

Annex 9

**3 November 2010
No. 2010/08027**

Faithful extract of the original documents of
the Secretariat of the Registry of the Paris Court Appeal
[*Cour d'Appel*]

**DECISION
GRANTING THE
REQUEST OF THE
INTERNATIONAL
CRIMINAL COURT
IN THE HAGUE FOR
THE ARREST FOR
THE PURPOSES OF
SURRENDER OF:
Callixte
MABARUSHIMANA,**

**PARIS COURT OF APPEAL
FIRST INVESTIGATING CHAMBER
[*Chambre de l'instruction*]**

**DECISION GRANTING THE REQUEST OF THE
INTERNATIONAL CRIMINAL COURT IN THE
HAGUE FOR ARREST FOR THE PURPOSES OF
SURRENDER**

(No. [illegible]- 13 pages)

**Copy of the decision
received on 3
November 2010
[signed]**

The Paris Investigating Chamber
Having held a public hearing on the twenty-seventh day of
October two thousand and ten
Issued the following decision on this 3rd day of November
two thousand and ten against:

**Callixte MBARUSHIMANA
A Rwandan national born on 24 July 1963 in Ndusu-
Ruhengeri, Northern Province, Rwanda,**

Detained pursuant to an order for pre-trial detention dated
and executed on 11 October 2010
Currently detained at the La Santé remand facility
Subject to arrest and surrender proceedings at the request of
the INTERNATIONAL CRIMINAL COURT in THE
HAGUE

Represented by Counsel of his choosing, Mr GRECIANO,
Ms GARAPIN and Mr GOUGET, and heard without the
assistance of an interpreter, having stated that he
understands and speaks French

APPEARING

**CHARACTERISATION OF THE CRIMES:
War crimes and crimes against humanity**

[signed] [signed]

BEFORE:

During hearings, deliberations and the issuance of the decision

Ms BOIZETTE, President
Mr FONTANAUD, Judge
Mr LAGEZE, Judge

All appointed pursuant to article 191 of the Code of Criminal Procedure

REGISTRAR:

Ms BINART, Registrar for the hearings and for the issuance of the decision

PUBLIC PROSECUTOR'S OFFICE:

Mr LECOMPTE, Advocate-General [*Avocat Général*], at hearings and at the issuance of the decision

HEARINGS:

At the hearing of 27 October 2010, the following persons addressed the court:

Ms BOIZETTE, President, to present her report;

Mr LECOMPTE, Advocate-General, to make his submissions;

Mr GRECIANO, Ms GARAPIN and Mr GOUGET, counsel for the person concerned, to make their oral pleadings;

Lastly, Mr MBARUSHIMANA Callixte, the person concerned.

PROCEDURAL HISTORY

By request of 30 September 2010, urgently transmitted to the Embassy of France in The Netherlands and to the Ministry of Foreign Affairs on 1 October 2010, the International Criminal Court sought from the French authorities the arrest of MBARUSHIMANA Callixte and

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his surrender in accordance with the provisions of article 59 of the Treaty establishing the Statute of the International Criminal Court adopted in Rome on 17 July 1998, and Law No. 2002-268 of 26 February 2002 implementing the said Treaty, which entered into force on 1 July 2002.

Given the urgency of the situation, the original request was transmitted with two further requests for judicial cooperation on 1 October 2010 by an official of the Registry of the ICC to the Office of the Public Prosecutor [*parquet*] of Paris in accordance with article 627(4) subparagraph 2 of the Code of Criminal Procedure.

The transmission included a request for arrest and surrender dated 30 September 2010 which was issued by the International Criminal Court for war crimes within the meaning of article 8 of the Rome Statute of the International Criminal Court (hereinafter “the Statute”) and for crimes against humanity within the meaning of article 7 of the Statute, and a warrant of arrest issued on 28 September 2010 against Callixte MBARUSHIMANA, as criminally responsible within the meaning of article 25(3)(d) of the Statute. The warrant of arrest was issued by Pre-Trial Chamber I of the International Criminal Court for the following counts:

- i) attacks against the civilian population, constituting war crimes under article 8(2)(b)(1) or 8(2)(e)(i) of the Statute;
- ii) acts of destruction of property, constituting war crimes under article 8(2)(a)(iv) or 8(2)(e)(xii) of the Statute;
- iii) acts of murder, constituting war crimes under article 8(2)(a)(i) or 8(2)(c)(i) of the Statute;
- iv) acts of murder, constituting crimes against humanity under article 7(1)(a) of the Statute;
- v) acts of torture, constituting war crimes under article 8(2)(a)(ii) or 8(2)(c)(i) of the Statute;
- vi) acts of torture, constituting crimes against humanity under article 7(1)(f) of the Statute;
- vii) acts of rape, constituting war crimes under article 8(2)(b)(xxii) or 8(2)(e)(vi) of the Statute;

[signed] [signed]

viii) acts of rape, constituting crimes against humanity under article 7(1)(g) of the Statute;

ix) inhumane acts, constituting crimes against humanity under article 7(1)(k) of the Statute;

x) acts of inhuman treatment, constituting war crimes under article 8(2)(a)(ii) of the Statute; and

xi) acts of persecution, constituting crimes against humanity under article 7(1)(h) of the Statute.

All of these acts were committed between January and 31 December 2009 in the Provinces of North Kivu and South Kivu in the Democratic Republic of the Congo, while Callixte MBARUSHIMANA was the Executive Secretary of the *Forces démocratiques pour la libération du Rwanda* (FDLR).

These documents were supplemented by an electronic communication from the ICC to the Principal Public Prosecutor's Office [*parquet général*], via the Ministry of Justice, dated 18 October 2010 and received on 19 October 2010. It included the full text of the decision issued by the ICC on 28 September 2010 on the Prosecutor's application for a warrant of arrest for Callixte MBARUSHIMANA.

Callixte MBARUSHIMANA was arrested on 11 October 2010 at his residence in Paris pursuant to article 627(1) and 627(5) of the Code of Criminal Procedure and subsequently detained that same day after appearing before the Public Prosecutor for Paris [*Procureur de la République de Paris*] pursuant to article 627(5) of the Code of Criminal Procedure.

On 14 October 2010, the Principal Public Prosecutor [*Procureur Général*] interviewed the person concerned and prepared an official record of the interview subject to article 627(6) of the Code of Criminal Procedure.

At the public hearing before the Investigating Chamber on 20 October 2010, information was provided as to the grounds for the arrest and the material provided in support of the request for surrender. Consideration of the

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merits was adjourned to the hearing of 27 October 2010.

On 26 October 2010 at 15.18, Mr GRECIANO, counsel for Callixte MBARUSHIMANA, filed a brief with the Registry of the Investigating Chamber. The brief was stamped by the Registrar, transmitted to the Public Prosecutor's Office, and filed in the record.

DECISION

Taken after deliberation in accordance with article 200 of the Code of Criminal Procedure.

AS TO FORM

Considering that this court has been seized pursuant to, *inter alia*, articles 59 and 87 of the Statute establishing the International Criminal Court, and articles 627(5) *et seq.*, including article 627(8), of the Code of Criminal Procedure and considering the afore-mentioned documents;

THE MERITS

In assessing the present request, the Investigating Chamber refers to the 28 September 2010 decision of the Pre-Trial Chamber of the ICC (ICC-01/04-01/10) on the Public Prosecutor's application of 20 August 2010 for the issuance of a warrant of arrest under article 58 of the Statute. The ICC found Callixte MBARUSHIMANA criminally responsible under articles 25(3)(a) and 25(3)(d) of the Statute as a co-perpetrator or, alternatively, under article 25(3)(d) for contributing to the commission, by a group of persons acting with a common purpose, of war crimes and crimes against humanity which were allegedly committed by the *Forces démocratiques pour la libération du Rwanda* (FDLR-FCA or FDLR) in the Provinces of North and South Kivu, the Democratic Republic of the Congo ("DRC") since early 2009.

The International Criminal Court retains jurisdiction to investigate and try these offences, which were committed after 1 July 2002 in the Democratic Republic of the Congo and referred on 3 March 2004 by the President of the Democratic Republic of the Congo, Joseph

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KABILA, under articles 13(a) and 14 of the Statute to the Prosecutor of the ICC, who decided to initiate an investigation under article 53 of the Statute.

In the instant case, the International Criminal Court is seized of crimes committed between January 2009 and the date of the request, 20 August 2010, and directly related to the crisis in the Democratic Republic of the Congo since 4 December 2002, which has been characterised by hostilities between regular forces and armed groups in North and South Kivu and Ituri. In the course of military activities, the FDLR allegedly took part in the commission of crimes falling within the jurisdiction of the International Criminal Court.

An analysis of the evidence shows that the counts accepted by the Court for the issuance of the warrant of arrest against Callixte MBARUSHIMANA rely on the following arguments or grounds:

In his capacity as FDLR leader, Callixte MBARUSHIMANA, as a co-perpetrator, or in the alternative, as part of a group of persons acting with a common purpose, committed or contributed to the commission of persecution by intentionally and in a discriminatory manner targeting women or men on account of their affiliation with the FARDC through torture, rape, inhumane acts and inhuman treatment during a series of acts of violence in the villages or locations mentioned, by committing the following acts:

- 1) in late January 2009, they attacked the village of Remeka, Ufamandu *groupement*, Walikale territory, and during such attack, gathered all the population and local leaders, accused them of betraying them and told them they would not be allowed to leave the village and killed those who tried to flee;
- 2) in late January 2009, they attacked the village of Busheke, in Kalehe territory, South Kivu, killing 14 civilians, including 12 women and girls whom they raped before killing;
- 3) in mid-February 2009, after they had come into contact with some Rwandan Defence Forces ("RDF") troops, perpetrated 28 rapes and killed a local chief around the

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village of Pinga, Masisi territory, North Kivu;

- 4) on 13 February 2009, after the *Forces Armées de la République Démocratique du Congo* ("FARDC") and RDF soldiers had passed through the village of Kipopo, Masisi territory, North Kivu, they set on fire some 100 houses in the village with civilians locked therein;
- 5) in February 2009 in Miriki, Lubero territory, North Kivu, they stopped a group of six young people, forcing the three boys to rape the three girls who were with them;
- 6) in late February 2009, they abducted from Remeka village, Ufamandu *groupement*, Walikale territory, at least a dozen women and girls and killed 9 of them when they resisted attempts to rape them;
- 7) on 12 April 2009, having neutralised an FARDC position in the village of Mianga, Waloa-Loanda *groupement*, Walikale, North Kivu, they attacked and burned down the village, killing at least 6 civilians, including the local chief;
- 8) on 18 April 2009, they attacked the villages of Luofu and Kasiki in Lubero territory, North Kivu, burning 250 houses in the first and 50 houses in the second and killing at least 17 civilians;
- 9) near Busurungi, Walikale territory, North Kivu, they raped, killed and mutilated three women who, on 28 April 2009, were found tied up, with sticks in their vaginas, cuts over their bodies and crushed skulls, and, in the same locations, on 5 May 2009, they raped and mutilated three other women;
- 10) on the night of 9-10 May 2009, they carried out a thoroughly planned attack, the initial target of which was an FARDC battalion, and which was directed at the village of Busurungi, Walikale territory, North Kivu and the nearby settlements; in the course of that attack at least 60 civilians were killed, female residents of the village raped and in some instances their wombs cut open and foetuses removed from their bodies, and over 700 lodgings were destroyed;

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11) on the night of 20-21 July 2009, they attacked the village of Manje, Masisi territory, North Kivu, accusing the villagers of being collaborators of the FARDC-FRD;

The International Criminal Court is of the view that these attacks form the basis of the war crimes committed in the context of and in association with an armed conflict between the FARDC-FRD government coalition and the FDLR, and of crimes against humanity so characterised due to their widespread and systematic commission against the civilian population throughout 2009. The war crimes were committed specifically between 20 January and 25 February 2009 (international armed conflict) and between 2 March and 31 December 2009 (non-international armed conflict).

In its decision, the International Criminal Court defined “widespread” as crimes which were committed on a large scale, and “systematic” as the organised nature of the acts of violence and the improbability of their random occurrence. It found that there are reasonable grounds to believe that these acts were committed by FDLR combatants, whereas a large number of the civilian victims were perceived as supporting the FARDC (there were allegedly 384 deaths, 135 cases of sexual violence, 521 abductions, 38 cases of torture and 5 cases of mutilation). The International Criminal Court found that the FDLR committed such acts for political ends.

The ICC found that Callixte MBARUSHIMANA, jointly with Ignace MURWANASHYAKA and Sylvestre MUDACUMARA, participated in the implementation of that plan. Since July 2007, Callixte Mbarushimana has been the Executive Secretary of the FDLR, whilst the other two persons are the President of the High Command of the FDLR and the Commander of the FDLR, respectively.

The International Criminal Court then turned to the characterisation of Callixte MBARUSHIMANA’s criminal responsibility in light of article 23(a), (c) to (d) (see pp. 20 to 23 of the ICC decision). It found that there are reasonable grounds to believe that Callixte MBARUSHIMANA participated in the aforementioned common plan and that he wielded sufficient power to frustrate the commission of those crimes. In that regard, he

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is a co-perpetrator or indirect co-perpetrator within the meaning of article 25(3)(a) of the Statute.

The International Criminal Court found that Callixte Mbarushimana's contribution, through his personal implementation of the common plan in agreement with other FDLR leaders, was relevant enough within the meaning of article 25(3)(d) of the Statute, and made with knowledge of the group's intentions and awareness of the existence of an armed conflict in the two provinces of North and South Kivu of the Democratic Republic of the Congo in 2009.

For all these reasons and grounds, the Pre-Trial Chamber of the International Criminal Court considered it necessary to cause the arrest and surrender of Callixte MBARUSHIMANA, who is able to travel freely within the Schengen area of the European Union and has an international support network.

As regards the custodial State, the Investigating Chamber of the Paris Court of Appeal is the competent authority to adjudge the present request pursuant to article 627(5) of the Code of Criminal Procedure, and in accordance with article 59(4) of the Statute.

* * *

In written submissions dated 22 October 2010, the Principal Public Prosecutor sought the surrender of Callixte MBARUSHIMANA to the International Criminal Court. The documents in the record of the case were transmitted in their entirety, both through diplomatic channels and in accordance with the urgent procedure via hand-delivery by an official of the International Criminal Court to the Principal Public Prosecutor via the Ministry of Justice, while certain other materials were delivered electronically. In light of the provisions of article 627(9) of the Code of Criminal Procedure the request for surrender was found, *prima facie*, not to contain any manifest errors. It must therefore be granted, since the other legal requirements are met and the material period is January to September 2009, or, to be more specific, 20 January to 25 February 2009 and 2 March to 31 December 2009.

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Defence for Callixte MBARUSHIMANA prayed the Court to refuse his surrender on various grounds. At the time when Callixte MBARUSHIMANA was notified of the warrant of arrest and the request for international judicial cooperation, the ICC had not provided any document in support of its jurisdiction and its requests for the purposes of prosecution.

Since the ICC proceedings are inconsistent with human rights, Callixte MBARUSHIMANA challenges the arbitrary nature of his arrest and argues the absence of a significant causal link between his activity in the FDLR and his direct involvement in the massacres. He has no guarantee that his trial will be conducted in The Hague within a reasonable time, and is wanted by other States, including Rwanda and Germany and that his surrender to Rwanda would be politically motivated. The ICC offers no clarification on this point.

Surrendering Callixte MBARUSHIMANA to the International Criminal Court could place him in a legal situation which is contrary to the fundamental principles which France has always undertaken to respect. Such fundamental rules and principles of protection which France affords to any person located on its territory must be safeguarded by virtue of a “reflex effect” in cases where France grants an application for extradition to a foreign entity. The Defence recalls the degree of vigilance required and recalled by the *Cour de Cassation C* concerning the safeguards which must be implemented, in particular where there is a real risk of the person being transferred to another State. Here again, the ICC offers no clarification.

The dates on which the crimes were committed are uncertain, and the crimes in which Callixte MBARUSHIMANA is alleged to have participated are not set out precisely and in detail. The proceedings are uncertain and, as characterised, the crimes alleged are extremely serious, yet the charges against Callixte MBARUSHIMANA and the level of his involvement are not indicated.

The legal instruments underpinning the accusations which the ICC characterises as war crimes and crimes

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against humanity are not appended and the penalties those crimes carry are unknown, thus contravening the requirements laid down by the European Convention for the Protection of Human Rights. Similarly, there is no documentary evidence in support of the accusations, whereas the ICC's request did not reach the Court of Appeal until 19 October 2010.

Finally, it would appear that the Federal Court in Karlsruhe in Germany is simultaneously prosecuting Callixte MBARUSHIMANA for the same crimes as those alleged by the ICC. It is for the Principal Public Prosecutor to satisfy himself that there are no proceedings in France or a third State. Transferring the suspect to the ICC would impede Germany from continuing its investigations. The French courts are duty-bound to request a copy of the record of the case, pursuant to the Council Act of 29 May 2000 in accordance with Article 34 of the Treaty on European Union and the Schengen Agreement. France is obliged to respect the Community principle of mutual recognition of the decisions of foreign States.

Pursuant to article 689(2) of the Code of Criminal Procedure, article 1 of the Rome Statute, and as a signatory to the New York convention against inhuman acts and treatment adopted on 10 December 1984, France has universal jurisdiction. The *Tribunal de Grande Instance* in Paris is responsible for investigating crimes ascribed to other Rwandans whom the Investigating Chamber of the Paris Court of Appeal has declined to surrender to the ICTR.

* * *

IN LIGHT OF THE FOREGOING:

Considering that, in signing the international treaty in Rome on 18 July 1998, the vast majority of the Member States of the United Nations, including France, recognised the International Criminal Court as an institution;

Considering that articles 59 and 87 of the Rome Statute govern international judicial cooperation and requests for arrest and surrender between States Parties;

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Considering that, pursuant to article 53(1) of its Constitution, France, as a signatory of the Treaty in Rome, has officially recognised the existence of the International Criminal Court;

Considering that, by virtue of Law No. 2002-268 of 26 February 2002, France implemented the provisions of the Statute by adding article 627 to 627(20) to Book IV of the Code of Criminal Procedure;

Considering that the arrest and surrender procedure is governed by article 627(4) to 627(15) of the Code of Criminal Procedure and that, under article 627(4), the Investigating Chamber of the Paris Court of Appeal is the competent court to receive such requests, as the judicial authority of the custodial State;

Considering that, in employing both the urgent procedure and the normal transmission procedure through the diplomatic channel provided for in articles 91 and 92 of the Statute, the Public Prosecutor's Office of the Paris *Tribunal de Grande Instance*, the Principal Public Prosecutor of the Paris Court of Appeal and this court were properly seized pursuant to article 8(1) of the Statute of the request for the arrest and surrender of Callixte MBARUSHIMANA by the sending of:

- the original of the warrant of arrest issued on 18 September 2008 by the Pre-Trial Chamber of the International Criminal Court, under reference number ICC-01/04-01/10;
- an annexed copy of articles 55, 58, 59, 60, 61, 67 and 117 of the Statute;
- a photograph of the person sought;
- the original of the request to the Republic of France for the arrest and surrender of Callixte MBARUSHIMANA, reference number ICC-01/04-01/10 of 28 September 2010, signed by the registrar of the Pre-Trial Chamber;
- the decision of the International Criminal Court

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on the Prosecutor's application for a warrant of arrest against Callixte MBARUSHIMANA dated 28 September 2010 (33 pages), signed by all three judges of the Pre-Trial Chamber;

Considering that all of these documents satisfy the requirements of articles 89, 91 and 92 of the Statute and article 627(7) of the Code of Criminal Procedure, and substantiate the jurisdiction of the International Criminal Court and the legitimacy of its requests;

Considering that, under article 627(8) of the Code of Criminal Procedure, where the investigating chamber finds that there is no manifest error, it shall order the surrender of the person sought; that the requirements of article 627(8) are satisfied in the instant case in that whilst Callixte MBARUSHIMANA denies any responsibility for the crimes ascribed to him in the request for arrest and surrender, he recognises that there is no error as to his identity with respect to the person sought;

Considering that, in light of the Rome Statute and article 627 of the Code of Criminal Procedure, the judicial authority of the custodial State, seized specifically of a request for arrest and surrender, is not seized of an extradition request, contrary to the assertion in the Defence brief, and need not verify, as the Defence desires, whether the requirements of the extradition procedure – such as the presentation of legal documents indicating the penalties carried, the level of involvement of the person sought and the charges brought against him – governed by agreements or the applicable ordinary law have been satisfied;

Considering that, still contrary to what is stated in the Defence brief, Callixte MBARUSHIMANA was arrested lawfully in accordance with the French Code of Criminal Procedure and articles 91 and 92 of the Statute, in light of the aforementioned documents provided to the French judicial authority;

Considering that, pursuant to article 627(8) of the Code of Criminal Procedure, the requested State need only conduct an *a minima* verification of compliance with the provisions of the Statute, and that it need not consider the accuracy of the dates of the commission of the crimes,

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which, in this instance, almost all occur in 2009 as stated;

Considering that, furthermore, it is not for this court to ascertain whether there are ongoing proceedings before the Federal Court in Germany, still less for it to request documentary evidence in support of such proceedings, consideration of and compliance with the *non bis in idem* rule being the sole purview of the International Criminal Court under article 20 of the Statute;

Considering that, although articles 689 *et seq.* of the Code of Criminal Procedure vest French courts with universal jurisdiction to hear and determine crimes committed abroad by any person ordinarily resident on French territory which fall within the jurisdiction of the International Criminal Court, article 8 of the Law of 9 August 2010, incorporated in article 689(11) of the Code of Criminal Procedure, restricts this jurisdiction by indicating at subparagraph 2 that, in the absence of a request by an international or a national court for a person's surrender or extradition, such crimes may be prosecuted only at the request of the Public Prosecutor's Office;

Considering, accordingly, that, since the International Criminal Court is asserting its jurisdiction by means of the request for arrest and surrender, the French courts are not competent to prosecute and/or try Callixte MBARUSHIMANA for the counts of the crimes and offences ascribed to him;

Considering that all of the legal, treaty and national conditions for the request for the surrender of Callixte MBARUSHIMANA to the International Criminal Court transmitted to France on 28 September 2010 have therefore been met;

Considering, nevertheless, that Callixte MBARUSHIMANA was granted political refugee status by France in 2003;

Considering that, under article 1(F) of the Geneva Convention of 28 July 1951, the provisions of that Convention shall not apply to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime, or a crime

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against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

Considering that it is also well established that article 33(1) of the Convention stipulates that “[n]o Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”;

Considering that, in light of the provisions of articles 107(3) and 108 of the Rome Statute, and given the lack of clarity of the request as to a potential transfer to a third State, there is reason to fear that, should Callixte MBARUSHIMANA eventually be stripped of his political refugee status by France after being prosecuted and convicted by the International Criminal Court, it must be ensured that, pursuant to article 33(1) of the aforementioned Geneva Convention, under no circumstances shall Callixte MBARUSHIMANA in any manner whatsoever be expelled, returned or extradited to Rwanda in the event that he is acquitted or has served any sentence handed down.

FOR THESE REASONS

THE COURT

ORDERS the surrender to the International Criminal Court in The Hague of:

Callixte MBARUSHIMANA

born on 24 July 1963 in Ndusu-Ruhengeri

Northern Province, Rwanda

a Rwandan national

detained pursuant to a detention order executed on 11 October 2010 for imprisonment pending trial

Currently detained at the La Santé remand facility pursuant to the request for arrest and surrender of the International Criminal Court

[signed] [signed]

dated 30 September 2010

**RULES that under no circumstances shall
Callixte MBARUSHIMANA in any manner
whatsoever be expelled, returned or extradited to
Rwanda, pursuant to article 33(1) of the Geneva
Convention.**

**Rules that this judgment shall be executed
by the Principal Public Prosecutor.**

THE REGISTRAR
[signed]

THE PRESIDENT
[signed]

[signed] [signed]