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ROD RASTAN*

THE JURISDICTIONAL SCOPE OF SITUATIONS BEFORE THE INTERNATIONAL CRIMINAL COURT

ABSTRACT. How should the jurisdictional scope of situations before the International Criminal Court (ICC) be defined? Modern conflicts are seldom well-defined events. They stop and re-start, have precursors, and encounter periods of low intensity and resurgence, as armed groups remobilize, undergo new configurations, or link up with other movements. Combatants, small arms, and extremist rhetoric migrate from one territory to another, precipitating new, inter-related violence. How should the ICC deal with such complex parameters? The prosecution will normally focus its investigation on the most serious criminal episodes within a situation. But what if the most serious incidents are separated by large periods of abeyance, representing different phases of violence, or waged between different formations of rival armed groups? What commonalities are required to encapsulate such acts within the same situation? These issues will be guided both by the prevailing factual circumstances as well as objective relational links. The discussion below examines a number of these issues in the first decisions of the ICC on the jurisdictional confines of situations.

I INTRODUCTION

How should the jurisdictional scope of situations before the International Criminal Court (ICC) be defined? Modern conflicts are seldom well-defined events. They stop and re-start, have precursors, and encounter periods of low intensity and resurgence, as armed groups remobilize, undergo new configurations, or link up with other movements. Combatants, small arms, and extremist rhetoric migrate from one territory to another, precipitating new, inter-related violence. How should the ICC deal with such complex parameters? The prosecution will normally focus its investigation on the most serious

* Ph.D. (LSE), LL.M (Nottm.); Legal Advisor, Office of the Prosecutor, International Criminal Court. The views expressed herein are solely the author's and do not necessarily reflect those of the Office of the Prosecutor or the International Criminal Court.

criminal episodes within a situation. But what if the most serious incidents are separated by large periods of abeyance, representing different phases of violence, or waged between different formations of rival armed groups? What commonalities are required to encapsulate such acts within the same situation? These issues will be guided both by the prevailing factual circumstances as well as objective relational links. The discussion below examines a number of these issues in the first decisions of the ICC on the jurisdictional confines of situations.

An overview of temporal, territorial, personal and subject-matter jurisdiction before the ICC has been treated previously and is not rehearsed here.[1] Instead, the sections below examine how the early decisions of the ICC on the jurisdictional boundary of situations, primarily to date in relation to temporal and territorial jurisdiction, have shaped the required nexus between cases and situations.

II THE SCOPE OF THE DRC REFERRAL

The *Mbarushimana* case is the first where the Court has critically examined the sufficiency of the required nexus between an individual case and the overall situation. The subject was initially raised by the Pre-Trial Chamber on its own initiative during the warrant issuance phase and subsequently litigated by the defence by way of a jurisdictional challenge. Issues considered in these proceedings concerned the temporal and territorial parameters of a referred situation, including in this instance the intent and understanding of authorities of the Democratic Republic of the Congo (DRC) and of the Prosecutor at the time of the referral, the notion of a ''situation of crisis'' which is said to trigger a particular referral and the required continuity between the situation and the cases brought forward for prosecution in view of the organization(s) and person(s) involved.

2.1 *Article 58 Application*

At very outset, in considering whether to issue an arrest warrant at all, the Pre-Trial Chamber questioned whether the application against Callixte Mbarushimana fell within the extant situation in the

[1] See R. Rastan, 'Situation and Case: Defining the Parameters' in C. Stahn and M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge, Cambridge University Press, 2011). This contribution serves as a companion piece to said chapter by examining the interpretation of jurisdictional parameters in a number of recent decisions of the Court.

DRC. Although the crimes alleged occurred in North and South Kivus ('the Kivus'), undoubtedly a part of the DRC, the Chamber noted that they related to events taking place during 2009, at considerable temporal distance from the original referral by the DRC in 2004. The Chamber questioned whether these events were sufficiently linked to the facts that triggered the initial referral: suggesting, by implication, that it might constitute a separate situation.[2] A negative finding would have necessitated the establishment of a new situation (either by another State Party referral or *proprio muto* authorization) within whose parameters the new case could be brought. Since the DRC was a State Party at the relevant time of the alleged offences the issue affected thus a matter of procedure, rather than of substance – i.e. is it part of *this* situation, as opposed to does the Court have jurisdiction *at all*.

The Pre-Trial Chamber framed its inquiry as a request for observations on "the link between the events alleged in the warrant application and the situation of crisis that triggered the DRC investigation" (i.e. the DRC referral).[3] In explaining the necessity for such clarification, the Chamber noted that the wording of Articles 13(a) and 14(1) "seems to require that the subject matter of the referral consist of events that either occurred before or are still ongoing at the time of its submission to the Prosecutor". It noted the same logic in Article 53(l)(a), in the requirement to establish whether a crime within the jurisdiction of the Court "has been or is being committed". As such, the Chamber held it a necessary component of its supervisory functions to identify the scope of the situation.[4] The Chamber furthermore noted that the need for such indentification "is rooted *inter alia* in the principle of complementarity as the paramount principle governing the relationship between the Court and national jurisdictions, according to which the Court is meant to complement, rather than replace, national jurisdictions", suggesting that the pursuit of

[2] *Situation in the Democratic Republic of the Congo* (Decision requesting clarification on the Prosecutor's Application under Article 58), ICC-01/04-575 (11 October 2010).

[3] *Ibid.*, 6. See also *ibid.*, para. 12, "(…) it is necessary for the Chamber to determine whether such events are sufficiently linked to the situation of crisis that triggered the DRC investigation, so as to fall within its scope and therefore within the Court's jurisdiction".

[4] *Ibid.*, paras. 6–8.

cases without situational delimitations might be inconsistent with the principle of complementarity.[5]

Following submissions by the Prosecutor the Chamber ultimately went on to find that the case did fall within the situation as referred by the DRC. It was satisfied that the original referral letter was not limited to past crimes occurring in particular locations, but to crimes that were ongoing throughout the country as a whole (« *situation qui se déroule dans mon pays depuis le 1er juillet 2002* »).[6] The Prosecutor in his notification to the Presidency and to the States Parties, upon the opening of investigations, also characterized the situation as encompassing the entire territory of the DRC since 1 July 2002.[7] In other words, there appeared to be nothing prejudicing the temporal or geographical scope of the referral in a way that would exclude more recent events in the Kivus.

The Chamber also went on to examine whether there was a sufficient link between the crimes alleged in the Prosecutor's application and the overall scope of the situation. As the Chamber stated:

> (…) for the case at hand not to exceed the parameters defining the DRC situation under investigation, the crimes referred to in the Prosecutor's Application must have occurred in the context of the ongoing situation of crisis that triggered the jurisdiction of the Court through the above mentioned referral. In the view of the Chamber, it is only within the boundaries of the situation of crisis for which the jurisdiction of the Court was activated that subsequent prosecutions can be initiated. Such a situation can include not only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, in so far as they are sufficiently linked to the situation of crisis referred to the Court as ongoing at the time of the referral.[8]

Having analyzed the additional information provided by the Prosecutor, the Chamber was satisfied that at least since 4 December 2002 hostilities involving the regular armed forces and different armed groups were ongoing in the east of the DRC, in particular in South Kivu and the Ituri region of the DRC. It also found that the *Forces Démocratiques de Libération du Rwanda* (FDLR), the armed group with which Mr. Mbarushimana was allegedly linked, were already

[5] *Ibid.*, para. 9.

[6] *Prosecutor v. Callixte Mbarushimana* (Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana), ICC-01/04-01/10-1 (11 October 2010), para. 5.

[7] *Ibid.*

[8] *Ibid.*, para. 6.

actively engaged in military activities in the eastern DRC and allegedly involved in the commission of war crimes around the time of the referral. As such, the Chamber was *prima facie* satisfied that the case against Callixte Mbarushimana fell within the context of "the DRC situation of crisis encompassed by the referral that triggered the Prosecutor's investigation".[9]

2.2 *Defence Challenge to Jurisdiction*

After the warrant was issued, the defence, which had not been a party to the earlier *ex parte* warrant application proceedings and was only apprised of their content upon the unsealing of the records, developed these lines of questioning further. Specifically, the defence contested three issues. It argued that the "situation of crisis that triggered the jurisdiction of the Court" at the time of the referral in fact focussed on Ituri and did not envisage events then unfolding in the Kivus. This it based on statements made by the Prosecutor, including in his first address to the Assembly of States Parties in 2003, which appeared to refer exclusively to Ituri. If the referral was indeed limited geographically to Ituri, the Court would have no jurisdiction to examine events in the Kivus without the activation of a separate triggering mechanism. Second, even if the situation did encompass the Kivus, the defence argued that the Prosecutor had to establish that the FDLR had committed atrocity crimes prior to 3 March 2004 (the time of the referral) in order for those alleged crimes to have contributed to the aforementioned "situation of crisis". Lastly, it argued that there was an insufficient nexus between the charges against Mbarushimana personally and the overall scope of the situation (in the light of the aforementioned arguments).[10] In later submissions seeking leave to reply to the Prosecutor's response, the defence sought to raise a further argument based on the fact that Mbarushimana, as a refugee at the time of the referral, was under France's legal protection and entitled to the jurisdictional opt-out lodged by France pursuant to Article 124.[11] The defence also sought leave to argue that since the alleged contribution by his client occurred on French ter-

[9] *Ibid.*, para. 7.

[10] *Prosecutor v. Callixte Mbarushimana* (Defence Challenge to the Jurisdiction of the Court), ICC-01/04-01/10-290 (20 July 2011), para. 12.

[11] *Prosecutor v. Callixte Mbarushimana* (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), ICC-01/04-01/10-323 (01 August 2011) ('*Mbarushimana* Defence request for leave to reply'), para. 6.

ritory and not that of the DRC, it was not encompassed by the scope of the DRC referral – which was necessarily limited to conduct occurring on Congolese soil.[12]

In its decision on the defence challenge to jurisdiction the Chamber rejected all of the defence's principal submissions.[13] As a preliminary matter, in referring to the need to identify the scope of the situation, the Chamber recalled the connection between the Court's jurisdiction and the principle of complementarity. It stated that the existence of a link between the jurisdictional scope of a situation and the case at hand "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". As the Chamber observed, "[t]he 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".[14] This particular observation appears to have been necessary to dispel the notion that a state can provide the Court with jurisdiction *carte blanche* and thereby "abdicate its responsibility for exercising jurisdiction over atrocity crimes for eternity".[15] Clearly, there must be a link between the case at hand and the situation before the Court.

Turning to the defence's first argument, the Chamber found that the DRC authorities had referred the situation "in the DRC", covering the entire country.[16] This was also confirmed by the observations filed by the DRC authorities to the Court at the Chamber's invitation.[17] The Chamber noted, *inter alia*, that the Article 18 notification by the Prosecutor to all States Parties referred repeatedly to allegations of crimes occurring in the entire territory of the DRC.[18]

[12] *Ibid.*

[13] *Prosecutor v. Callixte Mbarushimana* (Decision on the "Defence Challenge to the Jurisdiction of the Court"), ICC-01/04-01/10-451 (26 October 2011) ('*Mbarushimana* Decision on Jurisdiction'). As described below, the Chamber did not grant the defence leave to raise its further supplementary arguments.

[14] *Ibid.*, para. 21.

[15] *Ibid.*, para. 16.

[16] *Ibid.*, para. 26.

[17] *Ibid.*, para. 15.

[18] *Ibid.*, para. 33.

The Chamber acknowledged that there was one isolated reference to Ituri in the said Article 18 notification, where the Prosecutor notes that particular focus during the preliminary examination phase had been given to crimes occurring in Ituri, but it concurred with the prosecution that the reference here to Ituri was "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", which by contrast was defined as encompassing the entire territory of the DRC.[19]

In relation to temporal jurisdiction, the Chamber noted that the DRC referral employed terms that indicated the intent to address not just past crimes, but also ongoing crimes.[20] In this regard, as the Chamber noted, "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".[21] The Chamber further opined that, pursuant to Articles 13 and 14 of the Statute, a State Party in any event may only refer to the Prosecutor an entire situation and that "[a]ccordingly, 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."[22] Finally, the Chamber also observed that the regions of Ituri and the Kivus were often mentioned jointly in several Security Council resolutions and other United Nations documents dating from 2002 to the present, as

[19] *Ibid.*, paras. 32–34.

[20] The terms of the DRC referral letter as recalled by the Chamber refer to: « *situation qui* ***se déroule*** *dans mon pays* ***depuis*** *le 1er juillet 2002* » [emphasis added in the decision]; *ibid.*, para. 26.

[21] *Ibid.*, para. 27 [emphasis added in the decision].

[22] *Ibid.* See similarly the referral by the government of Uganda which defined the scope of its referral as related to the Lord's Resistance Army. The Prosecutor subsequently clarified with the government of Uganda that the OTP would examine allegations from all parties to the conflict; see letter of Prosecutor dated 17 June 2004 annexed to decision of the *Situation in Uganda* (Decision Assigning the Situation in Uganda to Pre-Trial Chamber II), ICC-02/04 (5 July 2004). Rule 44, dealing with declarations lodged pursuant to Article 12(3), also provides that a declaration "has as a consequence the acceptance of jurisdiction with respect to the *crimes* referred to in Article 5 *of relevance to the situation* (…)" [emphasis added]. See discussion in Rastan (n. 1), pp. 422 and 433.

regions of eastern DRC providing reasons for deep concern affecting international peace and security: hence, further indicative of continuity between the alleged events and locations.[23]

In relation to the defence's second argument, the Chamber held that it was not necessary to prove that the FDLR in particular, as the entity or organization concerned, was committing crimes at the time of the referral, i.e. in order for it to have contributed to the situation of crisis triggering the same referral. Instead, the critical question was whether the "crimes committed" were "sufficiently linked to the situation of crisis which was ongoing at the time of the referral and was the subject of the referral", "not the particular timing of the events underlying an alleged crime". For this purpose, the Chamber held that it was "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".[24] As the Chamber summarized:

> 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.
>
> 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

[23] *Mbarushimana* Decision on Jurisdiction (n. 13), paras. 35–38, citing S/RES/1445 (2002); S/RES/1565 (2004); S/PRST/2004/15(2004); S/PRST/2005/31 (2005); S/RES/1856 (2008); and S/RES/1896 (2009).

[24] *Mbarushimana* Decision on Jurisdiction (n. 13), paras. 41–42. The Chamber further observed that, in any event, contrary to the defence's assertions, the FDLR were in fact active and alleged to have been involved in the commission of crimes in the DRC since at least the early 2000 onwards; *ibid.*, paras. 44–46.

Prosecutor could not have been charged at the time of the original referral for crimes within the jurisdiction of the Court.[25]

For similar reasons, the Chamber also dismissed the defence's third argument that since contemporaneous events in the Kivus and the activities of the FDLR did not prompt the referral there was no causal link to Mr. Mbarushimana as an alleged member of the FDLR.[26] As the Chamber added: "[b]y 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".[27]

The Chamber's findings may be summarized as follows: (1) a situation cannot be left indeterminate – it must succumb to certain jurisdictional parameters; (2) the case brought forward by the Prosecutor cannot exceed the jurisdictional parameters of that situation; (3) specifically, the crimes concerned must have occurred in the context of the "situation of crisis" that triggered the referral; (4) this may encompass crimes that pre-dated or were contemporaneous to the referral as well as crimes committed thereafter as long as they are sufficiently linked to the original situation of crisis; (5) in this regard, it is not necessary to establish that the individuals or entity concerned were active or committing crimes at the time of the referral; and (6) 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 the crimes are committed within the context of the situation of crisis that triggered the jurisdiction of the Court.

2.3 *"Situation of Crisis"*

The Chamber's above mentioned reliance on the notion of "situation of crisis" which is said to trigger a referral appears to have been introduced by Pre-Trial Chamber I with the aim of defining the parameters on the Court's jurisdiction in objective terms. The phrase, which appears throughout the jurisdictional proceedings in the *Mbarushimana* case, is employed as a term of art, but is without

[25] *Ibid.*, paras. 41–42.

[26] *Ibid.*, para. 47.

[27] *Ibid.*, para. 50.

definition or reference to an explanatory authority. It is unclear, therefore, what the words ''of crisis'' denote.

The phrase does not appear in the drafting history of the ICC Statute or Rules. Apart from generic references by some delegations in documents from this period to the occurrence of a ''crisis'' in various countries (e.g. the ''crisis in the Balkans'', ''the Kosovo crisis'', the ''crisis in eastern Zaire''), the word ''crisis'' does not appear in any discussions as a threshold qualifier to the exercise of jurisdiction. The phrase ''situation of crisis'' has been used by another court, the European Court of Human Rights (ECtHR), in its landmark ruling in *Lawless v. Ireland*. The ECtHR in that case examined the permissible scope of derogations during states of emergency under Article 15 of the European Convention on Human Rights (ECHR) by reference to an assessment of the gravity or seriousness of the circumstances at hand and the proportionality of the governmental response thereto.[28] As the ECtHR held: ''[i]n the general context of Article 15 of the Convention, the natural and customary meaning of the words 'other public emergency threatening the life of the nation' is sufficiently clear; they refer to an exceptional *situation of crisis* or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed''.[29] In the *Greek Case*, the European Commission on Human Rights similarly observed:

> Such a public emergency may then be seen to have, in particular, the following characteristics: (1) It must be actual or imminent. (2) Its effects must involve the whole nation. (3) The continuance of the organised life of the community must be threatened. (4) The *crisis* or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.[30]

[28] Article 15(1) of the ECHR provides, ''In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law''. Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222 (1950).

[29] *Lawless v. Ireland (No 3)* (1961) 1 EHRR 15 [emphasis added].

[30] *Greek Case* (1969) 12 YB 1, para. 153 [emphasis added]. Similar language in relation to situations justifying derogation is found in 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights', under the section entitled 'Public Emergency which Threatens the Life of the Nation': ''A state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to

It is not apparent from the context whether the Chamber was using ''situation of crisis'' in the manner reflected in the derogation case law of the ECtHR to indicate assessments of gravity or proportionality. If it was, it is doubtful whether these considerations should apply as a jurisdictional boundary to limit the situations with which the Court may be seized. Such considerations appear to recall the notion of ''social alarm'' and accompanying factors that were introduced earlier by the same Pre-Trial Chamber in the *Lubanga* and *Ntaganda* cases as a threshold for the exercise of jurisdiction, and which were ultimately rejected by the Appeals Chamber.[31] As the Appeals Chamber recalled, while gravity features as part of the assessment on the admissibility of cases that are otherwise amenable to the jurisdiction of the Court, it is not a relevant factor for determining jurisdiction itself.[32]

If it is uncertain whether the Chamber intended to use ''situation of crisis'' within the meaning applied by the ECtHR, one respected commentator does make an explicit link to the Rome Statute:

> The distinction between the triggering and the criminal procedures in the RS [Rome Statute] is closely related to the distinction between the object of the requests that are respectively analysed in each of such procedure: situations and cases. The adjective ''crisis'' has been chosen in this book to define the expression ''situation'' referred to in arts. 13(a) and (b), 14(1), 15(5) and (6), 18(1) and 19(3) RS. This is in order to highlight the fact that this expression refers to exceptional circumstances – not structural ones – which constitute a departure from the status quo. As noted above, the RS constitutes a last resort tool for the protection of the highest values of the international community from those acts which, owing to their exceptional gravity,

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Footnote 30 continued
Article 4 (hereinafter called 'derogation measures') only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that: (a) affects the whole of the population and either the whole or part of the territory of the State, and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant. Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4.''; 'Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (1985) 7 Human Rights Quarterly 3, paras. 39–40.

[31] *Situation in the Democratic Republic of the Congo* (Judgment on the Prosecutor's appeal against the decision of the Pre-Trial Chamber I entitled ''Decision on the Prosecutor's Application for Warrants of Arrest, Article 58''), ICC-01/04-169, under seal 13 July 2006; reclassified public 23 September 2008 (*Ntaganda* Article 58 Appeal), paras. 69–79.

[32] *Ibid.*

may seriously undermine them. Thus, one can say that it is not the proper tool to be used against those other practices which, despite not being shared by the different cultures of the peoples making up the international community, are rooted in some of them (…) Thus, it is submitted that it would be contrary to the object and purpose of the RS to activate the Court's dormant jurisdiction over structural situations for the purpose of prosecuting some practices, such as some general discriminatory practices against women or homosexuals, that are historically rooted in the cultures of some peoples and that could be qualified by some as the crime against humanity of persecution by reason of gender or sexual orientation. In this regard, one can conclude that other means which fit better with the structural character of the situation in which these general discriminatory practices take place should be used to encourage their progressive elimination.[33]

As discussed above, recourse to a distinction between exceptional versus structural circumstances to demarcate the jurisdiction of the ICC is not supported by the drafting history. To the extent that the above passage intermingles gravity, which forms part of admissibility, with jurisdiction, it similarly appears to presage "social alarm" type considerations that were later rejected by the Appeals Chamber.[34] It is also debatable whether the ICC was intended to or should necessarily exclude structural crimes. While it is possible that cases concerning such conduct might fall foul of the gravity criteria under Article 17(1)(d), some of the most serious crimes within the jurisdiction of the Court may be quintessentially structural. This may include discriminatory practices based on deliberating inflicting on a group conditions of life calculated to bring about its physical destruction in whole or in part[35]; the imposition of measures intended to prevent births within a group[36] or enforced sterilization[37]; persecution against any identifiable group or collectivity, for example against an ethnic group or a religious minority, in connection with any act listed in article 7(1) (crimes against humanity) or any crime

[33] H. Olásolo, *The Triggering Procedure of the International Criminal Court* (Leiden, Brill Martinus Nijhoff, 2005), 43.

[34] The Appeals Chamber referred to the similarly undefined and indeterminate use of the term "social alarm" as follows: "As to the 'social alarm' caused to the international community by the relevant conduct, which, in the Pre-Trial Chamber's opinion, is a consideration for the first prong of the Pre-Trial Chamber's test, the Pre-Trial Chamber has not explained from where it derived this criterion. It is not mentioned in the Statute at all". *Ntaganda* Article 58 Appeal (n. 31), para. 72.

[35] Rome Statute of the International Criminal Court (2002) 2187 UNTS 90, Preamble [hereinafter Rome Statute or ICC Statute], Article 6(c).

[36] *Ibid.*, Article 6(d).

[37] *Ibid.*, Article 7(1)(g).

within the jurisdiction of the Court[38]; or apartheid.[39] It is unclear if the Chamber intended the phrase in this manner either.

From the context of the jurisdictional proceedings in the *Mbarushimana* case, the Chamber appears to have added the words ''of crisis'' primarily for temporal and territorial purposes to establish a link to the armed conflict in the DRC. This it defined as including the armed conflict in Ituri and the Kivus as it existed at the time of the referral in 2004 and which was ongoing through 2009.[40] Given that the Chamber anyway proceeded to specify the temporal and territorial parameters of the situation in this manner, it is unclear whether the words ''of crisis'' add anything of substance. The phrase appears to have been used as little more than shorthand. Accordingly, in view of the absence of a definition, its mirroring of wording used in a very different context by the ECtHR to deal with derogations, and its threshold-setting use by Olásolo to constrain the exercise of ICC jurisdiction, it is uncertain whether the continued retention of the qualifier ''of crisis'' to the statutory term ''situation'' remains helpful, superfluous or opaque.

2.4 *Non-refoulment, Article 124 and Objective Territoriality*

Leave to reply was ultimately denied with regard to the defence's further jurisdictional arguments related to Mbarushimana's presence in France and his status as a ''French-protected'' person. The Chamber held that these were new legal arguments unrelated to any issues arising from the prosecution's response. The arguments, although broached only in preliminary form, nonetheless raise a number of interesting questions. The defence's intended submissions, presented as part of its challenge to jurisdiction, were outlined as follows:

> In its reply, the Defence will argue that by 3 March 2004, Mr. Mbarushimana was already on French territory having received refugee status. The Defence will further argue that since France had, at that time, made a reservation pursuant to Article 124 of the Rome Statute, the situational referral could not then have encompassed war crimes committed by French-protected people such as Mr. Mbarushimana. In any event, in so far as the sum total of Mr. Mbarushimana's alleged contribution to the criminal common purpose is concerned (i.e. his purported handling of the 'deceitful' international media campaign) – all of it was conducted on French territory and not in the DRC. In circumstances such as these, therefore, the Defence will argue that the

[38] *Ibid.*, Article 7(1)(h).

[39] *Ibid.*, Article 7(1)(j).

[40] *Mbarushimana* Decision on Jurisdiction (n. 13), para. 55.

basic precondition for jurisdiction under Article 12 of the Rome Statute ceases to exist since the referral was not made by the State on the territory of which 'the conduct in question' occurred.[41]

The first of these arguments looks to the fact that Mbarushimana had refugee status in France at the time of the referral by the DRC authorities. While the 1951 Convention relating to the Status of Refugees (Refugee Convention) and its 1967 Protocol do not shield refugees or asylum-seekers who have engaged in criminal conduct from prosecution as such, it is true that international refugee law does preclude extradition in certain circumstances. In particular, refugees and asylum seekers are to be protected from extradition to a country where they have well-founded reasons to fear persecution on the grounds enumerated in Article 1A(2) of the Refugee Convention.[42] The principle of *non-refoulement* establishes a mandatory bar to extradition, for example, to a refugee's country of origin[43] or any other country where he or she has reason to fear persecution or from where he or she could be sent to a country where there is a risk of persecution.[44] It is highly doubtful, however, that this rule could be successfully invoked as a bar to surrender to the ICC since no risk of exposure to persecution linked to one of the Refugee Convention grounds would exist. As to onward transfer, the practice of the Court indicates that, pursuant to Article 21(3) of the Rome Statute, the ICC will not transfer a person within its custody, once proceedings have been concluded, to any state without an assessment of whether internationally recognized human rights might thereby be violated.[45] For convicted persons, moreover, the state

[41] *Mbarushimana* Defence request for leave to reply (n. 11), para. 6.

[42] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also provides "No State Party shall expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture"; 1465 UNTS 85 (1984), Article 3. See generally UNHCR, 'Guidance Note on Extradition and International Refugee Protection' (April 2008) (UNHCR Guidance Note on Extradition).

[43] An exception to this rule applies if it has been established by the authorities of the requested State that the wanted person comes within one of the exceptions provided for in Article 33(2) of the 1951 Convention.

[44] UNHCR, 'Note on Non-Refoulement', EC/SCP/2 (1977), para. 4; Human Rights Committee General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13 (26 May 2004), para. 12.

[45] *Prosecutor v. Thomas Lubanga Dyilo* (Redacted Decision on the request by DRC-DOl-WWWW-0019 for special protective measures relating to his asylum

of enforcement must be able to demonstrate, *inter alia*, "[t]he application of widely accepted international treaty standards governing the treatment of prisoners".[46]

It should also be recalled that while the principle of *non-refoulment* is absolute, a person's status as a refugee is not. It is subject to a number of exclusion provisions such as Article 1F of the Refugee Convention which applies where there are serious reasons to consider that the person concerned has committed war crimes or crimes against humanity.[47] Questions with regard to eligibility for refugee status may thus be raised in the state of asylum as a consequence of an extradition request from another state or in the context of surrender proceedings to the ICC. Depending on the circumstances, this may trigger a re-examination of the wanted person's refugee status in cancellation or revocation proceedings pursuant to Article 1F of the

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Footnote 45 continued
application), ICC-01/04-01/06-2766-Red (5 August 2011), para. 72: "Article 21(3) of the Statute stipulates that the application and interpretation of the applicable law must be consistent with internationally recognized human rights. The obligation to return defence Witness 19 to the DRC without delay under Article 93(7)(b) of the Statute and Rule 192(4) of the Rules cannot, therefore, be discharged without an assessment of whether internationally recognized human rights may be violated. This leads the Chamber to consider the implications of his asylum claim". As the Trial Chamber went on to clarify, the ICC has no jurisdiction to address the merits of an asylum application, which can only be conducted by the relevant state (here the Netherlands) which is as a signatory to the applicable international instruments; *ibid*., para. 84. Trial Chamber II similarly clarified, "Article 21(3) of the Statute does not place an obligation on the Court to ensure that States Parties properly apply internationally recognised human rights in their domestic proceedings. It only requires the Chambers to ensure that the Statute and the other sources of law set forth at article 21(1) and 21(2) are applied in a manner which is not inconsistent with or in violation of internationally recognised human rights"; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Decision on an Amicus Curiae application and on the "*Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile*" (articles 68 and 93(7) of the Statute)), ICC-01/04-01/07-3003-tENG (16 June 2011), para. 62.

[46] Article 103(3)(b), Rome Statute (n. 35).

[47] Article 1F of the 1951 Convention states: "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) He has been guilty of acts contrary to the purposes and principles of the United Nations". Convention Relating to the Status of Refugees, 189 UNTS 150 (1951).

Refugee Convention.[48] For exclusion to be justified under the Convention, it must be established that the person concerned incurred individual responsibility for the crimes concerned and that there is clear and credible evidence which meets the standard of proof required for exclusion from international refugee protection ("serious reasons for considering").[49]

A related argument raised by the defence was that, on the basis of the jurisdictional opt-out lodged by France pursuant to Article 124, "the situational referral could not have then encompassed war crimes committed by French-protected people such as Mr. Mbarushimana". The defence's argument suggests that the effect of the Article 124 opt-out by a State Party with regard to war crimes occurring on its territory or by its nationals could be extended to other persons, in particular non-nationals (aliens) who benefit from asylum or possibly permanent residency status. Article 124 acts as an exception to jurisdiction conferred by a State Party for the purpose of the exercise of jurisdiction under Article 12(1), based as it is on the principles of territory and active personality. While there is a general human rights obligation of states to respect and ensure the rights of all individuals within its territory irrespective of whether they are nationals or aliens,[50] such duties do not afford to aliens, including those protected

[48] UNHCR Guidance Note on Extradition (n. 42), para. 72. "Cancellation" refers to a decision to invalidate a refugee status recognition which should not have been granted in the first place because the individual concerned did not meet the eligibility criteria at the time of the original decision; while "revocation" means withdrawal of refugee status in situations where a person who was properly recognized as a refugee has incurred individual responsibility for acts within the scope of Article 1F(a) or 1F(c) of the 1951 Convention after recognition; *ibid*., para. 94.

[49] UNHCR Guidance Note on Extradition (n. 42), para. 84. In this regard, UNHCR has observed: "Given the rigorous manner in which indictments are put together by international criminal tribunals (…) indictment by such bodies, in UNHCR's view, satisfies the standard of proof required by Article 1F"; UNHCR, 'Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees' (4 September 2003), para. 107; available at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f5857d24.

[50] Article 2(1), International Covenant on Civil and Political Rights, 999 UNTS 171 (1966); Human Rights Committee General Comment No. 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), para. 10: "(…) the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party".

by *non-refoulment*, a status equivalent to nationals such that it would displace the personal jurisdiction of the ICC: i.e. a person's status as a refugee in particular state could not in and of itself act as a bar to the exercise of jurisdiction by the Court by virtue of an Article 124 declaration lodged by that state.[51] It is also worth recalling that: (a) arguments based on Article 124 would only affect jurisdictional claims *vis-à-vis* war crimes, not crimes against humanity, with which the suspect in this case was also charged; and (b) the seven year opt-out lodged by France ceased on 15 June 2009,[52] whereas the arrest warrant extended to alleged war crimes occurring up to September 2009. As such, it would appear that Article 124, even if applicable, could not have divested the Court of jurisdiction over the case.

Finally, the defence requested leave to argue that Mbarushimana was not amenable to the scope of the situation because his contribution was made on the territory of France not the DRC. It was argued that since the DRC had referred the situation with respect to crimes occurring on its own territory, those allegedly taking place in France would fall foul of its territorial scope.[53] As a preliminary matter, it is doubtful whether a contribution to the commission of a crime by a group of persons acting with a common purpose necessarily triggers considerations of territoriality, since all of the mental and material elements of the alleged crimes occurred in the DRC.[54] Assuming, however, that territoriality did apply, the question would relate to the *locus delicti* and

[51] Note, according to the arrest warrant Mr. Mbarushimana is a Rwandan national; *The Prosecutor v. Callixte Mbarushimana* (Warrant of Arrest for Callixte Mbarushimana), ICC-01/04-01/10-2-tENG (19 October 2010).

[52] « *Conformément à l'engagement pris, le retrait de la déclaration française autorisée par l'article 124 du Statut de Rome concernant la compétence de la CPI pour juger les crimes mentionnés à l'article 8 a été officiellement accompli auprès du Secrétaire général de l'ONU, dépositaire du Statut, le 13 août 2008. Ce retrait a pris effet le 15 juin 2009, conformément à la notification de retrait soumise par le Gouvernement français* »; UN Human Rights Council Universal Periodic Review of France (2008), Mid-Term Review of Recommendations and Additional Pledges (11 June 2010); available at http://www.upr-info.org/-France-.html.

[53] *Mbarushimana* Defence request for leave to reply (n. 11), para. 6.

[54] In relation to Article 25(3)(d), the Statute provides that the contribution shall be intentional and shall either: (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) be made in the knowledge of the intention of the group to commit the crime. Article 30(2) provides that a person has intent where (a) in relation to conduct, that person means to engage in the conduct; (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

the reach of liability for persons engaging in acts in one territory where the effects are caused in the other. This is classically illustrated by the example of a person in State A firing a gun across an international border causing death on State B. International law has long recognized the permissibility of an extra-territorial application of the territorial principle by either State A or State B, based on the subjective or objective application of the territorial principle.[55] Ryngaert observes that "[i]n international criminal law, it is commonly accepted that it is necessary and sufficient that one constituent element of the act or situation has been consummated in the territory of the State that claims jurisdiction".[56] A state can claim jurisdiction, thus, if the offence has been committed, in part or in whole, in its territory, in the sense that a constituent element of the offence occurred in its territory.[57] As Akehurst notes, "[t]his is the formulation adopted in the *Lotus* case, by the Harvard Research Draft Convention on Jurisdiction with Respect to Crime, by Article 18 of the American Law Institute's *Restatement of Foreign Relations Law,* by the criminal codes of many countries and by many judicial decisions in common law countries and elsewhere."[58]

[55] See for example. *France v. Turkey* (*Lotus case*), PCIJ, Series A. No. 10 (1927). The objective territoriality principle relates to acts commenced abroad, but completed in the forum state, while the subjective territoriality principle relates to acts initiated in the forum state, but completed abroad. See similarly the principle of ubiquity (*ubiquitätsprinzip*) under, e.g., Section 9 of the German Criminal Code (*Strafgesetzbuch*, StGB). See generally C.L. Blakesly, 'Jurisdiction', in M.C. Bassiouni (ed.), *International Criminal Law – Volume 2* (Leiden, Brill Martinus Nijhoff, 2008), 48; S. Bourgon, 'Jurisdiction *Ratione Loci*' in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, Oxford University Press, 2002), 556–557.

[56] C. Ryngaert, *Jurisdiction in International Law* (Oxford, Oxford University Press, 2008), 75–76. See generally Blakesly, *ibid*., 96–108. See also Harvard Research in International Law, 'Draft Convention on Jurisdiction with Respect to Crime', which provides: "a crime is committed 'in whole' within the territory when every essential constituent element is consummated within the territory; it is committed 'in part within the territory' when any essential constituent element is consummated there. If it is committed either 'in whole or in part' within the territory, there is territorial jurisdiction"; (1935) 29 *American Journal of International Law* 495.

[57] M. Akehurst, 'Jurisdiction in International Law' (1972–1973) 46 *British Yearbook of International Law* 145, 152; R. Jennings and A. Watts (eds.), *Oppenheim's International Law* (Oxford, Oxford University Press, 9th edn., 1996), 459–460.

[58] Akehurst, *ibid*., 152–153 (footnotes omitted). Note, the "constituent elements" approach under the objective territorial principle should be distinguished from the "effects doctrine" since, whereas the effect caused in the former is a constituent part of the offence, that arising in the latter is a mere consequence or repercussion of conduct completed abroad; Jennings and Watts, *ibid*., §139; *Timberlane Lumber Co*.

In relation to proceedings before the ICC, an act occurring in one state that causes consequences in another could give rise to subjective or objective territoriality with respect to the territory of either of the states concerned. Thus, there appears to be no reason why the Court could not exercise jurisdiction pursuant to a referral from the state where the crime was completed, for example, based on the objective application of the territoriality principle.[59] Moreover, although in the *Lotus* case *mens rea* was irrelevant to the assertion of jurisdiction under the objective territorial principle since the crime was one of inadvertence, arguably intention and motive could be taken into account as a further factor where the suspect aimed at the consequence to occur within the territory of another state.[60]

The question might arise as to the extent to which the Court's application of the subjective or objective territorial principle is dependant on domestic law. While states are presumed to enjoy broad discretion in matters of prescriptive jurisdiction,[61] is the ICC's acceptance of the objective territorial principle, for example, dependant on whether the relevant state on which the constituent element of the act was consummated also prescribes jurisdiction in this manner? This would make the parameters of the ICC's jurisdiction dependant on municipal characterization, which might result in inconsistencies and lacunae. One response is to examine the operation of the Court's exercise of jurisdiction in relation

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Footnote 58 continued
v. Bank of America, 549 F.2d 597 (1976); *Laker Airwarys v. Sabena*, 731 F.2d 909 (1984); *Hartford Fire Insurance v. California*, 509 US 764,113 Sup.Ct.2891 (1993); *F. Hoffman-LaRoche Ltd. v. Empagran*, S.A.124 S.Ct.2359 (2004).

[59] See also Bourgon (n. 55), 567.

[60] See Akehurst (n. 57), 155. see above fn.54.

[61] As the Permanent Court of International Justice stated in the *Lotus* case: "It does not (…) follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable"; *Lotus* case (n. 55), para. 46.

to its treaty-based jurisdiction.[62] While the principles of territory and active personality applied by the Court under Article 12(2)(a)–(b) flow from commonly recognized bases of jurisdiction conferred by States Parties, the Court does not have to establish the existence of matching legislation at the national level before its jurisdiction can be exercised in a particular case. This is demonstrated by the fact that although all states exercise jurisdiction over crimes occurring on their territory, not all do so for offences committed by their nationals abroad, and if so in only limited circumstances depending on the particular offence. To exercise jurisdiction based on active personality, however, the Court is not required to first ascertain whether the state of nationality of the suspect itself exercises such a base of jurisdiction with respect to the particular conduct alleged by the Prosecutor. States, nonetheless, enjoy broad discretion to prescribe jurisdiction in this manner, and a state can delegate the exercise of such discretionary jurisdiction with respect to its territory and nationals to the ICC by way of a treaty, irrespective of how it chooses to prescribe such jurisdiction domestically. This suggests that the subjective and objective applications of the territorial principle before the ICC would also not be dependent on municipal characterisation and could apply on the same basis. Supplementary recourse could also be made to article 21(1)(c), if required, given their routine assertion by States.

III KENYA ARTICLE 15 DECISION

In the first decision authorizing a *proprio motu* investigation by the Prosecutor, Pre-Trial Chamber II in the Situation in Kenya examined the Prosecutor's request to investigate conduct occurring "during the post-election period, including but not limited to the time period between 27 December 2007 and 28 February 2008", characterized as potentially constituting crimes against humanity within the jurisdiction of the Court.[63] The debate over the material jurisdiction of the Court in relation to alleged crimes against humanity arising from the

[62] The term "treaty-based jurisdiction" refers to the jurisdictional regime set out in Article 12 of the Statute; namely, the requirement that the exercise of the Court's jurisdiction relate to Article 5 crimes committed on the territory of or by the national of a State Party (Article 12(2)) or a state that has accepted the jurisdiction of the Court ad hoc (Article 12(3)).

[63] *Situation in the Republic of Kenya*, (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya), ICC-01/09-19-Corr (31 March 2010) (*Kenya* Article 15 Decision).

situation and the attendant cases is well known and does not require rehearsal here. Focus below is given to temporal jurisdiction.

In authorizing the investigation, the Pre-Trial Chamber concurred with the Prosecutor that the investigation should not be exclusively limited to the immediate post-election time period of 27 December 2007 to 28 February 2008, since related conduct surrounded it. Nonetheless, the Chamber observed that specification of the temporal parameters as proposed by the Prosecutor (''during (…) but not limited to'') was too broad and required clarification. On reviewing the materials, the Chamber ultimately set the start date at 1 June 2005 (Kenya's date of accession) and established an outer limit 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.[64]

This particular temporal finding was not contested by the Prosecutor, given that it did not have any substantive impact on the focus of the proposed investigation, which sought to focus on events that fell well within the time-period authorized. If anything, the temporal scope was wider than what had been requested. The Chamber's reasoning, however, appears problematic for other reasons, particularly insofar as it seeks to regulate the scope of Article 15 authorizations generally. As the Chamber observed:

> Since article 15(4) of the Statute subjects the Chamber's authorization of an investigation to an examination of the Prosecutor's Request and supporting material, it would be erroneous to leave open the temporal scope of the investigation to include events subsequent to the date of the Prosecutor's Request. Article 53 (1)(a) of the Statute, by referring to ''a crime [which] has been or is being committed'', makes clear that the authorization to investigate may only cover those crimes that have occurred up until the time of the filing of the Prosecutor's Request.[65]

According to the Chamber an Article 15 application, by definition, can only cover events up to the date of the Prosecutor's request. In many contexts, however, the ICC will face situations of ongoing violence, as is borne out by its early practice. In the DRC, for example, while the first two cases (*Lubanga* and *Katanga & Ngudjolo*) have focused on events occurring prior to the opening of the situation, the third, (*Mbarushimana*), as discussed above, relates to more contemporary events. In the Darfur situation, the second (*Bashir*) and third (*Abu Garda*, *Banda & Jerbo*) cases relate to events that extend beyond

[64] *Ibid.*, paras. 201–207.

[65] *Ibid.*, para. 206.

the opening of the situation in June 2005.[66] Applying the interpretation of the Pre-Trial Chamber, had these situations been opened under Article 15 the prosecution would have needed to halt investigations after a certain time limit, since it would have had no authority to investigate further without reverting back to the Chamber for authorization to continue. This means that the prosecution would have had to artificially curtail its powers in the middle of its investigations.[67] Adopting such an approach appears both impracticable and an unnecessary restriction on statutory powers otherwise envisaging the investigation of ongoing crimes. Moreover, it could inappropriately draw the Chamber into deciding upon investigative strategies, since each sequential application would place before the Pre-Trial Chamber options for new or extended investigative leads.

The reasoning of the Chamber appears to have arisen from the concern that it would fail to exercise its supervisory functions effectively if it authorized an open-ended investigation.[68] Part of the difficulty, however, comes not from the dates, but from the way the Chamber defined the material focus of the situation. Rather than specifying that the situation should focus on the post-election violence and events related thereto, as had been requested, it ruled that the authorized investigation "shall encompass the investigation into the situation in Kenya in relation to the alleged commission of crimes against humanity".[69] Accordingly, any alleged crime against humanity occurring within the time period set by the Chamber could potentially fall within the scope of the situation, whether related to

[66] The *Bashir* case relates to events occurring between March 2003 to July 2008; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir), ICC-02/05-01/09-3 (4 March 2009) (*Bashir* Article 58 Decision). The case against Bahar Idriss Abu Garda, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, subsequently separated, relates to the attack on African Union peacekeeping base at Haskanita, Darfur, in September 2007; *The Prosecutor v. Bahar Idriss Abu Garda*, (Decision on the Prosecutor's Application under Article 58), ICC-02/05-02/09-15-AnxA (29 July 2009).

[67] Such delimitation would appear artificial to the extent that it is imposed by the Pre-Trial Chamber on its own initiative in a situation where the Court has authority under the Statute to exercise jurisdiction over ongoing crimes.

[68] See for example in reference to material parameters, the reasoning of the Pre-Trial Chamber at para. 208, *Kenya* Article 15 Decision (n. 63).

[69] *Ibid.*, para. 209: "[T]he Chamber is of the view that the authorization granted to the Prosecutor pursuant to Article 15 of the Statute shall encompass the investigation into the situation in Kenya in relation to the alleged commission of crimes against humanity".

the post-election violence or not. But for the setting of an end date, this could have extended the situation to future, as yet unforeseen crimes against humanity unconnected with the 2007 elections.

Arguably, rather than relying on temporal parameters for this purpose, the Chamber could have specified with greater emphasis the focus of the situation: i.e., crimes related to or connected with the post-election violence.[70] This would have avoided the risks of authorizing blanket investigations by stipulating a required nexus between the crimes alleged and the facts investigated.[71] Importantly, it would have left untouched the possibility that other, future situations could encompass ongoing acts of violence, rather than excluding it outright. This is supported by the wording of Article 53(l)(a), which refers to whether "a crime has been or *is being* committed".[72] As discussed below, at the Article 15 stage the Chamber's supervisory functions do not necessitate the demarcation of an end-date, but rather satisfaction that investigations are materially related to the focus of the authorized situation.[73]

IV CÔTE D'IVOIRE ARTICLE 15 DECISION

The Article 15 decision of Pre-Trial Chamber III, authorizing an investigation into the Situation in Côte d'Ivoire, adopted a different approach to the Kenya Article 15 decision on both issues of material and temporal jurisdiction.[74]

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[70] If the Chamber was concerned that earlier conduct temporally disconnected to the post-election violence might have fallen outside of the situation (see *ibid.*, at para. 204), this could have been remedied by specifying their inclusion within the authorized scope of inquiry. It might be argued that such an approach is overly specific, i.e. that it would effectively specify the cases for investigation. However, defining the focus of a situation by reference to the post-election violence is arguably no more specific than characterizing a situation by reference to a particular armed conflict, since the identification of actual incidents, persons and conduct would remain within the scope of subsequently selected cases.

[71] Arguably, the approach proposed by the Pre-Trial Chamber might encourage the prosecution to delay submitting an Article 15 request until ongoing crimes have been completed, in order to ensure greater material coverage; which might in turn diminish the preventative impact of the Court towards ongoing violence.

[72] The factors listed in Article 53(1)(a)–(c) apply at the Article 15 stage by virtue of Rule 48 [emphasis added].

[73] Rastan (n. 1), 437.

[74] *Situation in the Republic of Côte d'Ivoire* (Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the

4.1 *Material Jurisdiction*

Whereas in the Kenya Situation the dissent on the Article 15 decision focussed on the absence of any crimes within the jurisdiction of the Court, in relation to Côte d'Ivoire the decision elicited a partial dissent for the way the majority had gone beyond the request and added to the provisional list of crimes and forms of attributions identified by the Prosecutor.[75] The approach resulted in a partly dissenting opinion from Judge Fernández, who held that the Chamber had exceeded its ''proper (and limited) function'' in the authorization procedure.[76] In particular, Judge Fernández noted that the information presented by the Prosecutor at this early stage is meant to be illustrative and, as such, is necessarily non-exhaustive. The provisional nature of such information, moreover, means that it is in no way predictive of the future cases that may arise upon the collection of evidence during the investigation itself, which may in fact focus on other crimes.[77] Its purpose is simply to satisfy the Chamber that the jurisdictional threshold in Articles 15(4) and 53(1) has been met. Pre-Trial Chamber II had adopted a similar approach in the

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Footnote 74 continued
Situation in the Republic of Côte d'Ivoire''), ICC-02/11-14-Corr (15 November 2011) (*Côte d'Ivoire* Article 15 Decision).

[75] Specifically, the majority made findings that the supporting materials submitted by the Prosecutor and victims representatives provided a reasonable basis to believe that, additionally, the following crimes had been committed: the war crime of torture and other inhumane acts by pro-Gbagbo forces (para. 86); the war crime of rape and sexual violence by pro-Gbagbo forces (para. 148); the war crime of pillage by pro-Outtara forces (para. 165); the war crime of torture and cruel treatment by pro-Outtara forces (para. 169). It also found a reasonable basis to believe that pro-Outtara forces had committed crimes against humanity (para. 116), whereas the Prosecutor had stated that the information available pointed to war crimes committed by pro-Outtara forces, but was inconclusive with respect to crimes against humanity and therefore required an assessment upon investigation (para. 26); *Côte d'Ivoire* Article 15 Decision (n. 74).

[76] *Situation in the Republic of Côte d'Ivoire* (Judge Fernández de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire) ('Judge Fernández Dissent'), ICC-02/11-15 (3 October 2011), para. 5; see also paras. 38–42.

[77] Judge Fernández Dissent, *ibid*., para. 34.

Kenya Situation.[78] Judge Fernández held that the furnishing by the Chamber of further examples from its own search of the supporting materials and its entering of legal determinations thereon was not only unnecessary, but engaged the Chamber in independent fact-finding assessments which were both duplicative of the Prosecutor's own exclusive functions and "incompatible with the neutrality that the Chamber needs to maintain with regard to the selection by the Prosecutor of persons and acts to be addressed in the investigation".[79] As the Judge opined, by "establish[ing] facts, additional acts, and draw[ing] further conclusions on criminal responsibility" the Chamber had exceeded its supervisory role to assess the facts and legal characterizations advanced by the Prosecutor,[80] and in doing so, risked reigniting debates, long settled during drafting of the Statute over the role of the Chamber with respect to investigations:

> It should be recalled that although the establishment of the Pre-trial Chamber stems from the Romano Germanic law tradition (where prosecutorial and investigative activities frequently undergo judicial scrutiny), it is clear from the drafting history, and the current language contained in the Statute and the Rules, that the Pre-trial Chamber is not an investigative chamber. The Pre-trial Chamber has no investigative powers of its own, nor is it responsible for directing the investigation of the Prosecutor. Indeed, a proposal by France at the Preparatory Committee on the establishment of an ICC that pre-trial functions be carried out by "Preliminary Investigation Chambers" was not adopted in the Statute.[81]

The disagreement between the majority and minority appears to focus, in part, on the question: in relation to what does the Chamber authorize an investigation? The Prosecutor's request, meaning the substantive Article 15 application, or also the supporting materials

[78] "The Prosecutor's selection of the incidents or groups of persons that are likely to shape his future case(s) is preliminary in nature and is not binding for future admissibility assessments. This means that the Prosecutor's selection on the basis of these elements for the purposes of defining a potential "case" for this particular phase may change at a later stage, depending on the development of the investigation"; *Kenya* Article 15 Decision (n. 63), para. 50.

[79] Judge Fernández Dissent (n. 76), para. 45; See also *ibid*, para. 19: "[T]he Chamber should not attempt to duplicate the preliminary analysis conducted by the Prosecutor for the purpose of initiating an investigation, in particular by seeking to identify additional alleged crimes and suspects on its own. The analysis by the Prosecutor at this stage is a preliminary but inseparable part of his exclusive investigative functions".

[80] *Ibid*., paras. 18, 28 and 38.

[81] *Ibid*., paras. 19–20 (footnotes omitted).

accompanying the request, meaning that the Chamber can go beyond the request and add its own finding based on such supporting materials? Clearly, the Chamber must address the Prosecutor's request and "issue its decision (…) with respect to all or any part of *the request* by the Prosecutor".[82] At the same time, Article 15(4) provides the Chamber shall render its decision "upon examination of the request and the supporting materials".

It is also incontrovertible, nonetheless, that the Article 15 procedure is primarily a threshold setting exercise designed to "prevent unwarranted, frivolous, or politically motivated investigations".[83] Once the majority was satisfied that that threshold had been met and it had supervised the correctness of the Prosecutor's assertions, it is open to question why it proceeded to engage in further independent inquiry by identifying other possible crimes and other tentative indications of attribution, i.e. other case hypotheses, unless it intended thereby to direct and/or steer future investigations by the Prosecutor. Otherwise, such information is superfluous.

It is worth examining, in this context, the purpose for which information on crimes is presented at the Article 15 stage. To meet the jurisdictional test, the prosecution is only required to identify the existence of one or more crimes within the jurisdiction of the Court.[84] For the purpose of admissibility, however, more specificity is required. As confirmed by Pre-Trial Chamber II in the Kenya Situation, for the Chamber to assess the admissibility test under Article 53(1)(b) it must consider the "potential cases" that may arise from an investigation of the situation, comprising the persons and incidents provisionally identified by the Prosecutor. The identification of such potential cases will enable an initial examination as to whether national proceedings currently exist in relation to such categories of persons and incidents. If there are none, there would appear to be no immediate bar to investigations. This provisional assessment is without prejudice to both the future cases that may emerge as a result

[82] Rule 50(5) provides: "The Pre-Trial Chamber shall issue its decision, including its reasons, as to whether to authorize the commencement of the investigation in accordance with Article 15, paragraph 4, with respect to all or any part of the request by the Prosecutor. The Chamber shall give notice of the decision to victims who have made representations" [emphasis added].

[83] *Côte d'Ivoire* Article 15 Decision (n. 74), para. 21; Judge Fernández Dissent (n. 76), para. 16.

[84] Article 53(1)(a), Rome Statute (n. 35); Rule 48, ICC Rules of Procedure and Evidence.

of investigations by the Prosecutor, as well as future admissibility challenges that may be brought by a state and/or a suspect.[85]

By contrast, it is not necessary for the Chamber to identify and review potential cases for the purpose of jurisdiction. The purpose of the provision of information by the Prosecutor pursuant to Regulation 49 is to substantiate the reasonable grounds standard of proof. Specifically, the Prosecutor is to provide "a statement of the facts being alleged to provide the reasonable basis to believe that those crimes have been or are being committed".[86] The Pre-Trial Chamber's task, thus, is to check the correctness of the assertions made by the Prosecutor on the basis of the facts and legal characterizations presented. The Chamber's independent identification of other possible crimes and forms of attribution at the jurisdictional stage places it outside of this verification process and signals its own assessment on what charges are ripe for investigation. Accordingly, once the threshold is passed, i.e. a determination that there is "a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed", investigations can commence and thereafter specific acts identified. The specification by the Chamber of further examples is merely illustrative of a threshold that has already been met. The task of the Chamber is to identify the outer parameters of the situation, not to fill in the individual pieces thereof.

In its second decision on the Article 15 authorization, in extending the temporal scope of the Situation, the full Chamber appears to have agreed on a less exhaustive inquiry on the allegations presented. Specifically, it noted that "the Prosecutor has referred to other crimes committed during this period that may fall within the jurisdiction of the Court"; it observed that the Chamber itself had concentrated "on the most significant of the samples of incidents"; and entered an observation, also made by Pre-Trial Chamber II in the Kenya Situation, that the Prosecutor "is not limited as to range of offences within the jurisdiction of the Court that he is entitled to consider, provided they fall within the timeframe for the investigation hereby

[85] *Kenya* Article 15 Decision (n. 63), paras. 48–50. See also R. Rastan, 'What is a "Case" for the Purpose of the Rome Statute?' (2008) 19 *Criminal Law Forum* 435, 441–442.

[86] Regulation 49(1) of the Regulations of the Court. Regulation 49(2) provides that the statement of facts shall include "(a) The places of the alleged commission of the crimes, e.g. country, town, as precisely as possible; (b) The time or time period of the alleged commission of the crimes; and (c) The persons involved, if identified, or a description of the persons or groups of persons involved".

authorised by the Chamber''.[87] Future Pre-Trial Chambers will thus have to balance the need to supervise the correctness of the Prosecutor's determinations on jurisdiction at the article 15 stage, without intruding on the latter's responsibilities in identifying allegations of criminal responsibility and possible case hypotheses.

4.2 *Temporal Jurisdiction*

Although Pre-Trial Chamber III followed closely the approach adopted in the Kenya Situation on issues such as the standard of proof, admissibility, the interests of justice and the interpretation of crimes against humanity, its approach towards temporal jurisdiction represents its most conspicuous departure from the earlier Article 15 decision. Specifically, the Chamber did not see a need to set an end-date to the temporal scope of the authorized situation based on the moment the prosecution submitted its application. This would have been particularly inappropriate in the Côte d'Ivoire context since, contrary to Kenya where the principal events had occurred in the past, the Court faced a ''volatile environment'' which had the potential to re-escalate.[88] Relying on the principles outlined by Pre-Trial Chamber I in the *Mbarishimana* case, the Chamber held that the Prosecutor could investigate ongoing crimes occurring after the date of authorization as long as they were sufficiently linked to the scope of the situation:

> Pre-Trial Chamber I indicated that in order for the case 'not to exceed the parameters defining the DRC situation under investigation, the crimes referred to in the Prosecutor's Request must have occurred in the context of the ongoing situation of crisis that triggered the jurisdiction of the Court' through the original referral in 2004. It was only within the context of this 'original' situation that subsequent prosecutions could be initiated. The Chamber explicitly set out that a single 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, insofar as they are sufficiently

[87] *Situation in the Republic of Côte d'Ivoire* (Decision on the ''Prosecution's provision of further information regarding potentially relevant crimes committed between 2002 and 2010''), ICC-02/11-36 (23 February 2012) (*Côte d'Ivoire* Second Article 15 Decision), para. 38. Nonetheless, it is notable that in the first Article 15 decision, the majority requested the Prosecutor to submit ''additional information'' pursuant to Rule 50(3) without invoking the further requirements of Regulation 49 (*Côte d'Ivoire* Article 15 Decision (n. 74), para. 185; Judge Fernández Dissent (n. 76), para. 61) and the prosecution proceeded to furnish the Chamber with the additional requested facts without legally qualifying them. Thus, instead of supervising the Prosecutor's legal characterisations per Regulation 49, legal qualification of the additional facts in the second authorization decision is conducted by the Chamber itself.

[88] *Côte d'Ivoire* Article 15 Decision (n. 74), para. 179.

linked to the situation of crisis referred to the Court as ongoing at the time of the referral'. The Chamber concluded that it was satisfied on a *prima facie* basis that the crimes allegedly committed in the Kivus were sufficiently linked to ('falls within the context of') the situation of crisis referred to the Court.

Bearing in mind the volatile environment in Côte d'Ivoire, the Chamber finds it necessary to ensure that any grant of authorisation covers investigations into 'continuing crimes' – those whose commission extends past the date of the application. Thus, crimes that may be committed after the date of the Prosecutor's application will be covered by any authorisation, insofar as the contextual elements of the continuing crimes are the same as for those committed prior to 23 June 2011. They must, at least in a broad sense, involve the same actors and have been committed within the context of either the same attacks (crimes against humanity) or the same conflict (war crimes). Therefore if the authorisation is granted, it will include the investigation of any ongoing and continuing crimes that may be committed after the 23 June 2011 as part of the ongoing situation.[89]

Although the echo to the phrase "situation of crisis" similarly remains unexplained,[90] the reference to tailor-made parameters to determine the nexus between individual cases and situational scope appears more satisfactory than the arbitrary cut-off date imposed as a matter of necessity in the Kenya Situation. In particular, the overall approach of Pre-Trial Chambers I and III towards judicial supervision appears better suited to the many volatile situations that the Court will continue to confront, by enabling the investigation of ongoing crimes based on considerations related to substantive jurisdictional nexus, rather than on the procedural moment when the Article 15 application was lodged.[91]

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[89] *Ibid.*, paras. 178–179.

[90] Although the Chamber recalls the use of the phrase "situation of crisis" by Pre-Trial Chamber I, it does not adopt the phrase as part of its own decision, and it only appears in reference to Côte d'Ivoire in Judge Fernández' Dissent (n. 76), para. 6. In its later second Article 15 decision, the Chamber appears to use a broader formulation to examine whether the underlying acts and incidents "form part of the *same crisis* or *sequence of events* for which an investigation has already been authorized" [emphasis added]; *Côte d'Ivoire* Second Article 15 Decision (n. 87), para. 14.

[91] The Chamber refers to the notion of ongoing crimes with the term "continuing crimes"; *Côte d'Ivoire* Article 15 Decision (n. 74), para. 179. However this appears to be a misnomer, since the term "continuing crimes" has a specific meaning in the context of, classically, cases of enforced disappearance where the particular completed act may be said to "continue" after the time of its initial occurrence until such time as the person's whereabouts are disclosed and the truth about them is discovered. This concept of continuity has enabled human rights bodies to examine unsolved cases of disappearances committed prior to entry into force of relevant conventions because the continuing nature of the crimes extends into the present; see e.g. *Chapman Blake v. Guatemala*, Merits, IACHR Series C No 36, IHRL 1419

Pre-Trial Chamber III applied the same considerations in examining temporal parameters going, not forwards, but backwards: i.e. the question of what should be the start-date of investigations. Specifically, although the prosecution had sought authorization for a proposed investigative focus on events occurring since 28 November 2010, it had also made general submissions that the events were linked with earlier crimes pre-dating those of November 2010. The Prosecutor had therefore stated that the Chamber could opt to provide jurisdiction over the entire period since 19 September 2002, based on the date of the original Article 12(3) declaration lodged by the Government of Côte d'Ivoire.[92] Some of the representations of victims had also pointed to alleged crimes arising from the earlier period.[93] Accordingly, upon authorizing the Prosecutor to proceed with an investigation into events since 28 November 2010, the Chamber also requested the submission of further information on the earlier time period.[94]

In conducting its review of the information presented, the Chamber referred to its crime pattern analysis as an examination into whether the incidents "form part of the same crisis or sequence of events for which an investigation has already been authorized".[95] Having satisfied itself that crimes with sufficient nexus to the previously authorized situation also occurred during this earlier period, the Chamber proceeded to supplement its authorization decision by

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Footnote 91 continued
(IACHR 1998), [1998] IACHR 1 (24 January 1998). This scenario is treated explicitly in paragraph 24 of the Elements of Crimes in relation to Article 7(1)(i) (Crime against humanity of enforced disappearance of persons), which specifies: "[t]his crime falls under the jurisdiction of the Court only if the attack referred to in elements 7 and 8 occurs after the entry into force of the Statute". By contrast, here, the Chamber appears to be referring to the continuing nature not of specific acts, but of related crimes in general. See also on this point Judge Fernández' Dissent, ICC-02/11-15 (3 October 2011), paras. 64–70.

[92] *Situation in the Republic of Côte d'Ivoire* (Request for authorisation of an investigation pursuant to article 15), ICC-02/11-3 (23 June 2011), para. 42.

[93] *Côte d'Ivoire* Article 15 Decision (n. 74), para. 182. Such representations were brought to the attention of the Chamber pursuant to Article 15(3) and Rule 50.

[94] *Côte d'Ivoire* Article 15 Decision (n. 74), paras. 183–185. Judge Fernández considered that no additional information was necessary and that the extension of the temporal scope could have been authorized on the basis of the facts already presented and the Chamber's own preliminary findings that the post-electoral violence was a continuation of the same political crisis; Judge Fernández Dissent (n. 76), paras. 56–61.

[95] *Ibid.*, para. 14.

back-dating the temporal scope of the situation to alleged crimes occurring since 19 September 2002.[96] The Chamber characterized this entire period, constituting periods of armed conflict, abeyance and renewed violence, as a single situation:

> The materials available to the Chamber include, in summary form, details of the history concerning the political and military crisis in Côte d'Ivoire since the coup attempt of 2002, which resulted in the de facto partition of the country into a northern zone controlled by the armed opposition (the *Forces Nouvelles*) and a southern zone controlled by President Gbagbo. Human Rights Watch indicates that efforts to resolve the conflict between the government of President Gbagbo and the rebels ended in a series of broken peace agreements, over 11,000 foreign peacekeeping troops on the ground and the imposition of a UN arms embargo. Although the peace agreements and peacekeepers brought about a cessation of active hostilities, they did not bring peace or unity to the country. The end result was a stalemate, a Situation of 'no peace, no war' or 'intermittent civil war'. The long-awaited presidential election took place on 31 October 2010 and 28 November 2010, having been postponed six times since 2005. However, far from solving the political crisis, the elections plunged 'the country into even deeper turmoil with severe consequences for the overall human rights situation'. While the context of violence reached a critical point in late 2010, it appears that this was a continuation of the ongoing political crisis and the culmination of a long power struggle in Côte d'Ivoire.[97]
> (…)
> In accordance with the Decision of 3 October 2011, and in light of the information analysed above, the Chamber is of the view that the violent events in Côte d'Ivoire in the period between 19 September 2002 and 28 November 2010, although reaching varying levels of intensity at different locations and at different times, are to be treated as a single situation, in which an ongoing crisis involving a prolonged political dispute and power-struggle culminated in the events in relation to which the Chamber earlier authorised an investigation.[98]

Thus, although violence was not continuous throughout this period, the Chamber held that the situation represented a period of prolonged political and military crisis characterized by an ongoing power struggle between the same principal protagonists, the armed opposition (*Forces Nouvelles*) and the forces loyal to President Gbagbo. This was not the first time that a situation before the Court had been held to span a long temporal period covering a wide geography witnessing peaks and troughs of inter-related violence. Pre-Trial Chamber I found a similar nexus between ongoing crimes occurring over a large territory and over a five year period characterized by

[96] *Côte d'Ivoire* Second Article 15 Decision (n. 87).

[97] *Côte d'Ivoire* Article 15 Decision (n. 74), para. 181.

[98] *Côte d'Ivoire* Second Article 15 Decision (n. 87), para. 36.

varying levels of intensity in the *Bashir* case (Darfur, the Sudan),[99] while the ongoing armed conflict in eastern DRC as examined in the *Mbarishimana* case also stretches over vast swathes of territory.

In sum, based on the combined findings in the *Mbarishimana* case, the *Situation in Côte d'Ivoire* and the *Bashir* case, in determining whether a sufficient nexus exists between the jurisdictional scope of a situation and crimes spanning different time-periods, locations and periods of intensity, the factors that a Chamber may consider include:

(a) whether there is continuity, at least in a broad sense, between the principal actors/groups involved,[100] although this is not a strict requirement as groups may re-form and re-group under different headings or subsequently emerge (see (d) below)[101]; and
(b) whether there is a link between the contextual elements of the crimes[102] – i.e. whether the crimes have occurred in the context of the same attacks for crimes against humanity, the same armed conflict for war crimes,[103] or in the context of a manifest pattern of similar conduct directed against the target group for genocide.[104]

[99] See for example, *Prosecutor v. Omar Hassan Ahmad Al Bashir* (Second Decision on the Prosecution's Application for a Warrant of Arrest), ICC-02/05-01/09-94 (12 July 2010) (*Bashir* Second Article 58 Decision), para. 15: "[t]he above-mentioned attack on the said part of the civilian population of Darfur was large in scale, as it affected hundreds of thousands of individuals and took place across large swathes of the territory of the Darfur region (…) [t]he above-mentioned attack was systematic as it lasted for well over 5 years and the acts of violence of which it was comprised followed, to a considerable extent, a similar pattern". These crimes also post-dated in part the date of the Security Council referral; see *Bashir* Article 58 Decision (n. 66), para. 37, identifying the temporal parameters of the situation, based on Security Council Resolution 1593 (2005), as encompassing crimes within the jurisdiction of the Court occurring "since July 2002".

[100] *Côte d'Ivoire* Article 15 Decision (n. 74), para. 179.

[101] *Mbarushimana* Decision on Jurisdiction (n. 13), para. 40–42.

[102] Alternatively characterized by Pre-Trial Chamber III as a focus on incidents that "form part of the same crisis or sequence of events for which an investigation has already been authorized"; *Côte d'Ivoire* Second Article 15 Decision (n. 87), para. 14.

[103] *Côte d'Ivoire* Article 15 Decision (n. 74), para. 179.

[104] Article 6, Elements of Crimes; *Bashir* Article 58 Decision (n. 66), para. 113; *Bashir* Second Article 58 Decision (n. 99), para. 8.

By contrast, the Court need not consider as determinative:

(c) restrictions on the investigation of ongoing crimes (i.e. those falling within (a) and (b) above) committed after the date of the referral or Article 15 application[105];
(d) whether specific actors/groups were in existence at the time of the referral or authorization application[106]; and
(e) whether the suspect was allegedly committing crimes at the time of the referral or authorization application.[107]

V CONCLUSION

As described above, the case law of the Court to date has only addressed a number of jurisdictional issues. There are a host of questions related to territorial, temporal, personal and subject-matter jurisdiction that have yet to arise. For example, in relation to personal parameters, future situations and cases may be confronted with such issues as the Court's jurisdiction over suspects who simultaneously enjoy State Party and non-Party State nationality (dual nationals); or the question of how to deal with personal jurisdiction in command responsibility cases in a context featuring interoperability between armed forces, i.e. joint operations of multi-national forces comprising State Party and non-Party State nationals. The Court may also need to answer the question whether a State Party referral can be bound by personal rather the territorial delimitations (i.e. in relation to a particular State Party's nationals allegedly committing crimes abroad) – and if so, whether this will disrupt the scheme whereby referrals are supposed to concern situations, not cases? What of the Security Council? Can jurisdiction *ratione personae* within a situation be constrained by a Chapter VII referral and, if so, does this permit of a contrary judicial determination by the

[105] *Mbarushimana* Decision on Jurisdiction (n. 13), paras. 41. See, nonetheless, Rastan, (n. 1), 424–426, on delimitations that may apply where end-date temporal parameters have been made express in a referral or declaration.

[106] *Mbarushimana* Decision on Jurisdiction (n. 13), para. 42.

[107] *Ibid.*, para. 50.

Court?[108] Can the referrals dictate material parameters (e.g. crimes against humanity, but not genocide)? What is the impact of apparently arbitrary start and end-dates specified in a Security Council referral or *ad hoc* declaration? What happens where the Court enjoys only partial territorial jurisdiction with respect to violence spanning two or more territories not all amenable to the Court's territorial jurisdiction? Can situations be joined? What if a suspect in one active situation (Joseph Kony, in Uganda) commits crimes on the territory of another (DRC) – is this a new situation or a continuation of an active one? How to resolve issues of standing under Article 12(3) and the appropriate procedure to be followed? Can a state whose cooperation has been sought question its obligations under Part 9 due to uncertainty over the parameters of the situation and/or investigation? These and many other issues remain to be resolved.[109] Clearly, questions of jurisdiction are set to provide fertile ground for future academic inquiry and developing jurisprudence.

[108] See for example para. 6 of Security Council Resolution 1970 (2011): "*Decides* that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State"; and Security Council Resolution 1593 (2005), para. 6. Cf. Office of the Prosecutor, 'Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1970 (2011)', para. 54: "The Office does not have jurisdiction to assess the legality of the use of force and evaluate the proper scope of NATO's mandate in relation to UNSC Resolution 1973. The Office does have a mandate, however, to investigate allegations of crimes by all actors".

[109] For treatment of a number of these issues, see Rastan (n. 1).