wide discretion within the parameters of the situation or matter he or she is charged to investigate by either the Security Council or a State Party [...].⁶⁷

42. At the Rome Conference, the Norwegian delegation also stated that “*once a situation has been referred, it must be entirely up to the Court, through its Prosecutor, to investigate and prosecute individuals on the basis of a truly independent mandate.*”⁶⁸ Moreover, the joint contribution of the Prosecutor’s Office of the International Criminal Tribunal for the Former Yugoslavia and Rwanda, and the Max Planck Institute urged that “[a]ny referral of jurisdiction by a political body should not limit the discretion of the prosecutor, including the selection of targets and charges.”⁶⁹ The delegation of the United States further insisted that it supports “*giving maximum independence and discretion to the prosecutor*” and thus, when a State Party or the Security Council refers a situation to the Court, “*the prosecutor should be free to investigate the situation within the context of the overall referral.*”⁷⁰ Finally, Amnesty International further urged the participants of the Rome Conference to “*make clear that the state cannot limit the referral to include crimes committed by only one side to a conflict in a situation, as in the proposal for an ad hoc international criminal tribunal for Cambodia, or restrict the*

⁶⁷ See Ambassador David Scheffer, U.S. Ambassador on Security Council and the ICC Prosecutor, MONITOR, The Newsletter of the NGO Coalition for an International Criminal Court, 1st December 1997, p. 4 (emphases added).

⁶⁸ See the Statement by Ms Hilde F. Johnson, Minister for International Development and Human Rights of Norway, 15 June 1998, p. 5.

⁶⁹ See the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia and Rwanda, and the Max Planck Institute, Freiburg Declaration on the Position of the Prosecutor of a Permanent International Criminal Court, 28 May 1998, p. 2.

⁷⁰ See the Statement by the Honorable Bill Richardson, United States Ambassador to the United Nations at the United Nations Plenipotentiaries Conference on the Establishment of an International Criminal Court, 17 June 1998, p. 4.

nationality of those who can be investigated and prosecuted, as in the Statute of the Rwanda Tribunal. The prosecutor must be free to investigate all persons who may be responsible for crimes within the court's jurisdiction in a situation. Indeed, the danger that states can insulate persons from international criminal responsibility by selective referrals demonstrates the need for the prosecutor to be able to initiate investigations on his or her own initiative, subject to appropriate judicial scrutiny. Paragraph 2, concerning the information which should accompany the state complaint, is a useful provision, provided that it does not become the basis for declaring that the court lacks jurisdiction or that cases investigated are inadmissible because the referral did not submit all the information the state could have done with more diligence."⁷¹

43. To conclude, the Legal Representative submits that according to the *travaux préparatoires* of the Rome 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. Such specific information, mentioning, for example, particular geographical areas, should only provide a starting point for the Prosecutor's investigation and further assist the Prosecutor in directing its investigative and prosecutorial actions and resources. The term "situation" contained in Article 14 of the Rome Statute covers the entire territory of the State making the referral and the Prosecutor has wide discretion to investigate the crimes falling under the Court's jurisdiction in any parts of the State's territory. The assumption that a case is inadmissible if the charges against suspect originated from the Prosecutor's investigation in areas of the State Party's territory which had not been explicitly mentioned in the referral finds no foundation in the legislative history of the Rome Statute. Strictly limiting the Prosecutor's investigation to the geographical areas or temporal specifications expressly named in the State Party's referral is antithetical to the independence and the impartiality of the

⁷¹ See AMNESTY INTERNATIONAL, *The International Criminal Court, Making the right choices – Part V, Recommendations to the diplomatic conference*, 1st May 1998, p. 32 and 33 (emphases added).

Prosecution and the Court as a whole and further contravenes the complementarity regime of the Rome Statute.

IV. SPECIFIC VIEWS AND CONCERNS OF VICTIM APPLICANTS

44. Regarding the specific views of victims represented by the OPCV, the Office has provided directly to most victims having communicated with the Court, through the assistance of individuals in the field, an explanation on the Defence Jurisdictional Challenge. To this end, a written explanation prepared was distributed in order to gather the views and concerns of victims in the most efficient and fast way.

45. Despite the security situation in the region and the logistical difficulties often faced, the Office has received to date the observations of about 145 victims.⁷² In this regard, the Office would like to emphasise that without the support of the persons involved in this gathering of observations in the field it would have been impossible to make effective the right granted to the victims to submit observations in the matter.

46. The Office hereby provides a summary of the main views and concerns of the victims. In accordance with Regulations 23*bis* of the Regulations of the Court, Annexes 1⁷³, 2⁷⁴, 3⁷⁵, 4⁷⁶ and 5⁷⁷ are submitted in their confidential *ex parte* only

⁷² The Legal Representative notes “Decision of the Presidency on the ‘Requête urgente portant recours contre la Décision du Greffier sur la radiation d'un conseil et sollicitant une suspension immédiate des effets de cette décision’” (Presidency), No. ICC-RoC72-01/11-4, 9 September 2011 as well as the email from the Legal Officer of Pre-Trial Chamber II dated 12 September 2011. The Office has not, due to obvious time constraints, been able to contact the 39 victims concerned by the decision of the Presidency and hence their observations cannot, at this stage, be conveyed to the Pre-Trial Chamber.

⁷³ Concerning Annex 1, the intermediary consulted about 50 victims. However, due to logistical constraints, only 3 victims were able to sign the document as annexed, namely victims a/2859/11, a/2973/11 and a/2976/11.

⁷⁴ Concerning Annex 2, the OPCV received three documents, namely: the observations of the victims gathered in a WORD format as well as the original versions thereof. The Office annexes the two documents as Annex 2.

available to the OPCV version, as well as in their public redacted version. Redactions have been applied after consultation with the authors to preserve the privacy and safety of the persons concerned, as well as of victims who reside in the Democratic Republic of the Congo.

47. The overwhelming majority of the victims is of the view that the Defence Jurisdictional Challenge is not relevant and has no legal basis and should be rejected by the Pre-Trial Chamber.⁷⁸

48. Some victims⁷⁹ have analysed the letter of referral sent by President Joseph Kabila dated 3 March 2004. This analysis, whether literal, historical or circumstantial demonstrates that said letter cannot be interpreted as restricting in any way the responsibilities and functions of the Prosecutors.⁸⁰

49. But victims a/2859/11, a/2973/11, a/2976/11, a/2581/11, a/2509/11, a/2434/11, a/2506/11, a/2520/11, a/2517/11, a/2511/11, a/2518/11, a/2330/11, a/2568/11, a/2566/11, a/2839/11, a/2823/11, a/2811/11, a/2821/11, a/2813/11, a/2461/11, a/2845/11, a/2571/11, a/2569/11, a/2851/11, a/2569/11, a/2851/11, a/2826/11, a/2829/11, a/2828/11, a/2834/11, a/2816/11, a/2850/11, a/2848/11, a/2835/11, a/2553/11, a/2810/11, a/2284/11, a/2561/11, a/2585/11, a/2252/11, a/2292/11, a/2333/11, a/2269/11, a/2457/11, a/2264/11, a/2267/11,

⁷⁵ Concerning Annex 3, the OPCV received a WORD document of the observations gathered as well as the original versions thereof. The Office annexes the two documents as Annex 3.

⁷⁶ Concerning Annex 4, the OPCV received two documents, namely: the observations of the victims gathered in a WORD format as well as the original versions thereof. The Office annexes the three documents as Annex 4.

⁷⁷ Concerning Annex 5, the OPCV received two documents, namely: the *Déclaration unanime des victimes de [REDACTED] face à la question d'irrecevabilité des charges par les avocats de Monsieur Calixte Mbarushimana à la CPI* in a WORD format as well as the original handwritten version. The Office annexes both documents as Annex 5. Please note that 40 victims signed the handwritten original version but only 29 of these individuals are currently represented by the Office as explained by the intermediary in the WORD version.

⁷⁸ See Annex 1, par. 2. See also Annexes 2, 3 and 4.

⁷⁹ See *supra* note 73.

⁸⁰ See Annex 1, paras. 3-7.

a/2266/11, a/2265/11, a/2263/11, a/2257/11, a/2233/11, a/2447/11, a/2464/11, a/2469/11, a/2476/11, a/2479/11, a/2485/11, a/2501/11, a/2499/11, a/2498/11, a/2745/11, a/2720/11, a/2781/11, a/2637/11, a/2775/11, a/2776/11, a/2764/11, a/2722/11, a/2702/11, a/2433/11, a/2458/11 and others⁸¹ also insist on the fact that the security conditions in the field are not improving in the least and that they still have to face regular attacks from the FDLR thus showing the inability – or even sometimes unwillingness – of the Congolese authorities to bring them under control and to bring them to justice.⁸² Accordingly, they argue that should the Court grant the challenge of the Defence, it will be a sign for the FDLR that they can continue to act with impunity and get away with their actions.⁸³

50. Victims a/2859/11, a/2973/11, a/2976/11, a/2661/11, a/2683/11, a/2514/11, a/2508/11, a/2568/11, a/2839/11, a/2823/11, a/2329/11, a/2811/11, a/2812/11, a/2556/11, a/2843/11, a/2549/11, a/2555/11, a/2551/11, a/2822/11, a/2814/11, a/2819/11, a/2847/11, a/2554/11, a/2569/11, a/2851/11, a/2826/11, a/2829/11, a/2828/11, a/2834/11, a/2816/11, a/2850/11, a/2848/11, a/2835/11, a/2553/11, a/2269/11, a/2457/11, a/2264/11, a/2267/11, a/2266/11, a/2265/11, a/2263/11, a/2257/11, a/2233/11, a/2447/11, a/2464/11, a/2469/11, a/2476/11, a/2479/11, a/2485/11, a/2501/11, a/2499/11, a/2498/11, a/2745/11, a/2720/11, a/2781/11, a/2637/11, a/2775/11, a/2776/11, a/2764/11, a/2722/11, a/2702/11, a/2433/11, a/2458/11 and others⁸⁴ contend that the International Criminal Court is the only jurisdiction able to play an effective and deterrent role in this matter – as opposed to the Congolese national jurisdictions.⁸⁵ Moreover, they believe that the Court is the only jurisdiction where their rights will be made effective,⁸⁶ and in particular their right to protection,⁸⁷ and to reparations⁸⁸.

⁸¹ See *supra* note 73.

⁸² See Annex 1, par. 12. See also Annexes 2, 3, 4, 5 and *supra* note 73.

⁸³ See Annex 1, par. 14. See also Annexes 2, 3, 4 and *supra* note 73.

⁸⁴ See Annexes 2, 3, 4 and 5.

⁸⁵ See Annex 1, par. 13.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, par. 15.

⁸⁸ See annexes 2, 3, 4 and 5.

51. Victims a/2859/11, a/2973/11, a/2976/11, a/2260/11, a/2668/11, a/2659/11, a/2685/11, a/2787/11, a/2653/11, a/2789/11, a/2315/11, a/2686/11, a/2500/11, a/2448/11, a/2440/11, a/2521/11, a/2508/11, a/2517/11, a/2515/11, a/2511/11, a/2518/11, a/2552/11, a/2566/11, a/2823/11, a/2329/11, a/2811/11, a/2833/11, a/2549/11, a/2550/11, a/2555/11, a/2813/11, a/2847/11, a/2554/11, a/2855/11, a/2826/11, a/2829/11, a/2828/11, a/2834/11, a/2816/11, a/2850/11, a/2835/11, a/2553/11, a/2547/11, a/2328/11, a/2849/11, a/2559/11, a/2561/11, a/2585/11, a/2252/11, a/2292/11, a/2333/11, a/2293/11, /2269/11, a/2457/11, a/2264/11, a/2267/11, a/2266/11, a/2265/11, a/2263/11, a/2257/11, a/2233/11, a/2447/11, a/2464/11, a/2469/11, a/2476/11, a/2479/11, a/2485/11, a/2501/11, a/2499/11, a/2498/11, a/2745/11, a/2720/11, a/2781/11, a/2637/11, a/2775/11, a/2776/11, a/2764/11, a/2722/11, a/2702/11, a/2433/11, a/2458/11 and others⁸⁹ further argue that the Congolese judiciary is inadequate and weak and cannot be seriously considered to deal with the crimes committed in the Kivus because of their gravity and in part because the perpetrators are foreigners.⁹⁰ Moreover, some of them contend that the ICC will provide an impartial and credible Justice⁹¹ and that a trial of Mr. Mbarushimana in the Kivus will only continue to compound the situation there.⁹²

⁸⁹ See *supra* note 73.

⁹⁰ See Annex 1, par. 7 and Annexes 2, 3, 4 and 5.

⁹¹ See Annexes 2, 3, 4 and 5.

⁹² *Idem*.

FOR THE FOREGOING REASONS, the Legal Representative respectfully requests Pre-Trial Chamber I to dismiss the Defence Jurisdictional Challenge and to hold that the case against Mr. Callixte Mbarushimana falls within the jurisdiction of the Court.



Paolina Massidda
Principal Counsel
Office of Public Counsel for Victims

Dated this 12th Day of September 2011

At The Hague, The Netherlands