

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 28 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
IN THE CASE OF THE PROSECUTOR V. CALLIXTE MBARUSHIMANA**

Under Seal

**Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte
Mbarushimana**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

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**Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations
Section****Others**

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I. Introduction

1. This decision of Pre-Trial Chamber I (“Chamber”) of the International Criminal Court (“ICC”) is with respect to the “Prosecution’s Application under Article 58”¹ filed by the Prosecutor on 20 August 2010 (“Prosecutor’s Application”), in which the Prosecutor requests the Chamber to find, pursuant to article 58 of the Rome Statute (“Statute”), that there are reasonable grounds to believe that Callixte Mbarushimana is criminally responsible under article 25(3)(a) of the Statute as a co-perpetrator or, alternatively, under article 25(3)(d) for contributing to the commission of crimes by a group of persons acting with a common purpose, for war crimes and crimes against humanity allegedly committed by the *Forces Démocratiques pour la Libération du Rwanda – Forces Combattantes Abacunguzi* (FDLR-FCA, hereafter “FDLR”) in the North and South Kivu Provinces of the Democratic Republic of the Congo (“DRC”) since early 2009. The Prosecutor further requests the Chamber to issue a warrant of arrest against Callixte Mbarushimana and seeks a number of directions from the Chamber in relation to such a warrant.

2. On 6 September 2010, the Chamber issued a “Decision requesting clarification on the Prosecutor’s Application under Article 58”,² whereby the Prosecutor was requested to submit observations on the link between the events alleged in his Application and the situation of crisis that triggered the DRC investigation. On 10 September 2010, the Prosecutor submitted the “Prosecution’s Submissions on Jurisdiction” addressing the matters on which the Chamber sought clarification.³

3. The Chamber will analyse the evidence and information provided by the Prosecutor in his Application in light of the standard set out in article 58 of the Statute to determine whether there are reasonable grounds to believe that Callixte Mbarushimana has committed one or more crimes within the jurisdiction of the Court, and that his arrest appears necessary.

¹ ICC-01/04-573-US-Exp and Annexes 1-11. On 7 September 2010, the Prosecutor filed the “Prosecution’s Provision of Letter Concerning Legal Representation”, together with an Annex; ICC-01/04-576-US.

² ICC-01/04-575-US.

³ ICC-01/04-576-US.

II. Whether the case against Callixte Mbarushimana falls within the jurisdiction of the Court and is admissible

4. As the Chamber has held elsewhere:

[...] a case arising from the investigation of a situation will fall within the jurisdiction of the Court only if the specific crimes of the case do not exceed the territorial, temporal and possibly personal parameters defining the situation under investigation and fall within the jurisdiction of the Court.⁴

To fall within the Court's jurisdiction, a crime must meet the following three conditions: it must be one of the crimes mentioned in article 5 of the Statute, that is to say, the crime of genocide, crimes against humanity and war crimes; the crime must have been committed within the time period laid down in article 11 of the Statute; and the crimes must meet one of the two alternative conditions described in article 12 of the Statute.⁵

5. The situation under investigation, relating to the territory of the DRC, from which the case against Callixte Mbarushimana arises, was referred to the Prosecutor by the DRC in accordance with articles 13(a) and 14 of the Statute on 3 March 2004. In the letter of referral, the DRC President, Mr Joseph Kabila, requested the Prosecutor to investigate « 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* »⁶. On 17 June 2004 the Prosecutor informed the ICC President that –after having considered all the criteria in accordance with article 53 of the Statute– it has determined that there was a reasonable basis to initiate an investigation.⁷ The situation under investigation was therefore defined by the Prosecutor as encompassing the territory of the DRC since 1 July 2002.⁸

6. The Prosecutor's Application refers to crimes allegedly committed between January 2009 and the date of the application, within the context of an armed conflict in the Kivu Provinces, DRC. In the view of the Chamber, for the case at hand not to exceed the

⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, "Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo", 24 February 2006, ICC-01/04-01/06-8-Corr, para. 21.

⁵ *Situation in the Democratic Republic of the Congo*, "Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", 17 January 2006, ICC-01/04-100-Conf-Exp-tEN, para. 85.

⁶ ICC-01/04-98-US-Exp-Anx1 [emphasis added].

⁷ ICC-01/04-1, p. 4.

⁸ See Press Release: 23.06.2004. The Office of the Prosecutor of the International Criminal Court opens its first investigation. ICC-OTP-20040623-59.

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.

7. Having analysed the additional information provided by the Prosecutor, the Chamber is satisfied that at least since 4 December 2002, hostilities involving regular forces and armed groups were ongoing in the east of the DRC, in particular in South Kivu and Ituri.⁹ The Chamber is further satisfied that, around the time of the referral, the FDLR were already actively involved in military activities in the eastern part of the DRC,¹⁰ with alleged involvement in the commission of crimes within the jurisdiction of the Court.¹¹ The Chamber is therefore satisfied, on a *prima facie* basis, that the case against Callixte Mbarushimana falls within the context of the DRC situation of crisis encompassed by the referral that triggered the Prosecutor's investigation.

8. The Prosecutor further alleges that the acts committed by the FDLR soldiers in North and South Kivu Provinces between 20 January 2009 and the date of the Prosecutor's Application, for which Callixte Mbarushimana is allegedly responsible, give rise to war crimes and crimes against humanity. The Chamber observes that intentional attacks against the civilian population, destruction of property, murder or wilful killings, torture, rape and inhuman treatment all constitute war crimes under articles 8(2)(b)(i), 8(2)(b)(xxii), 8(2)(a)(iv), 8(2)(a)(i) and 8(2)(a)(ii) of the Statute –if the conflict is of an international

⁹ See UNSC Resolution 1445 (2002), 4 December 2002, DRC-OTP-0131-0144, 3-4.

¹⁰ See UNSC Presidential Statement S/PRST/2004/15, 14 May 2004, DRC-OTP-2020-0043; UNSC Presidential Statement S/PRST/2005/46, 4 October 2005, DRC-OTP-0128-0148; UNSC Resolution 1649 (2005), 21 December 2005, DRC-OTP-0185-1917; See also Prosecutor's Application, Anx8, 38 and 90.

¹¹ See, *inter alia*, UNSC Presidential Statement S/PRST/2005/31, 13 July 2005, DRC-OTP-2020-0060 which condemns the massacre of some fifty people in Ntulu-Mamba (South Kivu) and demands that the FDLR renounce the use of force and settle without delay the issue of their combatants' return to Rwanda.

character— or articles 8(2)(e)(i), 8(2)(e)(xii), 8(2)(e)(vi) and 8(2)(c)(i) –if the conflict is of a non-international character; and that murders, torture, rape, inhuman acts and persecution all constitute crimes against humanity under article 7(1)(a), 7(1)(f), 7(1)(g), 7(1)(k) and 7(1)(h) of the Statute. Having considered all the foregoing information, the Chamber is satisfied that the case against Callixte Mbarushimana falls within the jurisdiction of the Court.

9. The Chamber declines, at this stage, to use its discretionary *proprio motu* power to determine the admissibility of the case against Callixte Mbarushimana as the Prosecutor's Application still remains *confidential* and *ex parte* and there is no ostensible cause or self-evident factor which impels the Chamber to exercise its discretion pursuant to article 19(1) of the Statute.

III. Whether there are reasonable grounds to believe that one or more of the crimes listed in the Prosecutor's Application were committed

10. In his Application, the Prosecutor seeks the issuance of a warrant of arrest for Callixte Mbarushimana for the following alleged crimes:

Count 1

Attacks against the civilian population constituting war crimes

(Article 8(2)(b)(i) or Article 8(2)(e)(i) and Article 25(3)(a) or (d) of the Rome Statute)

From on or about 20 January 2009 to the date of this application, 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 direction of intentional attacks against the civilian population of North and South Kivu Provinces, DRC, including the populations of Remeka, Pinga, Kipopo, Mianga, Luofu, Kasiki, Busurungi and neighbouring villages, Manje and Malembe constituting war crimes perpetrated by the FDLR.

Count 2

Destruction of property constituting war crimes

(Article 8(2)(a)(iv) or Article 8(2)(e)(xii) and Article 25(3)(a) or (d) of the Rome Statute)

From on or about 20 January 2009 to the date of this application, 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, war crimes in the form of destruction of the adversaries' property or extensive destruction of property not justified by military necessity by the FDLR at various locations in North and South Kivu Provinces, DRC, including Kipopo, Mianga, Luofu, Kasiki, Busurungi and neighbouring villages, Manje and Malembe.

Count 3

Murders or wilful killings constituting war crimes

(Article 8(2)(a)(i) or Article 8(2)(c)(i) and Article 25(3)(a) or (d) of the Rome Statute)

From on or about 20 January 2009 to the date of this application, 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, war crimes in the form of murders or wilful killings perpetrated by the FDLR upon members of the civilian population of various locations in North and South Kivu Provinces, DRC, including Malembe, Remeka, Pinga, Busheke, Kipopo, Mianga, Luofu, Kasiki, Busurungi and surrounding villages, and Manje.

Count 4

Murders constituting crimes against humanity

(Article 7(1)(a) and Article 25(3)(a) or (d) of the Rome Statute)

From on or about 20 January 2009 to the date of this application, 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, crimes against humanity which in fact occurred, namely murders perpetrated by the FDLR upon members of the civilian population of various locations in North and South Kivu Provinces, DRC, including Malembe, Remeka, Pinga, Busheke, Kipopo, Mianga, Luofu, Kasiki, Busurungi and surrounding villages, and Manje.

Count 5

Torture constituting a war crime

(Article 8(2)(a)(ii) or Article 8(2)(c)(i) and Article 25(3)(a) or (d) of the Rome Statute)

From on or about 20 January 2009 to the date of this application, 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, a war crime in the form of torture perpetrated by the FDLR upon members of the civilian population of Busurungi, DRC, inflicted through rape, at various locations in North and South Kivu Provinces, DRC.

Count 6

Torture constituting a crime against humanity

(Article 7(1)(f) and Article 25(3)(a) or (d) of the Rome Statute)

From on or about 20 January 2009 to the date of this application, 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, a crime against humanity which in fact occurred, namely torture perpetrated by the FDLR upon members of the civilian population of Busurungi, DRC, inflicted through rape at various locations in North and South Kivu Provinces, DRC, and through the mutilation of their genitals at Busurungi, on or about 10 May 2009.

Count 7

Rape constituting a war crime

(Article 8(2)(b)(xxii) or Article 8(2)(e)(vi) and Article 25(3)(a) or (d) of the Rome Statute)

From on or about 20 January 2009 to the date of this application, 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, war crimes in the form of rape of civilian women at various locations of North and South Kivu, DRC, including, but not limited to Busheke, Pinga, Miriki, Remeka, Busurungi and surrounding villages, Manje, and Malembe.

Count 8

Rape constituting a crime against humanity

(Article 7(1)(g) and Article 25(3)(a) or (d) of the Rome Statute)

From on or about 20 January 2009 to the date of this application, 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, crimes against humanity which in fact occurred, namely rape of women at various locations of North and South Kivu, DRC, including, but not limited to Busheke, Pinga, Miriki, Remeka, Busurungi, Manje, and Malembe.

Count 9

Inhumane acts constituting crimes against humanity

(Article 7(1)(k) and Article 25(3)(a) or (d) of the Rome Statute)

From on or about 20 January 2009 to the date of this application, 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, crimes against humanity which in fact occurred, namely inhumane acts perpetrated by the FDLR upon male members of the civilian population of various locations of North and South Kivu, DRC, including, but not limited to Miriki, who were forced to rape women, as well

as upon women who were mutilated on 28 April and 5 May 2009, and pregnant women who had their stomachs cut open and their foetuses forcibly removed at Busurungi on 10 May 2009.

Count 10

Inhuman treatment constituting war crimes

(Article 8(2)(a)(ii) and Article 25(3)(a) or (d) of the Rome Statute)

From on or about 20 January 2009 to the date of this application, 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, war crimes in the form of inhuman treatment perpetrated by the FDLR upon male members of the civilian population of various locations of North and South Kivu, DRC, including, but not limited to Miriki, who were forced to rape women, as well as upon women who were mutilated on 28 April and 5 May 2009, and pregnant women who had their stomachs cut open and their foetuses forcibly removed on 10 May 2009 at Busurungi.

Count 11

Persecution constituting a crime against humanity

Article 7(1)(h) and Article 25(3)(a) or (d) of the Rome Statute

From on or about 20 January 2009 to the date of this application, 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, the crime against humanity of persecution by intentionally and in a discriminatory manner targeting women and men seen to be affiliated with the FARDC on the basis of their gender, through torture, rape, inhumane acts and inhuman treatment, in various locations in North and South Kivu Provinces, DRC.

11. Having analysed the evidence presented by the Prosecutor, the Chamber is satisfied that there are reasonable grounds to believe that a series of attacks was carried out by FDLR troops in the period between January and September 2009 against the civilian population of the North and South Kivu.

12. In particular, the Chamber finds that there are reasonable grounds to believe that FDLR troops:

- (i) in late January 2009, 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;¹²

- (ii) in late January 2009, attacked the village of Busheke, in Kalehe territory, South Kivu, killing 14 civilians, including 12 women and girls whom they raped before killing;¹³
- (iii) 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 village of Pinga, Masisi territory, North Kivu;¹⁴
- (iv) 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, set on fire some 100 houses in the village with civilians locked therein;¹⁵
- (v) in February 2009 in Miriki, Lubero territory, North Kivu, stopped a group of six young people, forcing the three boys to rape the three girls who were with them;¹⁶
- (vi) in late February 2009, 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;¹⁷
- (vii) on 12 April 2009, having neutralised an FARDC position in the village, attacked and burned down the village of Mianga, Waloa-Loanda *groupement*, Walikale, North Kivu, killing at least 6 civilians, including the local chief;¹⁸

¹² Prosecutor's Application, Anx 8, 165-166.

¹³ Prosecutor's Application, Anx 8, 76.

¹⁴ Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary General. Report of the United Nations High Commissioner on the situation of human rights and the activities of her Office in the Democratic Republic of the Congo, A/HRC/10/58, 2 April 2009, para. 9, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A-HRC-10-58_F.pdf, Prosecutor's Application, para. 102, footnote 145.

¹⁵ Prosecutor's Application, Anx 6, 9-11; Prosecutor's Application, Anx 6, 26-28; Prosecutor's Application, Anx 8, 69 and 188.

¹⁶ Prosecutor's Application, Anx 8, 84.

¹⁷ HRW, "DR Congo: Brutal Rapes by Rebels and Army", 8 April 2009, available at <http://www.hrw.org/en/news/2009/04/08/dr-congo-brutal-rapes-rebels-and-army>, Prosecutor's Application, para. 101, footnote 143.

- (viii) on 18 April 2009, attacked the villages of Luofu and Kasiki in Lubero territory, North Kivu, burning 250 and 50 houses respectively and killing at least 17 civilians;¹⁹
- (ix) nearby Busurungi, Walikale territory, North Kivu, 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, raped and mutilated three other women;²⁰
- (x) on the night of 9-10 May 2009, carried out a thoroughly planned attack, the initial target of which was an FARDC battalion, and which was directed to 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 fetuses removed from their bodies, and over 700 lodgings were destroyed;²¹
- (xi) on the night of 20-21 July 2009, attacked the village of Manje, Masisi, North Kivu, accusing the villagers of being collaborators of the Congolese army, and killing at least 16 civilians, setting on fire over 180 houses and raping at least 10 women;²²

¹⁸ Prosecutor's Application, Anx 6, 13; Prosecutor's Application, Anx 6, 56-57; Prosecutor's Application, Anx 6, 42-43; Prosecutor's Application, Anx 5, 20; Prosecutor's Application, Anx 11, 8 and 14; Prosecutor's Application, Anx 8, 71 and 189; Human Rights Watch, "DR Congo: Massive Increase In Attacks on Civilians, 2 July 2009, p. 2, <http://www.hrw.org/en/news/2009/07/02/dr-congo-massive-increase-attacks-civilians>, Prosecutor's Application, para. 104, footnote 149; Prosecutor's Application, Anx 7, 84.

¹⁹ Prosecutor's Application, Anx 6, 41-42; Human Rights Watch, "Children Burned to Death by Rwandan Hutu Militia." 23 April 2009, available at <http://www.hrw.org/en/news/2009/04/23/children-burned-death-rwandan-hutu-militia>, Prosecutor's Application, para. 104, footnote 150; IRIN, "Thousands of civilians trapped in east as clashes resume" 24 April 2009, available at <http://www.globalsecurity.org/military/library/news/2009/04/mil-090424-irin05.htm>, Prosecutor's Application, para. 104, footnote 150.

²⁰ Prosecutor's Application, Anx 8, 74.

²¹ Prosecutor's Application, Anx 8, 71-72.

²² Prosecutor's Application, Anx 6, 31-32; Prosecutor's Application, Anx 6, 35; Prosecutor's Application, Anx 6, pp. 24-25; Prosecutor's Application, Anx 6, 15; Prosecutor's Application, Anx 8, pp. 74-75, 165; Prosecutor's Application, Anx 10, 5-6.

(xii) in mid-August 2009, carried out a planned attack on the village of Malembe, in Waloa-Loanda *groupement*, Walikale, North Kivu, burning down a large number of houses;²³

(xiii) on 15 September 2009, during another attack perpetrated near Malembe, raped a woman who was 5-months pregnant, causing her to lose her unborn child.²⁴

13. The Chamber is of the view that there are reasonable grounds to believe that the attacks, as well as the acts perpetrated during those attacks, form the basis of the war crimes and of the crimes against humanity listed by the Prosecutor under the different counts presented to the Chamber. However, the Chamber must be satisfied that those acts were performed in the context of and in association with an armed conflict in order for them to qualify as war crimes or that they were part of a widespread or systematic attack directed against the civilian population in order for them to qualify as crimes against humanity.

14. According to the Prosecutor's Application, the criminal conducts underlying the alleged crimes under the counts proposed were committed:

- a. in the context of and in association with an armed conflict in the Kivu Provinces of an international character in the period between 20 January and 25 February 2009 and of a not international character from 2 March until 31 December 2009;²⁵ and
- b. as part of a widespread and systematic attack against the civilian population of North and South Kivus throughout 2009.²⁶

15. In relation to the alleged armed conflict, the Chamber notes that the criminal acts which form the basis of the proposed counts were perpetrated during two different periods of time, namely from late January to late February 2009 and from 2 March to mid-September 2009. There are reasonable grounds to believe that the attacks perpetrated from

²³ Prosecutor's Application, Anx 6, 43-44; Prosecutor's Application, Anx 6, 23-25; Prosecutor's Application, Anx 6, 14-15; Prosecutor's Application, Anx 10, 6.

²⁴ Prosecutor's Application, Annex 10, 6.

²⁵ Prosecutor's Application, paras. 57 and 60

²⁶ Prosecutor's Application, para. 91.

late January to late February 2009 were carried out by the FDLR troops while fighting against the coalition formed by the FARDC and the RDF, which, on 20 January 2009, jointly launched operation *Umoja Wetu* in order to forcefully dislodge the FDLR from its bases in North Kivu.²⁷ According to the available information, the coalition established to fight against the FDLR comprised over 25.000 troops.²⁸ On 25 February 2009, the RDF troops began withdrawing from North Kivu, thus terminating the offensive.

16. The second period of time started on 2 March 2009, when the FARDC, supported by the United Nations Mission in the Democratic Republic of Congo ("MONUC"), began operation *Kimia II*, the purpose of which was to prevent the FDLR from reoccupying its former positions as well as to cut its lines of economic sustenance. Operation *Kimia II* – with 16.000 FARDC troops involved in the offensive against 6.000 to 8.000 FDLR troops²⁹ – was terminated on 31 December 2009.³⁰

17. The Chamber notes that the armed conflict alleged by the Prosecutor occurred between governmental authorities (the FARDC-RDF coalition in the first period of time and the FARDC in the second one) and the FDLR. As previously held by the Chamber, in order for the existence of an armed conflict to be established, the organised armed group(s), as opposed to governmental authorities, involved in such conflict must have the ability to plan and carry out military operations for a prolonged period of time.³¹

18. The Chamber finds that there are reasonable grounds to believe that the FDLR had at all times relevant for the purposes of the present decision a hierarchical structure enabling it to act under responsible command with operational and disciplinary powers and, as such, a high level of internal organisation operating on a well-defined decision-

²⁷ Prosecutor's Application, para. 51.

²⁸ Prosecutor's Application, para. 52; Secretary-General's 27th report on the work of MONUC, 27 March 2009 (S/2009/160), para. 5, Prosecutor's Application, para. 57, footnote 63;

²⁹ Secretary-General's 29th report on the work of MONUC, 18 September 2009 (S/2009/472), para 9, DRC; Secretary-General's 30th report on the work of MONUC, 4 December 2009 (S/2009/623), paras 2 and 5; 31st Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, 30 March 2010 (S/2010/164), para. 4. Prosecutor's Application, paragraph 59, footnote 67.

³⁰ Prosecutor's Application, paras. 54-56 and 59.

³¹ ICC-02/05-01/09-3, para. 60; ICC-02/05-02/09-1, para. 9.

making process.³² Moreover, there are reasonable grounds to believe that the FDLR resorted to armed violence of certain intensity and had the ability to conduct sustained military operations for a prolonged period of time.³³

19. Therefore, having analysed the evidence, the Chamber is of the view that there are reasonable grounds to believe that, during the period from 20 January until 25 February 2009 and again from 2 March until 31 December 2009, an armed conflict of a certain intensity was waged in the North and South Kivu between the FDLR and the FARDC-RDF (in the first period of time) and between the FDLR and the FARDC, at times in conjunction with MONUC (in the second period of time).

20. The Chamber agrees with the Prosecutor that, for the purposes of the present decision, it is not necessary to determine whether such armed conflict is to be qualified as international or as non-international, since the conduct which forms the basis of the counts proposed under the heading of war crimes is criminalised by the Statute irrespective of whether it is carried out in the context of an international or an internal armed conflict.

21. Furthermore, the Chamber is of the view that there are reasonable grounds to believe that the criminal acts of attack against civilian population, destruction of property, murder, torture, rape and inhuman treatment referred in para. 12 above were perpetrated by the FDLR soldiers throughout their progression across the Kivus during encounters with its opponents, throughout which civilians were targeted due to their perceived affiliation with the FARDC troops, and, as such, that these acts were closely related to the ongoing hostilities.³⁴

22. Therefore, the Chamber is satisfied that there are reasonable grounds to believe that FDLR members committed war crimes of attack against the civilian population, destruction of property, murder, torture, rape and inhuman treatment, as presented by the Prosecutor under Count 1, Count 2, Count 3, Count 5, Count 7 and Count 10.

³² Prosecutor's Application, Anx 4, 23 ; Prosecutor's Application, Anx 6, 11,16-17, and 24-25; Prosecutor's Application, Anx 6, 55; Prosecutor's Application, Anx 7, 122.

³³ Prosecutor's Application, para. 64.

³⁴ Prosecutor's Application, Anx 6, 58; Prosecutor's Application, Anx 8, 74, 76, 77, 81-85; Prosecutor's Application, Anx 6, 38-41; Prosecutor's Application, Anx 6, 56-57

23. The Prosecutor further alleges that the crimes committed by the FDLR troops were also part of widespread and systematic attacks against the civilian population in the Kivu provinces and as such also qualify as crimes against humanity within the jurisdiction of the Court.³⁵

24. Consistent with the established jurisprudence of the Court, the Chamber is of the view that the adjective “widespread” refers to “the large-scale nature of the attack and the number of targeted person”, while the adjective “systematic” refers to the “organised nature of the acts of violence and the improbability of their random occurrence”.³⁶

25. Having analysed the evidence, the Chamber considers that there are reasonable grounds to believe that the above-listed acts perpetrated by FDLR troops were part of both widespread and systematic attacks against the civilian population. As established by the evidence, the attacks against the civilian population, particularly in Busheke, Pinga, Kipopo, Remeka, Luofu, Mianga, Busurungi and Manje took place on a large scale and targeted a high number of civilian victims, who were often perceived as supporting to the FARDC. According to available information, between February and October 2009, attacks on civilians perpetrated by FDLR resulted in at least 384 deaths, 135 cases of sexual violence, 521 abductions, 38 cases of torture and 5 cases of mutilation,³⁷ whilst a different source reports a much higher number of instances of murder, rape and destruction of property.³⁸

26. There are also reasonable grounds to believe that the said attacks against the civilian population was committed pursuant to an organisational policy to commit such attacks, since the evidence provides reasonable grounds to believe that the FDLR leadership decided to launch an offensive targeting the civilian population of the Kivus in order to ultimately obtain political concessions.³⁹ Furthermore, the Chamber considers that

³⁵ Prosecutor's Application, para. 91.

³⁶ ICC-02/05-01/07-1-Corr, para. 62.

³⁷ Prosecutor's Application, Anx 7, 83.

³⁸ Prosecutor's Application, Anx 8, 165, 176 and 187.

³⁹ Prosecutor's Application, Anx 6, 48-52; Prosecutor's Application, Anx 6, 38-41; Prosecutor's Application, Anx 6, 56; Prosecutor's Application, Anx 5, 21-23; Prosecutor's Application, Anx 7, 126.

there are reasonable grounds to believe that the FDLR, pursuant to such organisational policy, perpetrated a multiplicity of acts as part of the attacks and that these acts did not merely amount to isolated incidents.

27. In view of the foregoing, the Chamber is satisfied that there are reasonable grounds to believe that FDLR members committed crimes against humanity in the form of murder, torture, rape, inhumane acts and persecution, as presented by the Prosecutor under Count 4, Count 6, Count 8, Count 9 and Count 11.

IV. Whether there are reasonable grounds to believe that Callixte Mbarushimana is criminally responsible for the crimes alleged by the Prosecutor

28. The Prosecutor alleges that Callixte Mbarushimana bears criminal responsibility as a co-perpetrator pursuant to article 25(3)(a) of the Statute⁴⁰ and, in the alternative, as a having contributed to the commission of crimes by a group of persons acting with a common purpose pursuant to article 25(3)(d) of the Statute,⁴¹ for the war crimes and crimes against humanity committed by the FDLR soldiers in North and South Kivu Provinces in 2009, listed in the Prosecutor's Application. In particular, the Prosecutor alleges under both article 25(3)(a) and 25(3)(d), that Callixte Mbarushimana together with Ignace Murwanashyaka and Sylvestre Mudacumura, adopted and implemented the common plan of "conducting widespread and systematic attacks against the civilian population in order to create a 'humanitarian catastrophe' and an international campaign to persuade the DRC and Rwanda Governments and the international community that the FDLR could not be defeated militarily and extort from them concessions of political power for the FDLR to stop atrocities against civilians".⁴²

29. The Chamber notes at the outset that the Prosecutor alleges that Callixte Mbarushimana is a member of the FDLR and that other members of this organization physically perpetrated the crimes alleged in the Prosecutor's Application. The Chamber is

⁴⁰ Prosecutor's Application, para. 115.

⁴¹ Prosecutor's Application, para. 129.

⁴² Prosecutor's Application, paras 119, 139.

satisfied that there are reasonable grounds to believe that at least since July 2007 Callixte Mbarushimana is the Executive Secretary of the FDLR,⁴³ Ignace Murwanashyaka is the President of the High Command of the FDLR⁴⁴ and Sylvestre Mudacumura is the Commander of the Army.⁴⁵ There are reasonable grounds to believe that following the arrest of President Murwanashyaka, in November 2009, Mbarushimana took over at least part of the decision-making powers of the President.⁴⁶

Criminal responsibility under article 25(3)(a) of the Rome Statute

30. The Chamber reiterates the rulings of the Court that article 25(3)(a) of the Statute embraces the notion of control of the crime as the determining criterion to distinguish between principal and accessory liability⁴⁷ and that “commission”, within the meaning of article 25(3)(a), gives rise to principal liability whereas the modes of participation punishable under article 25(3)(b) to (d) give rise to accessory liability.⁴⁸ The Chamber also reiterates its ruling in the *Katanga and Ngudjolo* case:

A definition of a principal that is predicated on the requirement of exercising control over the crime means that, for the purposes of distinguishing the three forms of principal liability provided for in article 25(3)(a) of the Statute, a principal is the one who:

a. physically carries out all elements of the offence (commission of the crime as an individual)

⁴³ Prosecutor's Application, Anx 6, 45.; Prosecutor's Application, Anx 6, 37.

⁴⁴ Prosecutor's Application, Anx 5, 4; Prosecutor's Application, Anx 6, 45.

⁴⁵ Prosecutor's Application, Anx 6, 12-3; Prosecutor's Application, Anx 6, 36-41; Prosecutor's Application, Anx 7, 122.

⁴⁶ Prosecutor's Application, Anx 6, 45-7; Prosecutor's Application, Anx 4, 159-161.

⁴⁷ See *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, “Decision on the confirmation of charges”, 29 January 2007, ICC-01/04-01/06-803-tEN (“*Lubanga Decision*”), para. 338; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, “Decision on the confirmation of charges”, 30 September 2008, ICC-01/04-01/07-717 (“*Katanga Decision*”), para. 486; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, “Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, 4 March 2009, ICC-02/05-01/09-3, para. 210; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 15 June 2009, ICC-01/05-01/08-424, para. 348.

⁴⁸ *The Prosecutor v. Germain Katanga*, Pre-Trial Chamber I, “Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga”, 5 November 2007, ICC-01/04-01/07-55, para. 54; *The Prosecutor v. Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, “Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui”, 6 July 2007, ICC-01/04-02/07-3, para. 55.

- b. has, together with others, control over the offence by reason of the essential tasks assigned to him (commission of the crime jointly with others); or
- c. has control over the will of those who carry out the objective elements of the offence (commission of the crime through another person).⁴⁹

31. While the Prosecutor submits that Callixte Mbarushimana bears responsibility as a co-perpetrator, there is no allegation that he has agreed to a common plan with any of the low rank executors or physical perpetrators of the alleged crimes. The Chamber therefore finds it more appropriate to analyse his responsibility in light of the requirements for indirect co-perpetration. The Chamber recalls the objective requirements of this mode of participation as set out in the *Katanga and Ngudjolo* case:

(a) existence of an agreement or common plan between two or more persons;⁵⁰ (b) coordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime;⁵¹ (c) control over the organization;⁵² (d) organised and hierarchical apparatus of power;⁵³ and (e) execution of the crimes secured by almost automatic compliance by the subordinates with the orders given by the leader.⁵⁴

32. On the basis of the information and evidence provided by the Prosecutor, the Chamber finds that there are reasonable grounds to believe that from on or about 20 January 2009, Callixte Mbarushimana, together with Ignace Murwanashyaka, Sylvestre Mudacumura and other high-ranking members of the FDLR, agreed to a common plan of conducting attacks against the civilian population in order to create a 'humanitarian catastrophe'.⁵⁵ Further, the Chamber recalls its finding that there are reasonable grounds to

⁴⁹ *Katanga* Decision, para. 488. See also *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", 4 March 2009, ICC-02/05-01/09-3, para. 210 that speaks about four manifestations of the notion of control of the crime: (i) direct perpetration, (ii) perpetration through another person or indirect perpetration, (iii) co-perpetration based on joint control; and (iv) indirect co-perpetration.

⁵⁰ *Katanga* Decision, paras 522-3; see also *Lubanga* Decision, paras 343-5.

⁵¹ *Katanga* Decision, paras 524-6; see also *Lubanga* Decision, paras 364-8.

⁵² *Katanga* Decision, paras 500-10.

⁵³ *Katanga* Decision, paras 511-4.

⁵⁴ *Katanga* Decision, paras 515-8.

⁵⁵ Prosecutor's Application, Anx 5, 22; Prosecutor's Application, Anx 6, 37-41; Prosecutor's Application, Anx 6, 48; Prosecutor's Application, Anx 6, 49; Prosecutor's Application, Anx 6, 49-50; Prosecutor's Application, Anx 6, 50-1; Prosecutor's Application, Anx 6, 56; "Crossing Continents: Congo Connection", interview by Peter Greste for BBC East Africa, 21 November 2009, available at

believe that war crimes and crimes against humanity in these provinces were actually committed throughout 2009, as a result or in furtherance of such common plan.⁵⁶

33. The Chamber further finds that there are reasonable grounds to believe that as part of the implementation of the common plan, an international campaign conducted simultaneously with and in close relation to the commission of crimes against the civilian population was put in place.⁵⁷ The Chamber is satisfied that there are reasonable grounds to believe that such international campaign was aimed at the concealment of the FDLR's involvement in the alleged commission of war crimes and crimes against humanity by publicly shifting the responsibility to the DRC and Rwandan armed forces,⁵⁸ in order to ultimately extort concessions of political power from the Governments of the DRC and Rwanda.⁵⁹ Moreover, the Chamber is satisfied that there are reasonable grounds to believe that the international campaign contributed to the commission of the alleged crimes in that it was motivational for and provided encouragement to the FDLR troops on the ground.⁶⁰

www.bbc.co.uk/programmes/p0053dr8#broadcasts, Prosecutor's Application, para. 71, footnote 86; Prosecutor's Application, Anx 6, 48-52; Prosecutor's Application, Anx 6, 56; Prosecutor's Application, Anx 6, 37-41; Prosecutor's Application, Anx 7, 126.

⁵⁶ See *supra*, paras 22 and 27.

⁵⁷ The evidence suggests that on several occasions the alleged commission of crimes was followed by intensive discussions among the FDLR leaders resulting in press releases signed by Callixte Mbarushimana, in which he denied the FDLR's involvement. See Prosecutor's Application, Anx 5, 12; Prosecutor's Application, Anx 4, 72; Prosecutor's Application, Anx 4, 73-4; Prosecutor's Application, Anx 5, 13-14; Prosecutor's Application, Anx 4, 76-7; Prosecutor's Application, Anx 5, 17; Prosecutor's Application, Anx 5, 24-33; Prosecutor's Application, Anx 5, 35-6; Prosecutor's Application, Anx 4, 109-10; "Crossing Continents: Congo Connection", interview by Peter Greste for BBC East Africa, 21 November 2009, available at www.bbc.co.uk/programmes/p0053dr8#broadcasts, Prosecutor's Application, para. 150, footnote 179.

⁵⁸ Prosecutor's Application, Anx 4, 72; Prosecutor's Application, Anx 4, 73-4; Prosecutor's Application, Anx 4, 76-7; Prosecutor's Application, Anx 5, 15-16; Prosecutor's Application, Anx 5, 18; Prosecutor's Application, Anx 4, 96; Prosecutor's Application, Anx 5, 24; Prosecutor's Application, Anx 5, 25; Prosecutor's Application, Anx 5, 26-33; Prosecutor's Application, Anx 5, 35-6; Prosecutor's Application, Anx 4, 109-10.

⁵⁹ Prosecutor's Application, Anx 5, 20-1; "Rebels 'threaten DR Congo deal'", available from <http://news.bbc.co.uk/2/hi/africa/72006720.stm>, Prosecutor's Application, para. 12, footnote 19; "DRC Hutu rebels warn against use of force", available from <http://www.mg.co.za/article/2008-12-09-drc-hutu-rebels-warn-against-use-of-force>, Prosecutor's Application, para. 2, footnote 3. The campaign included declarations that the FDLR would liberate the Rwandan people from the "yoke of the fascist regime" and demands to the governments to enter negotiations with the FDLR. See: Prosecutor's Application, Anx 4, 159-161; Prosecutor's Application, Anx 4, 72; Prosecutor's Application, Anx 4, 73-4; Prosecutor's Application, Anx 5, 13-14; Prosecutor's Application, Anx 4, 96; Prosecutor's Application, Anx 5, 26-33; Prosecutor's Application, Anx 4, 109-10; Prosecutor's Application, Anx 4, 168-69.

⁶⁰ Prosecutor's Application, Anx 6, 36-7; Prosecutor's Application, Anx 5, 46.

34. The Chamber also finds, on the basis of the information and evidence submitted by the Prosecutor, that there are reasonable grounds to believe that Callixte Mbarushimana, as Executive Secretary of the FDLR "Steering Committee" (*Comité Directeur*), personally contributed to the common plan, organising and conducting the above-mentioned international campaign by regularly using international and local media channels.⁶¹ The Chamber is further satisfied that there are reasonable grounds to believe that prior to addressing the media channels Callixte Mbarushimana was in regular contact with the other members of the FDLR "Steering Committee" to discuss the ways to misrepresent the facts relating to the alleged involvement of the FDLR in the commission of the crimes.⁶²

35. The Chamber, however, reiterates that co-perpetration based on joint control over the crime, whether that crime is perpetrated by the co-perpetrators or executed through another person, requires that the contribution to the common plan be essential in the sense that each co-perpetrator should have the power to frustrate the commission of the crime, in the way it was committed, by not performing his or her tasks.⁶³

36. In the case at hand, while there are reasonable grounds to believe that Callixte Mbarushimana contributed to the common plan in the way described above, at this stage the Chamber finds no sufficient evidence to establish reasonable grounds to believe that he had the power, by not performing his tasks, to frustrate the commission of the crimes. Therefore, the Chamber does not find at this stage sufficient evidence to establish reasonable grounds to believe that Callixte Mbarushimana's contribution was essential, and that his participation in the commission of the crimes alleged by the Prosecutor is that of a co-perpetrator or an indirect co-perpetrator, within the meaning of article 25(3)(a) of the Statute.

37. For the foregoing reasons, the Chamber will not examine the remaining elements of the alleged co-perpetration and will proceed to examine whether there are reasonable grounds to believe that Callixte Mbarushimana in any other way contributed to the

⁶¹ See supra footnote 57.

⁶² Prosecutor's Application, Anx 5, 35-6.

⁶³ *Katanga* decision, para. 525; *Lubanga* decision, para. 347.

commission of the alleged crimes by a group of persons acting with a common purpose, pursuant to article 25(3)(d) of the Statute.

Criminal responsibility under article 25(3)(d) of the Rome Statute

38. At the outset, the Chamber recalls its rulings that:

by moving away from the concept of co-perpetration embodied in article 25(3)(a), article 25(3)(d) defines the concept of (i) contribution to the commission or attempted commission of a crime by a group of persons acting with a common purpose; (ii) with the aim of furthering the criminal activity of the group or in the knowledge of the criminal purpose;⁶⁴

article 25(3)(d) of the Statute provides for a residual form of accessory liability which makes it possible to criminalise those contributions to a crime which cannot be characterised as ordering, soliciting, inducing, aiding, abetting or assisting within the meaning of article 25(3)(b) or article 25(3)(c) of the Statute, by reason of the state of mind in which the contributions were made.⁶⁵

39. The Chamber is of the view that the notion of “contribution” to a crime committed by a group of persons, as set out in article 25(3)(d) of the Statute has the following specific requirements:

Objective Elements: (i) a crime within the jurisdiction of the Court is attempted or committed; (ii) the commission or attempted commission of such a crime was carried out by a group of persons acting with a common purpose; (iii) the individual contributed to the crime in any way other than those set out in Article 25(3)(a) to (c) of the Statute;

Subjective Elements: (i) the contribution shall be intentional;⁶⁶ and (ii) shall either (a) be made with the aim of furthering the criminal activity or criminal purpose of the group; or (b) in the knowledge of the intention of the group to commit the crime.

⁶⁴ *Lubanga* decision, para. 334.

⁶⁵ *Lubanga* decision, para. 337.

⁶⁶ The Chamber takes note of the various interpretations of the word “intentional” used in article 25(3)(d) of the Statute but does not deem necessary to entertain in such legal discussion at this stage of the proceedings. For the different approaches see *inter alia* Kai Ambos, ‘Article 25’, in *Commentary on the Rome Statute of the International Criminal Court*, ed. by Otto Triffterer, Second Edition, pp. 758-759; Jens David Ohlin, ‘Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise’, 5 *Journal of International Criminal Justice* (2007), pp. 69-90, at 78-80; Antonio Cassese, ‘The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise’, in 5 *Journal of International Criminal Justice* 5 (2007), pp. 109-33, at 132.

40. The Chamber recalls its findings in the preceding section that there are reasonable grounds to believe that crimes within the jurisdiction of the Court were committed.⁶⁷ The Chamber has also found that there are reasonable grounds to believe that from on or about 20 January 2009 a common plan to attack the civilian population of the North and South Kivu Provinces of the DRC was agreed upon by a group of persons including Callixte Mbarushimana, Ignace Murwanashyaka, Sylvestre Mudacumura and other high-ranking members of the FDLR. As also found earlier, there are reasonable grounds to believe that as part of the implementation of the common plan an international campaign to extort concessions of political power for the FDLR was put in place.⁶⁸

41. As indicated earlier, the Chamber is satisfied that there are reasonable grounds to believe that Callixte Mbarushimana contributed to the implementation of the common plan by personally conducting the said international campaign in agreement with other leaders of the FDLR. Although at this stage the Chamber is not satisfied that the suspect's contribution was essential to the extent that, if withheld, it would frustrate the commission of crimes as they were committed, there are reasonable grounds to believe that the contribution made by Callixte Mbarushimana to the commission of war crimes and crimes against humanity by the FDLR soldiers in the North and South Kivus was relevant enough so as to amount to a contribution "in any other way" in the sense of article 25(3)(d) of the Statute.

42. The Chamber also finds reasonable grounds to believe that Callixte Mbarushimana's contribution to the alleged commission of the crimes by the FDLR was intentional. The Chamber is further satisfied that there are reasonable grounds to believe that Callixte Mbarushimana's contribution was made (i) with knowledge of the intention of the group to commit war crimes and crimes against humanity in the in North and South Kivu Provinces in 2009 and (ii) with the aim of furthering the criminal activity or criminal

⁶⁷ See supra paras. 22 and 27.

⁶⁸ See supra para. 34.

purpose of the FDLR which involved the commission of the war crimes and crimes against humanity in the in North and South Kivu Provinces in 2009.⁶⁹

43. On the basis of the evidence and information provided by the Prosecutor, the Chamber further finds reasonable grounds to believe that Callixte Mbarushimana was aware of the existence of the armed conflict on the territory of the Kivu provinces DRC; and that he knew that the conduct of the members of the FDLR troops was part of a widespread and systematic attack on the civilian population of North and South Kivu.

44. In view of the foregoing, the Chamber finds that there are reasonable grounds to believe that Callixte Mbarushimana is criminally responsible under article 25(3)(d) of the Statute for having contributed to the commission of war crimes and crimes against humanity allegedly committed by the FDLR troops in North and South Kivu Provinces in 2009.

V. Whether the requirements for the arrest of Callixte Mbarushimana have been met

45. Pursuant to article 58(1)(b) of the Statute, the Chamber shall, on the application of the Prosecutor, issue a warrant of arrest if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that the arrest of the person appears necessary:

- i. to ensure the person's appearance at trial;
- ii. to ensure that the person does not obstruct or endanger the investigation or the court proceedings; or
- iii. where applicable, to prevent the person from continuing with the commission of those of the crimes listed in the application of the Prosecutor, with respect to which the Chamber found that there are reasonable grounds to believe that they were

⁶⁹ Prosecutor's Application, para. 145-61; Prosecutor's Application, Anx 4; Prosecutor's Application, Anx 6, 37; Prosecutor's Application, Anx 5, 35-6.

committed, or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

46. In his application, the Prosecutor contends that the issuance of a warrant of arrest is necessary (i) to ensure Callixte Mbarushimana's appearance at trial, (ii) to ensure that he does not obstruct or endanger the investigation or the court proceedings, and (iii) to prevent him from continuing with the commission of crimes.⁷⁰

47. The Chamber notes that Callixte Mbarushimana, through his legal representative, expressed to the Prosecutor his willingness to cooperate with the Court, and assured in particular of his accessibility and immediate availability at all times.⁷¹ The information and materials provided by the Prosecutor, however, show that Callixte Mbarushimana resides in France and holds a French residency permit which enables him to travel freely within the Schengen area of the European Union.⁷² Further, it appears from a report appended to the Prosecutor's Application that the FDLR has an international support network that could enable him to flee by providing financial support.⁷³ The information and materials provided by the Prosecutor establish therefore that Callixte Mbarushimana has the necessary means to flee. The Chamber is thus satisfied that an arrest warrant is necessary at this stage to ensure Callixte Mbarushimana's appearance at trial.

48. As regards the second proposed ground for issuing an arrest warrant, the Chamber notes that, according to the Prosecutor, many witnesses and potential witnesses reside in areas of the DRC that are under the control and influence of the FDLR and other armed groups.⁷⁴ In light of Callixte Mbarushimana's alleged position as a temporary leader of the FDLR⁷⁵ and the information about his contacts with the FDLR members in the field,⁷⁶ he could have access to those witnesses and potential witnesses through FDLR supporters in the field. He is thus in a position to interfere with the Prosecutor's investigation by

⁷⁰ Prosecutor's Application, para 177.

⁷¹ "Prosecutor's Provision of Letter Concerning Legal Representation", ICC-01/04-576-US and ICC-01/04-576-US-Anx, 7 September 2010;

⁷² Prosecutor's Application, para 178.

⁷³ Prosecutor's Application, Anx 7, 25-31.

⁷⁴ Prosecutor's Application, para. 184.

⁷⁵ Prosecutor's Application, para. 184; Prosecutor's Application, Anx 6, 45-7.

⁷⁶ Prosecutor's Application, Anx 5, 35-6.

fostering an atmosphere of intimidation against FDLR victims and ICC witnesses or potential witnesses. The Chamber thus finds that the risk of such intimidation or interference is such as to justify the issuance of a warrant of arrest.

49. The Chamber finally notes that the information and evidence provided by the Prosecutor show that Mbarushimana maintains to date his position as a temporary leader of the FDLR⁷⁷ and continues to contribute to the commission of the crimes alleged in the Prosecutor's Application, by organising and conducting an international campaign by using media channels.⁷⁸ The Chamber is thus satisfied that the risk of continuing contribution to the commission of the said crimes is sufficiently high to justify the issuing of a warrant of arrest.

50. As is apparent from the language of article 58 of the Statute,⁷⁹ it is sufficient for the Chamber to be satisfied of only one of the conditions set forth in article 58(1)(b) of the Statute in order to issue a warrant of arrest. However, for the foregoing reasons and on the basis of the evidence provided by the Prosecutor, the Chamber finds, without prejudice to any subsequent determination under article 60 of the Statute and rule 119 of the Rules of Procedure and Evidence ("Rules"),⁸⁰ that the arrest of Callixte Mbarushimana appears necessary to ensure his appearance before the Court, for protecting victims, witnesses and potential witnesses in the field and the prosecutor's ongoing investigations, and to prevent

⁷⁷ See *supra* para. 29.

⁷⁸ Prosecutor's Application, Anx 6, 45-7; The Washington Times, Rukmini Callimachi, Accused genocide leader safe in Paris, giving orders, 28 January 2010, available at <http://www.washingtontimes.com/news/2010/jan/28/accusedgenocide-leader-safe-in-paris-giving-order>, last accessed on 1 September 2010, Prosecutor's Application, para. 126, footnote 163; Radio Okapi, 14 May 2010, at <http://radiookapi.net/actualite/2010/05/14/shabunda-liberation-des-45-otages-apres-de-violents-affrontements/>, last accessed on 20 August 2010, Prosecutor's Application, para. 188, footnote 129; FDLR press release of 04/03/10, DRC-OTP-2014-3505; FDLR press release of 28/04/10, DRC-OTP-2001-0924; FDLR press release of 02/06/10, DRC-OTP-2014-3501.

⁷⁹ As recalled in previous decisions of the Chamber. See *The Prosecutor v. Germain Katanga*, "Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga", 6 July 2007, ICC-01/04-01/07-4, para. 63; *The Prosecutor v. Omar Hassan Al Bashir*, "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", 4 March 2009, ICC-02/05-01/09-3, para. 227.

⁸⁰ *The Prosecutor v. Germain Katanga*, "Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga", 6 July 2007, ICC-01/04-01/07-4, para 64; *The Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo", 10 June 2008, ICC-01/05-01/08-14-tENG, para 90.

the suspect from continuing to contribute to the commission of the above-mentioned crimes.

FOR THESE REASONS, the Chamber

DECIDES that the case against Callixte Mbarushimana falls within the jurisdiction of the Court;

DECIDES to issue a warrant of arrest for Callixte Mbarushimana for his alleged responsibility for the following war crimes and crimes against humanity under article 25(3)(d) of the Statute:

- i. attacks against the civilian population as a war crime under article 8(2)(b)(i) or article 8(2)(e)(i) of the Statute;
- ii. destruction of property as a war crime under article 8(2)(a)(iv) or article 8(2)(e)(xii) of the Statute;
- iii. murders as a war crime under article 8(2)(a)(i) or article 8(2)(c)(i) of the Statute;
- iv. murders as a crime against humanity under article 7(1)(a) of the Statute;
- v. tortures as a war crime under article 8(2)(a)(ii) or article 8(2)(c)(i) of the Statute;
- vi. tortures as a crime against humanity under article 7(1)(f) of the Statute;
- vii. rapes as a war crime under article 8(2)(b)(xxii) or article 8(2)(e)(vi) of the Statute;
- viii. rapes as a crime against humanity under article 7(1)(g) of the Statute;

- ix. inhumane acts as a crime against humanity under article 7(1)(k) of the Statute;
- x. inhuman treatments as a war crime under article 8(2)(a)(ii) of the Statute;
and
- xi. persecution as a crime against humanity under article 7(1)(h) of the Statute;

DECIDES that the warrant of arrest for Callixte Mbarushimana shall be included in a separate self-executing document containing the information required by article 58(3) of the Statute;

DECIDES that, as soon as practicable, the Registry: (i) shall prepare a request for cooperation seeking the arrest and surrender of Callixte Mbarushimana and containing the information and documents required by articles 89(1) and 91 of the Statute, and by rule 187 of the Rules; and (ii) shall transmit, in consultation and coordination with the Prosecutor, such request to the competent French authorities in accordance with rule 176(2) of the Rules;

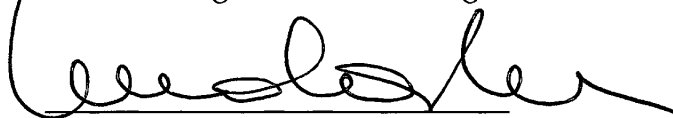
DIRECTS the Registrar, as appropriate, to prepare and transmit to any other State any additional request for arrest and surrender which may be necessary for the arrest and surrender of Callixte Mbarushimana to the Court pursuant to articles 89 and 91 of the Statute, and if the circumstances so require, to prepare and transmit a request for provisional arrest in accordance with article 92 of the Statute;

FURTHER DIRECTS the Registrar, pursuant to article 89(3) of the Statute, to prepare and transmit to any State any request for transit which may be necessary for the surrender of Callixte Mbarushimana to the Court;

ORDERS the Prosecutor to transmit to the Chamber and to the Registry, as far as his confidentiality obligations allow, all information available to him that may assist in averting any risks to victims or witnesses associated with the transmission of the above-mentioned cooperation request;

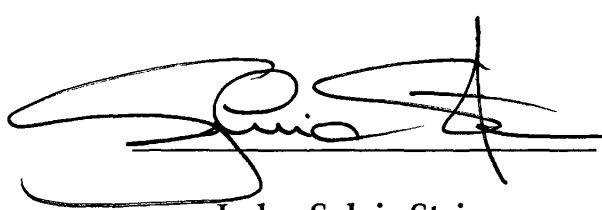
INVITES the Prosecutor to transmit to the Chamber and to the Registry, as far as his confidentiality obligations allow, all information available to him that, in his view, would facilitate the transmission and execution of the above-mentioned cooperation request.

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

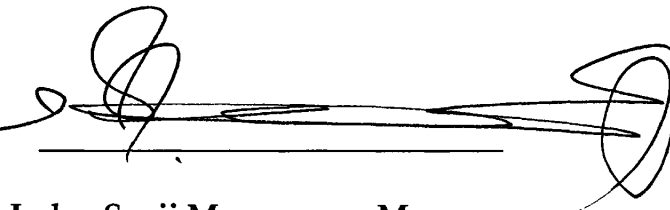


Judge Cuno Tarfusser

Presiding Judge



Judge Sylvia Steiner



Judge Sanji Mmasenono Monageng

Dated this Tuesday, 28 September 2010

At The Hague, The Netherlands