

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04

Date: 6 September 2010

PRE-TRIAL CHAMBER I

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Under Seal

Decision requesting clarification on the Prosecutor's Application under Article 58

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo

Ms Fatou Bensouda

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

PRE-TRIAL CHAMBER I of the International Criminal Court;

1. **NOTING** the "Prosecution's Application under Article 58" dated 20 August 2010 ("Application")¹, whereby the Prosecutor requested the Chamber (i) to find that there were reasonable grounds to believe that "Callixte MBARUSHIMANA [wa]s criminally responsible for war crimes and crimes against humanity within the jurisdiction of the Court committed by the FDLR in North and South Kivu Provinces of the DRC between January 2009 and the date of [the] Application, pursuant to Article 25(3)(a) or, in the alternative, Article 25(3)(d) of the Statute"; (ii) to find that the arrest of Callixte Mbarushimana was necessary; (iii) to issue a warrant of arrest for Callixte Mbarushimana and (iv) to direct the Registry to prepare and transmit a number of relevant requests for cooperation to the competent authorities of a number of countries;

2. **NOTING** the referral of the situation in the Democratic Republic of the Congo ("DRC") to the Prosecutor by the Government of the same DRC, dated 3 March 2004 ("DRC Referral");

3. **NOTING** that the section "Background to investigation/Legal framework" of the Application mentions the DRC Referral as "includ[ing] crimes within the jurisdiction of the Court committed in the territory of the DRC since July 2002"²;

4. **NOTING** that, in the DRC Referral, the President of the DRC requested the Prosecutor to investigate as regards "*la situation qui se déroule dans mon pays depuis le 1^{er} juillet 2002, dans laquelle il apparaît que des crimes relevant de la compétence de la Cour Pénale Internationale ont été commis*";

¹ ICC-01/04-573-US-Exp.

² ICC-01/04-573-US-Exp, paragraph 162.

5. **NOTING** article 13(a) of the Statute, pursuant to which the Court may exercise its jurisdiction if “[A] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14” and article 14(1) of the Statute, pursuant to which “A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes”;

6. **CONSIDERING** that the wording of articles 13(a) and 14(1) of the Statute 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;

7. **CONSIDERING** that the same logic appears, with respect to the subject matter of the investigation, in article 53(1)(a) of the Statute, pursuant to which, in deciding whether to initiate an investigation, the Prosecutor shall consider, *inter alia*, whether the available information “provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed”;

8. **CONSIDERING** further that, since the submission of a situation to the Court, whether by way of referral or as a consequence of the authorisation to a *motu proprio* investigation, triggers and determines the scope of its jurisdiction according to temporal, territorial and material parameters, the scope of any situation should be identified;

9. **CONSIDERING** that the need for such identification 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;

10. **NOTING** that the events referred to in the Prosecutor's Application as allegedly forming the basis for the requested warrant of arrest took place in the Kivu Provinces between January 2009 and the date of the Application;

11. **NOTING** that, in his Application, the Prosecutor fails to clarify in what manner and to what extent such events are linked to the situation of crisis that triggered the DRC investigation;

12. **CONSIDERING** that, in light of the aforementioned provisions and principles, as well as of the time elapsed between the submission of the DRC Referral and the events mentioned in the Application, 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;

13. **NOTING** article 19(1) of the Statute, pursuant to which the Court shall satisfy itself that it has jurisdiction in any case brought before it;

14. **NOTING** regulation 28(1) of the Regulations of the Court, whereby a Chamber may order the participants to clarify or to provide additional details on any document within a time limit specified by the Chamber;

15. **CONSIDERING** that the issue appears of a fundamental, novel and complex nature so as to make it appropriate to provide the Prosecutor with an opportunity to submit the necessary clarifications;

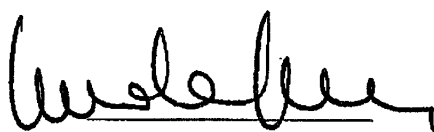
FOR THESE REASONS,**ORDERS**

the Prosecutor to submit, no later than Monday 20 September 2010, observations on the link between the events alleged in the Application and the situation of crisis that triggered the DRC investigation, accompanied by all available supporting documentation.

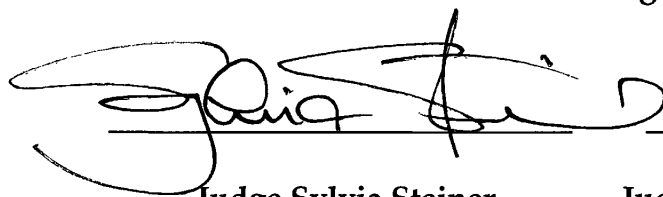
Done in both English and French, the English version being authoritative.

Dated this Monday, 6 September 2010

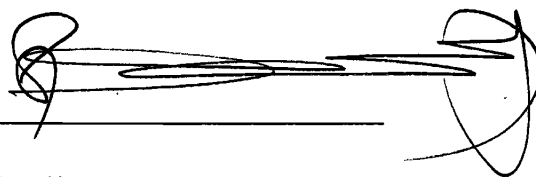
At The Hague, The Netherlands



Judge Cuno Tarfusser
Presiding Judge



Judge Sylvia Steiner



Judge Sanji Mmasenono Monageng