

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04

Date: 31 May 2012

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

Decision on the Prosecutor's Application under Article 58

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

The Office of the Prosecutor
Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the 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 & Deputy Registrar
Silvana Arbia, Registrar
Didier Preira, Deputy-Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER II (the “Chamber”) of the International Criminal Court (the “Court”) renders this decision¹ on the “Prosecutor’s Application under Article 58” dated 15 May 2012 (the “Application”).²

1. On 3 March 2004, the Democratic Republic of the Congo (the “DRC”) referred the situation in the DRC to the Prosecutor in accordance with articles 13(a) and 14 of the Rome Statute (the “Statute”).³

2. On 15 May 2012, the Prosecutor filed the Application, requesting the Chamber to, *inter alia*:

1. Find that there are reasonable grounds to believe that Sylvestre MUDACUMURA is 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 20 January 2009 and 31 August 2010, pursuant to Article 25(3)(a) or, in the alternative, Article 25(3)(b) or Article 28(a) of the Statute;

2. Find that the arrest of Sylvestre MUDACUMURA is necessary; [and]

3. Issue a warrant of arrest for Sylvestre MUDACUMURA;⁴

3. The Chamber notes articles 58, 60(1) and 67(1) of the Statute and rule 121(1) of the Rules of Procedure and Evidence (the “Rules”).

4. Articles 58(2)(b)(c) and (3)(b)(c) of the Statute require that the application of the Prosecutor and the warrant of arrest, respectively, contain, *inter alia*, a “specific reference to the crimes within the jurisdiction of the Court” and “a concise statement of the facts which are alleged to constitute those crimes”. The Prosecutor is thus obliged by virtue of the law to specifically refer to the crimes “which the person is alleged to have committed”. Accordingly, the warrant of arrest shall contain a *specific*

¹ The present decision is classified as public, although it refers to the existence of documents and, as the case may be, to a limited extent to their content, which have been submitted and are currently treated as confidential *ex-parte*. The Chamber considers that the references made in the present decision are required by the principle of publicity and judicial reasoning. Moreover, those references are not inconsistent with the nature of the documents referred to and have been kept to a minimum.

² ICC-01/04-612-Conf-Exp and its Annexes. *See also* ICC-01/04-612-Red-Corr (“Public Redacted Version of Application”).

³ Letter of Referral of the DRC Situation by Joseph Kabila, dated 3 March 2004, annexed to the “Prosecutor’s Application for Warrants of Arrest, Article 58”, ICC-01/04-98-US-Exp-Anx1.

⁴ Application, p. 47; Public Redacted Version of Application, p. 23.

reference to the crimes “for which the person’s arrest is sought”. The wording of the provision makes it clear that the responsibility of identifying the *specific* crimes allegedly committed lies solely with the Prosecutor and that the Chamber can only decide on the arrest of the person sought for the crimes *specifically* identified and described in the Application. It is beyond controversy that the fundamental principles of fair trial do not allow the Chamber to establish on its own any of the connections which are missing in the Prosecutor’s Application.

5. The need for *specificity* in detailing the conduct underlying the alleged crimes is also apparent in light of the provisions governing the proceedings following the issuance of an arrest warrant. Article 60(1) of the Statute requires that the Pre-Trial Chamber satisfies itself that the person “has been informed of the crimes which he or she is alleged to have committed”. Rule 121(1) of the Rules states that “the person shall enjoy the rights set forth in article 67” for persons subject to a warrant of arrest under article 58 of the Statute. Article 67(1)(a) of the Statute further requires that the accused be “informed promptly and in detail of the nature, cause and content of the charge”. Consequently, an application seeking the arrest of a person and a warrant of arrest if issued respectively, should comply with the legal requirement for *specificity*. Thus, the right of the person (in this case Mr. Mudacumura) would not fall short of adequately informing him at the appropriate stage of the proceedings of the crimes he has allegedly committed.

6. The Chamber notes that, although paragraph 32 of the Application lists all of the crimes alleged to have been committed by Mr. Mudacumura, no proper counts or any other kind of accompanying description of the specific facts underlying those crimes, as required by article 58(2) of the Statute, are provided in that paragraph.⁵ Although several criminal acts allegedly committed in various places in the Kivu provinces of the DRC are described in different paragraphs of the Application, the Prosecutor has not precisely identified the spatial parameters of each of those alleged

⁵ Compare Application, para. 32 with *Situation in the Democratic Republic of the Congo*, “Second Corrigendum of the Public Redacted Version of Prosecutor’s Application under Article 58 filed on 14 May 2012 (ICC-01/04-611-Red)”, 16 May 2012, ICC-01/04-611-Red-Corr2, pp 12-13.

crimes.⁶ Even where the underlying acts (murder, rape, etc.) are mentioned⁷ with regard to specific locations and dates, there is no clarity whether, in relation to these incidents, the Prosecutor is seeking Mr. Mudacumura's arrest for war crimes, crimes against humanity, or both. Other crime bases are even more problematic. In paragraph 67 of the Application, multiple crime bases and underlying criminal acts are named in the same paragraph with no detailed and precise indication as to which crimes are alleged in respect of which incident.⁸ In paragraph 70 of the Application, an attack on a series of villages in a single area is mentioned and the Chamber is not able to verify which of the underlying criminal acts in the last line of this paragraph correspond to which village(s).⁹

7. As is clearly indicated in article 58(2) of the Statute, it is the Prosecutor's duty and responsibility to set out the *specific* references to the crimes Mr. Mudacumura is alleged to have committed. The Prosecutor's own regulations confirm that it is the Office of the Prosecutor's responsibility to "*clearly identify* the crime(s) [...] alleged".¹⁰ It is for the Prosecutor to plead the *specific* crimes he believes to be proven and it is for the Chamber only to evaluate whether his allegations are substantiated to the relevant evidentiary standard.

8. *Specificity* in pleading an application for a warrant of arrest is also essential for the Chamber to be properly informed why its authority to deprive a person of his or her liberty should be exercised. Therefore, if the Prosecutor's Application falls short of the proper level of specificity, the Chamber will not effectuate its authority.

FOR THESE REASONS, THE CHAMBER HEREBY

dismisses the Application *in limine*.

⁶ See Application, paras 67, 70.

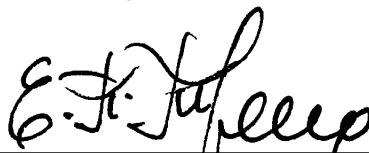
⁷ See Application, paras 55, 59, 65.

⁸ Application, para. 67.


⁹ Application, para. 70.

¹⁰ Regulations of the Office of the Prosecutor, reg. 53(1).

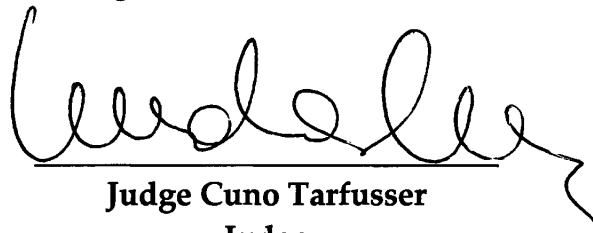
Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova
Presiding Judge



Judge Hans-Peter Kaul
Judge



Judge Cuno Tarfusser
Judge

Dated this Thursday, 31 May 2012

At The Hague, The Netherlands