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Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**Second
Public redacted version of
Prosecution's Application under Article 58**

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SUMMARY OF THE CASE

1. Pursuant to Article 58(1), the Prosecution applies for a warrant for the arrest of Sylvestre MUDACUMURA, who bears criminal responsibility for crimes against humanity and war crimes committed by the *Forces Démocratiques pour la Libération du Rwanda – Forces Combattantes Abacunguzi* (FDLR-FOCA, hereafter “FDLR”) between 20 January 2009 and the end of September 2010, in North and South Kivu Provinces (“the Kivus”), Democratic Republic of the Congo (“DRC”).

2. In early 2009, Ignace MURWANASHYAKA, Sylvestre MUDACUMURA, Callixte MBARUSHIMANA and Gaston IYAMUREMYE, together with other senior FDLR military and political leaders, agreed to conduct a widespread and systematic attack against the civilian population of the Kivus and a simultaneous international media campaign together designed to extort political concessions for the FDLR in Rwanda (“Common Plan”).

3. Based on the evidence collected, the Prosecution alleges that there are reasonable grounds to believe that MUDACUMURA is responsible pursuant to Article 25(3)(a), or in the alternative Article 25(3)(b) or Article 28(a), of the Statute for the crimes committed in implementation of the Common Plan.

4. At all relevant times, MUDACUMURA was a member of the FDLR's Steering Committee and head of the FDLR military wing. In early 2009 he transmitted an order to FDLR troops to create a humanitarian catastrophe in the Kivus through attacks on civilians and ensured implementation of this order during 2009 and 2010, in furtherance of the Common Plan. MUDACUMURA also collaborated with MURWANASHYAKA, MBARUSHIMANA and other FDLR leaders in implementation of the international media campaign authorised by the Steering Committee in January 2009 as part of the group's multi-dimensional response to the joint military operation.

A. THE HISTORICAL BACKGROUND TO THE CRIMES COMMITTED BY THE FDLR

5. The FDLR is an armed group created by some members of the former *Forces Armées Rwandaises* (ex-FAR) and the *interahamwe* militias, groups involved in the Rwanda genocide in 1994 who fled Rwanda and relocated to the Democratic Republic of the Congo ("DRC"). From their base in the DRC, the FDLR's two immediate predecessors created conditions that triggered the First and Second Congo Wars,¹ as a result of which millions of civilians were killed and displaced.

6. When the forces led by Paul Kagame overthrew the genocidal regime in Rwanda, hundreds of thousands of Rwandans fled into North and South Kivu Provinces in the eastern part of the country then called Zaire. Some members of the ex-FAR and the *interahamwe* militias who had masterminded and executed the death of almost one million people in Rwanda used the refugee camps in the East to recruit and train members of politico-military groups with the aim of regaining power in Rwanda.²

7. They formed two successive armed groups: the *Rassemblement pour le retour des Réfugiés Rwandais* ("RDR"), whose military attacks on Rwanda from within the refugee camps³ triggered Rwanda's entry into DRC together with its DRC ally, the AFDL of Laurent-Désiré Kabila, and thus the First Congo War,⁴ and subsequently the *Armée de Libération du Rwanda* ("ALIR"), a sub-section of which⁵ served as a proxy to the then-DRC Government against its enemy, Rwanda, during the Second Congo War.⁶ These two groups were the FDLR's immediate predecessors.⁷

¹ Anx.78, p.7.

² Anx.119, pp.27-28; Anx.77, p.42.

³ Anx.119, p.29; Anx.77, p.42; Anx.89, p.21.

⁴ Anx.119, pp.29-31; Anx.117, pp.38-41; Anx.90, p.3.

⁵ ALIR split along geographical lines into ALIR-I and -II. During the Second Congo War, ALIR II fought in support of DRC President Laurent-Désirée Kabila in return for the political and military support necessary to return to Rwanda and oust the Kagame regime. Anx.77, p.43; Anx.117, from p.42. Like the RDR before it, ALIR launched attacks on Rwanda. Anx.119, p.52.

⁶ Anx.90, p. 3; Anx.119, p.97; Anx.78, p.19; Anx.91, pp.12-13.

8. In July 1999 the DRC, Rwanda and other states involved in the First Congo War signed the Lusaka Ceasefire Agreement, committing them to disarm foreign armed groups present on Congolese soil, including the ex-FAR and *interahamwe* from whose ranks the FDLR would also be formed. The countries of origin of such groups (*ie* Rwanda) were invited to offer amnesty and political asylum to former combatants. However, the signatories to the Agreement explicitly excluded *génocidaires* from the amnesty.⁸ In a further setback for the group in 2001, ALIR was listed by the United States of America as a terrorist organisation.⁹

9. It was in this context of the growing political isolation of former *génocidaires* after the Congo Wars that the FDLR was created in early 2000 from a splinter group of ALIR II¹⁰ leaders. One of the main objectives of the founders of the FDLR was to attempt to distance themselves from its roots in the Rwandan 1994 genocide. They needed to disguise their connection to it so as to avoid isolation and gain international legitimacy, clearing the way for their participation in political negotiations aimed ultimately at regaining political power in Rwanda.¹¹ To this end, the FDLR adopted a bifurcated structure:

- a. On the one hand, in Europe a political leadership was established, which was ostensibly unconnected either with either the genocide or the new crimes in the Kivus. The movement sought to sanitise its image in order to participate in political negotiations aimed at regaining power in Rwanda.
- b. However, the FDLR maintained a military force of thousands of soldiers in the Kivus, under the command of Sylvestre MUDACUMURA,

⁷ Anx.78, p.12; Anx.77, p.42; Anx.91, pp.12-13; Anx.78, pp.12-20; Anx.90, p.3.

⁸ Anx.10, p.6, para.22, and p.14, §9.2. The UN peace keeping forces established pursuant to this agreement were tasked to hand over all *génocidaires* to the ICTR. See Anx.10, p.13, §8.2.2(c).

⁹ Anx.117, p.46; Anx.78, p.17.

¹⁰ See fn.5.

¹¹ Anx.119, pp.31-32.

who were tasked in 2009 with the creation of a humanitarian catastrophe in order to extort political concessions.

10. Having inherited the leadership¹² and the goals of its predecessors, the FDLR continued to seek to return to Rwanda and overthrow that country's government.¹³ Its criminal activities over the years have been publicly and officially exposed. Between 2002 and 2010, the UN Security Council repeatedly expressed serious concerns about the military activities of the FDLR in Eastern DRC. It characterized the group as a threat to the peace and security of the Great Lakes region, a cause of insecurity and instability and a threat to the local civilian population. It issued repeated resolutions since at least 2004,¹⁴ condemning the FDLR for breaches of human rights and IHL and calling on them to cease their attacks against the civilian population including during 2009-2010, the time when the crimes dealt with in this application were committed.¹⁵ The UN Security Council ("UNSC") and the Council of the European Union ("EU") have also imposed travel bans and asset freezes on several of the FDLR's leaders, including MUDACUMURA, as a result of the group's activities.¹⁶ Furthermore, numerous respected and independent international

¹² The RDR was founded by MUDACUMURA and others and represented abroad by MURWANASHYAKA. Anx.117, pp.105-106; Anx.89, pp.54, 55; Anx.78, p.14.

¹³ Anx.104, p.4, para.9-10; Anx.136 ("Exigence de départ 1 : départ de Kagame."); Anx.111, ll.18-19; Anx.116, pp.110 (first para.), 115 ("...la prise du pouvoir par les FDLR...") and 142 ("...et le remplacer..."; "...Les FDLR sont un mouvement politique décidé à mener la lutte jusqu'au bout... donc l'alternative pour la bonne gouvernance du RWANDA..."); W-[REDACTED], Anx.27, p. 27 pp 188-189, ll.251-280; W-[REDACTED], Anx.39, p.332, ll.670-675. (Where available, the Prosecution has provided, for the Chamber's convenience, the summaries of insider witnesses transcripts which were prepared for the MBARUSHIMANA confirmation hearing, in addition to the full transcripts.)

¹⁴ See documents compiled (and highlighted) in Anx.9, in which the UNSC denounces the FDLR for increased military activities in Eastern DRC and for its incursions on the territory of Rwanda and for violations of human rights and international humanitarian law including attacks on the civilian population, extrajudicial executions, the recruitment of children, widespread sexual violence including rape and other forms of sexual abuse, illicit exploitation and trade in natural resources and proliferation and trafficking of arms.

¹⁵ Anx.9.

For a Security Council resolution identifying the FDLR as "a major obstacle to lasting peace in the Kivus" and as "one of the primary causes for the conflict in the region", see Anx.9, p.24.

¹⁶ See sanctions imposed pursuant to paras.13, 15 of UNSC Res.1596(2005), as confirmed and renewed most recently (until 30 November 2012) in UNSC Res.2021(2011), Anx.9, p.55, para.3; see list of

organisations and NGOs repeatedly reported on the catalogue of abuses committed by FDLR combatants against the civilian population of the Eastern DRC.¹⁷

11. In July 2002, President Kabila signed the Pretoria Accords with the Rwandan government, in which he committed to dismantle FDLR camps and expel its leaders from the DRC.

12. The December 2008, the DRC and Rwanda Governments announced their agreement to launch a joint military operation against the FDLR on DRC territory, in line with the Pretoria Accord. Following this announcement, the Congolese armed forces ("FARDC") and their partners¹⁸ launched three successive military operations – *Umoja Wetu*, *Kimia II* and *Amani Leo* – to dislodge the FDLR from its strongholds in Eastern DRC. The events relevant to this application took place between January 2009 and end of September 2010, within the context of a non-international armed conflict in the Kivu Provinces.¹⁹

13. At all relevant times, the parties to this armed conflict included the FARDC, fighting alone or in coalition with Rwandan forces or supported by

individuals subject to UN sanctions, last updated 28 November 2011, Anx.94, p.6. See also restrictive travel and financial measures imposed by EU Council Decision 2010/788/CFSP of 20 December 2010, Anx.92, Arts.3, 4(1), 5(1) and p.37.

¹⁷ See fn.124.

¹⁸ The Rwandan Defence Forces ("RDF") and MONUC/MONUSCO.

¹⁹ For the existence of an armed conflict between 20 January 2009 – 31 December 2009, see Anx.50, paras.8, 9, 12-15; Anx.51, paras.3-5, 11; Anx.52, paras.3-5; Anx.53, para.3; Anx.9, pp.50-51. On the strength of this evidence, the Chamber has previously found the existence of an armed conflict between 20 January and 31 December 2009 in North and South Kivu and that it was unnecessary, in relation to the offences alleged, to determine whether this armed conflict was of an international or non-international character. ICC-01/04-01/10-1, paras.19-20. In the MBARUSHIMANA confirmation decision, the Chamber also confirmed the existence of a non-international armed conflict. ICC-01/04-01/10-465-Conf, para.107. For evidence of its continuation until the end of September 2010 and of the non-international nature of the conflict throughout the relevant time period, the Prosecution relies on Anx.53, paras.2-4, 6; Anx.83, pp.12-13; Anx.71, paras.3-13; Anx.64, p.4, para.9; Anx.65, p.2; Anx.66, p.3-4, 10, paras.5, 9, 43; and Anx.76, p.14, paras.27-28.

MONUC/MONUSCO forces, and the FDLR, fighting alone or, in July and August 2010 in particular, in coalition with other armed groups.²⁰

²⁰ For the various parties' participation in the armed conflict, see fn.19 and sources relied on elsewhere in this application. For evidence of the FDLR's coalition with other armed groups in July and August 2010, see in particular para.41 below.

B. CONCISE STATEMENT OF FACTS PURSUANT TO ARTICLE 58(2)(C)

The 2009/10 Common Plan

14. In early 2009, the FDLR leadership decided to launch a widespread and systematic attack against the civilian population of the Kivus and a simultaneous international media campaign, together designed to extort political concessions for the FDLR in Rwanda.²¹

15. The Prosecution alleges that the policy to attack civilians could not have occurred without the concept of operations being approved by the Steering Committee – the highest functioning decision making body of the FDLR, integrated by top military and political leaders such as MURWANASHYAKA, MUDACUMURA, MBARUSHIMANA and others, and responsible *inter alia* for developing the group's defence and security policies²² – even though this decision was not explicitly documented in its resolutions.²³

16. The FDLR leaders knew this strategy had worked for other militias in the Great Lakes region.²⁴ Acting alone or in coalition with others,²⁵ the FDLR pursued a military terror campaign, directing numerous attacks against civilians in pursuit of the FDLR's goals.

²¹ W-[REDACTED], Anx.39, pp.329-332, ll.581-618, 657-685.

²² Anx.104, p.20, Arts.39, 40.

²³ Other than in orders sent by MUDACUMURA to his units in the field, as described in para.30 *infra*. Certain FDLR documents, such as records of the Steering Committee meeting of January 2009 included in Anx.5 and Anx.7, allude to the group's overall strategy in response to *Umoja Wetu*, but do not refer explicitly to the policy to attack civilians. According to W-[REDACTED], such documents were circulated down the chain of command. The Prosecution notes that this somewhat broad circulation of the records of such meetings, coupled with the FDLR leaders' consciousness of the problem of desertions and the risks of sensitive information falling into enemy hands, made it unlikely that they would record any discussion of the policy to attack civilians in writing. See W-[REDACTED], Anx.21, p.285, ll.608-632, and sources cited in fn.87.

²⁴ Intercept Lfd.Nr.1165 (20 January 2009), Anx.43, p.22, ll.53-57.

²⁵ In March 2009, the FDLR leadership also approved the formation of coalitions with other armed groups opposed to the FARDC as a way of ensuring the FDLR's survival in the face of the FARDC offensive. See para.41 below.

17. MUDACUMURA issued the order to attack civilians shortly after the launch of *Umoja Wetu*.²⁶ It was transmitted to all FDLR commanders and read out to the troops in the field. It identified the primary target as the civilian population. MUDACUMURA's order directed FDLR combatants to treat civilians as enemies and traitors and to make them "suffer". It directed the troops to pillage civilian property and burn down entire villages to create a tide of refugees and ensure that civilians supportive of the FARDC's offensive could never return.²⁷ MUDACUMURA also issued orders to pillage and ordered FDLR units to carry out so-called resupply or "*ravitaillement*" operations, a euphemism for pillaging operations during which FDLR troops forcibly robbed the local population of their personal property and committed other crimes. Although the direct objective of these operations was to pillage money and goods to sustain the organisation, they also served the purpose of punishing and terrorising the civilian population.

18. However, the attacks were not aimed solely at punishing those Congolese civilians considered as enemies by the FDLR, but also at a wider audience. Thus, in parallel with the campaign of crimes on the ground, MURWANASHYAKA, MUDACUMURA and MBARUSHIMANA, as members of the Steering Committee, approved a "war of information" on media and diplomatic fronts,²⁸ designed to exploit the military terror campaign in order to persuade the government to abandon its military operations in favour of a negotiated settlement on terms favourable to the FDLR.²⁹ It was also designed to deny the FDLR's responsibility for crimes in order to maintain its credibility as a legitimate party for negotiation.

²⁶ However, according to some former FDLR combatants, the order originated from MURWANASHYAKA. W-[REDACTED], Anx.14, pp.224-225, ll.104-136, p.227, ll.215-253, p.268, ll.661-710; W-[REDACTED], Anx.19, p.358, ll.823-836.

²⁷ See para.44 below.

²⁸ Annex 7, para.87.

²⁹ W-[REDACTED], Anx.39, pp.329-332, ll.581-618, 670-675.

Crimes committed pursuant to the Common Plan

19. The Common Plan was systematically implemented. Early on in the FDLR campaign, MBARUSHIMANA “warn[ed] MONUC against a danger resulting of [sic] its alignment with the Rwandan-Congolese troops”,³⁰ that “[a]ny solution based on the desire to destroy militarily the FDLR is not only counterproductive but also extremely dangerous”, and that any attempt to forcibly disarm the group would plunge the region into a long and dreadful war, “the consequences of which are immeasurable”.³¹

20. In conjunction with these warnings, the FDLR launched its campaign of attacks on civilians.³² Implementing MUDACUMURA’s orders, FDLR units perpetrated crimes against the civilian population – murder, rape, torture, inhumane acts, cruel treatment, persecution, mutilation, outrage upon personal dignity, pillaging and extensive destruction of civilian property – during attacks on Busurungi, Mandje, Mianga, [REDACTED], Malembe, [REDACTED] and numerous other villages as detailed in section E.5 below.

21. In some attacks, the FDLR assaults initially focussed on FARDC positions located in or near villages, but then razed the villages and attacked civilians after the military opposition, if any, had been neutralised. In others, the FDLR deliberately perpetrated attacks on completely undefended places. In some instances where the FDLR was itself attacked by coalition forces, it prevented civilians from fleeing, resulting in many casualties and also killed civilians during and after the attack as retribution. In its aim to create a humanitarian catastrophe, FDLR units perpetrated rapes and other sexual atrocities, burnt down houses on a massive scale, and fueled substantial civilian displacement in both Kivu Provinces.³³

³⁰ Anx.41, p.7.

³¹ Anx.41, p.5; see also Anx.41, p.8.

³² See Anx.70, para.10 and sources relied on elsewhere in this application.

³³ Anx.75, paras.29-30, 48 and sources relied on in section D.5.

22. UN agencies and NGOs confirm that FDLR attacks were widespread: up to 750 killings, more than 600 rapes and over 7,000 houses or other structures destroyed at numerous different locations over the relevant period.³⁴ The rapes perpetrated by FDLR soldiers included gang rapes and other brutal sexual attacks, sometimes involving mutilation and disfigurement.³⁵ [REDACTED].³⁶

23. The FDLR leadership supervised the execution of the order to attack civilians. FDLR units regularly reported to MUDACUMURA on operations during which crimes were committed. In certain instances, notorious perpetrators of these crimes were promoted, not punished.³⁷ MUDACUMURA also personally received a share of the profits of the *ravitaillement* campaign.³⁸ The order to attack civilians remained in place throughout the period relevant to this application.³⁹

³⁴ See para.49 below.

³⁵ W-[REDACTED], Anx.24, para.31; W-[REDACTED], Anx.25, (first statement) paras.8, 30-33 and (second statement) paras.10-12; W-[REDACTED], Anx.31, paras.27-28; W-[REDACTED], Anx.34, paras.18-26; W-[REDACTED], Anx.29; W-[REDACTED], Anx.38; W-[REDACTED], Anx.40, paras.74-81; W-[REDACTED], Anx.35, paras.35-43; W-[REDACTED], Anx.36, paras.52-56, 63; W-[REDACTED], Anx.26, paras. 33-35, 39-41; Anx.9, pp.60, 72, 80-83; Anx.70, paras.21, 25-29.

³⁶ Anx.70, pp.14, 15, paras.25, 30. [REDACTED].

³⁷ W-[REDACTED], Anx.17, p.406, ll.542-543, p.416, ll.826-884. The FDLR commanders responsible for ordering attacks on civilians relevant to the present charges remained in their positions throughout 2009-2010, including, notably, Reserve Brigade Commander KALUME.

³⁸ W-[REDACTED], Anx.21, p.575, ll.1373-1382 and p.645, ll.717-737; W-[REDACTED], Anx.20, p.231, ll.755-859 and p.269, ll.701-703; W-[REDACTED], Anx.30, p.189, ll.940-988; W-[REDACTED], Anx.14, pp.369-373, ll.497-636.

³⁹ W-[REDACTED]'s evidence indicates that until at least mid 2010 there was no change in the order to create a humanitarian catastrophe. According to the witness, faced with criticism of the FDLR's actions, FOCA command told the commander of the Bahama Battalion to "be careful... You can't kill people because it's tarnishing our image". According to the witness, MUDACUMURA directed "slow[ing] down a bit" with the creation of the humanitarian catastrophe in mid 2010, because of the ongoing criticism. See W-[REDACTED], Anx.21, p.812, ll.171-230. However, throughout September 2010, the ongoing perpetration of attacks on civilians that were ordered and/or reported by/to MUDACUMURA and went unpunished confirms that the order remained in place throughout the period relevant to this application. See *i.a.* paras.44, 79 and fns.85, 86 below.

24. MUDACUMURA made various essential⁴⁰ contributions to the Common Plan. As a top FDLR leader and Steering Committee member, he contributed to its adoption. The Prosecution submits that it is inconceivable that such a plan could have been conceived and adopted without his involvement as Steering Committee member and top military commander of the FDLR. Through his command of FDLR forces, MUDACUMURA personally ordered and supervised the attack on civilians. He kept MURWANASHYAKA and MBARUSHIMANA apprised of its development, ensuring coordination between the military and the political dimensions of the Common Plan. As the Supreme Commander of the FDLR military wing, MUDACUMURA had the authority to issue orders and enforce their execution. But for his order to attack civilians and his enforcement of the order, the Common Plan would have been frustrated. MUDACUMURA is therefore responsible pursuant to Article 25(3)(a) as an indirect co-perpetrator, or alternatively as an indirect individual perpetrator under 25(3)(a) or accessory under 25(3)(b) for ordering the commission of crimes, or further alternatively pursuant to Article 28(a) as a military commander.

25. The Prosecution submits that it is unnecessary for the Chamber, at this stage at least, to choose between these modes of liability. It is sufficient to determine that there are reasonable grounds to believe that MUDACUMURA has committed the crimes alleged under any one or more of the modes alleged.⁴¹

⁴⁰ The Prosecution does not necessarily agree that an “essential” contribution is required to incur liability as a co-perpetrator, (see Judge Fulford’s dissenting opinion to the *Lubanga* trial judgment, ICC-01/04-01/06-2842, para.15, Separate Opinion) but in this case it alleges that the contribution was indeed essential so it is unnecessary to decide this issue.

⁴¹ The Prosecution notes in this regard Judge Fulford’s dissenting opinion that these modes of liability are not intended to be mutually exclusive (ICC-01/04-01/06-2842, para.7), or arranged in any hierarchy of seriousness (*ibid.* para.9).

**C. PERSON AGAINST WHOM A WARRANT OF ARREST IS SOUGHT
(ARTICLE 58(2)(A))**

26. Sylvestre MUDACUMURA⁴² was born in 1954 in *cellule* Ferege, Gatumba sector, Kibilira commune, Gisenyi prefecture, Rwanda.⁴³ He is otherwise known as Pierre Bernard MUPENZI,⁴⁴ Commandant Pharaon⁴⁵ or Pharaoh,⁴⁶ Mudac,⁴⁷ Mukanda⁴⁸ or Radja.⁴⁹ He is married and has a son and daughter. His wife and son are believed to live in France or Belgium.⁵⁰

27. MUDACUMURA was a member of the Rwandan Presidential Guard and was responsible for President Juvénal HABYARIMANA's security. He became the S3 officer, responsible for operations, in the Presidential Guard Battalion.⁵¹ During the 1994 Rwandan genocide, MUDACUMURA commanded the 31st (Rutare) Battalion, and was part of operational sector Byumba,⁵² until he fled to the DRC.

28. MUDACUMURA is among the longest-serving high-level commanders of the various Rwandan rebel groups that sought to overthrow the Rwandan Government. MUDACUMURA was a founder of the RDR in 1995,⁵³ which recruited over 50,000 men and launched attacks on Rwandan territory in pursuit of the goal of returning to power there.⁵⁴ He subsequently led the Western faction of the ALIR, the FDLR's

⁴² See photos of MUDACUMURA in Anx.1.

⁴³ Anx.117 p.104.

⁴⁴ Anx.41, p.4; W-[REDACTED], Anx.21, p.189, ll.74-85; Anx.117, p.104; Anx.95, p.9; Anx.94, p.6.

⁴⁵ Anx.95, p.9.

⁴⁶ Anx.117, p.104.

⁴⁷ Anx.117, p.104.

⁴⁸ Anx.95, p.9.

⁴⁹ W-[REDACTED], Anx.15, p.201-202, ll.468-494; Anx.95, p.9; Anx.94, p.6.

⁵⁰ Anx.117 p.104; Anx.78, p.34, para 76; Anx.72, p.34, para.76.

⁵¹ Anx.117 p.105.

⁵² Anx.117, p.104; W-[REDACTED], Anx.15, p.202-203, ll.503-525; W-[REDACTED], Anx.21, p.648, ll.1307-1319.

⁵³ Anx.117, p.105.

⁵⁴ Anx.77, p.42; Anx.78, p.13.

immediate predecessor.⁵⁵ MUDACUMURA has been a member of the FDLR since its foundation.

29. MUDACUMURA became acting Commander of the FDLR in November 2003.⁵⁶ He was confirmed in that position in January 2004 and re-elected three times, including in 2009.⁵⁷ As Supreme Commander of the Army and President of its High Command, MUDACUMURA is the highest-ranking military commander in the FDLR.⁵⁸

30. MUDACUMURA is staunchly opposed to FDLR disarmament unless its conditions are met.⁵⁹ He is on the United Nations' Security Council's and the European Union's sanctions lists.⁶⁰

⁵⁵ W-[REDACTED], Anx.15, pp.204-2016; Anx.117, pp.105-6.

⁵⁶ W-[REDACTED], Anx.15, p.220, ll.381-421, p.158, ll.55; W-[REDACTED], Anx.20, p.47, ll.41-60; W-[REDACTED], Anx.21, p.143, ll.1009-1027.

⁵⁷ W-[REDACTED] Anx.21, p.144, ll.1028-1066 and p.189, ll.78-107; Anx.45, p.3; Anx.46, p.13; intercept Lfd.Nr.914 (14 January 2009), Anx.44, p.29.

⁵⁸ Intercept Lfd.Nr.166 (15 December 2008), Anx.44, p.9.

⁵⁹ Intercept Lfd.Nr.5665 (29 June 2009), Anx.44, p.161; W-[REDACTED], Anx.14, pp.97-98, ll.420-434; Anx.46, p.13.

⁶⁰ See fn.16.

D. CRIMES COMMITTED BY MUDACUMURA (ARTICLE 58(2)(B))

31. The Prosecution alleges that there are reasonable grounds to believe that MUDACUMURA is criminally responsible as an indirect co-perpetrator (Art.25(3)(a)), or alternatively, by ordering (Art.25(3)(b)) or as a military commander (Art.28(a)), for the crimes described below which were committed by FDLR troops under his effective command and control between 20 January 2009 and 30 September 2010:

Count 1 - Attack against the civilian population constituting a war crime

(Art.8(2)(e)(i))

MUDACUMURA is criminally responsible for the war crime of **intentionally directing attacks against the civilian population** at or near various locations in the Kivu Provinces, DRC, including **Kipopo**, Masisi territory, North Kivu, on or about 12-13 February 2009; **Mianga**, Walikale territory, North Kivu, on or about 12 April 2009; **Busurungi** and surrounding villages, Walikale territory, North Kivu, on or about the 9-10 May 2009; **Manje**, Masisi territory, North Kivu, on or about 20-21 July 2009; **Malembe**, Walikale territory, North Kivu, in late July, early August, on or about 11-13 August and 15 September 2009; [REDACTED].

Count 2 - Murder constituting a war crime (Art.8(2)(c)(i)-1)

MUDACUMURA is criminally responsible for the war crime of **murder** perpetrated by the FDLR upon members of the civilian population at or near various locations in the Kivu Provinces, DRC, including **Kipopo**, Masisi territory, North Kivu, on or about 12-13 February 2009; **Busurungi**, Walikale territory, North Kivu, on or about 3 March 2009; **Mianga**, Walikale territory, North Kivu, on or about 12 April 2009; **Busurungi** and surrounding villages on or about 9-10 May 2009; **Manje**, Masisi territory, North Kivu, on or about 20-21 July 2009; **Malembe**, Walikale territory, North Kivu, on or about 11-13 August and 15 September 2009; [REDACTED]; **Mutakato**, Walikale territory, North Kivu, on or about 2-3 December 2009; [REDACTED].

Count 3 - Murder constituting a crime against humanity (Art.7(1)(a))

MUDACUMURA is criminally responsible for the crime against humanity of **murder** perpetrated by the FDLR upon members of the civilian population at or near various locations in the Kivu Provinces, DRC, including **Kipopo**, Masisi territory, on or about 12-13 February 2009; **Busurungi**, Walikale territory, North Kivu, on or about 3 March 2009; **Mianga**, Walikale territory, North Kivu, on or about 12 April 2009; **Busurungi** and surrounding villages on or about 9-10 May 2009; **Manje**, Masisi territory, North Kivu, on or about 20-21 July 2009; **Malembe**, Walikale territory, North Kivu, on or about 11-13 August and 15 September 2009; [REDACTED]; **Mutakato**, Walikale territory, North Kivu, on or about 2-3 December 2009; [REDACTED].

Count 4 – Mutilation constituting a war crime (Art.8(2)(c)(i)-2)

MUDACUMURA is criminally responsible for the war crime of **mutilation** perpetrated by the FDLR at or near **Busurungi** and surrounding villages, Walikale territory, North Kivu on or about 9-10 May 2009.

Count 5 - Inhumane acts constituting a crime against humanity (Art.7(1)(k))

MUDACUMURA is criminally responsible for the crime against humanity of **inhumane acts** perpetrated by the FDLR by assaulting and/or injuring civilians and/or forcing them to carry heavy loads of pillaged goods, thus inflicting great pain and suffering or serious injury to body or mental or physical health at or near various locations in the Kivu Provinces, DRC, including **Busurungi** and surrounding villages, Walikale territory, North Kivu, on or about the 9-10 May 2009; **Manje**, Masisi territory, North Kivu, on or about 20-21 July 2009; [REDACTED].

Count 6 - Cruel treatment constituting a war crime (Art.8(2)(c)(i)-3)

MUDACUMURA is criminally responsible for the war crime of **cruel treatment** perpetrated by the FDLR by assaulting and/or injuring civilians and/or forcing them to carry heavy loads of pillaged goods, thus inflicting great pain and suffering or serious injury to body or mental or physical health at or near various locations in the Kivu Provinces, DRC, including **Busurungi** and surrounding villages, Walikale territory, North Kivu, on or about the 9-10 May 2009; **Manje**, Masisi territory, North Kivu, on or about 20-21 July 2009; [REDACTED].

Count 7 - Rape constituting a war crime (Art.8(2)(e)(vi)-1)

MUDACUMURA is criminally responsible for the war crime of **rape** perpetrated by the FDLR troops on civilian women at or near various locations in the Kivu Provinces, DRC, including **Busurungi** and surrounding villages, Walikale territory, North Kivu, in late April or early May and on or about 9-10 May 2009; [REDACTED]; **Manje**, Masisi territory, North Kivu, on or about 20-21 July 2009; [REDACTED].

Count 8 - Rape constituting a crime against humanity (Art.7(1)(g)-1)

MUDACUMURA is criminally responsible for the crime against humanity of **rape** perpetrated by the FDLR troops on civilian women at or near various locations in the

Kivu Provinces, DRC, including **Busurungi** and surrounding villages, Walikale territory, North Kivu, in late April or early May and on or about 9-10 May 2009; [REDACTED]; **Manje**, Masisi territory, North Kivu, on or about 20-21 July 2009; [REDACTED].

Count 9 - Torture constituting a war crime (Art.8(2)(c)(i)-4)

MUDACUMURA is criminally responsible for the war crime of **torture** inflicted through severe assaults, aggravated rape, mutilation and/or inhumane treatment involving the infliction of severe physical or mental pain or suffering upon the victims for the purpose of intimidation, punishment or in discrimination based on their perceived allegiance to the FARDC forces; at or near various locations in the Kivu Provinces, DRC, including **Busurungi** and surrounding villages, Walikale territory, North Kivu, on or about the 9-10 May 2009; [REDACTED].

Count 10 - Torture constituting a crime against humanity (Art.7(1)(f))

MUDACUMURA is criminally responsible for the crime against humanity of **torture** inflicted through severe assaults, aggravated rape, mutilation and/or inhumane treatment involving the infliction of severe physical or mental pain or suffering upon the victims at or near various locations in the Kivu Provinces, DRC, including **Busurungi** and surrounding villages, Walikale territory, North Kivu, on or about the 9-10 May 2009; [REDACTED].

Count 11 - Destruction of property constituting a war crime (Art.8(2)(e)(xii))

MUDACUMURA is criminally responsible for the war crime of **destruction of the enemy's property** or extensive destruction of property not required by military necessity committed by the FDLR, including the widespread burning of civilian houses and buildings at or near various locations in the Kivu Provinces, DRC, including **Kipopo**, Masisi territory, North Kivu, on or about 12-13 February 2009; **Mianga**, Walikale territory, North Kivu, on or about 12 April 2009; **Busurungi** and

surrounding villages, Walikale territory, North Kivu, on or about the 9-10 May 2009; **Manje**, Masisi territory, North Kivu, on or about 20-21 July 2009; **Malembe**, Walikale territory North Kivu, in early August, on or about 11-13 August and 15 September 2009; and [REDACTED].

Count 12 – Pillaging constituting a war crime (Art.8(2)(e)(v))

MUDACUMURA is criminally responsible for the war crime of **pillaging** of the property of the civilian population, including, but not limited to money, gold, household property, food and livestock at or near various locations in the Kivu Provinces, DRC, including **Mianga**, Walikale territory, North Kivu, on or about 12 April 2009; **Busurungi** and surrounding villages, Walikale territory, North Kivu, on or about the 9-10 May 2009; **Manje**, Masisi territory, North Kivu, on or about 20-21 July 2009; **Malembe**, Walikale territory, North Kivu, in late July, on or about 11-13 August and 15 September 2009; [REDACTED]; **Mutakato**, Walikale territory, North Kivu, on or about 2-3 December 2009; [REDACTED].

Count 13 - Persecution constituting a crime against humanity (Art.7(1)(h))

MUDACUMURA is criminally responsible for the crime against humanity of **persecution** perpetrated by the FDLR upon members of the civilian population by intentionally and in a discriminatory manner targeting women and men seen to be affiliated with the FARDC on the basis of their political affiliation, through torture, rape, inhumane acts and inhuman treatment at or near various locations in the Kivu Provinces, DRC, including **Kipopo**, Masisi territory, North Kivu, on or about 12-13 February 2009; **Pinga**, Masisi territory, North Kivu, on or about 14 February 2009; **Mianga**, Walikale territory, North Kivu, on or about 12 April 2009; **Busurungi** and surrounding villages, Walikale territory, North Kivu, on or about the 9-10 May 2009; **Manje**, Masisi territory, on or about 20-21 July 2009; **Malembe**, Walikale territory, North Kivu, in in late July, on or about 11-13 August and 15 September 2009; [REDACTED].

Count 14 – Outrage upon personal dignity constituting a war crime (Art.8(2)(c)(ii))

MUDACUMURA is criminally responsible for the war crime of **outrage upon personal dignity** at various locations in the Kivu Provinces, DRC, including [REDACTED].

E. SUMMARY OF EVIDENCE AND OTHER INFORMATION ESTABLISHING REASONABLE GROUNDS TO BELIEVE THAT MUDACUMURA COMMITTED CRIMES WITHIN THE JURISDICTION OF THE COURT (ARTICLE 58(2)(d))

1. Categories of evidence relied on primarily

32. Consistent with Article 58(2)(d), the application contains a summary of evidence and other information sufficient to establish reasonable grounds to believe that MUDACUMURA committed crimes within the jurisdiction of the Court.

33. The Prosecution relies primarily on the following categories of evidence and information:

- a. statements taken from demobilised FDLR combatants and other witnesses;⁶¹
- b. FDLR documents and press releases, including those seized from MBARUSHIMANA;⁶²
- c. telecommunications and data of MBARUSHIMANA;⁶³
- d. intercepted telecommunications between MUDACUMURA and MURWANASHYAKA;
- e. telephone call logs for MBARUSHIMANA; MURWANASHYAKA; Straton MUSONI; and call logs provided for telephone numbers that MUDACUMURA contacted;⁶⁴
- f. telephone call logs for [REDACTED], a telephone associated with MUDACUMURA, for the period between [REDACTED] and [REDACTED];⁶⁵
- g. content and metadata for e-mail accounts accessed by MUDACUMURA;⁶⁶

⁶¹ Anxs.11-40.

⁶² ERNs of all seized evidence begin with "DRC-REG-".

⁶³ Incorporated into telecommunications data summary, Anx.3(a), as further explained in Anx.3(b), and individual intercepted calls identified throughout this application.

⁶⁴ See Anx.3(a)-(b).

⁶⁵ See Anx.3(a)-(b).

h. documents and reports authored by various other sources, including United Nations bodies and agencies and non-governmental organisations.

34. The Prosecution relies on these materials to establish both reasonable grounds to believe that MUDACUMURA committed crimes and the necessity of his arrest, pursuant to Article 58(1)(a) and (b).

35. The Prosecution acknowledges that in the MBARUSHIMANA case, after having authorized his arrest, the majority of the Chamber declined to find substantial grounds to believe that the Suspect committed the crimes charged, rejecting as insufficient the evidence as to (a) 20 of the 25 incidents alleged⁶⁷ and (b) the existence of a policy to attack civilians.⁶⁸ The Prosecution submits that, notwithstanding the Chamber's finding on confirmation, this Application meets the requirements under Article 58.⁶⁹ Moreover, as set out in detail below, this Application presents additional new evidence that was not considered in the Mbarushimana case that strengthens the evidence of certain incidents, establishes several new attacks and demonstrates that the attacks continued over an expanded time-frame, which together strengthen the conclusion that the attacks were committed in pursuance of a specific and intentional policy to attack civilians.

⁶⁶ [REDACTED] The metadata identifies the sending and receiving e-mail addresses, the date and time of e-mail, names associated with the e-mail accounts, and other technical information. For attribution of these e-mail accounts, see Anx.3(c).

⁶⁷ ICC-01/04-01/10-465-Red, paras.113-121, 136, 232, 239.

⁶⁸ ICC-01/04-01/10-465-Red, para.263. This in turn led the Majority to conclude that the existence of a common plan was not established (para.291).

⁶⁹ The Prosecution submits that this finding that the evidence presented by the Prosecution had failed to establish the higher threshold of "substantial grounds to believe" in another case against another person should not influence the Chamber's decision whether the evidence presented in this application meets the lower arrest warrant threshold.

2. The structure, leadership and functioning of the FDLR in 2009 and 2010

36. In 2009 and 2010, the FDLR had a hierarchical structure,⁷⁰ with operational and disciplinary powers and a high level of internal organisation. It operated on a well-defined decision-making process and had the ability to conduct coordinated military operations.⁷¹

37. Throughout the relevant period, the Steering Committee was the highest decision-making organ of the FDLR.⁷² The group's top military and political leaders -- including President Ignace MURWANASHYAKA, 2nd Vice-President Gaston IYAMUREMYE, Executive Secretary Callixte MBARUSHIMANA and MUDACUMURA -- converged in the Steering Committee⁷³ to discharge their joint responsibilities, such as the development of the FDLR's media,⁷⁴ defence and security⁷⁵ strategies. MUDACUMURA implemented the decisions adopted by the Steering Committee.⁷⁶

⁷⁰ Anx.2 contains organigrams of the FDLR's military structure in 2009-2010.

⁷¹ See the Chamber's prior finding of reasonable grounds to believe in this respect for 2009 at ICC-01/04-01/10-1, para.18, based on evidence similar to that relied on in this application. See also Anx.117 pp.56-62, ll.86-101; Anx.73, pp.13-14, at paras.55, 57, 58; Anx.79, p.40; Anx.76, p.14, paras.27-28; W-[REDACTED], Anx.21, p.188, ll.44-403, p.204, ll.619-873, p.215, ll.976-984, p.220, ll.1167-1848.

⁷² See records of Steering Committee meetings in January 2009 and April-May 2010, Anx.5, Anx.7, Anx.101; Anx.112, p.118. See also Anx.112, pp.126, 128, in which Steering Committee members discuss the decision-making process of the FDLR.

⁷³ Anx.104, p.20, Art.39; W-[REDACTED], Anx.20, p.281, ll.219-223.

⁷⁴ In early 2009 the Steering Committee decided to react "*immediately and systematically*" to all criminal allegations against the FDLR. See Anx.5, p.8, paras.1 and 9; Anx.7, p.15, para.14. The FDLR military wing was instrumental in implementing this media strategy: "*For the abuses of which the Organisation is accused, it is important that the unit commanders of the regions in which the presumed abuses allegedly took place, undertake investigations and make reports to the FOCA Command which will immediately inform the Steering Committee.*" See Anx.5, p.12, para.41. For an example of MBARUSHIMANA forwarding criminal accusations to MUDACUMURA (on 20 November 2009) for investigation, see Anx.112, p.33 ("*...PAR Carl a écrit:...*"); for MBARUSHIMANA's denial of the same accusations (on 18 November 2009), see Anx.41, p.30.

⁷⁵ The FDLR Statute (Anx.104, p.20, Art.40) entrusts the Steering Committee with the responsibility to articulate the FDLR's defence and security policies. For the FDLR's multidimensional defence and security strategy, see Anx.7, p.27, paras.86-87.

⁷⁶ For MUDACUMURA's implementation of and contribution to the FDLR's media strategy, see Anx.4. For his implementation of and contribution to the defence and security strategies, see Anx.112, pp.118, 119.

38. MURWANASHYAKA and MUSONI were arrested in Germany in November 2009 and remain in custody pending the outcome of their trial. By early May 2010 at the latest, the Steering Committee resolved that IYAMUREMYE and MBARUSHIMANA would act as President and 1st Vice-President of the FDLR, respectively, in addition to their other functions.⁷⁷

39. At all material times MUDACUMURA was the Supreme Commander of the FDLR and in that capacity led the group's military operations in implementation of the Common Plan. FDLR troops operated under MUDACUMURA's command and control.⁷⁸ MUDACUMURA issued orders to his troops of a general,⁷⁹ pre-authorised nature,⁸⁰ as well as for specific operations.⁸¹ The FDLR had a sophisticated communications system that included satellite and mobile telephones as well as radio transmitters used to transmit coded messages.⁸² MUDACUMURA used this system to transmit orders to division and battalion commanders⁸³ and FDLR commanders and units (or MUDACUMURA's own "agents"⁸⁴) used it to report regularly⁸⁵ to MUDACUMURA on their operations.⁸⁶ In the implementation of the Common Plan, however, MUDACUMURA was careful not to record sensitive

⁷⁷ Anx.101, p. 2, l.3-4; W-[REDACTED], Anx.21, p.273, ll.190-317, p.216, ll.318-405.

⁷⁸ See para.77. See also W-[REDACTED], Anx.39, p.165, ll.307-310.

⁷⁹ See para.44.

⁸⁰ W-[REDACTED], Anx.19, p.343, ll.261-272 and p.445, ll.1929-1967; W-[REDACTED], Anx.20, p.170, ll.443-453; W-[REDACTED], Anx.16, p.312, ll.1640-1750, p.323, ll.203-305.

⁸¹ W-[REDACTED], Anx.17, p.474, ll.442-467; W-[REDACTED], Anx.17, p.291, ll.271-293; W-[REDACTED], Anx.16, p.323, ll.203-305. See fn.147.

⁸² W-[REDACTED], Anx.30, p.48, ll.36-58 and p.193, ll.14-511; W-[REDACTED], Anx.19, p.218, ll.2257-2302; W-[REDACTED], Anx.16, p.120, ll.260-413, p.125, ll.440-491, p.174, ll.44-234; W-[REDACTED], Anx.17, p.134, ll.1823-1845; W-[REDACTED], Anx.20, p.124, ll.771-785; W-[REDACTED], Anx.21, p.237, ll.1751-1856 and p.243, ll.43-430; W-[REDACTED], Anx.39, p.100, ll.342-422 and p.169, ll.69-82. On the use of codes in internal FDLR communications, see also [REDACTED] W-[REDACTED], Anx.27, referring to [REDACTED] Anx.112, p.119.

⁸³ See previous footnote.

⁸⁴ W-[REDACTED], Anx.21, p.668, ll.295-332.

⁸⁵ W-[REDACTED], Anx.19, p.204, ll.1785-1868, p.210, ll.1965-1970, p.220, ll.2303-2340; W-[REDACTED], Anx.16, p.117, ll.143-246; p.330, ll.475-476, p.337, ll.699-719; W-[REDACTED], Anx.21, p.843, ll.96-103, p.845, ll.162-170, p.847, ll.216-270.

⁸⁶ See Anx.4. W-[REDACTED], Anx.21, p.254, ll.455-582; W-[REDACTED], Anx.20, p.175, ll.614-650; W-[REDACTED], Anx.39, p.246, ll.357-403.

information in writing.⁸⁷ MUDACUMURA also transmitted orders directly to FDLR senior commanders during meetings⁸⁸ and through couriers.⁸⁹ FDLR commanders and troops obeyed MUDACUMURA's orders.⁹⁰

40. MUDACUMURA consulted and updated the FDLR's political leaders about developments on the ground in the Kivus. He coordinated with them the FDLR's activities in furtherance of the Common Plan.⁹¹ MUDACUMURA accessed at least six different telephones⁹² (four of which he used regularly⁹³) as well as three e-mail accounts⁹⁴ to communicate with the political leaders and his subordinates. [REDACTED].⁹⁵

41. In March 2009 the FDLR leadership authorised subordinate units to form coalitions with other armed groups opposed to the FARDC.⁹⁶ The purpose of such

⁸⁷ Anx.112, p.138, first full paragraph, final five lines; Intercepts ID_NO:984771 (6 August 2010), Lfd.Nr.6872 (11 August 2009), Anx.43, p.210, ll.79-81 and p.186, ll.68-81; W-[REDACTED], Anx.20, p.309, ll.324-374; W-[REDACTED], Anx.16, p.401, ll.1145-1172.

⁸⁸ W-[REDACTED], Anx.18, p.172, ll.214-227.

⁸⁹ W-[REDACTED], Anx.21, p.243, ll.54-55.

⁹⁰ W-[REDACTED], Anx.30, p.183, ll.730-758; W-[REDACTED], Anx.16, p.304, ll.1345-1353, p.332, ll.551-667; W-[REDACTED], Anx.20, p.188, ll.208-240.

⁹¹ Anx.3(a) identifies the telecommunications that occurred in 2009 and 2010 between MUDACUMURA on the one hand, and MURWANASHYAKA, MBARUSHIMANA and other FDLR political and military leaders, on the other.

⁹² See Anx.3(c) for attribution of telephones to MUDACUMURA.

⁹³ While specific intercepts from the various phones accessed by MUDACUMURA have been used to provide evidence of MUDACUMURA's role and activity in the field, the Prosecution has relied primarily on the telephones used most regularly by MUDACUMURA to provide evidence on his communications patterns and network, summarised in Anx.3(a). These four phones are [REDACTED] (see Anx.3(a), Anx.3(c) for attribution). Credit on MUDACUMURA's Thuraya phones was topped-up by MBARUSHIMANA. See Anx.99, p.3, (27/02/2009: "...Carte transmise à Mupenzi..."), Anx.102, p.85, (04/09/2009: "...100 € - Carte de Mup...").

⁹⁴ See Anx.3(c) for attribution of [REDACTED]. Should the Chamber require further evidence of the attribution of these emails, the Prosecution is able to provide it.

⁹⁵ [REDACTED] See Anx.112, pp.42-46.

For indications that MUDACUMURA communicated with MBARUSHIMANA [REDACTED].

⁹⁶ Anx.76, p.27, para.87; Anx.112, p.136; [REDACTED] W-[REDACTED], Anx.27, p.397, 7th line from the bottom of the page [REDACTED].

coalitions was to ensure the survival of the FDLR by preying on the civilian population.⁹⁷

⁹⁷ One such coalition was with Mayi Mayi Cheka and ex-CNDP elements led by Emmanuel NSENGIYUMVA ("the FDLR coalition"), *see* W-[REDACTED], Anx.21, p.579, ll.1523-1598.

3. Organisational policy to attack a civilian population (Article 7(2)(a))⁹⁸

42. In early 2009, the FDLR leadership decided to launch a widespread and systematic attack against the civilian population of the Kivus, as part of the wider common plan described above.⁹⁹ The purpose of the attack, *inter alia*, was to make the human cost of the FARDC's offensive so high that public and international pressure would force the Congolese and Rwandan Governments to abandon the military campaign in favour of a negotiated settlement.¹⁰⁰ The ultimate aim, however, was to "liberate" Rwandans from the RPF-Inkotanyi (Rwandan President Kagame's political party)¹⁰¹ and regain power in Rwanda.¹⁰²

43. The policy to attack civilians materialised in the FDLR soldiers' treatment of civilians perceived as siding with the FARDC as "enemies", in compliance with their superiors' orders.¹⁰³

44. The policy also took the form of an explicit actual order to attack civilians, issued by MUDACUMURA¹⁰⁴ shortly after the launch of *Umoja Wetu*.¹⁰⁵ The order was

⁹⁸ The evidence discussed in this section also establishes that the crimes alleged were committed as part of a plan, as envisaged in Article 8(1).

⁹⁹ See section B above.

¹⁰⁰ W-[REDACTED], Anx.39, p.329-330, ll.577-618 and p.331, ll.657-685; W-[REDACTED], Anx.20, p.170, ll.450-572 and p.212, ll.38-40; W-[REDACTED], Anx.19, p.423, ll.1153-1193 and p.437, ll.1646-1649 ; W-[REDACTED], Anx.14, p.277, ll.971-993; Anx.76, p.129; Anx.118, p.60; intercept Lfd.Nr.4461 (15 May 2009), Anx.43, p.110.

¹⁰¹ FDLR press releases dated 15 September, 5 October, 30 October 2009 and 19 November 2009, Anx.41, pp.25, 27, 28 and 30.

¹⁰² W-[REDACTED], Anx.39, p.331, ll.657-685.

¹⁰³ W-[REDACTED], Anx.16, p.400, ll.1080-1089; W-[REDACTED], Anx.19, p.343, ll.287-514, p.376, ll.1467-1496 and p.426, ll.1261-1326; W-[REDACTED], Anx.30, p.102, ll.774-776; W-[REDACTED], Anx.18, p.396, ll.759-761; W-[REDACTED], Anx.20, p.308, ll.310-329; W-[REDACTED], Anx.14, p.381, ll.916-918; W-[REDACTED], Anx.23, p.10, para.42; W-[REDACTED], Anx.31, p.6, para.18; W-[REDACTED], Anx.21, p.808, l.888.

¹⁰⁴ Transcript of order given by MUDACUMURA and read out by an FDLR radio operator to the Group of Experts on the DRC, at Anx.18 of UN Group of Experts November 2010 report, Anx.76, p.129; W-[REDACTED], Anx.19, p.425, ll.1236-1670; W-[REDACTED], Anx.16, p.417, ll.140-181, p.435, ll.779-885; W-[REDACTED], Anx.21, p.426, ll.529-584; W-[REDACTED], Anx.14, p.227, ll.215-253, p.268, ll.661-710, p.277, ll.971-993; W-[REDACTED], Anx.20, p.170, ll.450-453, p.184, ll.73-90, p.204, ll.796-806, p.308, ll.285-301 and p.313, ll.477-481; W-[REDACTED], Anx.39, p.215, ll.705-707.

transmitted to all FDLR commanders¹⁰⁶ and read out to their subordinates and units in the field.¹⁰⁷ As recounted by demobilised FDLR combatants, MUDACUMURA directed the FDLR to treat the civilians as enemies,¹⁰⁸ to inflict suffering on them,¹⁰⁹ and to pillage¹¹⁰ their property. MUDACUMURA ordered the troops to burn entire villages¹¹¹ as punishment for the population's perceived support of the government forces' efforts to dislodge the FDLR from the Kivus¹¹² and to ensure that the FDLR's enemies and civilians supportive of the FARDC's offensive, once forced out, would be unable to return.¹¹³

45. In execution of this order, FDLR troops engaged in widespread rapes and other forms of sexual violence, before, during and after their attacks, with the aim of intimidating and punishing the civilian population perceived as being supportive of the FDLR's enemies.¹¹⁴

46. MUDACUMURA authorised, even ordered,¹¹⁵ FDLR units to carry out *ravitaillement* operations, which sought to secure resources for the FDLR¹¹⁶ at the

¹⁰⁵ W-[REDACTED], Anx.14, p.225, ll.130-149, p.227, ll.996-1022, p.229, ll.254-268 p.267, ll.621-710; W-[REDACTED], Anx.19, p.424, ll.1183-1202 and p.436, ll.1618-1649; W-[REDACTED], Anx.20, p.170, ll.433-496 and p.314, ll.504-508; W-[REDACTED], Anx.16, p.439, ll.927-953 ; W-[REDACTED], Anx.39, p.150, ll.212-253.

¹⁰⁶ W-[REDACTED], Anx.20, p.170, ll.433-496 and p.310, ll.358-360.

¹⁰⁷ W-[REDACTED], Anx.14, p.225, ll.130-142 and p.226, ll.169-209.

¹⁰⁸ W-[REDACTED], Anx.19, p.343, ll.273-514; p.425, ll.1236-1670; W-[REDACTED], Anx.20, p.308, ll.310-329; W-[REDACTED], Anx.30, p.102, ll.774-776; W-[REDACTED], Anx.39, p.190, ll.427-471, p.198, ll.67-73, p.214, ll.669-753, p.233, ll.509-536.

¹⁰⁹ W-[REDACTED], Anx.19, p.358, ll.823-836 and p.437, ll.1646-1649; W-[REDACTED], Anx.14, p.277, ll.971-993.

¹¹⁰ W-[REDACTED], Anx.20, p.173, ll.535-537. See also evidence regarding the *ravitaillement* operations referred to elsewhere in this application.

¹¹¹ W-[REDACTED], Anx.20, p.171, ll.450-496, p.184, ll.73-90; W-[REDACTED], Anx.16, p.436, ll.818-871; W-[REDACTED], Anx.12, p.319, DRC-OTP-2033-2198 at 2210, ll.383-400; W-[REDACTED], Anx.39, p.216, l.717.

¹¹² W-[REDACTED], Anx.19, p.343, ll.273-514; W-[REDACTED], Anx.39, p.104, ll.500-743 and p.115, ll.39-79, p.119, ll.197-200 and p.215, ll.705-707.

¹¹³ W-[REDACTED], Anx.20, p.212, ll.38-40; W-[REDACTED], Anx.21, p.428, ll.582-634; Anx.21, p.793, ll.361-423, p.816, ll.761-890 .

¹¹⁴ Anx.59, para.64; Anx.118, pp.80-83. See section E.5 below.

¹¹⁵ W-[REDACTED], Anx.20, p.229, ll.699-872; W-[REDACTED], Anx.14, p.371, ll.557-636.

expense of the civilian population. However, these operations were often accompanied by other crimes against the victims, consistent with MUDACUMURA's general order to intimidate and punish the civilian population.

47. Even without regard to the direct evidence of this policy, it is reflected in the fact that the attacks against civilians were both widespread and systematic, as set out in section E.4 and E.5 below. FDLR troops carried out multiple attacks on civilians in 2009 and 2010. Although it is not possible for the Prosecution to investigate every attack that has been reported,¹¹⁷ the number of reports of directed against civilians from a variety of independent and credible sources, together with the concrete examples confirmed by the evidence gathered by the Prosecution, establishes reasonable grounds to believe that an organisational policy to attack civilians existed.

48. Despite the FDLR's pretence of non-violent intentions,¹¹⁸ MUDACUMURA followed-up his initial general order with subsequent orders for specific operations, (issued personally or through his high-ranking commanders),¹¹⁹ committed troops to attack civilians, and received regular reports on the progress of the campaign.¹²⁰ MUDACUMURA kept the political leaders of the FDLR informed about the implementation of the Common Plan.¹²¹ In May 2010, the Steering Committee

¹¹⁶ W-[REDACTED], Anx.18, p.552, ll.680-734; W-[REDACTED], Anx.17, p.495, ll.101-126; W-[REDACTED], Anx.39, p.186, ll.284-340 and p.264, ll.331-351.

¹¹⁷ Apart from the sheer number of attacks reported, the ongoing unrest in the area, the remoteness of many of the locations and issues relating to the protection of victims and witnesses make such a broad-ranging investigation impossible.

¹¹⁸ FDLR press release, 17 February 2009, Anx.41, p.7.

¹¹⁹ W-[REDACTED], Anx.13, p.180, ll.152-173, p.181, ll.205-263, p.185, ll.318-368, p.208, ll.390-426, 455-461; W-[REDACTED], Anx.16, p.473, ll.330-432; W-[REDACTED], Anx.17, p.437, ll.1612-1620, p.438, ll.1654-1660; W-[REDACTED], Anx.39, p.214, ll.669-753.

¹²⁰ See fn.85 above.

¹²¹ W-[REDACTED], Anx.19, p.222, ll.2376-2395; p.358, ll.840-843; W-[REDACTED], Anx.14, p.595, ll.438-473; W-[REDACTED], Anx.17, p.126, ll.1530-1552. Intercept Lfd.Nr.4461 (15 May 2009), Anx.43, p.110.

congratulated the FDLR fighters for their participation in the operations launched since January 2009.¹²²

¹²² Anx.101, para.6: *“La réunion CD a adressé une motion de soutien à nos vaillants leaders en détention et un message de félicitation aux ABACUNGUZI pour leur résistance manifestée au cours des OPS lancées depuis Janvier 2009”* (emphasis added). See also Anx.112, p.116, email from MUDACUMURA transmitting a message from IYAMUREMYE to the Bacunguzi on 4 May 2010, commending their good conduct, bravery and discipline in the war that began in January 2009.

4. Widespread or systematic attack against the civilian population of North and South Kivu in 2009 and 2010 (Article 7(1))¹²³

49. In implementation of MUDACUMURA's orders, FDLR troops committed crimes against civilians by attacking and razing villages and by assaulting civilians before and after such attacks. Various FDLR units perpetrated murders, torture, rapes, inhumane acts, cruel treatment, mutilation, persecution, outrages on personal dignity, pillaging and extensive destruction of civilian property over many months and at multiple locations, often over 100 kilometres apart. Several of the incidents referred to below were FDLR attacks in which 30 or more civilians were killed, 10 or more women were raped, or in which several hundreds of houses and other civilian structures were burnt. Credible sources hold the FDLR responsible for at least 750 killings, more than 600 rapes and the destruction of over 7,000 houses and other structures during the relevant period.¹²⁴ Combined with the actions of other armed groups – some aligned with the FDLR or responding to FDLR violence -- these crimes produced the desired humanitarian catastrophe throughout North and South Kivu in 2009 and 2010.¹²⁵ Over one million people were displaced in the DRC in 2009 alone, most of them in North Kivu, and an additional 400,000 in 2010.¹²⁶

50. Cumulatively, the FDLR's numerous attacks on civilians constitute a widespread and systematic attack in the sense of Article 7(2)(a), on account of their geographical and temporal spread, the large number of victims, and the improbability of the random occurrence of the acts. The Prosecution submits that some individual incidents were also widespread and systematic attacks in and of themselves.¹²⁷

¹²³ The evidence discussed in this section also establishes that the crimes alleged were committed as part of a large-scale commission of such crimes, as envisaged in Article 8(1).

¹²⁴ Anx.59, para.10; Anx.74, pp.82, para.345; Anx.118, pp.66, 80, 84; Anx.70, p.14, para.25; Anx.55, pp.3-5; Anx.76, pp.39-40; Anx.48; Anxs.68, 69.

¹²⁵ Anx.81, p.37, Anx.42, pp.23, 30, 33; Anx.53, paras.2-4, 6, 60, 62-63, 117; Anx.81, pp.16, 37.

¹²⁶ Anx.81, p.37; Anx.53, p.15.

¹²⁷ The Prosecution submits that the incidents at Busurungi (May 2009), Malembe (August 2009) [REDACTED] constitute "attacks" in the sense of Article 7(2)(a) in and of themselves, on account of

51. At all times relevant to the present application MUDACUMURA had knowledge of the existence of the widespread or systematic attack on the civilian population of the Kivus. All the attacks were committed by FDLR soldiers under the command of higher officers who themselves were within MUDACUMURA's chain of command.¹²⁸ The main incidents are described below.

their large-scale nature, their considerable seriousness, the resulting number of victims and the fact that they were each "planned, directed or organised". See ICC-02/05-01/07-1-Corr, para.62; ICC-01/04-01/07-717, paras.394-398; ICC-01/05-01/08-424, para.83; and ICC-01/09-19-Corr, para.95. See also ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgement, 7 May 1997, para.653 ("...if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not..."), relied on in ICC-01/04-01/07-717, para.396, fn.508 (citing Werle, who in turn cites the *Tadic* decision); ICC-01/05-01/08-424, para.81, fns.103 and 104 (citing *Katanga*, para.396 and the *Tadic* decision); and ICC-01/09-19-Corr, para.85, fn.77.

¹²⁸ For the purposes of this application the Prosecution does not consider it necessary to identify each of these commanders although many of them are known, as is evident from the evidence referred to in support of the specified incidents. See also Annex 2.

5. Evidence and information of FDLR attacks on civilians

52. In this section, the Prosecution will set out the evidence underlying the alleged crimes specified in section D above. In framing these charges, the Prosecution will focus on the nine incidents for which the evidence is the strongest and most specific. However, the Prosecution will also set out evidence of alleged FDLR attacks against the civilian population which, while not relied upon to support specific charges against MUDACUMURA, cumulatively establish reasonable grounds to believe that the crimes alleged were committed as part of a widespread or systematic attack directed against the civilian population of North and South Kivu, DRC.

53. On or about 27 January 2009, FDLR combatants under MUDACUMURA's ultimate command attacked civilians in the village of **Kibua** in Masisi territory, North Kivu.¹²⁹ The FDLR Reserve Brigade, which had stationed itself in this village, was attacked by the FARDC and RDF coalition forces. In the course of the military battle, FDLR combatants prevented civilians from fleeing and murdered at least 11 civilians during the attack itself and several more in the days following this incident.¹³⁰ In late January 2009, FDLR elements attacked **Busheke** village, in Kalehe territory, South Kivu. During this attack, murders and rapes were committed as persecution of civilians for their perceived allegiance with the FARDC.¹³¹ For the purposes of this application, the Prosecution does not rely on these attacks to establish the crimes alleged, but rather to establish the widespread and systematic nature of FDLR attacks directed against the civilian population during the relevant period.

¹²⁹ Anx.118, p.91.

¹³⁰ Anx.118, pp.66-68, 91, 165; Anx.42, pp.8, 12; Anx.79, pp.13-14; Anx.49, pp.6-7.

¹³¹ Anx.118, p.75. Based on similar evidence, the Chamber previously found reasonable grounds to believe that FDLR troops attacked Busheke. See ICC-01/04-01/10-1, para.12 (ii).

54. On or about 12-13 February 2009, FDLR troops attacked civilians in **Kipopo**, Masisi territory.¹³² The FDLR locked civilians in their homes and set them on fire, thus committing multiple murders as well as destroying civilian property. These acts were also committed to persecute civilians for their perceived allegiance with the Rwandan and Congolese coalition forces.¹³³ This evidence is accordingly relied on in support of **Counts 1, 2, 3, 11 and 13**.

55. On or about 14 February 2009, FDLR troops attacked civilians in the village of **Pinga**, Masisi territory.¹³⁴ RDF troops had occupied Pinga village for two days. Once they left, the FDLR embarked on a campaign of reprisals and intimidation against civilians. They killed a prominent local chief and others in the village to persecute the civilian villagers for their connection with the RDF.¹³⁵ For the purposes of this application, the Prosecution does not rely on these attacks to establish the crimes alleged, but rather to establish the widespread and systematic nature of FDLR attacks directed against the civilian population during the relevant period.

56. FDLR troops carried out several attacks on **Mianga**,¹³⁶ Walikale territory. The largest attack took place on or about 12 April 2009. The order for this attack came from FOCA High Command through MUDACUMURA's Deputy Commander Stanislas Nzeyimana, aka "Bigaruka",¹³⁷ and passed to the Commander of the FOCA

¹³² W-[REDACTED], Anx.13, p.208, ll.390-630; W-[REDACTED], Anx.17, p.454, ll.2221-2283; W-[REDACTED], Anx.30, p.151, ll.105-144.

¹³³ W-[REDACTED], Anx.13, p.208, ll.390-630; W-[REDACTED], Anx.17, p.454, ll.2221-2258, p.455, ll.2268-2283; W-[REDACTED], Anx.30, p.153, ll.160-173, p.155, ll.221-223; Anx.118, pp.68, 187; Anx.42, pp.16-17, 18, 20; Anx.57, p.11; Anx.58, p.4. Based on similar evidence, the Chamber previously found reasonable grounds to believe that FDLR troops attacked Kipopo. *See* ICC-01/04-01/10-1, para.12 (iv).

¹³⁴ W-[REDACTED], Anx.16, p.549, ll.1253-1272.

¹³⁵ Anx.118, pp.77, 167; Anx.42, p.15; Anx.79, p.14; Anx.49, pp.6-7, para.9. Based on similar evidence, the Chamber previously found reasonable grounds to believe that FDLR troops attacked Pinga. *See* ICC-01/04-01/10-1, para.12 (iii).

¹³⁶ W-[REDACTED], Anx.39, p.252, ll.582-629. Based on similar evidence, the Chamber previously found reasonable grounds to believe that FDLR troops attacked Mianga. *See* ICC-01/04-01/10-1, para.12 (vii).

¹³⁷ W-[REDACTED], Anx.16, p.473, ll.330-432; W-[REDACTED], Anx.17, p.437, ll.1612-1632, p.438, ll.1654-1660; W-[REDACTED], Anx.39, p.214, ll.636-645, p.214, ll.669-689 and p.219, ll.17-35.

Reserve Brigade, Lt. Col. 'Kalume'.¹³⁸ MUDACUMURA also specifically ordered troop reinforcements for the execution of the attack.¹³⁹ There had been a deployment of FARDC soldiers in the village, but the FDLR routed them. When they fled, they left the population undefended. Many civilians fled their village, but the FDLR killed others, including the chief who was decapitated.¹⁴⁰ The FDLR directed an attack against the civilian population of Mianga, destroyed and pillaged civilian property and committed the crime of murder.¹⁴¹ Through these acts, the FDLR persecuted civilians at Mianga for their perceived allegiance with the FARDC.¹⁴² MUDCACUMURA was informed after the attack on Mianga that the FDLR soldiers burned houses and that civilians fled or died.¹⁴³ This evidence is relied on in support of **Counts 1, 2, 3, 11, 12 and 13.**

57. In April 2009, the FDLR Montana Battalion (SONOKI) attacked the village of **Kinyumba**, Masisi, close to Nyabiondo, killing FARDC soldiers and civilians.¹⁴⁴ For the purposes of this application, the Prosecution does not rely on these attacks to establish the crimes alleged, but rather to establish the widespread and systematic nature of FDLR attacks directed against the civilian population during the relevant period.

58. On or about 3 March 2009, FDLR elements attacked and killed a young man in the vicinity of **Busurungi**.¹⁴⁵ This evidence is relied on in support of **Counts 2 and 3.** On or about the 9-10 May 2009, the FDLR carried out another attack on the village of

¹³⁸ Referred to as the 'Brigadier' by W-[REDACTED], Anx.13, p.138, ll.156-158.

¹³⁹ W-[REDACTED], Anx.13, pp.136-139, ll.90-181 and p.138, ll.142-181.

¹⁴⁰ W-[REDACTED], Anx.32, para.44; W-[REDACTED], Anx.37, para.36.

¹⁴¹ W-[REDACTED], Anx.39, p.197, ll.36-753, p.219, ll.17-558 (generally) and p.237, ll.20-53, p.240, ll.122-125; W-[REDACTED], Anx.32, paras.35-50; W-[REDACTED], Anx.18, p.770, ll.533-661; W-[REDACTED], Anx.20, p.174, ll.572-604; W-[REDACTED], Anx.19, p.455, ll.271-295; W-[REDACTED], Anx.16, p.474 ll.361-363, p.476, ll.445-457, p.481, ll.636-707; Anx.118, pp.65, 70; Anx.74, p.83; Anx.57, pp.7, 13; Anx.58, p.8.

¹⁴² W-[REDACTED], Anx.39, p.214, ll.669-707 and p.243, ll.253-293.

¹⁴³ W-[REDACTED], Anx.20, p.175, ll.615-650; W-[REDACTED], Anx.39, p.246, ll.357-403.

¹⁴⁴ W-[REDACTED], Anx.21, p.841, ll.30-103.

¹⁴⁵ W-[REDACTED], Anx.23, paras.25, 28; W-[REDACTED], Anx.24, para.16; W-[REDACTED], Anx.31, para.19.

Busurungi and surrounding villages. The attack had been carefully planned in advance. At least one reconnaissance mission was conducted beforehand.¹⁴⁶ The order to attack originated with MUDACUMURA¹⁴⁷ and the results reported afterward to him.¹⁴⁸ The order was passed on in the field through Kalume.¹⁴⁹ The initial target was an FARDC battalion located in Busurungi,¹⁵⁰ but the ultimate objective of the operation was to attack the civilians under FARDC protection¹⁵¹ whom the FDLR accused of aligning with government forces.¹⁵² During the attack on Busurungi, the FDLR committed the crimes of murder, rape, torture and mutilation, and subjected civilians to inhumane acts and cruel treatment as persecution for their perceived affiliation with the FARDC. FDLR troops also destroyed and pillaged civilian property in and around the village.¹⁵³ This evidence is relied on in support of **Counts 1 to 13**.

59. [REDACTED].¹⁵⁴ This evidence is relied on in support of **Counts** [REDACTED]. [REDACTED].¹⁵⁵ This evidence is relied on in support of **Counts** [REDACTED].

¹⁴⁶ W-[REDACTED], Anx.18, p.185, ll.678-717; W-[REDACTED], Anx.39, p.199, ll.80-110, p.214, ll.636-668.

¹⁴⁷ By virtue of both the standing order and likely a specific order. W-[REDACTED], Anx.17, p.291, ll.271-293; W-[REDACTED], Anx.18, p.231, ll.2282-2294; W-[REDACTED], Anx.13, p.76, ll.506-521; W-[REDACTED], Anx.12, p.224, ll.706-717.

¹⁴⁸ W-[REDACTED], Anx.19, p.397, ll.207-209 and p.406, ll.508-568; W-[REDACTED], Anx.39, p.263, ll.194-259; W-[REDACTED], Anx.17, p.791, ll.815-835.

¹⁴⁹ W-[REDACTED], Anx.17, p.288, ll.167-176; W-[REDACTED], Anx.18, p.230, ll.2248-2275, p.247, ll.145-171 and p.726, ll.740-810; W-[REDACTED], Anx.12, p.221, ll.630-631 and p.223, ll.701-735.

¹⁵⁰ There were at least three FARDC positions targeted in Busurungi - one was situated in the centre of the village and the others on the outskirts of the village. W-[REDACTED], Anx.18, p.188, ll.791-801, p.192, ll.936-1213 and p.217, ll.1792-1812.

¹⁵¹ W-[REDACTED], Anx.39, p.262, ll.228-259.

¹⁵² W-[REDACTED], Anx.18, p.181, ll.536-548, p.713, ll.258-269, p.719, ll.513-533 and p.724, ll.679-700; W-[REDACTED], Anx.19, p.400, ll.304-347; Anx.57, pp.4, 6, 8, 15.

¹⁵³ W-[REDACTED], Anx.23, paras.42-64; W-[REDACTED], Anx.24, paras.19-29, paras.19-29; W-[REDACTED], Anx.25, (first statement) paras.8-13, 22-33 and (second statement) paras.10-12; W-[REDACTED], Anx.31, paras.22-31; W-[REDACTED], Anx.34, paras.13-27; W-[REDACTED], Anx.18, p.337, ll.936-989, p.713, ll.258-384, p.717, ll.422-483, p.728, ll.830-905, p.732, ll.958-1197 and p.742, ll.1320-1370; W-[REDACTED], Anx.12, p.249, ll.544-560; W-[REDACTED], Anx.17, p.612, ll.1705-1720; W-[REDACTED], Anx.27, pp.207 to 209, ll.924-1004 and p.211, ll.15-23; Anx.9, pp.71-73; Anx.54, pp.2-4, 6. Based on similar evidence, the Chamber previously found reasonable grounds to believe that FDLR troops attacked Busurungi. See ICC-01/04-01/10-1, para.12 (ix) and (x).

¹⁵⁴ [REDACTED].

60. On or about 20-21 July 2009, FDLR troops attacked the village of **Manje** (or “Mandje”), Masisi territory.¹⁵⁶ The FARDC had been stationed in Manje but they fled when the FDLR reached the village. The FDLR then targeted and attacked the civilians in revenge for their affiliation with the FARDC.¹⁵⁷ The attack included murders, rapes, pillaging and destruction of civilian property.¹⁵⁸ They also subjected civilians to inhumane acts and cruel treatment [REDACTED]. Through these acts, the FDLR troops also persecuted civilians for allegedly “following the government’s line”.¹⁵⁹ This evidence is relied on in support of **Counts 1, 2, 3, 5, 6, 7, 8, 11, 12 and 13**.

61. The FDLR perpetrated several attacks on the village of **Malembe** and surrounding areas, in Walikale territory, during the period late July to mid September 2009, as described further below. The order to attack Malembe and its surrounding areas came from General Gaston IYAMUREMYE, aka “Rumuli”, 2nd Vice-President of the FDLR, who requested assistance from Lt Col “Kalume”.¹⁶⁰ Kalume authorised the mission and ordered Capt Vainqueur to deploy his troops, having them report directly to Gen IYAMUREMYE.¹⁶¹ Gen IYAMUREMYE gave the order directly to the troops to kill and burn anything in Malembe.¹⁶² The FDLR first held a public meeting warning the civilians not to cooperate with the coalition forces or the FDLR would regard them as the enemy. The first attack took place in late July 2009, during which FDLR troops looted the area (**Counts 1, 12 and 13**). Shortly thereafter in early August, they again attacked and destroyed civilian property (**Counts 1, 11 and 13**). During the period 11-13 August, FDLR troops attacked, killed

¹⁵⁵ [REDACTED].

¹⁵⁶ W-[REDACTED], Anx.18, p.470, ll.109-126 and p.472, ll.187-193.

¹⁵⁷ W-[REDACTED], Anx.33, paras. 25, 33; Anx.118, pp.73-74.

¹⁵⁸ W-[REDACTED], Anx.33, paras.16-34; W-[REDACTED], Anx.18, p.470, ll.109-126, p.484, ll.608-638, p.488, ll.786-796; W-[REDACTED], Anx.19, p.456, ll.315-387; Anx.118, pp.73-74. Based on similar evidence, the Chamber previously found reasonable grounds to believe that FDLR troops attacked Manje. See ICC-01/04-01/10-1, para.12 (xi).

¹⁵⁹ W-[REDACTED], Anx.33, para.33.

¹⁶⁰ W-[REDACTED], Anx.13, p.180, ll.155-173.

¹⁶¹ W-[REDACTED], Anx.13, p.131, ll.316-334, p.182, ll.226-234, 245-263 and p.189 ll.477-501; W-[REDACTED], Anx.18, p.383, ll.284-315.

¹⁶² W-[REDACTED], Anx.13, p.182, ll.226-234, 364-368.

civilians and burned 600 houses (**Counts 1, 2, 3, 11, 12 and 13**). Finally on or about 15 September 2009, FDLR troops attacked and killed civilians, pillaged and burned down all the houses that had been re-built in the interim (**Counts 1, 2, 3, 11, 12 and 13**). All of the above-mentioned attacks were perpetrated in order to persecute the population for its perceived allegiance with the FARDC.¹⁶³

62. [REDACTED].¹⁶⁴ This evidence is relied on in support of **Counts [REDACTED]**.

63. On or about 2-3 December 2009, FDLR troops killed two civilians and injured at least one other and pillaged civilian goods in the village of **Mutakato**, Walikale territory.¹⁶⁵ This evidence is accordingly relied on in support of **Counts 2, 3 and 12**.

64. From January 2010, the FDLR carried out a series of attacks on civilians at the following locations: on or about 20 January in **Rutshuru** town, Rutshuru territory, North Kivu, killing two people and injuring several others;¹⁶⁶ on or about the night of 20 to 21 January at the IDP camp of **Nyange**, Masisi territory, killing three people and injuring three more;¹⁶⁷ on or about 23 January near **Lulingu**, Shabunda territory, mutilating six civilians;¹⁶⁸ in late January or early February at **Kakenge**, Kabare territory, South Kivu, killing one civilian and pillaging 50 houses;¹⁶⁹ on or about 10 February in the area of **Itombwe**, in Fizi territory, South Kivu, kidnapping 15 women and killing at least eight of them;¹⁷⁰ on or about 11 or 12 February in **Mulombozi**,

¹⁶³ W-[REDACTED], Anx.37, paras.31, 38-46, 55-57, 61-64; W-[REDACTED], Anx.19, p.462, ll.515-543; W-[REDACTED], Anx.13, p.129, ll.254-306, p.191, ll.524-530 and p.193, ll.610-624; W-[REDACTED], Anx.17, p.464, ll.94-101; W-[REDACTED], Anx.12, p.319, ll.383-400; W-[REDACTED], Anx.18, p.782, ll.983-1122; Anx.56, pp.2, 4, 5; Anx.118, p.189. Based on similar evidence, the Chamber previously found reasonable grounds to believe that FDLR troops attacked Malembe. *See* ICC-01/04-01/10-1, para.12 (xii) and (xiii).

¹⁶⁴ [REDACTED].

¹⁶⁵ Anx.55, pp.3-5, paras. 5, 13-15, W-[REDACTED], Anx.39, p.264, ll.331-372.

¹⁶⁶ Anx.48, p.2.

¹⁶⁷ Anx.48, p.2.

¹⁶⁸ Anx.42, p.36.

¹⁶⁹ Anx.42, p.37.

¹⁷⁰ Anx.96, p.5.

Mwenga territory, South Kivu, killing five civilian women;¹⁷¹ on or about the night of 4 May to 5 May in **Kahira**, Masisi territory, killing five people and injuring five others;¹⁷² on or about 19 May in **Lwigi** and **Kamingisi** villages and on or about 21 May in the village of **Mianzi**, in Shabunda territory, pillaging and raping a dozen civilian women;¹⁷³ on or about 2 June in **Burungu**, about 40 km from Goma, North Kivu, killing eight civilians;¹⁷⁴ and on or about 5 August in the villages of **Luembu** and **Ndesse**, Shabunda territory, killing four people, injuring several more and burning hundreds of houses.¹⁷⁵ The Prosecution does not rely on these attacks for the purposes of the crimes alleged, but rather to establish the widespread and systematic nature of FDLR attacks directed against the civilian population during the relevant period.

65. [REDACTED]¹⁷⁶ [REDACTED]¹⁷⁷ [REDACTED]¹⁷⁸ [REDACTED]¹⁷⁹ [REDACTED].¹⁸⁰ [REDACTED]¹⁸¹ [REDACTED],¹⁸² [REDACTED],¹⁸³ [REDACTED].¹⁸⁴ [REDACTED]¹⁸⁵ [REDACTED].¹⁸⁶ This evidence is relied on in support of **Counts [REDACTED]** .

66. [REDACTED].¹⁸⁷ This evidence is relied on in support of **Counts [REDACTED]**.

¹⁷¹ Anx.76, p.40, para.140(d); Anx.42, p.38.

¹⁷² Anx.42, p.39.

¹⁷³ Anx.69, p.2.

¹⁷⁴ Anx.42, p.41.

¹⁷⁵ Anx.97, p.2.

¹⁷⁶ [REDACTED].

¹⁷⁷ [REDACTED].

¹⁷⁸ [REDACTED].

¹⁷⁹ [REDACTED].

¹⁸⁰ [REDACTED].

¹⁸¹ [REDACTED].

¹⁸² [REDACTED].

¹⁸³ [REDACTED].

¹⁸⁴ [REDACTED].

¹⁸⁵ [REDACTED].

¹⁸⁶ [REDACTED].

¹⁸⁷ [REDACTED].

67. Between 2 and 18 August 2010, FDLR troops attacked the civilian population in Shabunda territory, South Kivu. FDLR combatants attacked over 30 villages,¹⁸⁸ causing the displacement of several thousand civilians,¹⁸⁹ destroying civilian property and committing rape.¹⁹⁰ For the purposes of this application, the Prosecution does not rely on these attacks to establish the crimes alleged, but rather to establish the widespread and systematic nature of FDLR attacks directed against the civilian population during the relevant period.

68. On 6 and 7 September 2010 FDLR troops attacked civilians in the village of **Kampala**, Walikale, North Kivu, beating men and children,¹⁹¹ raping at least nine women and conducting vaginal searches for gold or money on four others¹⁹² and pillaging 65 houses.¹⁹³ For the purposes of this application, the Prosecution does not rely on these attacks to establish the crimes alleged, but rather to establish the widespread and systematic nature of FDLR attacks directed against the civilian population during the relevant period.

¹⁸⁸ [REDACTED] the following locations in Shabunda were attacked by the FDLR in August 2010: Byangama, Kegele, Kyankindo, Lumba, Ndese, Tchateka, Tumba, Makeke, Tchombi, Lukamba, Bikili, Mwitwa, Kinzanza, Ndeya, Misoke or Misone, Sangasanga, Papaha, Walianga, Kolula (Tchamombe), Kisuku, Kalaga, Kamingisi, Makalakala and Lwigi in Chefferie Bakisi, *groupements* des Bamuguba Sud et Baliga; and Itula, Kitingi, Masanga and Thsabnee in Chefferie Wakabango (Anx.82, pp.3-4 and Anx.114, p.4).

¹⁸⁹ Anx.65, p.2.

¹⁹⁰ Anx.65, p.2 ; Anx.82, p.3; Anx.114, p.4.

¹⁹¹ Anx.123, paras.26, 31, 32.

¹⁹² Anx.123, paras.23, 27, 32.

¹⁹³ Anx.123, paras.1, 7, 17-44

6. Mode of liability

69. MUDACUMURA bears responsibility pursuant to Article 25(3)(a) as an indirect co-perpetrator of the crimes referred to in section D above. In the alternative, he bears responsibility pursuant to Article 25(3)(b) or Article 28(a).

Article 25(3)(a)

70. As described above, MURWANASHYAKA, MUDACUMURA and MBARUSHIMANA, together with other senior FDLR military and political leaders, agreed to a Common Plan to conduct, and in fact conducted, a widespread and systematic attack against the civilian population of the Kivus, along with a parallel international media campaign designed to extort political concessions for the FDLR in Rwanda.¹⁹⁴

71. MUDACUMURA, MURWANASHYAKA and – in at least 2010 – IYAMUREMYE are responsible for the FDLR's crimes as principal co-perpetrators. Together they had full control over the implementation of the policy to attack civilians and the media campaign. As the overall leader, MURWANASHYAKA, and later IYAMUREMYE,¹⁹⁵ coordinated the political and military branches in the implementation of the Common Plan. MBARUSHIMANA contributed by transforming the crimes into political capital to achieve the goals of the Common Plan. He used the international media campaign to encourage FDLR commanders and soldiers to continue to commit crimes by keeping alive the hope of a negotiated settlement.

¹⁹⁴ See paras.42-48 above. See also W-[REDACTED], Anx.39, p.153, ll.331-353, p.189, ll.400-471; W-[REDACTED], Anx.20, p.170, ll.450-572, p.212, ll.38-40; W-[REDACTED], Anx.19, p.421, ll.1083-1133, p.437, ll.1646-1649; W-[REDACTED], Anx.14, p.277, ll.971-993; W-[REDACTED], Anx.21, p.428, ll.582-634, p.625, ll.446-525.

¹⁹⁵ W-[REDACTED], Anx.21, p.273, ll.206-294, p.280, ll.438-349, p.218, ll.343-344; W-[REDACTED], Anx.39, p.159, ll.80-133.

72. As the top FDLR operational military commander and a member of the FDLR's top decision-making organs¹⁹⁶ MUDACUMURA made essential contributions to the implementation of the Common Plan. Indeed, without his contribution, the Common Plan would have been frustrated. MUDACUMURA also contributed directly to the commission of the crimes by FDLR troops: he gave the orders that led to the creation of a humanitarian catastrophe.¹⁹⁷ FDLR units in the field carried out operations that had been outlined or approved by him. These included operations to punish civilian populations perceived as siding with the FDLR's enemy, the FARDC, as well as *ravitaillement* operations in the course of which civilians were robbed and brutalised. MUDACUMURA provided the manpower for the crimes to be physically committed. He prevented the soldiers from demobilising.¹⁹⁸ Through his subordinate commanders' and soldiers' compliance with his orders,¹⁹⁹ he ensured that these crimes against civilians would occur.²⁰⁰ MUDACUMURA also contributed to the parallel international campaign,²⁰¹ sending information to MBARUSHIMANA (through MURWANASHYAKA in 2009 and, after his arrest, directly to MBARUSHIMANA in 2010²⁰²) for him to use in denying FDLR responsibility for the crimes in implementation of the Steering Committee's media strategy,²⁰³ and he

¹⁹⁶ National Congress, Steering Committee, Army High Command. Anx.104, pp.10, 20, 21, Arts.5, 39, 46; W-[REDACTED], Anx.20, p.281, ll.210-252.

¹⁹⁷ See section E.3 above.

¹⁹⁸ W-[REDACTED], Anx.20, p.87, ll.513-548; W-[REDACTED], Anx.12, p.77, ll.831-846; W-[REDACTED], Anx.16, p.209, ll.1296-1412; W-[REDACTED], Anx.17, p.71, ll.1653-1720; Anx.105; W-[REDACTED], Anx.20, p.82, ll.299-369; W-[REDACTED], Anx.21, p.681, ll.780-790, p.686, ll.82-120; W-[REDACTED], Anx.39, p.46, ll. 129-222, and p.50, ll.278-312.

¹⁹⁹ See fn.90 above.

²⁰⁰ In this respect, his contribution was committed through the acts of his subordinates, as recognised in the *Katanga* confirmation decision (ICC-01/04-01/07-717, paras.492, 521).

²⁰¹ In this respect, his contribution was committed personally.

²⁰² See Anx.112, p.38, for MBARUSHIMANA's email telling MUDUCUMURA to use [REDACTED] to communicate confidential information in order to avoid interception.

²⁰³ See fn.74 above. For evidence that information sent by MUDACUMURA (or his subordinates, pursuant to MUDACUMURA's instructions) reached MBARUSHIMANA through MURWANASHYAKA and was used in the denial of FDLR responsibility for the Busurungi attack see Anx.4. For further evidence of MUDACUMURA's execution of the Steering Committee's media strategy; Anx.112, p.49; Intercept Lfd.Nr.2335 (17 February 2009), Anx.43, p.59; intercept

disseminated selected FDLR press releases to his military subordinates.²⁰⁴ MUDACUMURA also contributed to the implementation of the FDLR's multidimensional defence and security strategy.²⁰⁵

73. MUDACUMURA was in regular contact with other members of the Common Plan including MURWANASHYAKA,²⁰⁶ MBARUSHIMANA²⁰⁷ and IYAMUREMYE.²⁰⁸ The evidence relied on in this application provides reasonable grounds to believe that MUDACUMURA's contribution was closely coordinated with those of others,²⁰⁹ including MBARUSHIMANA,²¹⁰ as well as with the essential

ID_NO:1022672 (27 September 2010), Anx.43, p.255; Anx.112, p.136, point 2; W-[REDACTED], Anx.14, p.595, ll.438-473; W-[REDACTED], Anx.16, p.251, ll.984-1044 ; W-[REDACTED], Anx.39, p.299, ll.495-543, p.302, ll.583-595.

²⁰⁴ W-[REDACTED], Anx.16, p.284, ll.632-717; W-[REDACTED], Anx.21, p.447, ll.195-263; W-[REDACTED], Anx.39, p.123, ll.356-464.

²⁰⁵ For the FDLR's defence and security strategy, see fn.75. [REDACTED]

²⁰⁶ For a summary of the communications between MUDACUMURA and MURWANASHYAKA in 2009, see Anx.3(a).

²⁰⁷ For a summary of the (at least) 74 communications between MUDACUMURA and MBARUSHIMANA between September 2009 and October 2010, see Anx.3(a). See also records of MBARUSHIMANA's purchase for and transmission of Thuraya top-up card to "Mupenzi", Anx.99, p.3, and the evidence of the two leaders' further communication [REDACTED] referred to in fn.93. For the two leaders' exchanges by email, see Anx.112, items 13, 15-32, 37-38. For attribution of the email accounts to MUDACUMURA see Anx.3(c). See additional intercepted calls between MBARUSHIMANA and a caller assessed by the Prosecution to be MUDACUMURA (on the basis of voice recognition) [REDACTED].

²⁰⁸ For information about the communications between MUDACUMURA and IYAMUREMYE, see fn.212.

²⁰⁹ W-[REDACTED], Anx.39, p.189, ll.400-471. The evidence collated in the timeline contained in Anx.4 shows MUDACUMURA, MURWANASHYAKA, KALUME and MBARUSHIMANA collaborating in the implementation of the Common Plan. It shows the reporting system – from the ground to the military and political leaders – in operation after the FDLR attack on Busurungi was conducted on MUDACUMURA's orders. It shows that MUDACUMURA and other FDLR leaders knew that crimes were committed by their troops. It also shows the FDLR leaders collaborating to conceal the FDLR's responsibility and use the FDLR attack on civilians to denounce the war effort against the FDLR. For evidence showing MUDACUMURA and MBARUSHIMANA taking decisions together about [REDACTED], see fn.205.

²¹⁰ MBARUSHIMANA was responsible for implementing the January 2009 Steering Committee mandate to react immediately and systematically to all criminal allegations made against the FDLR. See Anx.5, p.8, paras.1, 9; Anx.7, p.15, para.14. MUDACUMURA was responsible for receiving reports on such allegations from his subordinates and informing the Steering Committee accordingly. See Anx.5, p.11, para.41; and Anx.112, p.33 ("...PAR Carl a écrit..."). MBARUSHIMANA and MUDACUMURA exchanged information and documents directly or through MUDACUMURA's subordinates. They discussed a range of topics including the accusations against the FDLR leaders in

contributions by MURWANASHYAKA²¹¹ as overall FDLR leader up until his arrest and by IYAMUREMYE (once he became acting President).²¹² MUDACUMURA, MURWANASHYAKA and IYAMUREMYE were mutually aware of each other's contributions and accepted that implementing the Common Plan would result in the commission of crimes.

74. In particular, MUDACUMURA was well aware of his position and powers in the FDLR and of his control over FDLR troops. His orders explicitly encompassed the commission of crimes within the jurisdiction of the Court. MUDACUMURA thus knew that crimes would be committed in the ordinary course of events in implementation of the Common Plan, and shared the intent that they be committed. And when, as expected, crimes were committed, MUDACUMURA knew about them.²¹³

Germany, military operations against the FDLR and the FDLR's communication strategy with external parties, and collaborated in the verification of intelligence relevant to [REDACTED]. See the intercepted communications referred to in fn.207 above. For an illustration of the interplay between MUDACUMURA's and MBARUSHIMANA's contributions, see further Anx.4, and see also W-[REDACTED], Anx.39, p.130, ll.636-774, p.192, ll.514-620; W-[REDACTED], Anx.21, p.280, ll.438-569; W-[REDACTED], Anx.20, p.93, ll.726-791. Finally see, fn.203.

²¹¹ MUDACUMURA reported to and discussed with MURWANASHYAKA a range of topics including the FDLR's military operations (intercept Lfd.Nr.4461, (15 May 2009), Anx.43, p.110, ll. 52-74; W-[REDACTED], Anx.19, p.222, ll.2378-2569; intercept Lfd.Nr.5108 (10 June 2009), Anx.43, p.139, ll.115-134) and the international media campaign (intercept Lfd.Nr.3154, (23 March 2009), Anx.43, p.73, ll.1-21; see also sources in fn.203 and Anx.4); and contacts with external parties (intercept Lfd.Nr.3154, (23 March 2009), Anx.43, p.73, from l.22).

²¹² See indications of meetings or other exchanges between MUDACUMURA and IYAMUREMYE – referred to as "2VP", "AI" (*ad interim*) or [REDACTED], Anx.27, pp.73, 86)– in handwritten "Prison Break" notebook seized from MBARUSHIMANA, Anx.102, pp.82, 86 (22 February, 3 April 2010); intercept ID_NO:984771 (6 August 2010), Anx.43, p.210, ll.75-78; intercept ID_NO:985359 (8 August 2009), Anx.43, p.178, l.51, 83-84; intercept ID_NO:1005199 (5 September 2010), Anx.43, p.245, ll.24-25. See also email from MUDACUMURA [REDACTED] to IYAMUREMYE [REDACTED] forwarded to MBARUSHIMANA, Anx.133, p. 118, and follow-up conversation between MBARUSHIMANA and IYAMUREMYE, intercept ID_NO:985359, Anx.43, p.178. See also fn.77 and W-[REDACTED], Anx.39, p.168, ll.12-25.

²¹³ For evidence that MUDACUMURA was aware of crimes committed in Busurungi, see W-[REDACTED], Anx.19, p.397, ll.207-209; W-[REDACTED], Anx.20, p.163, ll.164-399; W-[REDACTED], Anx.17, p.791, ll.828-835; intercept Lfd.Nr.4545 (17 May 2009) at Anx.44, p.141, and and intercepts collated in timeline in Anx.4, Lfd.Nr.4461 (15 May 2009), Lfd.Nr.4544 (17 May 2009), Lfd.Nr.4546 (17 May 2009), Lfd.Nr.4559 (18 May 2009), Lfd.Nr.5290 (17 June 2009), at Anx.43, pp.110(ll.70-71), 116(ll.22-27), 119, 128, 151; and in Mianga, see W-[REDACTED], Anx.39, p.287, ll.36-99. For evidence

75. Based on these circumstances, co-perpetration under Article 25(3)(a) is a clearly applicable mode of liability. However, the facts set out above also establish reasonable grounds to believe that he is liable, in the alternative, for indirect individual perpetration under Article 25(3)(a),²¹⁴ or ordering under Article 25(3)(b), based upon MUDACUMURA's orders to FDLR troops to attack Congolese civilians.²¹⁵

Article 28(a)

76. In the alternative, MUDACUMURA bears responsibility for the crimes committed by FDLR troops in North and South Kivu in 2009 and 2010 pursuant to Article 28(a) as a military commander.²¹⁶

77. Major-General²¹⁷ MUDACUMURA was formally and legally appointed Supreme Commander of the FDLR in 2004.²¹⁸ Senior FDLR leaders and soldiers alike acknowledge MUDACUMURA as the highest military authority in the FDLR.²¹⁹ He had effective command and control over the FDLR troops throughout 2009 and

that MUDACUMURA was aware of crimes committed in [REDACTED], see Anx.112, p.136 and intercept [REDACTED] at Anx.43, p.255.

While systematically denied by many FDLR demobilised combatants, FDLR troops perpetrated rape and this was known to their superiors. See W-[REDACTED], Anx.20, p.307, ll.259-263, p.244, ll.292-301 and ll.331-348 ; W-[REDACTED], Anx.14, p.380, ll.890-1005; W-[REDACTED], Anx.21, p.601, ll.468-503; W-[REDACTED], Anx.40, p. 12, paras.79-80; intercept Lfd.Nr.5755 (2 July 2009), Anx.44, p.166; intercept Lfd.Nr.2426 (20 February 2009), Anx.43, p.63.

²¹⁴ In that he has control over the will of the FDLR troops who carry out the objective elements of the offence. See, *e.g.*, *Katanga and Ngudjolo* confirmation decision (ICC-01/04-01/07-717, paras. 488(c), 494-518.

²¹⁵ See para.44 above.

²¹⁶ See *Bemba* confirmation decision (ICC-01/05-01/08-424), paras.402 *et seq.*

²¹⁷ Intercept Lfd.Nr.166 (15 December 2008), Anx.44, p.9; Anx.41, p.4; W-[REDACTED], Anx.20, p.47, ll.41-60.

²¹⁸ See para.29.

²¹⁹ W-[REDACTED], Anx.13, p.94, ll.350-363; W-[REDACTED], Anx.39, p.165, ll.307-310, p.185, ll.260-262.

2010.²²⁰ He was able to countermand attacks or withdraw his troops at any given moment.²²¹ The FDLR's sophisticated communications system enabled MUDACUMURA to enforce his orders at all levels. MUDACUMURA was also able to make changes to the command structure by promoting, removing and disciplining any member of his forces.²²²

78. MUDACUMURA not only had the authority by virtue of his command position, he affirmatively used his power to issue orders and ensure compliance with them. He ordered troops under his immediate command and at lower levels to conduct attacks on civilians.²²³

79. MUDACUMURA's failure to exercise proper control over his troops resulted in the commission of crimes. MUDACUMURA failed in his duty to prevent,²²⁴ repress and punish²²⁵ the commission of crimes. On the contrary his general and specific orders to commit crimes, as described above, could reasonably be expected to encourage the commission of other crimes in the ordinary course of events.²²⁶

80. MUDACUMURA's actual knowledge that FDLR troops were in fact committing or about to commit the crimes is established both through the actual reports he received of attacks carried out by FDLR troops²²⁷ and through the large number and widespread nature of incidents at which crimes were committed throughout 2009

²²⁰ See paras.17 and 44 above for MUDACUMURA's *de jure* position and his issuing of orders, and fn.224 below for his power to discipline his troops.

²²¹ W-[REDACTED], Anx.21, p.688, ll.160-221.

²²² Anx.104, Art.40 ; W-[REDACTED], Anx.21, p.673, ll.462-511 ; W-[REDACTED], Anx.18, p.175, ll.328-358; W-[REDACTED], Anx.39, p.80, ll.602-613 and p.298, ll.463-468; W-[REDACTED], p. 157, ll.597-656.

²²³ See para.44 above.

²²⁴ Had he wanted to, MUDACUMURA had the means to prevent the commission of crimes. W-[REDACTED], Anx.21, p.688, ll.160-221, p. 673, ll.462-481; W-[REDACTED], Anx.11, pp.119-120, ll.173-213; W-[REDACTED], Anx.14, pp.397-398, ll.374-441; W-[REDACTED], Anx.10, p.91, ll.576-590.

²²⁵ W-[REDACTED], Anx.20, p.186, ll.116-126; W-[REDACTED], Anx.17, p.477, ll.547-564; W-[REDACTED], Anx.39, p.176, ll.319-330 and p.251 ll.556-559.

²²⁶ W-[REDACTED], Anx.20, p.313, ll.477-481. See also sources cited in fn.213.

²²⁷ See fns.85, 86. W-[REDACTED], Anx.39, p.246, ll.357-403, p.261, ll.194-259; W-[REDACTED], Anx.19, p.397, ll.207-209; W-[REDACTED], Anx.21, p.668, ll.290-332. See Anx.4.

and 2010, the large-scale destruction of property by FDLR troops, the number of FDLR troops involved in the perpetration of the crimes,²²⁸ the means of communication and systems for reporting and monitoring available to MUDACUMURA and his subordinates, and the recurring pattern of the attacks on civilians. Furthermore, the frequent and widely circulated reports of crimes against civilians attributed to his troops by international organizations and respected NGOs frequently came to his attention.²²⁹

81. MUDACUMURA failed to take all necessary and reasonable measures within his power to prevent or repress the commission of the crimes. Indeed, he failed even to investigate them and sought to prevent others from investigating them.²³⁰ He failed in his duty to bring his troops' behaviour in compliance with the laws of war. By promoting notorious perpetrators among his troops, he instead deliberately encouraged the commission of more crimes.

²²⁸ Often drawn from several different units under his command.

²²⁹ See eg intercept ID_NO:1022672 (27 September 2010), Anx.43, p.255.

²³⁰ See intercept Lfd.Nr.5290 (17 June 2009), Anx.43, p.151, excerpted in Anx.4, p.8, and W-[REDACTED], Anx.39, p.247, ll.409-504.

F. BACKGROUND TO INVESTIGATION / LEGAL FRAMEWORK

1. Jurisdiction and admissibility

82. The Chamber already found in the *Mbarushimana* case that the crimes committed by the FDLR in North and South Kivu in 2009 fall within the jurisdiction of the Court,²³¹ based on the DRC's referral of the situation. The Prosecution relies on the same facts to establish that the Court has jurisdiction in this matter. The FDLR forces continued to commit such crimes in 2010 under MUDACUMURA's command; those 2010 crimes fall within the Court's jurisdiction for the same reasons.

83. The Prosecution submits that the case against MUDACUMURA is admissible. The information available to the Prosecution indicates that there are no ongoing investigations or prosecutions²³² by any State²³³ in relation to the conduct that forms the subject of the Prosecution's application against MUDACUMURA.²³⁴

84. In accordance with Regulation 29(2) of the Regulations of the Office of the Prosecutor, in assessing the gravity of the case, the Prosecution considered the scale, nature, manner of commission and impact of the crimes. Based on all the facts and circumstances referred to in this application, the Prosecution submits that this case is of sufficient gravity to justify further action by the Court.

²³¹ ICC-01/04-01/10-1, paras.7-8 and ICC-01/04-01/10-451.

²³² *Prosecutor v. Lubanga*, Decision on the Prosecutor's Application for a Warrant of Arrest, ICC-01/04-01/06-8-Corr, 24 February 2006, paras.30-40.

²³³ According to the information available to the Prosecution, no investigations or prosecutions have been or are being undertaken in the DRC or in Rwanda for the crimes allegedly committed by the FDLR's leaders or members in the two Kivu Provinces in general, and no investigations or prosecutions have been or are being undertaken in relation to MUDACUMURA in particular [REDACTED].

²³⁴ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, No. ICC-01/04-01/07 OA 8, para.78.

2. Issues of victim and witness protection

85. [REDACTED].

86. [REDACTED].

G. NECESSITY OF ARREST OF MUDACUMURA (Article 58(1)(b) and (2)(e))

87. An arrest warrant for Sylvestre MUDACUMURA is necessary to ensure his appearance at trial, ensure that he does not obstruct or endanger the investigation or the court proceedings, and prevent him from committing further crimes within the jurisdiction of the Court arising out of the same circumstances.

88. First, there are reasonable grounds to believe that MUDACUMURA will not appear for trial unless compelled to do so by arrest. He faces many serious charges and, if convicted, a lengthy term of imprisonment.²³⁵ MUDACUMURA lives in remote, deep forest areas of Masisi territory, North Kivu, beyond the reach of the Court. MUDACUMURA has been able to evade capture and operate with impunity in the Kivus for over 15 years. In that time, successive campaigns by government forces have failed to dismantle the troops under his command. Even if he did move out of the DRC, he has the means to evade arrest with the aid of the FDLR's international network of supporters.²³⁶

89. Second, as the top FDLR operational commander, MUDACUMURA has the means and opportunity to obstruct and endanger the investigations and court proceedings as well as to foster an atmosphere of intimidation against FDLR victims, potential ICC witnesses and FDLR rank-and-file soldiers who want to demobilise. [REDACTED].

²³⁵ The Prosecution notes that in the MBARUSHIMANA case Pre-Trial Chamber I found that the Prosecution had established substantial grounds to believe that the FDLR had committed the war crimes of attacks against the civilian population, murder, mutilation, cruel treatment, rape and destruction of property committed at Busurungi, Manje, Malembe and Mianga (ICC-01/04-01/10-465-Conf, p.53-102). The Prosecution submits that these five charges alone would justify the arrest and detention of MUDACUMURA.

²³⁶ Based on similar facts, Pre-Trial Chamber I already made findings to this effect in the *Mbarushimana* case. See ICC-01/04-01/10-1, para.47; ICC-01/04-01/10-163, paras.46, 59; ICC-01/04-01/10-428, para.40.

90. Third, and for the same reasons described above, a warrant of arrest is necessary to prevent MUDACUMURA from continuing with the commission of crimes within the jurisdiction of the Court.

H. [REDACTED]

91. [REDACTED].

92. [REDACTED].

93. [REDACTED].

94. [REDACTED].

I. OTHER REQUESTS

1. Confidentiality of filing

95. Pursuant to Regulation 23*bis*, the Prosecution requests that this Application and its annexes be received by the Chamber as “confidential, *ex parte* Prosecution only”, since this application contains details which, if disclosed publicly, might undermine the Prosecution’s ongoing investigations and pose a danger to victims and witnesses. A Public redacted version is filed simultaneously.

2. Transmission of request for arrest and surrender

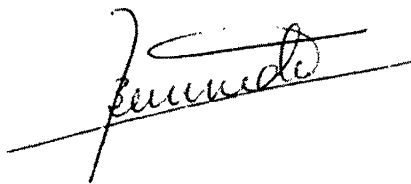
96. The information available to the Prosecution indicates that MUDACUMURA is currently located in a very remote and difficultly accessible area in Masisi territory, North Kivu. The Prosecution has sent requests for assistance to [REDACTED] in the course of its investigation of MUDACUMURA as well as of MBARUSHIMANA and has had numerous exchanges with the competent authorities [REDACTED]. Pursuant to Article 89(1), the Prosecution requests that the transmission by the Registry of any request for arrest and surrender to the competent Congolese authorities be done in consultation and coordination with the Prosecution.

97. [REDACTED]

J. RELIEF SOUGHT

For the reasons set out in this application, the Prosecution requests that this Chamber:

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 end of September 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;
3. Issue a warrant of arrest for Sylvestre MUDACUMURA;
4. Direct the Registry, in consultation and coordination with the Prosecution, to prepare and transmit a request for arrest and surrender of MUDACUMURA to the competent authorities of the DRC;
5. [REDACTED].



Fatou Bensouda, Prosecutor

Dated this 4th day of July 2012

At The Hague, The Netherlands