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PRE-TRIAL CHAMBER I

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF

THE PROSECUTOR v. Callixte MBARUSHIMANA

Public redacted version

Prosecution's written submissions on the confirmation of charges

Source: **Office of the Prosecutor**

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I. INTRODUCTION

1. The Prosecution submitted that FDLR is a "group of persons acting with a common purpose" (Article 25(3)(d)) to attack civilians in order to gain power in Rwanda through an extortive negotiation. The FDLR committed widespread attacks against civilians in the Kivus area to force the international community to step in and pressure the DRC and in particular Rwanda to stop the crimes by intervening and forcing a political resolution.

2. The FDLR is composed of two different branches: a political and a military wing coordinated at the top by a Steering Committee. The military wing, based in DRC, conducted the attacks mentioned in the DCC. The leaders of the political wing, including Mbarushimana, were mainly based in Europe.

3. The FDLR leaders decided to engage in what Mbarushimana himself described as a "war of information".[1] The aim of this "war" was to deny the FDLR responsibility for a deliberate campaign of very serious crimes and at the same time to demand negotiation to end the suffering. This was a decision adopted by the Steering Committee including Mbarushimana.

4. Mbarushimana received the mandate to carry out this campaign, to be the voice of the group's extortive political demands. They were extortive because they demanded concessions in order to bring an end to the humanitarian catastrophe created by the FDLR. And, at the same time that he pushed for political negotiations, Mbarushimana made blanket denials of all alleged FDLR crimes, seeking to ensure that the FDLR would not be held accountable for its crimes.

[1] DRC-OTP-2038-2153 [EVD-PT-OTP-00782], 25 January 2009 email from Mbarushimana to Murwanashyaka and others referring to the "*guerre de communication / information contre l'ennemi qui nous a attaqué*" and proposing the publication of daily "situation reports" to complement the press releases. See also the 35 press releases listed in Slide 13, shown at the hearing, from which the Prosecution submits it is evident that Mbarushimana believed that he was waging such a "media war" by denying the FDLR's involvement in crimes and shifting the overall responsibility for the attacks on civilians onto the Congolese and Rwandan governments.

5. Mbarushimana's extortive negotiation demands and his public denials were his criminal and voluntary contribution to the FDLR's common purpose. He sought to provide a façade of reasonableness and plausible deniability that would allow the international community to accept the FDLR as something other than a purely criminal organization. To this end he would – from Europe and in his purely civilian capacity – publicly, immediately, repeatedly, vehemently and falsely deny the FDLR's direct involvement in the crimes and attribute them to other national or local armed groups. But at the same time, he would insist that the waves of civilian casualties would inevitably continue unabated until the States negotiated with and resolved the FDLR's legitimate grievances. It was necessary to engage in this parallel media war in order to give the FDLR public legitimacy sufficient to justify its inclusion in the talks and consideration of its demands on behalf of its leaders.

6. That, briefly summarized, is the theory of the case. The evidence also shows that the Suspect was a knowing contributor to the scheme, deliberately contributing on the public relations front to further the group's plan and with the knowledge that the group intended to commit crimes against the civilian population.

7. He was part of the FDLR Steering Committee that was responsible for the adoption of the FDLR's defence policies and he was a participant in the crafting of the parallel media campaign. By design, he did not need to be informed of each attack in advance, but he knew of the plan and he played his role of official spokesperson, categorically and authoritatively denying each attack as soon as public accusations were levied against the FDLR. Indeed, his contribution was essential to achieve the ultimate political objective of the common plan (a fact reasonably established by the evidence, though not required under article 25(3)(d)), because without his denials and his insistence that the FDLR was a lawful entity, the humanitarian catastrophe could not achieve the FDLR's goals. In addition, the evidence shows that the Suspect's public pronouncements

contributed to the commission of the crimes by boosting the morale of the fighters tasked with committing the crimes.

8. Specifically, Mbarushimana denied crimes committed during 15 FDLR attacks against the civilian population in different villages in the North and South Kivu provinces throughout 2009, which the Prosecution submits are illustrative of a wider pattern of attacks in the temporal period of the Charging Document.[2] Each of the attacks were either specifically denied, as is the case with six[3] of those incidents referred to in the Prosecution's submissions, or fell under one or more general 'blanket' denials of atrocities attributed to the FDLR in their campaign against the civilian population.

The January incidents and denials:

9. The first incident relates to an attack in January 2009, where FDLR combatants attacked civilians in the villages of Kibua and Katoyi in Masisi territory, North Kivu.

10. The second incident relates to an attack in January 2009 on the villages Malembe, Mianga and Busurungi, Walikale Territory, North Kivu. During these attacks, murders were perpetrated.

11. The third incident took place in late January 2009, when FDLR attacked civilians in Katoyi, Masisi territory.

12. The fourth incident relates to an attack also in late January 2009 on Remeka, Masisi territory, where the FDLR attacked civilians and carried out murders and rapes, destroyed civilian property and persecuted its people.

[2] ICC-01/04-01-10-T-6-ENG, page 83 line 18 – page 88 line 16.
[3] Katoyi, Pinga, Remeka, Luofu & Kasiki, Mianga, Busurungi,

13. The fifth incident relates to an attack in late January 2009, where FDLR attacked Busheke village, in Kalehe territory, South Kivu. During this attack, murders and rapes were committed, and civilians were subjected to persecution.

14. On 2 February 2009, Mbarushimana issued a press release denying reports by the Missionary International News Agency (MISNA) that the FDLR killed 36 civilians in villages between Masisi and Walikale.[4] Another press release denying a Human Rights Watch report[5] of the FDLR's January attacks was issued by the Suspect on 14 February.[6] On 20 February, the Suspect issued a further press release shifting blame for the Katoyi attack in January to PARECO and RPA forces and denying that massacres took place in Remeka and South Kivu.[7]

The February incidents and denials:

15. The sixth incident relates to an attack on or about 12-13 February 2009, where the FDLR attacked civilians in Kipopo, Masisi territory. During the attack, murders were committed and civilian property was destroyed.

16. The seventh incident is an attack on or about 14 February in Pinga, Masisi territory, North Kivu. During the attack, murders and rapes were committed out by the FDLR, and civilians were persecuted.

17. On 20 February, Mbarushimana issued a press release denying reports by MONUC which attributed responsibility for the massacre of 100 people in Pinga to the FDLR.[8] On 23 February, he issued a press release containing a blanket denial of crimes. It stated that "the FDLR have never committed any violation of human rights"[9] in the conflict. On 5 March, another press release issued by the

[4] DRC-OTP-2022-2433 [EVD-PT-OTP-00489].
[5] DRC-OTP-2014-0237 [EVD-PT-OTP-00281].
[6] DRC-OTP-2022-2441 [EVD-PT-OTP-00492].
[7] DRC-OTP-2022-2449 [EVD-PT-OTP-00494].
[8] DRC-OTP-2022-2449 [EVD-PT-OTP-00494].
[9] DRC-OTP-2003-0631 [EVD-PT-OTP-00066].

Suspect offered another blanket denial: "the FDLR have never been involved in massacres of Congolese civilians."[10] On 20 March, Mbarushimana issued another press release referring to the Pinga attack,[11] for which he claimed the FDLR were "falsely accused" by MONUC. On 23 March, he issued yet another press release that denied UNHCR reports of the propensity and consequences of FDLR attacks since mid-January. He offered another blanket denial: "the FDLR have never attacked and do not attack any civilian populations."[12]

The April incidents and denials:

18. The eighth incident took place on or about 12 April 2009, when the FDLR attacked Mianga, Walikale territory. The FDLR committed the crimes of murder, rape, torture and persecution and also destroyed and pillaged civilian property in Mianga.

19. The ninth incident was on or about 17-18 April 2009, when FDLR attacked the villages of Luofu and Kasiki, southern Lubero territory, North Kivu. The FDLR murdered and persecuted civilians and destroyed their property.

20. On 20 April 2009, Mbarushimana issued a press release denying any FDLR implication in the attacks on Luofu and Kasiki.[13] On 5 May, he issued a press release in response to a statement from the head of MONUC that the FDLR were responsible for the Luofu massacres, condemning these accusations as lies.[14] On 27 May, Mbarushimana issued a press release denying that the FDLR attacked

[10] DRC-OTP-2001-0054 [EVD-PT-OTP-00020].
[11] DRC-OTP-2001-0056 [EVD-PT-OTP-00021].
[12] DRC-OTP-2020-0564 [EVD-PT-OTP-00366].
[13] DRC-OTP-2022-2472 [EVD-PT-OTP-00506].
[14] DRC-OTP-2022-2475 [EVD-PT-OTP-00508].

civilians at Mianga and claiming instead that the FDLR were attacked by coalition forces.[15]

The Busurungi incidents and denials:

21. The tenth incident relates to the attacks before and on or about 9-10 May on Busurungi village and its vicinity, Walikale territory. The FDLR committed murder, rape, torture and mutilation, subjected civilians to inhumane acts, cruel treatment and persecution, and destroyed and pillaged civilian property in and around the village.

22. On 27 May, Mbarushimana issued a press release denying FDLR involvement in the attacks on Busurungi, shifting the blame instead to FARDC, RDF and Mai Mai coalition forces.[16] On 7 July, he issued a press release rejecting Human Rights Watch allegations of FDLR crimes and recalling his denials of the Busurungi and Mianga incidents.[17] On 9 July, he published a press release listing the artillery and equipment seized by the FDLR from the coalition forces at Mianga and Busurungi, implying that these were legitimate military attacks.[18]

Incidents in the second half of 2009 and denials:

23. The eleventh incident took place on or about 20-21 July 2009, when the FDLR attacked civilians in the village of Manje, Masisi territory, North Kivu. During the attack, the FDLR committed murder, rape and torture, subjected civilians to inhumane acts, cruel treatment and persecution, and destroyed civilian property in Manje.

24. The twelfth incident took place in August and September 2009, when the FDLR attacked the village of Malembe, Walikale territory. The FDLR committed rape,

[15] DRC-REG-0100-0628 [EVD-PT-OTP-01160].
[16] DRC-REG-0100-0628 [EVD-PT-OTP-01160].
[17] DRC-OTP-2022-2489 [EVD-PT-OTP-00516].
[18] DRC-OTP-2022-2606 [EVD-PT-OTP-00554].

torture and persecution, and destroyed and pillaged civilian property in Malembe.

25. The thirteenth incident took place on or about 2-3 December 2009, when the FDLR attacked Mutakato, Walikale territory, North Kivu. During the attack, the FDLR perpetrated the crimes of murder and destruction of civilian property.

26. The fourteenth incident took place on or about 6 December, when the FDLR attacked Kahole, Shabunda territory, South Kivu. During the attack, civilians were murdered and their property was destroyed.

27. The fifteenth incident was in the second half of 2009, when the FDLR attacked the village of witnesses W-673 and W-674 in Masisi territory, North Kivu. The FDLR committed rape, torture and murder, destroyed and pillaged civilian property and persecuted civilians in and around this village.

28. On 27 August 2009, Mbarushimana issued a press release warning the public that politicians, international institutions, authorities, journalists and other individuals had set out to tarnish the reputation of the FDLR.[19] He issued another press release on 15 September in response to the GoE report, rejecting accusations against the FDLR of abuses against civilians.[20] On 20 October, he issued a blanket denial of attacks against civilians, which had been attributed to the FDLR by MONUC and the UN Secretary General.[21] On 30 October, he issued a press release denying FDLR involvement in attacks in October, and reiterating the shift in blame to other groups for the attacks on Busurungi, Mianga, Kipopo and Remeka, amongst others.[22] On 18 November, in response to the arrest of Murwanashyaka and Musoni, he issued a press release with a blanket denial: "the

[19] DRC-OTP-2022-2508 [EVD-PT-OTP-00527].
[20] DRC-OTP-2001-0063 [EVD-PT-OTP-00025].
[21] DRC-REG-0003-1358 [EVD-PT-OTP-00944].
[22] DRC-OTP-2001-0099 [EVD-PT-OTP-00028].

FDLR are in no way involved in the atrocities committed against civilians in eastern DRC."[23]

29. For purposes of this submission, the Prosecution incorporates its amended Document Containing the Charges (DCC), amended List of Evidence (LoE), and its oral presentations of its core evidence at the confirmation hearing. This submission instead will address the specific legal and factual issues that arose during the confirmation hearing.

30. At the outset, however, the Prosecution also reminds the Chamber of the purpose of the confirmation hearing, to ensure that only sufficiently compelling charges – going beyond mere theory or suspicion – proceed to trial. This mechanism is designed to protect the rights of the Defence against wrongful and wholly unfounded charges, to distinguish between those cases that should go to trial from those that should not.[24] As this Chamber and others have repeatedly observed, the confirmation hearing is not a mini-trial or a "trial before the trial".[25] This Chamber further explained, *"at no point should the Pre-Trial Chambers exceed their mandate by entering into a premature in-depth analysis of the guilt of the suspect. The Chamber, therefore, shall not evaluate whether the evidence is sufficient to sustain a future conviction. Such a high standard is not compatible with the standard under article 61(7) of the Statute."*[26]

31. In order to meet its evidentiary burden, the Prosecution "must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations"[27] that is sufficient, taken at face value, to warrant committing the Suspect to trial on the charges against him. The Prosecution submits that for

[23] DRC-REG-0100-0514 [EVD-PT-OTP-01091].
[24] ICC-01/04-01/06-803-tENG, para. 37; ICC-01/04-01/07-717, para. 63; ICC-01/05-01/08-424, para. 28; ICC-02/05-02/09-243-Red, para. 39; ICC-02/05-03/09-121-Corr-Red, para. 31.
[25] ICC-01/09-01/11-221, para. 9; ICC-01/09-02/11-321, para. 8; ICC-01/04-01/07-717, para. 64; ICC-02/05-03/09-121-Corr-Red, para. 31 ; ICC-01/04-01/06-803-tENG, at para. 37.
[26] *Prosecutor v. Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, 8 February 2010, para. 40.
[27] *Ibid.*, para 39.

purposes of confirmation, the Pre-Trial Chamber should accept as reliable the Prosecution's evidence so long as it is relevant and admissible.[28] The process of resolving contradictions in evidence, which requires a full airing of the evidence on both sides and a careful weighing and evaluation of the credibility of the witnesses, occurs at trial. This is, significantly, consistent with analogous processes in other tribunals. Though the Pre-Trial Chamber's confirmation process is a unique feature of the Rome Statute, other international tribunals follow a similar analysis when reviewing mid-trial motions for acquittal[29] -- that is, they accept the evidence at face value, they do not make reliability or credibility assessments, and they determine if the evidence accepted on its face is sufficient to make a prima facie case under the requisite burden.[30] Similarly here at the confirmation hearing stage, the Pre-Trial Chamber should evaluate whether the evidence, accepted on its face, proves the elements of the crimes in accordance with the "substantial grounds" standard.

[28] See Rules 63(2), 64.

[29] The confirmation process is unique to this Court; other international tribunals do not provide similar pre-trial judicial examination of the merits of criminal charges. The ad hoc tribunals do provide, however, for a mid-trial review upon the Accused's application for an acquittal – which is, in effect, a comparable, albeit more comprehensive, screening of the case after the close of the Prosecution's evidence. See ICTY Rule 98*bis*. The standards by which those courts evaluate the evidence in ruling on acquittal applications are instructive. In particular, decisions of both the Yugoslav and Rwandan Tribunals consistently recognize that, in evaluating a Rule 98 *bis* motion for acquittal, the trial court does not assess reliability or credibility of the evidence presented in the case-in-chief, nor does it give lesser weight to evidence that it deems to be "'suspect', 'contradictory' or in any other way reliable". *Prosecutor v Blagojevic and Jokic*, Judgement on Motions for Acquittal Pursuant to Rule 98*bis*, IT-02-60-T, 5 April 2004, para. 15. See also, e.g. *Prosecutor v Jelisic*, Appeal Judgement, IT-95-10-A, 5 July 2001, para. 37; *Prosecutor v Rukundo*, 22 May 2007, ICTR-2001-70-T, Decision on Defence Motion for Judgement of Acquittal Pursuant to Rule 98*bis*, paras. 2-3; *Prosecutor v Rwamakuba*, Decision on Defence Motion for Judgment of Acquittal, ICTR-98-44C-R98*bis*, 28 October 2005, paras. 5-7, 13; *Prosecutor v Brdjanin*, Decision on Motion for Acquittal Pursuant to Rule 98*bis*, IT-99-36-T, 28 November 2003, paras. 2-4; *Prosecutor v Semanza*, Decision on the Defence Motion for a Judgment of Acquittal, ICTR-97-20-T, 27 September 2001, paras. 14-15, 17.

Instead, in deciding whether an accused is entitled to an acquittal at the close of the Prosecution case, "the Trial Chamber will not assess the credibility and reliability of witnesses unless the Prosecution case can be said to have 'completely broken down,' in that no trier of fact could accept the evidence relied upon by the Prosecution to maintain its case on a particular issue." *Prosecutor v Blagojevic and Jokic*, *supra*, para. 15 (citations omitted).

The "applicable objective standard of proof under Rule 98*bis* of the Rules is 'whether a reasonable trier of fact could, upon the evidence presented by the Prosecutor, taken together with all the reasonable inferences and applicable legal presumptions and theories that might be applied to it, convict the accused'". *Prosecutor v Kvocka et al*., IT 98-30/1-T, Decision on Defence Motions for Acquittal, 15 December 2000, citing *Prosecutor v Kordic and Cerkez*, Decision on Defence Motion for Judgement of Acquittal, IT-95-14/2-T, 6 April 2000, and *Prosecutor v Kunarac et al*., Decision on Motion for Acquittal, IT-96-23-T, 3 July 2000.

It is noteworthy that the *ad hoc* tribunals apply this less stringent standard in evaluating the Prosecution's case after the witnesses and evidence have been tested through direct and cross examination.

[30] *Prosecutor v Martic* IT-95-11-T Rule 98*bis* oral decision of 3 July 2006, T.5959-5971.

32. This standard means that the Pre-Trial Chamber should not reject or discount evidence because it is ambiguous, subject to more than one interpretation, or potentially inconsistent with other evidence. If the evidence is not incredible on its face, the Chamber must accept it and give it due weight.

33. This standard is necessary and appropriate because of the nature of confirmation as a screen. In the screening process, the Prosecution's evidence is "entitled to credence unless incapable of belief."[31] Similarly, the Pre-Trial Chamber should not weigh the evidence based on reliability or credibility assessments, nor should it evaluate the strengths and weaknesses of contradictory or different evidence before it.[32] And it should not reject evidence for lack of corroboration, since "it is well-established that a reasonable trier of fact may reach findings based on uncorroborated […] evidence".[33]

34. Since the presentation of witness evidence by way of written statements is to be considered the norm, given the nature and purpose of the hearing,[34] a fair and accurate assessment of the credibility and reliability of the witnesses' evidence is not possible on the basis of written witness statements alone. Should Chambers insist upon embarking upon such a process, the result will be that the parties may be constrained to call most or all of their witnesses at confirmation to avoid potentially adverse credibility findings based on perceived deficiencies of their witness statements. Such a result, however, would indeed transform the confirmation hearing into a "mini-trial".

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[31] *Prosecutor v Mrksić* IT-95-13/1-T Rule 98*bis* oral decision of 28 June 2006, T.11311-11313. See further *Prosecutor v Lubanga* Decision on the confirmation of charges, ICC-01/04-01/06-803-tENG, 29 January 2007, paras. 37 to 39; *Prosecutor v Katanga* Decision on the confirmation of charges, ICC-01/04-01/07-717, 30 September 2008, para. 65.
[32] *Prosecutor v Martic* IT-95-11-T Rule 98*bis* oral decision of 3 July 2006, T.5959-5971.
[33] *Prosecutor v Rwamakuba*, *supra*, para. 13.
[34] "the single judge expects the parties to rely on live witnesses only so far as their oral testimony at the hearing cannot be properly substituted by documentary evidence or witnesses' written statements"; *Prosecutor v Ruto and other*, ICC-01/09-01/11-153, para. 9; See also ICC-01/09-01/11-221.

35. The Prosecution submits that, considered as a whole,[35] the evidence it presented has provided concrete and tangible proof, demonstrating a clear line of reasoning, underlying each of the 13 charges contained in the Charging Document – remembering that it is not each *incident* which the Prosecution must establish in order for the Chamber to confirm the charges, but rather each *crime* alleged.

II. CRITICISMS LEVELLED AGAINST THE CHARGES

(i) Alleged imprecision of charges

36. Before confirmation, the Defence objected to the use of the phrase "including but not limited to", which was used to describe the incidents that exemplified the pattern of criminal conduct alleged in the charges. It also complained that the charges were imprecise in identifying dates and locations of alleged FDLR attacks.[36] The Prosecution responded in detail to this objection and refers the Chamber to its oral submissions and list of authorities provided.[37]

37. At the confirmation hearing, the Defence newly complained that the Prosecution's definition of the common purpose group is also imprecise. This objection is founded upon the premise that a common purpose group must contain three or more persons and that the common purpose group alleged here – which includes the Suspect, two other named individuals, and other FDLR members – is defective because the Defence asserts that it does not name three persons apart from the suspect. The Prosecution disagrees on all grounds with this objection.

38. First, Article 25(3)(d) does not impose a numerical requirement, either explicitly or by implication. Additionally, a group does not necessarily require a minimum

[35] *Ibid.*
[36] ICC-01/04-01/10-305, paras. 5 and 6.
[37] ICC-01/04-01/10-T-6-CONF-ENG ET, 16 September 2011, page 22 line 6 to page 27 line 12, ICC-01/04-01/10-427-Anx.

of three units.[38] However, the FDLR is integrated by thousands of persons, including some of the leaders identified by the charges. In fact, the group was identified in the DCC, and further clarification was given at the confirmation hearing that this common purpose group included, in addition to the suspect, FDLR President Murwanashyaka, General Mudacumura, 1st Vice President Musoni, and 2nd Vice President Iyamuremye.[39] Therefore the Defence's claims are both legally and factually without merit.

39. The Defence cited (1) an unsupported opinion by Prof. Albin Eser[40] that the word "group" must be distinguished from "a couple", and (2) the United Nations Transnational Organized Crime Convention (TOC),[41] which defines an organized criminal group as "three or more members". There is no evidence to suggest that the drafters of the Statute made the distinction between "a couple" and "group". Nor even is the term "a couple" necessarily limited to two people; instead it can informally be understood to mean 'an indefinite small number.' And the fact that the TOC found it essential to *expressly* define group as three or more members signifies that they understood that, without such a definition, "group" would otherwise normally be interpreted as denoting two or more persons acting with a common goal. The Rome Statute, indeed, does not establish a numeric requirement.

40. Additionally, there is no requirement that the identities of the group members be specified in the charges themselves. Nonetheless, as mentioned above, the Prosecution identified some of the FDLR's leaders including the suspect, FDLR

[38] "**Group :** [...] A number of people or things regarded as forming a unity or whole on the grounds of some mutual or common relation or purpose [...]." *Shorter Oxford English Disctionary on Histroical Principles*, Oxford University Press Inc. New York, 2002.
[39] ICC-01/04-01/10-T-6-CONF-ENG, 16 September 2011, page 32, lines 1 to 8.
[40] Cassese A., Gaeta P., Jones J.R.W.D. (eds), *The Rome Statute of the International Criminal Court: a commentary*,, Oxford University Press, 2002, page 802.
[41] United Nations Convention against Transnational Organized Crime, General Assembly resolution 55/25 of 15 November 2000, http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf, Article 5(1)(a)(ii), read with Article 2.

President Murwanashyaka, General Mudacumura, 1st Vice President Musoni, and 2nd Vice President Iyamuremye.[42]

(ii) Alleged Cumulative Charging

41. Relying on the *Bemba* confirmation decision,[43] the Defence argued that the charges are cumulative and purportedly infringe the right of the Suspect to be promptly informed of the nature and content of the charges and to have the time and means to adequately prepare his Defence. It additionally complains that torture incorporates the crime against humanity of inhumane acts and the war crime of cruel treatment; that the charges of rape and mutilation rely on the same acts; and that it is impermissible to charge the same offences as both war crimes and crimes against humanity.[44]

42. The Prosecution incorporates its earlier oral submissions.[45] Additionally, nothing in the Statute authorises a pre-trial chamber to decline to confirm charges because it considers the charges to be unnecessary or unduly burdensome to the Defence.

43. The Rome Statute makes it clear that the Pre-Trial Chamber is authorised to refuse to confirm a charge only if the evidence is insufficient. The selection of the offences to charge a Suspect, as long as they are supported by the evidence, is the prerogative of the Prosecutor.[46]

44. The Prosecution submits that *Bemba* decision erroneously declined to confirm the charges of torture (a crime against humanity) and outrages upon personal dignity (a war crime) on the grounds that these were improper 'cumulative charges'. The decision explicitly borrowed a test from the ICTY's decision in the *Čelebići* case to

[42] ICC-01/04-01/10-T-6-CONF-ENG, 16 September 2011, page 32, lines 1 to 8.
[43] ICC-01/05-01/08-424, 15 June 2009.
[44] ICC-01/04-01/10-T-6-CONF-ENG, 16 September 2011, page 18 to 19.
[45] ICC-01/04-01/10-T-7-CONF-ENG, 19 September 2011
[46] See articles 42(1) and 54(1)(b).

support its findings.[47] This test, however, does not prohibit *cumulative charging*, it governs the circumstances under which *cumulative convictions* are (and are not) permissible.[48]

45. While national jurisdictions and international tribunals allow cumulative charging,[49] the *Bemba* decision rejected this jurisprudence for two reasons. First, it reasoned that cumulative charging places an undue burden on the defence and undermines the fairness and expeditiousness of the proceedings.[50] Second, it found that there is no need for the Prosecutor to charge cumulatively because Regulation 55 allows for the Trial Chamber to re-characterise a crime to give it the most effective legal characterisation.[51]

46. In the Prosecution's submission, the principles relied upon in the *Bemba* confirmation decision are not applicable at this stage of the proceedings. Indeed, following the rule adopted in the *Bemba* decision could also preclude the Prosecution from charging both war crimes and crimes against humanity, or crimes against humanity and genocide, for the same underlying facts, notwithstanding that the legal elements and concerns of each category of crimes are distinct.[52]

47. Moreover, Regulation 55 is not an answer. First, it is not settled whether Regulation 55 can authorise the *addition* of a new legal characterisation (rather

[47] ICC-01/05-01/08-424, fn 270 (relying on *Prosecutor v. Delalic et. al.*, Case No. IT-96-21, AC Judgment, 20 February 2001, also referred to as the *Čelebići* case).
[48] *Prosecutor v. Delalić et. al.*, *supra*, paras. 400 (on cumulative charging), 412-413 (on cumulative convictions). The Appeals Chamber held that there is a distinction between cumulative charging and cumulative convictions and that cumulative charging is permissible but fairness to the accused requires that "*multiple cumulative convictions* entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other" (emphasis added).
[49] Pre-Trial Chamber II recognised that cumulative charging is followed in national courts and international tribunals (Bemba confirmation decision, para. 200). It also failed to provide any authority to prohibit or limit this practice at the charging (as opposed to conviction) stage.
[50] ICC-01/05-01/08-424, para. 202.
[51] *Ibid*, para. 203.
[52] It is only after the prosecutors present their evidence that the Trial Chamber will be in a better position to "evaluate which of the charges may be retained based upon [precisely] the sufficiency of evidence": *Prosecutor v. Delalić et al.*, *supra*, para. 400.

than merely the replacement of the old one).[53] So the availability of Regulation 55 does not eliminate the concern that eliminating counts diminishes the capacity of the charging document to properly reflect the full range of criminality. Second, it is more burdensome to the parties, including the Defence, to invoke Regulation 55. Far from being an efficient means to deal with the issue, dismissing charges at confirmation stage with the possibility that the Trial Chamber will resurrect them at a later time could affect the rights of the defence. It could also delay the conclusion of the trial in order to provide the Defence with "adequate time and facilities" to prepare its defence to the new, recharacterised charges and the opportunity to recall witnesses.[54]

48. With respect to the Defence's specific complaints, each of the charged offences in fact contain specific elements that the other offences do not: rape requires penetration, which is not required to prove torture or mutilation; torture requires an intentional infliction of severe pain for the purpose of punishing or intimidating, which is not an element of rape or mutilation; and mutilation requires the permanent disfigurement or disabling or removing an organ or appendage of the victim, which is not an element of either rape or torture. Inhumane acts and cruel treatment both require the intentional infliction of severe physical or mental pain and suffering, but do not contain the same punishment or intimidation requirement as torture. Charging the same conduct under crimes against humanity and war crimes is a recognized practice of international tribunals[55] and was additionally approved in *Bemba*.[56]

[53] While the Prosecution considers that there are arguments that Regulation 55 does include the possibility of adding a new legal characterisation (ICC-01/04-01/06-1966, paras. 16-18) it cannot be denied that the issue remains controversial (ICC-01/04-01/06-1975, paras. 10-25).
[54] Regulation 55(2) and (3) of the Regulations of the Court.
[55] Chambers of the ICTY and ICTR have delivered Judgments convicting persons for crimes against humanity and violations of the laws or customs of war which stem from the same conduct. *See*, for example, *Prosecutor v. Kovac et. al.*, IT-96-23, Judgment, 22 February 2001. *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment, 5 December 2003; *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, 2 August 2001; *Prosecutor v. Rutaganda*, ICTR 96-3-T, Judgment and sentence, 88, December 6, 1999.
[56] Decisions confirming the charges in: *Prosecutor against Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424; *The Prosecutor against Germian Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07-717;

49. It is also acceptable (and common practice) to charge persecution in addition to the underlying charge. The crime of persecution is distinct because it requires an additional specific persecutory intent. Further, the statute defines the crime as the commission of another act referred to in paragraph 7(1) or another crime within the jurisdiction of the Court with this added subjective element. The Prosecution submits that this formulation indicates that the drafters of the Statute intended that the crime of persecution be charged in addition to such crimes.

50. In other words, all the offences charged are distinct crimes, each with specific elements not required to prove the other crimes. Criminalising persecution, rape, torture, inhumane acts, cruel treatment and mutilation also protects separate – but equally important – interests. The Prosecution submits that where facts are capable of establishing more than one type of criminal conduct and responsibility, the Chamber is obligated – and it is appropriate -- to confirm all the established charges in order to encompass the entire scope of criminality committed, and injury suffered.

51. To decide otherwise would mean that the Suspect will avoid trial on serious charges for which the Prosecution has presented sufficient evidence to establish 'substantial grounds to believe that the person committed each of the crimes charged'. It also unfairly restricts the Trial Chamber's prerogative to pronounce judgment on the full range of crimes committed by the person and the nature and degree of victimisation suffered. Further, it could potentially restrict the rights of victims as granted and protected by the Statute to participate in the proceedings and later seek reparation for the harm suffered.

52. For these reasons, the Prosecution submits that the Chamber should confirm all charges established by sufficient evidence, and not strike any of the charges as inappropriately cumulative.

(ii) Alleged infringement of the Rule of Speciality

53. The Defence argued at confirmation that two crimes – pillaging and mutilation – were not part of the charges outlined in the arrest warrant and for which surrender was granted. Accordingly, it seeks as a remedy the denial of confirmation of those charges. Both the argument and the remedy are legally unsound.

54. Article 101(1) of the Statute provides: "A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered" (emphasis added). Unlike standard extradition treaties that bar the requesting State from prosecuting or punishing the person for offences for which extradition was not granted, this language is conduct-based.[57] The inquiry thus is whether the conduct or course of conduct was presented to the requested State in the surrender request.

55. In this instance, the Prosecution's Article 58 Application expressly spelled out the pillaging and mutilation by FDLR troops,[58] and the facts formed the basis of the charges of attacks against the civilian population and torture. The conduct alleged in the Application for a warrant of arrest formed the basis of the crimes

[57] The formulation of the initial propositions involved the terms "crime", "criminal act" or "offence", but in the final draft of the Statute, that terminology was put aside in favour of the more generic "course of conduct". As commentary on this provision suggests, this was to avoid misunderstanding that speciality is related to the *legal qualification* of the offender's deed rather than to the underlying *facts.* See Wilkitzki, P., "Commentary on article 101", in Triffterer, O., *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article*, Second edition, Verlag, C.H. Beck OHG, Munich, 2008, p.1638; see also United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998. Official records. Vol. 3, Reports and Other Documents, p.333, http://edms.icc.int/webdrawer/webdrawer.dll/webdrawer/rec/55065/. See also Tae Hyun Choi and Sangkul Kim, *Internationalized International Criminal Law*: 19 Mich. St. J. Int'l L. 589, 633 (2011)

[58] ICC-01/04-01/10, page 41, paragraph 101: "During the fighting, houses and military positions alike were set on fire. FDLR troops went from door to door, burning and **looting** houses and killing civilians in a systematic fashion."; Page 9, paragraph 13: "It also reported gang-rape on a mass scale, often perpetrated by seven to eight soldiers or more, and noted the extreme brutality of FDLR sexual attacks, which included **mutilation**, disfigurement, and savage rape, often culminating in murder."; See also for facts of mutilation: page 15 at count 6, page 36, paragraph 95; page 42 at paragraph 110 and 111.

for which the Warrant of arrest[59] was issued and, in turn, for which the Suspect was surrendered by the French authorities.[60]

56. Even if there were a speciality issue, however, speciality is ultimately an issue for the requested State.[61] If troubled by the possibility that the surrender did not encompass these charges, the Chamber may inquire of the French authorities whether they believe their prerogatives are infringed. If they do not agree with the Defence, that is the end of the issue. If they do agree, the Court may request a waiver of speciality under Article 101(2). It would, however, be a waste of institutional resources to deny confirmation on the assumption that speciality has been violated; instead, even if the Pre-Trial chamber believes that there exists a speciality issue, it should nonetheless consider the charges on the merits and, if the charges are confirmed, leave the resolution of this issue to the Trial Chamber.

III. CRITICISMS LEVELLED AGAINST THE PROSECUTION'S INTERPRETATION OF THE COMMON PURPOSE MODE OF LIABILITY

(i) Mbarushimana's membership in common purpose group

57. The Defence asserts that Article 25(3)(d) liability is available only for persons *outside* the group.[62] The Defence has thus far cited Professor Cassese as authority

[59] ICC-01/04-01/10-2.
[60] Furthermore, the Chamber expressly referred to acts of mutilation in its Decision on the Application for a Warrant of Arrest (ICC-01/04-01/10-1, page 13, paragraph 12 (ix) (x)); In the course of the proceedings in France, the *Chambre de l'Instruction* in ordering the surrender of the Suspect had access to the same Decision and also expressly referred to acts of mutilation.[60] This Order was confirmed by the *Cour de Cassation* (ICC-01/04-01/10-49-Conf-Anx8).
[61] Specialty derives from international comity and protects States' interests. Thus the right to object lies with the Requested state that surrendered the person. See *United States v. Tse*, 135 F.3d 200, 205 (1st Cir. 1998); *Truong v. the Queen*, 223 CLR 122,, 162 (para. 102), [2004] HCA 10.
[62] ICC-01/04-01/10-T-8-CONF-ENG, 20 September 2011, p 15, line 6 to p 16, line 17.

in support of this argument.[63] In contrast, none of the other authorities commonly referred to when interpreting Article 25(3)(d) advance this position.[64]

58. Again, the Prosecution disagrees.[65] The plain language of Article 25(3)(d) does not exclude charging a person who is a member of the common purpose group with this mode of liability. And the structure of Article 25(3), including the language employed, signifies an unambiguous intent that *all* participants in the commission of these crimes – whether they act directly, or order or solicit or aid and abet the crimes, or whether they make an intentional or knowing contribution to the common purpose to commit the crimes – can be prosecuted. The Statute is designed to capture all forms of direct, indirect, accessorial and other participatory liability. Immunizing an insider member of the common purpose group who shares in the plan and makes an intentional or knowing contribution but does not directly perpetrate, order, or assist the crime would be wholly contrary to that broad intent.

59. The Defence further asserts that if the Suspect is named as part of the common purpose group, it must prove that he shared the group's common intent. The Prosecution disputes that membership in the common purpose group does not change the subjective requirements of Article 25(3)(d**)**. It does not make them more burdensome. In particular, in a common purpose case, the Prosecution is not required to show that the Suspect shared the intent to commit the crimes. Nor does it require a "meeting of minds" with the perpetrators in respect of the commission of the crimes. It must only show that he made a contribution, either

[63] The Defence did not identify the publication by Professor Cassese that sets out his position. The Prosecution assumes it is Cassese, *International Criminal Law*, p. 213 (Second ed. 2008) and is not aware of any other articulation of this view. To be sure, Prof. Ambos also made the argument as an advocate supporting the Suspect, but he did not cite authority, much less establish that he had espoused that view before joining the defence team.
[64] See W.A. Schabas, *An Introduction to the International Criminal Court*, 3rd, 2007, at 215: "Under the concept of common purpose complicity, those who participate in a criminal enterprise are liable for acts committed **by their colleagues**" (emphasis added).
[65] See also T-8, p 91, lines 11-18.

with the intent of furthering the group's criminal activity or purpose,[66] or with the knowledge of the intention of the group to commit the crimes (in which case there is no additional intent requirement at all).

(ii) Mbarushimana's knowledge and intent

60. The Defence further contends that the Prosecution failed to establish that the Suspect knew of the criminal purpose of the FDLR and he intended to contribute to the crimes they committed.[67] That criticism is equally unfounded.

61. Starting from the proposition that a person may be both a member of the common purpose group and criminally liable under Article 25(3)(d), membership in the group provides some indicia that he knew of the group's criminal activity and purpose and of its intention to continue to commit the crimes – i.e. the FDLR's policy to attack civilians. His membership in the common purpose group therefore confirms the Suspect's knowledge. In addition, the following factors to consider include:

a. his knowledge of the steady and repeated allegations of FDLR crimes from a variety of sources, including UN Security Council Resolutions, public reports and internal FDLR sources;
b. his position as one of the top elected officials in the FDLR and as a trusted advisor of President Murwanashyaka;
c. his role on the Steering Committee, the body responsible for the adoption of FDLR defence policy, and his participation in the adoption of the plan to conduct the international media campaign;
d. his access to information about the FDLR's military and criminal activities from internal sources;

[66] In which case his intent is directed at the activity or purpose which "involve", but are not limited to, the commission of crimes.
[67] ICC-01/04-01/10-T-8-CONF-ENG, 20 September 2011, page 79 line 24 to page 80 line 8.

e. his implementation of the international media campaign aiming to deny all allegations made against the FDLR "immediately and systematically"; and

f. his representation of the FDLR internationally, *vis-à-vis* a variety of relevant actors, including the mediators;

- all of which permits the inference that he knew of the scheme to commit a series of crimes against civilians to further the group's political goals.

62. As stressed in the Prosecution's opening statement, the Suspect did not need to have prior knowledge of each specific crime committed by the FDLR, or alleged in the Prosecution charges. The Rome Statute requires knowledge of the criminal intention of the group, not details of the crimes. His knowledge of exact details about FDLR crimes prior to their commission was irrelevant to the execution of the Common Plan, since the latter required Mbarushimana to deny *all* allegations as soon as they surfaced, regardless of their veracity. Indeed, knowledge was not only irrelevant, it was also contrary to the deliberate FDLR policy to distance the political leadership from any direct involvement in the on-the-ground commission of crimes.

63. The Prosecution does not, however, allege – and need not allege, as a matter of law – that he shared an explicit intent to commit the particular attacks and particular crimes. His *mens rea* is sufficient to meet the requirement that he intended to further FDLR's criminal activities or purpose (for sub-paragraph (i)) or that he knew of the group's intention to continue to commit the specific crimes (for sub-paragraph (ii)).

64. The evidence provides substantial grounds to believe that this common purpose group adopted and executed a two-pronged common plan of attacking civilians and denying responsibility therefore. This two-pronged plan had, as its ultimate purpose, to extort political concessions for the FDLR. As submitted during the

oral hearing,[68] the two parts of the plan were interconnected and inseparable: one could not work without the other. Without Mbarushimana's denials and extortive message, the FDLR's crimes would be purposeless; they would defeat, rather than further, the group's ultimate goal. For this reason, Professor Ambos's attempt to analyse the case by dividing up the common plan into separate and unrelated components fails.

(iii) Mbarushimana's contribution: link with and effect on the crimes

65. The Defence argues that Article 25(3)(d) requires a link between Mbarushimana's contribution and the crimes committed which is at least "substantial"[69] and that Prosecution has failed to establish this.[70] The Prosecution disputes this.

66. While Article 25(3)(a) requires essential contributions – i.e., that the person "commits such a crime" -- for co-perpetrators, Article 25(3)(d) does not. Contrary to defence counsel Ambos' argument, sub-paragraph (d) does not require that the contribution be substantial. Instead, by its plain language the Statute simply requires that the person contribute "in any other way".[71]

67. The Prosecution alleges that the Suspect contributed to the commission of these crimes by (1) making public statements intended to shield them from responsibility or sanctions for their ongoing criminal activities, (2) encouraging the soldiers to continue to commit crimes with the knowledge that the leadership will support and protect them, (3) making extortive demands of the international community (including with veiled threats that absent agreement to his demands the violence would continue), and (4) participation as a member of the Steering

[68] ICC-01/04-01/10-T-8-CONF-ENG, 20 September 2011, p 95, lines 17-25.
[69] Or, at least, "grave and not irrelevant". ICC-01/04-01/10-T-8-CONF-ENG, 20 September 2011, p 25 line 21 to p 26 line 2.
[70] ICC-01/04-01/10-T-8-CONF-ENG, 20 September 2011, p 10, lines 11-19, p 23 from line 20 to p 24 line 2, and p 24, lines 18-21.
[71] See Prosecution's oral submissions during the confirmation hearing, ICC-01/04-01/10-T-8-CONF-ENG, 20 September 2011, pp 93-94.

Committee that planned the overall strategy. Its evidence provides substantial grounds to believe that Mbarushimana contributed to the common plan, that this contribution had a real and tangible effect on the commission of the crimes and, therefore, that he contributed to their commission, as required by Article 25(3)(d), in at least the following specific respects:

a. According to W-689, Mbarushimana was an authorised FDLR representative in discussions about the group's conditions for demobilisation. He also agreed to the use of humanitarian corridors on behalf of the group. This provides substantial grounds to believe that Mbarushimana's contribution had a direct effect on the exposure of civilians to the conflict. It also provides substantial grounds to believe that Mbarushimana had a say as to whether, when and on what terms the FDLR would cease to participate in the armed conflict. His contribution therefore had an effect on the combatants' ability to continue to commit crimes.
b. According to demobilised FDLR combatants, the words of their leaders, including Mbarushimana, had an effect on the soldiers' morale. Their leaders' words helped the soldiers do their "job". These same (and other) FDLR demobilised combatants described their activities in the FDLR (i.e. their "job") as including the commission of crimes.[72] The same FDLR insiders also confirm that the crimes were in fact committed, in implementation of the order to create a humanitarian catastrophe. This evidence therefore provides substantial grounds to believe that Mbarushimana's contribution had a direct effect on the soldiers who committed the crimes.
c. More importantly, Mbarushimana's denials of FDLR responsibility for the crimes gave the FDLR the political space to continue to pursue its political objective of extorting concessions of political power. This, it is submitted, contributed to the ongoing commission of the crimes against civilians by

[72] See Prosecution's oral submissions, ICC-01/04-01/10-T-7-CONF-ENG, 19 September 2011, page 38 line 16 to page 39 line 2.

providing the very *raison d'être* for the continuation of the campaign to create a humanitarian catastrophe, without which the campaign would have been futile.

68. The evidence provides, therefore, substantial grounds to believe that there was a definite link between Mbarushimana's contribution and the crimes committed by FDLR soldiers and that this contribution had a tangible effect on the commission of such crimes.

(iv) Mbarushimana's contribution: temporal analysis of selected contributions

69. During its oral presentation, the Prosecution provided the Chamber with 11 timelines illustrating some of the evidence of Mbarushimana's knowledge of, and contribution to, the commission of crimes by the FDLR in their temporal context, in particular Mbarushimana's contribution to the FDLR's vital international campaign.[73] In these 11 separate parts of the timeline, the Prosecution linked public reports of alleged FDLR crimes, internal FDLR documents and intercepted communications. They are placed along three horizontal theme lines corresponding to (i) reports of main events such as news of alleged FDLR attacks or meetings; (ii) evidence of Mbarushimana's contribution and knowledge, and (iii) intercepted communications or telecommunications data.

Parts 1, 2 and 5 – Common purpose, the Suspect's contribution and knowledge

70. Part 1[74] relates to the January 2009 Steering committee meeting,[75] wherein the FDLR leadership decided on the international media campaign to be conducted in parallel with the attacks on civilians and the intended central role and content of

[73] Because the Chamber has assigned HNE numbers to these documents, the Prosecution does not annex them to this submission.
[74] ICC-01/04-01/10-445-Conf-Exp-Anx2, page 1: *Steering committee Meeting, January 2009.*
[75] DRC-REG-0007-0752 [EVD-PT-OTP-01025].

the media campaign as part of the FDLR's overall strategy.[76] It shows the intense discussions, coordinated exchange of comments and input through phone, emails and SMS, among FDLR political and military leaders in the field[77] and in Europe[78] leading up to the meeting. It particularly demonstrates Mbarushimana's access to the information exchanged, and his involvement in the discussions,[79] including that he signed the final recommendation document.[80]

71. Part 2[81] demonstrates Mbarushimana's access to and immediate knowledge of information pertaining to FDLR military operations on the ground. Following the FARDC/RDF attack on the FDLR bases on Kibua and Katoyi, Mbarushimana had daily SMS and telephone contact with a member of the president's cabinet in the field (Levite). He records[82] and transmits[83] to Murwanashyaka the contents of these exchanges on issues such as movements of FDLR and other armed groups' troops, displacement of civilians, crimes and political developments.

72. Part 5 concerns the Easter motivational message[84] by President Murwanashyaka to the troops dated 26 March 2009. Iyamuremye[85] received this in early April for dissemination to the FDLR combatants. A copy was also found at Mbarushimana's residence, along with an email by President Murwanashyaka to the Suspect containing the translation of a Press Release. In the email the FDLR

[76] DRC-REG-0100-0936 [EVD-PT-OTP-01230].
[77] Such as Mudacumura and Iyamuremye.
[78] Such as Mbarushimana and Murwanashyaka.
[79] DRC-OTP-2038-2294 [EVD-PT-OTP-00801]; DRC-REG-0100-0943 [EVD-PT-OTP-01231]; DRC-REG-0100-0946 [EVD-PT-OTP-01232]; DRC-REG-0100-0934 [EVD-PT-OTP-01231]; DRC-REG-0100-0931 [EVD-PT-OTP-01226]; DRC-REG-0100-0936 [EVD-PT-OTP-01230]; DRC-REG-0007-0752 [EVD-PT-OTP-01025].
[80] DRC-REG-0007-0752 [EVD-PT-OTP-01025].
[81] ICC-01/04-01/10-445-Conf-Exp-Anx2, page 11*: Suspect's access to information about operations on the ground January February 2009.*
[82] DRC-REG-0100-1146 [EVD-PT-OTP-01237]; DRC-OTP-2039-0145 [EVD-PT-OTP-00825]; DRC-OTP-2039-0135 [EVD-PT-OTP-00824]; DRC-REG-0004-2054 [EVD-PT-OTP-00970]; DRC-OTP-2038-2291 [EVD-PT-OTP-00800].
[83] DRC-OTP-2037-0045 [EVD-PT-OTP-00749]; DRC-OTP-2038-2156 [EVD-PT-OTP-00783].
[84] DRC-REG-0001-2481 [EVD-PT-OTP-00900]; DRC-OTP-2039-0126 [EVD-PT-OTP-00822].
[85] DRC-OTP-2013-4911 [EVD-PT-OTP-00234]; DRC-OTP-2022-0306 [EVD-PT-OTP-00467].

President insisted[86] on the need to post the press release and the motivational message on the home page of the FDLR website.

73. Together, these sequences expose the coordinated functioning of the common purpose group, circulation of information and the contacts between its members. They highlight the central importance of the media campaign and maintaining the morale of the troops, both to the members in Europe and in the field, in the FDLR criminal plan. They also highlight the Suspect's role in the middle of the strategy and his knowledge and contribution to the detailed operational functioning and goals of the FDLR.

Parts 3, 4, 6, 9 and 11– Suspect's contribution to the media campaign and knowledge of crimes, common purpose

74. Part 3[87] shows that the Suspect's reactions to an HRW article (on 13 February 2009)[88] alleging FDLR involvement in crimes in Remeka and in sending warning letters to the civilian population. Within hours of this public allegation, Mbarushimana recorded an audio message of denial.[89] The next day, he signed and issued a press release[90] and two days later he recorded a second audio message.[91] In all three media, the Suspect issued blanket denials of HRW's accusation and called for "independent" investigations.

75. Part 4[92] shows that, in early March 2009, within 24 hours of a UN imposition of sanctions on FDLR leaders (including the Suspect) based on alleged crimes against civilians, Mbarushimana and Murwanashyaka spoke by telephone.[93] After several drafts,[94] a Press release[95] denying these crimes and condemning the UN

[86] DRC-REG-0002-0918 [EVD-PT-OTP-00936]; DRC-OTP-2038-2280 [EVD-PT-OTP-00796].
[87] ICC-01/04-01/10-445-Conf-Exp-Anx2, page 16: *Denial of HRW allegations of 13 February 2009.*
[88] DRC-OTP-2014-0237 [EVD-PT-OTP-00281].
[89] DRC-REG-0100-1263 [EVD-PT-OTP-01247].
[90] DRC-OTP-2001-0050 [EVD-PT-OTP-00018]; DRC-REG-0100-0542 [EVD-PT-OTP-01112].
[91] DRC-REG-0100-1266 [EVD-PT-OTP-01248].
[92] ICC-01/04-01/10-445-Conf-Exp-Anx2, page 17: *FDLR reaction to UNSC sanctions imposed on suspect and military commanders, early March 2009.*
[93] DRC-OTP-2014-2133 at 2709, 2710, 2711, 2716, 2718, 2719 [EVD-PT-OTP-00311].
[94] DRC-REG-0001-4055 [EVD-PT-OTP-00914] and DRC-REG-0001-4049 [EVD-PT-OTP-00911].

sanctions was issued two days later in the Suspect's name. The same day, Murwanashyaka informed an FDLR member in the field that the press release has been issued to defend the FDLR and condemn the sanctions.

76. Part 6[96] shows the Suspect's reaction to a media report[97] from Radio Okapi on 18 April 2009 alleging that the FDLR killed civilians and burned houses in Luofu and Kasiki,. Within a day of that report, Mbarushimana contacted Murwanashyaka via SMS. The Suspect then received three emails[98] from FDLR members, including the FDLR President, forwarding articles by other press agencies taking up the same allegations of crimes. These email exchanges stressed the need to react, to coordinate a response and to urgently deny the allegations. After two drafts,[99] a press release[100] was issued in the Suspect's name on 20 April, denying FDLR responsibility for the crimes in Luofu and Kasiki. [101]

77. Part 9[102] shows that the Suspect was intimately involved in denying FDLR responsibility for criminal acts committed at Busurungi and Mianga. It also shows the pattern of communication and decision-making processes between top FDLR leaders, including the Suspect, in denying crimes committed by the FDLR. Mbarushimana knew of crimes which took place in Busurungi and Mianga both from media reports[103] and directly from Murwanashyaka.[104] The latter was also in direct contact with commanders on the ground in the Kivus regarding the

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[95] DRC-REG-0100-0537 [EVD-PT-OTP-01109] and DRC-OTP-2001-0054 [EVD-PT-OTP-00020].
[96] ICC-01/04-01/10-445-Conf-Exp-Anx2, page 19: *FDLR denial of responsibility for alleged crimes in Luofu and Kasiki*, *18-20 April 2009*.
[97] DRC-OTP-2014-0807 [EVD-PT-OTP-00293].
[98] DRC-REG-0002-0907 [EVD-PT-OTP-00930]; DRC-REG-0002-0908 [EVD-PT-OTP-00931] and DRC-REG-0002-0906 [EVD-PT-OTP-00929].
[99] DRC-REG-0100-3836 [EVD-PT-OTP-01258]; DRC-REG-0002-0911 [EVD-PT-OTP-00933].
[100] DRC-OTP-2022-2582 [EVD-PT-OTP-00548]; DRC-REG-0100-0596 [EVD-PT-OTP-01143].
[101] DRC-OTP-2002-0860 [EVD-PT-OTP-00052].
[102] ICC-01/04-01/10-445-Conf-Exp-Anx2, page 31: *FDLR Reaction to Busurungi and Mianga attacks*
[103] ICC-01/04-01/10-445-Conf-Exp-Anx2, pages 31 and 33 (DRC-REG-0100-1603 [EVD-PT-OTP-01252]; DRC-REG-0001-2877 [EVD-PT-OTP-00904]).
[104] ICC-01/04-01/10-445-Conf-Exp-Anx2, p. 31. Email to MBARUSHIMANA *[Subject: info on what happened at Busurungi],* reporting on the units involved, weapons seized, the retaliatory nature of the attack, that it was carried out by the Reserve Brigade and soldiers from FOCA command, and propaganda surrounding the incident (DRC-REG-0001-1625 [EVD-PT-OTP-00866], translation at DRC-OTP-2034-1583 [EVD-PT-OTP-00728]).

Busurungi and Mianga attacks.[105] The top FDLR leaders, including the Suspect, collaborated to prepare a press release denying FDLR responsibility for the crimes,[106] which was subsequently published in the Suspect's name.[107] This press release falsely shifted the blame for civilian deaths onto the FARDC, despite the fact that the Suspect knew full well that the FDLR was responsible.[108] The automatic cycle of denial and blame-shifting continued with Mbarushimana issuing follow-up press releases continuing to deny the FDLR role in the Busurungi and Mianga attacks,[109] directly responding to HRW accusations. These press releases also listed armaments allegedly seized from the FARDC coalition, which would support a claim that these attacks were legitimate military operations, in spite of the evidence to the contrary[110]

78. Part 11[111] reflects arrangements for and content of an interview given to the BBC by Mbarushimana in October 2009, appearing in his official position as FDLR Executive Secretary. He promoted the FDLR's agenda and denied insiders' reports that FDLR leaders in Europe ordered the troops to commit crimes and that the FDLR in fact committed the crimes. He blamed other armed groups,

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[105] ICC-01/04-01/10-445-Conf-Exp-Anx2, pages, p. 32 and 33. He had contact with an FDLR field commander (DRC-OTP-2013-5525 [EVD-PT-OTP-00264]) and with Iamuremye (DRC-OTP-2013-5538 [EVD-PT-OTP-00265]; DRC-OTP-2013-5567 [EVD-PT-OTP-00268], DRC-OTP-2013-5581 [EVD-PT-OTP-00269]).

[106] ICC-01/04-01/10-445-Conf-Exp-Anx2, pages, p. 33 and 34. Iamuremye suggests wording for a press release to Murwanashyaka (DRC-OTP-2013-5589 [EVD-PT-OTP-00270]); Murwanashyaka drafts press release and circulates to FDLR leaders for comment, including Mbarushimana (DRC-OTP-2037-0032 [EVD-PT-OTP-00746]); Mbarushimana and Murwanashyaka discuss the draft (DRC-OTP-2021-0262 [EVD-PT-OTP-00381]).

[107] ICC-01/04-01/10-445-Conf-Exp-Anx2, pages, p. 36 (DRC-OTP-2014-3488 [EVD-PT-OTP-00326]; DRC-REG-0100-0752 [EVD-PT-OTP-01203]).

[108] ICC-01/04-01/10-445-Conf-Exp-Anx2, pages, p. 34 (DRC-OTP-2021-0262 [EVD-PT-OTP-00381]; DRC-OTP-2024-2675 at -2678 lines 56-62 [EVD-PT-OTP-00592]).

[109] ICC-01/04-01/10-445-Conf-Exp-Anx2, pages, p. 37 (DRC-OTP-2022-2489 [EVD-PT-OTP-00516]; DRC-OTP-2022-2606 [EVD-PT-OTP-00554]).

[110] ICC-01/04-01/10-T-7-CONF-ENG, 19 September 2011, p.67 lines 6-10 and ICC-01/04-01/10-T-8-CONF-ENG, 20 September 2011, p. 48 lines 1-19. Notably, the Defence no longer appears to contend that the Busurungi attack was a legitimate operation; at the hearing it suggested that the attack was unauthorized and unlawful but planned and executed by a rogue FDLR commander without the knowledge or approval of FOCA Command.

[111] ICC-01/04-01/10-445-Conf-Exp-Anx2, page 39: *Coordination for Interview with BBC*.

questioning the method of identification of perpetrators and calling for independent investigations.[112]

79. Sequences 3, 4, 6, 9 and 11 demonstrate that Mbarushimana was on notice of serious allegations of crimes attributed to the FDLR. These timelines illustrate the systematic nature of Mbarushimana's denials of crimes, which complied with the FDLR Steering Committee's earlier mandate. He was in constant contact with FDLR members in Europe in order to coordinate the FDLR reaction to public accusations by denying responsibility as swiftly as possible. The veracity of the allegations was apparently irrelevant – it was never discussed in these communications and the immediacy of the reactions did not allow verification. Mbarushimana contributed to the media campaign crucial to the common plan, aimed at preserving the FDLR's pretence that it was not responsible.

Parts 7, 8, 10 - Common purpose, the Suspect's contribution and knowledge regarding contact of FDLR with external actors.

80. Part 7[113] shows the circulation of information between FDLR military and political leaders, including the Suspect, and the detailed instructions[114] transmitted to the field[115] on the procedure for contacts with external actors. Because of the ongoing threat that troops would desert, it was crucial that the FDLR control information and negotiation on issues related to the UN demobilisation campaign. The Suspect reacted[116] to external contacts and replied[117] to them as the representative of the FDLR. As expressed by the FDLR President to the FOCA Commander, the

[112] DRC-REG-0100-0960 [EVD-PT-OTP-01236] and DRC-REG-0100-0959 [EVD-PT-OTP-01235].
[113] ICC-01/04-01/10-445-Conf-Exp-Anx2, page 21: *Contact with external parties to be channeled through MURWANASHYAKA and Suspect only*.
[114] FDLR internal document (email) DRC-REG-0001-1850 [EVD-PT-OTP-00896]; DRC-OTP-2038-2266 [EVD-PT-OTP-00793].
[115] DRC-OTP-2022-0032 [EVD-PT-OTP-00398].
[116] Mbarushimana's electronic notes: DRC-REG-0100-0910 [EVD-PT-OTP-01224].
[117] Mbarushimana's emails (DRC-REG-0002-0909 [EVD-PT-OTP-00932]; DRC-OTP-2038-0221 [EVD-PT-OTP-00768]; DRC-REG-0100-0852 [EVD-PT-OTP-01222])

agreed policy was that all contacts of this nature should be channelled exclusively through Murwanashyaka and the Suspect.[118]

81. Part 8[119] illustrates that, when a UN mission requested the cooperation of the FDLR on the ground, the Suspect requested[120] and received information and transmitted[121] messages from the field to the FDLR President. The Suspect was in charge[122] of liaising with the UN representative and advised President Murwanashyaka to be cautious[123] in his discussions because the head of the mission was a member of the Group of Experts. This demonstrates the Suspect's authority and ability to obtain relevant information from the field when he wished, and his important advisory role in the FDLR and in direct dealings with the FDLR president.

82. Part 10 [124] demonstrates the Suspect's prompt access to and knowledge of detailed information from the field regarding a meeting in Ntoto between DRC officials, MONUC representative and an FDLR/FOCA delegation. It also shows the circulation of information between members of the Common purpose group on the FDLR strategy faced with the demands of the international community that denounced FDLR crimes.[125]

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[118] BKA intercept: DRC-OTP-2013-5294 [EVD-PT-OTP-00253]; DRC-OTP-2032-0462 [EVD-PT-OTP-00696]; DRC-OTP-2032-0152 [EVD-PT-OTP-00681].
[119] ICC-01/04-01/10-445-Conf-Exp-Anx2, page 28*: FDLR communication regarding the UN official's investigation into alleged crimes at Shalio, June 2009.*
[120] DRC-OTP-2037-0066 [EVD-PT-OTP-00755]; DRC-OTP-2039-0075 [EVD-PT-OTP-00815]; DRC-OTP-2039-0117 [EVD-PT-OTP-00820].
[121] DRC-OTP-2013-0357 [EVD-PT-OTP-00082]; DRC-OTP-2022-0012 [EVD-PT-OTP-00393]; DRC-OTP-2037-0055 [EVD-PT-OTP-00751]; DRC-OTP-2038-2140 [EVD-PT-00776]; DRC-OTP-2037-0058 [EVD-PT-OTP-00752]; DRC-OTP-2038-2142 [EVD-PT-OTP-00777]; DRC-OTP-2037-0052 [EVD-PT-OTP-00750], DRC-OTP-2038-2138 [EVD-PT-OTP-00775]; DRC-OTP-2037-0061 [EVD-PT-OTP-00753]; DRC-OTP-2038-2144 [EVD-PT-OTP-00778]; DRC-OTP-2037-0064 [EVD-PT-OTP-00754], DRC-OTP-2038-2146 [EVD-PT-OTP-00779].
[122] DRC-OTP-2037-0069 [EVD-PT-OTP-00756]; DRC-OTP-2039-0077 [EVD-PT-OTP-00816]; DRC-OTP-2039-0120 [EVD-PT-OTP-00821].
[123] DRC-OTP-2037-0073 [EVD-PT-OTP-00757] and DRC-OTP-2038-2148 [EVD-PT-OTP-00780].
[124] ICC-01/04-01/10-445-Conf-Exp-Anx2, page 38: *Suspect's Access to information concerning political negotiations in the field, September 2009.*
[125] Two days after the meeting, *compte-rendu* via SMS from Iyamuremye to Murwanashyaka (DRC-OTP-2013-2078 [EVD-PT-OTP-00135]; DRC-OTP-2022-0140 [EVD-PT-OTP-00432]); Four days after, call from

83. Together, parts 7, 8 and 10 show that Mbarushimana acted as the representative of the FDLR with external actors. They show that he was involved in the decision-making process relating to the external relations of the FDLR and that he knew detailed operational and diplomatic information.

84. The Prosecution submits that collectively these timelines provide a graphic illustration of the collaborative effort of the FDLR's top leaders, including the Suspect, in the dissemination of the FDLR's extortive message and its simultaneous attempts to retain legitimacy through the denial of crimes, demonstrating the importance that the common purpose group placed on the international campaign. They also show the Suspect's intimate knowledge of the activities of the organisation and his ability to seek and obtain detailed information, including information directly from the field.

IV. RELIABILITY OF EVIDENCE

(i) Assessment of evidence at confirmation stage

85. In its oral presentation at the confirmation hearing, the Defence offered detailed critiques of each individual piece of evidence relied upon by the Prosecution in support of each of the incidents mentioned in the DCC. However, as Chambers of this Court, including this Chamber,[126] have previously recognized, the Prosecution's evidence must be analyzed and assessed as a whole and not on a piecemeal basis. This includes not only the evidence specifically referred to during the confirmation hearing, but also all the evidence tendered by the Prosecution that is identified in its amended LoE. Rule 63(2) also expressly permits a Chamber to assess freely all evidence submitted in order to determine

Mbarushimana to Murwanashyaka (DRC-OTP-2014-2133 [EVD-PT-OTP-00311]); on the same day, the latter sends the minutes of the meeting to the Suspect via email (DRC-REG-0001-1787 [EVD-PT-OTP-00883]).

[126] ICC-01/04-01/06-803-tENG, para. 39; ICC-01/04-01/07-717, para. 66; ICC-01/05-01/08-424, paras. 54, 57, 72, 91, 94, 101, 108, 110, 115, 117, 126, 140, 180, 212, 246, 249, 258, 277, 282, 286, 322, 332, 374, 444, 446, 474, 478; see *Prosecutor v. Abu Garda*, ICC-02/05-02/09-243-Red., para 41.

its relevance or admissibility in accordance with Article 69. Therefore, unless it expressly rules that an item is inadmissible, the Chamber may rely on any evidence provided in the Prosecution's amended LoE.[127]

86. The Statute also draws clear distinctions between the evidentiary rules governing the confirmation stage and trial.[128] Furthermore, as referenced previously, the Appeals Chamber has recognised that an in-depth assessment of evidence is not expected at the confirmation stage.[129] For the reasons set out previously, a full assessment of the evidence is neither required nor possible at the confirmation stage, but can and should be made only at trial, when the parties have presented all their evidence and the credibility, reliability and consistency of the evidence has been fully explored through questioning of the witnesses.

V. SUFFICIENCY OF EVIDENCE

87. The Prosecution submits that its evidence establishes substantial grounds to believe that the suspect committed the crimes charged. The Prosecution will not herein reiterate how all of its evidence confirms the charges against the suspect, but relies on its amended Document Containing the Charges (DCC), amended List of Evidence (LoE), and oral presentations of its core evidence during the confirmation hearing. Rather than restate the Prosecution's case, this submission will address specific key issues that arose during the confirmation hearing.

88. The Defence's criticisms of the Prosecution's evidence as to the FDLR's responsibility for the attacks on civilians were centred on the alleged insufficiency

[127] ICC-01/04-01/07-717, para. 66.
[128] See, e.g. Article 61(5) and 68(5).
[129] "As the threshold for the confirmation of the charges is lower than for a conviction, the Prosecutor may be able to convince the Pre-Trial Chamber that the threshold for the confirmation of the charges has been reached even if the reliability of the witnesses and other evidence was not fully tested." *Prosecutor v Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, ICC-01/04-01/06-774, 14 December 2006, para. 47 (emphasis added).

of the evidence underpinning the specific incidents enumerated in the DCC. However, the Prosecution stresses that the Chamber is not required to confirm each individual incident presented in support of the Prosecution's allegation of a pattern of crimes committed by the FDLR. Rather, the Chamber is only required to satisfy itself that the evidence presented provides substantial reasons to believe that each of the offences charged was committed by the FDLR during the relevant period.

89. The Prosecution presented direct evidence from insider or crime base witnesses establishing the FDLR's responsibility for attacks on at least six locations alleged in the charging document -- Kipopo, Mianga, Busurungi (two incidents), Manje and Malembe and the unnamed village of W-673 and W-674.[130] The Prosecution submits that cumulatively, the evidence presented in respect of these attacks proves the commission by the FDLR of each of the 13 charges contained in the DCC. It also presented indirect evidence of other incidents, consisting of open source evidence. That evidence is worthy of consideration on its own merits, and it also corroborates the direct evidence. Together, this evidence establishes the FDLR's commission of the crimes alleged and the existence of the required contextual elements necessary to establish war crimes and crimes against humanity. In these circumstances, the Prosecution submits that the totality of the evidence presented, including both the direct and indirect evidence, establishes substantial grounds to believe that the FDLR was responsible for the repeated commission of the pattern of alleged crimes throughout the relevant period.

[130] Additionally, they establish FDLR involvement in 2 further clashes in which extraneous evidence attributes atrocities to FDLR troops, namely Katoyi and Pinga.

VI. RESPONSE TO SELECTED DEFENCE SUBMISSIONS

(i) Response to the defence of lawful military attack

90. The Defence suggested that civilian casualties, injuries and damage to civilian property suffered as a result of FDLR attacks on various villages and their civilian inhabitants were 'collateral damage' suffered in the normal course of military operations, and thereby permissible at law.[131] The Prosecution disagrees.

91. The Prosecution submits that the evidence it presented at the confirmation hearing and in its List of Evidence establishes that the FDLR knowingly and intentionally committed direct attacks on civilians, which were clearly easier targets, because attacking civilians was consistent with its effort to create a humanitarian crisis. The Prosecution thus disagrees fundamentally with the defence argument that the FDLR attacked legitimate military targets. Indeed, the FDLR regarded all targets as fair game -- the Prosecution presented evidence of a deliberate order to attack civilians and, in particular, that the FDLR considered anyone not 'with' the FDLR as the 'enemy', including civilians.

92. The Prosecution presented evidence of:

a. Former FDLR soldiers or 'insider' witnesses, who stated that there was a deliberate order to attack civilians and/or burn their property;

b. Crime base witnesses who were the objects of an FDLR attack and/or who saw the deliberate attacks and/or killing of civilians and deliberate destruction of civilian property;

c. Indirect evidence from objective sources, recounting information that the FDLR committed deliberate attacks on civilians; and

[131] ICC-01/04-01/10-T-7-CONF-ENG, 19 September 2011, at p. 71, lines 3-7. See also, ICC-01/04-01/10-T-8-CONF-ENG, 20 September 2011, at p. 3, lines 10-14; and p. 45 line 19 to p. 46 line 1; p. 59 line 21- p.60 line 4.

d. Evidence of eyewitnesses and other reports on the aftermath of such attacks, and the injuries and damage suffered by civilians after attacks – such as decapitation by machete, dismemberment of limbs, and the pounding to death of babies – which are not possibly consistent with the defence claim that these were accidental or collateral damage.

(ii) Response to selected criticisms of Prosecution evidence

93. At the confirmation hearing, the Defence scrutinized evidence relating to each incident the Prosecution presented as illustrating the wider pattern of attacks alleged. The Prosecution reiterates that it is required to present sufficient evidence to show substantial grounds to believe that the crimes alleged in the Charging Document have been committed, and not the incidents.[132] On numerous occasions, however, the Defence misrepresented evidence or made assertions which were entirely incorrect. Although the Prosecution stands by its position that the confirmation hearing is not the correct forum for dissecting evidence piece by piece,[133] it is nevertheless necessary to correct particular assertions made by the Defence which are so flawed (and which the Prosecution has not already addressed in oral submissions), there is an inherent danger for the Chamber to be misled.

Immunity from prosecution

94. At the confirmation hearing, the Defence asserted that the Prosecution offered Witness W-562 immunity from Prosecution.[134] This is untrue. The Prosecution conducted the interview with W-562 – and the interviews with the other 14 former FDLR members it is relying on as witnesses for the confirmation hearing

[132] ICC-01/04-01/10-T-9-CONF-ENG, 21 September 2011, p. 4 line 21 to p. 5 line 1.
[133] See para. 85 above.
[134] ICC-01/04-01/10-T-8-CONF-ENG, 20 September 2011, p. 49, lines 6-9.

(or 'insider' witnesses) – pursuant to article 55(2) of the Rome Statute, but did not offer W-562, nor the other 14 insider witnesses, immunity from prosecution.

95. At the commencement of interview with W-562, the investigator informed him of the Prosecution policy to prosecute the most responsible people for the gravest crimes, and that the Court's purpose is not to prosecute everyone who has been involved in criminal activity, but to focus on those persons who are high in rank and who plan and lead the actions on the ground.[135] In light of this explanation, the investigator told W-562 that "based on what we know about you […] you are certainly not one of the most responsible people that the Prosecutor would be interested to charge."[136]

96. The Prosecution submits that this statement is not equivalent to providing 'immunity from prosecution'. Even had immunity been promised, however, that would not require the Chamber to dismiss the witness's evidence.

Characterisation of the armed conflict

97. At the confirmation hearing, the Defence criticised the Prosecution's shift in characterisation of the armed conflict, as pleaded in the Charging Document. The Prosecution characterised the conflict for the entirety of 2009 as non-international and stands by its position as presented at the confirmation hearing.[137]

98. The Defence submitted that the Chamber "issued an arrest warrant on the assertion and made a judicial finding that Umoja Wetu was indeed an international conflict on a reasonable grounds basis, of course."[138] The Prosecution submits that this assertion is incorrect, and that the Chamber did not make a finding in its Decision as to the characterisation of the armed conflict

[135] DRC-OTP-2032-0907 at -0919, lines 424-433 [EVD-PT-OTP-00700].
[136] DRC-OTP-2032-0907 at -0920, lines 448-449 [EVD-PT-OTP-00700].
[137] ICC-01/04-01/10-T-6-CONF-ENG, 16 September 2011, p. 79, line 9 to p. 80, line 20.
[138] Emphasis added, ICC-01/04-01/10-T-8-CONF-ENG, 20 September 2011, p. 37, lines 19-21.

during Umoja Wetu.139 Rather, it determined that it was unnecessary to characterise the armed conflict, as each of the war crimes alleged in the Article 58 application arose from conduct that is proscribed in both types of conflicts.

Attacks not carried out by the Reserve Brigade are still attributable to FDLR leadership

99. At the confirmation hearing, the Defence submitted that the attack on Malembe, Mianga and Busurungi in January 2009 were not perpetrated by the FDLR Reserve Brigade. The Defence claimed that this was of "extreme importance" because the Reserve Brigade was "directly subordinated to FOCA high command and, by implication, to General Mudacumura."[140] The conclusion drawn by the Defence was that if the Reserve Brigade was not involved in these attacks, then the planning and authorisation was not attributable to Mudacumura and "by implication, to the FDLR members in Europe. Such attacks […] cannot be said to be part of the so-called common criminal purpose."[141]

100. The Prosecution disputes this line of reasoning. All the FDLR attacks are attributable to the FDLR leadership, regardless of which Division of the FDLR's military arm were responsible. The Prosecution has presented evidence to establish that the FDLR has a clear command and control structure, with two main Divisions and the mobile Reserve Brigade, all of which fall under the authority of FOCA high command and ultimately the commander of the army, General Mudacumura.[142] The Defence completely fails to address this evidence.

101. A well-defined reporting structure existed between the Divisions and Mudacumura. If an attack is carried out by one of the Divisions, it is still

[139] ICC-01/04-01/10-1, para. 20: "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."
[140] ICC-01/04-01/10-T-7-CONF-ENG, 19 September 2011, p. 78, lines 17-12.
[141] ICC-01/04-01/10-T-7-CONF-ENG, 19 September 2011, p. 78, line23 – p.79, line 1.
[142] ICC-01/04-01/10-T-6-CONF-ENG, 16 September 2011, p.68, lines 11-19; See DCC paragraph 28 and the corresponding evidence listed in the LoE. *See also* ICC-01/04-01/10-445-Anx1, p. 5.

attributable to Mudacumura as overall commander of the FOCA military. As the Defence appears to concede, the attacks by the Reserve Brigade were in fact attributable to Mudacumura and the FDLR leaders in Europe. However, the evidence establishes substantial grounds to believe that attacks carried out by other Divisions within the FDLR military branch are also attributable to them.

102. In the same vein, the Prosecution disagrees with the Defence assertion that in order to convince the Chamber that the FDLR perpetrated the attacks, it must demonstrate "which unit led by which officer ultimately carried out which attack." The Prosecution submits that it is required show substantial grounds to believe that the FDLR committed the attacks, and not specific officers or units of the FDLR. Given that the Prosecution alleges that a general order was given to all FDLR troops to attack civilians was dispatched by Mudacumura,[143] and given that the mode of liability alleged requires no direct contribution or order from the Suspect himself, the Prosecution submits that the level of detail which the Defence requires is unnecessary, particularly at the confirmation stage of proceedings.

Inconsistencies in reports of deaths and HRW research methodology

103. At the confirmation hearing, the Defence criticised the accuracy and evidentiary value of materials on the Prosecution's List of Evidence particularly on the basis of alleged inconsistencies in HRW and other reports on the number of people killed during various incidents.[144] The Prosecution disagrees that these inconsistencies establish the unreliability of the evidence that the attacks occurred and that the FDLR was responsible. Estimates regarding the numbers of casualties are regularly amended from the earliest reports, as additional

[143] ICC-01/04-01/10-T-6-CONF-ENG, 16 September 2011, p. 72 line 14 to p. 74 line 15.
[144] See, for example, ICC-01/04-01/10-T-8-CONF-ENG, 20 September 2011, p. 2, lines 19-25, where the Defence deems Radio Okapi 'unreliable' because on 17 February 2009, it reported that the FDLR had killed 14 people at Kipopo whereas two days later, it reported that instead 13 people had been killed; ICC-01/04-01/10-T-7-CONF-ENG, 19 September 2011, p. 85 lines 21-24, criticising HRW report in April that 13 had been killed whereas in the final December report, reported 11 killed at Kipopo.

information and corroboration is secured. Nor should the recounts and corrected numbers discredit the crux of the conclusions that the FDLR committed these unlawful attacks and civilian deaths. For example, initial estimates of casualties in the United States from the terrorist attacks on September 11 put the death toll at over 6,000. Thereafter it was eventually accepted that roughly 3,000 persons died in the attacks. It would be foolish to discount reports that the September 11 attacks occurred on the ground that the early casualty estimates were substantially adjusted over time.

104. The Prosecution submits further that inconsistencies between two reports of a same incident, issued at different time period, should not be surprising. Once details are verified, it is not unusual that numbers of victims are adjusted in order to be accurate. For example, the fact that Human Rights Watch reported in February that 'dozens' of civilians were killed in Remeka just after the attack happened, and that it refined this number of casualties to seven in its final report in December does not mean that Human Rights Watch statistics and methodology are "not worth the paper they're written on", as proclaimed by the Defence.[145] Human Rights Watch explains its methodology in its report of December 2009:

> *"Our statistics on the numbers killed are based on eyewitness accounts, information from family members, and testimony from those who helped to bury the dead. We have made every effort to corroborate our findings and dismiss accounts that we did not find credible."*[146]

105. Additionally a perusal of the December report reflects that it apportions blame for atrocities evenly between the FDLR and government forces. The Prosecution submits that a change on the number of victims does not affect the value of the evidence to prove that FDLR had a criminal organizational policy. Even if individual statistics or incidents described by HRW are open to criticism, the

[145] ICC-01/04-01/10-T-7-CONF-ENG, 19 September 2011, p. 80, lines 14-19.
[146] DRC-OTP-2014-0240 at -0264 [EVD-PT-OTP-00282].

overwhelming body of evidence which it presents of FDLR responsibility for atrocities committed against the civilian population of the Kivus, considered together with the direct evidence presented by the Prosecution, provide substantial grounds to believe that the FDLR was responsible for the war crimes and crimes against humanity alleged in the DCC.

106. The Defence also contended that it could not be proven that the women abducted in Busurungi on or about 28 April 2009 were raped before being killed.[147] Without conceding that this is a relevant distinction, the Prosecution disagrees with the factual premise. The incident was described in detail by three of the Prosecution's crime base witnesses,[148] three UNHJRO reports[149] and the December 2009 Human Rights Watch report.[150] All also identify the FDLR as the perpetrators. [REDACTED] tied up with ropes, a pointless precaution to take after death, and with open wounds.[151] UNJHRO reports that the genitals of the women were swollen, a vital reaction to trauma inflicted on living victims, indicating that they were raped before death.[152]

Criticisms of the use of hearsay evidence

107. At the confirmation hearing, the Defence repeatedly complained of the Prosecution's reliance on hearsay evidence,[153] alleging that such evidence is not sufficient to prove charges on substantial grounds[154] and protesting that it is 'extremely danger[ous] to rely on hearsay evidence."[155] There is no bar against the

[147] ICC-01/04-01/10-T-8-CONF-ENG ET, 20 September 2011.
[148] DRC-OTP-2025-0107 at 0114 para.34 [EVD-PT-OTP-00597]; DRC-OTP-2025-0070 at 0074 para.17 [EVD-PT-OTP-00596]; DRC-OTP-2032-0799 at 0803 para.19 [EVD-PT-OTP-00699].
[149] DRC-OTP-2014-1169 page 1172 [EVD-PT-OTP-00309], DRC-OTP-2016-0033 p. 0043 and 0044 [EVD-PT-OTP-00343], DRC-OTP-2016-0053 at 0058 [EVD-PT-OTP-00344].
[150] DRC-OTP-2014-0240 at 0311 [EVD-PT-OTP-00282].
[151] DRC-OTP-2025-0107 at 0114 [EVD-PT-OTP-00597].
[152] DRC-OTP-2016-0033 at 0043 [EVD-PT-OTP-00343]; DRC-OTP-2014-1169 at 1172 para.24 [EVD-PT-OTP-00309]; DRC-OTP-2016-0053 at 0058 [EVD-PT-OTP-00344].
[153] ICC-01/04-01/10-T-8-CONF-ENG, 20 September 2011, page 40, lines 7-9; page 41, lines 10-11; page 44, lines 4-5; page 72, lines 7-10; ICC-01/04-01/10-T-9-ENG, page 26, line 20 to page 27 line 2.
[154] ICC-01/04-01/10-T-7-CONF-ENG, 19 September 2011, p. 82, lines 1-6, where the Defence submits that second-hand hand hearsay is not sufficient to prove charges on substantial grounds with respect to the attack on Busheke,
[155] ICC-01/04-01/10-T-8-CONF-ENG, 20 September 2011, p. 41, lines 10-11.

use of hearsay evidence in the Statute or the Rules. Moreover, Chambers of this Court have admitted hearsay evidence – including anonymous hearsay – and given it credence and weight at the confirmation hearing;[156] hearsay has also been admitted at trial.[157] The Prosecution accordingly submits that the Chamber ought to attach appropriate weight to hearsay evidence, as it fits in with the entire mosaic of evidence and to disregard the Defence claim that such evidence is inherently insufficient to prove 'substantial grounds to believe'.

VII. CONCLUSION

108. The Prosecution has therefore established substantial grounds to believe that Callixte Mbarushimana committed the crimes against humanity and war crimes alleged in the DCC. The Prosecution thus requests that the Chamber confirm all 13 charges against the Suspect.

Luis Moreno-Ocampo
Prosecutor

Dated this 6th day of October 2011

At The Hague, The Netherlands

[156] *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on Confirmation of Charges," ICC-01/04-01/06-803-tENG, 29 January 2007, para 101; *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, 15 June 2009, para 47 and 51; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the Confirmation of Charges," ICC-01/04-01/07-717, 30 September 2008, para 118 and 137.
[157] *Prosecutor v. Thomas Lubanga Dyilo*, "Decision regarding the Protocol on the practices to be used to prepare witnesses for trial," ICC-01/04-01/06-1351, 23 May 2008, para. 41.