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PRE-TRIAL CHAMBER II

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF THE PROSECUTOR V. SYLVESTRE MUDACUMURA**

Public redacted version

Decision on the Prosecutor's Application under Article 58

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

The Office of the Prosecutor
Fatou Bensouda, Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

Other

REGISTRY

Registrar & Deputy Registrar
Silvana Arbia, Registrar
Didier Preira, Deputy-Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

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PRE-TRIAL CHAMBER II (the “Chamber”) of the International Criminal Court (the “Court”) renders this decision on the “Prosecution’s Application under Article 58” (the “Application” or “Prosecutor’s Application”),¹ whereby the Prosecutor² seeks the issuance of a warrant of arrest against Mr. Sylvestre Mudacumura (“Mr. Mudacumura”).

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

2. On 17 June 2004, the President of the Court was informed that the Prosecutor had determined that there was a reasonable basis to initiate an investigation in the DRC situation.⁴

3. On 6 July 2004, the Presidency assigned the situation in the DRC to Pre-Trial Chamber I.⁵

4. On 15 March 2012, the Presidency re-assigned the situation in the DRC to Pre-Trial Chamber II.⁶

5. On 15 May 2012, the Prosecutor submitted an application for Mr. Mudacumura’s arrest (the “Initial Application”).⁷

6. On 31 May 2012, the Chamber dismissed the Initial Application *in limine* for lack of specificity.⁸

¹ ICC-01/04-616-Conf-Exp and its Annexes. *See also* “Public Redacted Version of Prosecutor’s Application under Article 58”, ICC-01/04-616-Red.

² On 15 June 2012, Ms. Fatou Bensouda was sworn in as the Prosecutor of the Court.

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

⁴ Letter from the Prosecutor to the President of the Court, dated 17 June 2004, annexed to the “Decision Assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I”, ICC-01/04-1, p. 4.

⁵ Presidency, “DECISION ASSIGNING THE SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO TO PRE-TRIAL CHAMBER I”, ICC-01/04-1.

⁶ Presidency, “Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the Congo, Darfur, Sudan and Côte d’Ivoire situations”, ICC-01/04-02/06-32.

⁷ ICC-01/04-612-Conf-Exp, “Corrigendum to ‘Public redacted version of Prosecution’s Application under Article 58’”, ICC-01/04-612-Red-Corr and its Annexes.

⁸ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application Under Article 58”, ICC-01/04-613.

7. On 13 June 2012, the Prosecutor submitted the Application, requesting that the Chamber, *inter alia*:

1. Find that there are reasonable grounds to believe that Sylvestre MUDACUMURA is criminally responsible for war crimes and crimes against humanity within the jurisdiction of the Court committed by the FDLR in North and South Kivu Provinces of the DRC between 20 January 2009 and 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;

[REDACTED].⁹

8. For the sake of ruling on the Prosecutor's Application, the Chamber shall examine: (i) jurisdiction of the Court and admissibility of the case; (ii) whether there are reasonable grounds to believe that one or more crimes outlined in the Prosecutor's Application has been committed; (iii) whether there are reasonable grounds to believe that Mr. Mudacumura is criminally responsible for the crimes presented in the Prosecutor's Application and (iv) whether the requirements to issue a warrant of arrest for Mr. Mudacumura have been met.

I. Jurisdiction of the Court and admissibility of the case

A. Jurisdiction of the Court

9. Article 19(1) of the Statute provides that: "The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17". Consequently, an initial determination as to whether the case against Mr. Mudacumura falls within the jurisdiction of the Court is a prerequisite for the issuance of a warrant of arrest against him.¹⁰

⁹ Prosecution's Application, pp. 57-58.

¹⁰ Pre-Trial Chamber III, "Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo," ICC-01/05-01/08-14-tENG, para. 11.

10. For a crime to fall within the Court's jurisdiction, it is necessary that the following three criteria are met: (i) the crime must be one of the crimes set out in article 5 of the Statute (jurisdiction *ratione materiae*); (ii) the crime must have been committed within the timeframe specified in article 11 of the Statute (jurisdiction *ratione temporis*) and (iii) the crime must satisfy one or other of the two criteria laid down in article 12 of the Statute; namely, it must either have been committed on the territory of a State Party to the Statute or by a national of that State, or have been committed on the territory of a State which has made a declaration under article 12(3) of the Statute or by nationals of that State.¹¹ The Chamber's findings on these three conditions are based on the Application and the evidence or other information submitted by the Prosecutor.

11. With regard to the first condition, the Chamber is satisfied that the crimes Mr. Mudacumura allegedly committed constitute crimes contained in the Statute. The Chamber is satisfied that the first condition relating to jurisdiction *ratione materiae* has been met.

12. With respect to the second condition, namely the Court's jurisdiction *ratione temporis*, the Chamber observes that the Statute entered into force for the DRC on 1 July 2002. The Chamber is satisfied that the alleged crimes were committed after 1 July 2002, specifically between 20 January 2009 and end of September 2010, and, accordingly, the second condition has been met.

13. With respect to the third condition, namely the two alternative criteria set out in article 12 of the Statute, the Chamber is satisfied that the crimes Mr. Mudacumura allegedly committed took place on the DRC's territory, and the Chamber accordingly concludes that the third condition has also been met.

14. The Chamber further recalls that a "case arising from the investigation of a situation will fall within the jurisdiction of the Court only if the specific crimes of the case do not exceed the territorial, temporal and possibly personal parameters defining the situation

¹¹ Pre-Trial Chamber III, "Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo," ICC-01/05-01/08-14-tENG, para. 12.

under investigation and fall within the jurisdiction of the Court”.¹² The parameters of the investigation of a situation can include not only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, in so far as they are sufficiently linked to the situation which initially triggered the referral to the Court.¹³

15. In this respect, the DRC situation, from which the case against Mr. Mudacumura arises, was referred to the Prosecutor by way of a letter of referral dated 3 March 2004 (the “DRC Letter”). In the DRC Letter, the DRC’s President Joseph Kabila requested the Prosecutor to investigate «*la situation qui se déroule dans mon pays depuis le 1^{me} juillet 2002, dans laquelle il apparaît que des crimes relevant de la compétence de la Cour Pénale Internationale ont été commis*». ¹⁴ On 17 June 2004 the Prosecutor informed the ICC President that, after having considered all the criteria in accordance with article 53 of the Statute, there was a reasonable basis to initiate an investigation.¹⁵ The situation under investigation was therefore defined by the Prosecutor as encompassing the territory of the DRC since 1 July 2002.¹⁶

16. The Prosecutor's Application refers to crimes allegedly committed between January 2009 and the end of September 2010 within the context of an armed conflict in the Kivu Provinces, DRC. Having analysed the information provided by the Prosecutor, the Chamber is satisfied that, at least since 4 December 2002, hostilities involving regular forces and armed groups were ongoing in the eastern DRC, in particular in the Kivus and

¹² Pre-Trial Chamber III, “Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo”, ICC-01/05-01/08-14-tENG, para. 12; Pre-Trial Chamber I, “Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo”, ICC-01/04-01/06-8-Corr, annex 1, para. 21 (contains arrest warrant decision for Thomas Lubanga Dyilo, originally filed on 10 February 2006).

¹³ See Pre-Trial Chamber I, “Decision on the Defence Challenge to the Jurisdiction of the Court”, ICC-01/04-01/10-451, para. 21; Pre-Trial Chamber I, “Decision on the Prosecutor’s Application for a Warrant of Arrest Against Callixte Mbarushimana”, ICC-01/04-01/10-1, para. 6 (originally filed on 28 September 2010); Pre-Trial Chamber III, “Corrigendum to ‘Judge Fernández de Gurmendi’s separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire’”, ICC-02/11-15-Corr, paras 70-72 (separate and partially dissenting opinion of J. Fernández de Gurmendi).

¹⁴ Letter of Referral of the DRC Situation to the ICC by Joseph Kabila, dated 3 March 2004, annexed to the “Prosecutor’s Application for Warrants of Arrest, Article 58”, ICC-01/04-98-US-Exp-Anxl.

¹⁵ See Presidency, “DECISION ASSIGNING THE SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO TO PRE-TRIAL CHAMBER I”, ICC-01/04-1, p. 4.

¹⁶ See Press Release: 23.06.2004. The Office of the Prosecutor of the International Criminal Court opens its first investigation, ICC-OTP-20040623-59.

Ituri.¹⁷ The Chamber is further satisfied that, at least since the time of the referral, the *Forces Démocratiques pour la Libération du Rwanda* (the “FDLR”) were already actively involved in military activities in the eastern part of the DRC with alleged involvement in the commission of crimes within the jurisdiction of the Court.¹⁸ The Chamber is therefore satisfied that the case against Mr. Mudacumura is linked to the situation which initially triggered the referral of the DRC situation to the Court.

17. Having regard to the foregoing, and on the basis of the evidence and information provided by the Prosecutor, the Chamber concludes that the case against Mr. Mudacumura falls within the jurisdiction of the Court.

B. Admissibility of the case

18. The second sentence of article 19(1) of the Statute provides that the Court may, on its own motion, determine the admissibility of a case in accordance with article 17 of the Statute. The Chamber does not consider it necessary to examine the admissibility of the case at this stage of the proceedings.¹⁹

II. Whether there are reasonable grounds to believe that one or more crimes outlined in the Application have been committed

19. For the standard of issuing an arrest warrant, article 58(1) of the Statute requires that a Chamber need only to be satisfied that there are reasonable grounds to believe that the person committed a crime within the jurisdiction of the Court. The evidence need only establish a reasonable conclusion that the person committed a crime within the jurisdiction of the Court, and it is not required that this be the only reasonable conclusion that can be drawn from the evidence.²⁰

¹⁷ Prosecutor’s Application, Annex 9, pp. 5, 10, 15, 19. *See also* Pre-Trial Chamber I, “Decision on the Prosecutor’s Application for a Warrant of Arrest Against Callixte Mbarushimana”, ICC-01/04-01/10-1, paras 6-7.

¹⁸ Prosecutor’s Application, Annex 9, pp. 8-10, 15, 19, 21-22.

¹⁹ *See also* Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang”, 8 March 2011, ICC-01/09-01/11-01, para. 12.

²⁰ Appeals Chamber, “Judgment on the appeal of the Prosecutor against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’”, ICC-02/05-01/09-73 (OA), paras 33, 39.

20. The Chamber notes that the Prosecutor's Application bears some similarities with the case presented in *The Prosecutor v. Callixte Mbarushimana*, a case where Pre-Trial Chamber I, by majority, declined to confirm the charges.²¹ This decision was upheld on appeal.²² However, the Chamber is of the view that the findings from Pre-Trial Chamber I in the *Mbarushimana* confirmation decision should not, in principle, affect the outcome of the present assessment, as this is a distinct case before a new Chamber involving a different person and a lower standard of proof.

21. It follows that the Chamber needs to analyse the Application, the annexes and the summary of evidence presented by the Prosecutor (collectively, the "material") in order to determine whether there are reasonable grounds to believe that Mr. Mudacumura has committed the alleged crimes.²³

A. Crimes against humanity

22. The Chamber notes that all of the acts identified in article 7 of the Statute qualify as crimes against humanity only if committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack. An "attack against any civilian population", in accordance with article 7(2)(a) of the Statute, means a course of conduct involving the multiple commission of acts referred to in article 7(1) of the Statute against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such an attack. Thus, it must be demonstrated that a state or an organizational policy existed which had a civilian population as the *primary object* of the attack,²⁴ and the Elements of Crimes further clarify that the "policy to commit such attack" requires that the state or organisation "actively promote or encourage such an attack against the civilian population".²⁵

²¹ Pre-Trial Chamber I, "Decision on the confirmation of charges", ICC-01/04-01/10-465.

²² Appeals Chamber, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'", ICC-01/04-01/10-514 (OA 4).

²³ The Chamber has only referred below to a part of the available material that supports its overall conclusions.

²⁴ See Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, para. 76.

²⁵ Article 7(3) of the Elements of Crimes.

23. On the basis of the material presented by the Prosecutor, the Chamber considers that there are reasonable grounds to believe that: (i) the FDLR qualifies as an organisation within the meaning of article 7(2)(a) of the Statute and (ii) from 20 January 2009 to the end of September 2010, the FDLR was responsible for the multiple commission of acts referred to in article 7(1) of the Statute. However, for the reasons discussed below, the Chamber does not find reasonable grounds to believe that these acts were committed pursuant to or in furtherance of a FDLR policy to attack the civilian population.

24. As to the organized structure of the FDLR, the group has a hierarchical structure with well-defined decision making processes.²⁶ The FDLR's political and military leadership were closely connected²⁷ and conducted side-by-side an international media campaign in support of its political and military endeavours.²⁸

25. With respect to the FDLR's involvement, in early 2009, an order to create "a chaotic situation in Congo"²⁹ by way of a "humanitarian catastrophe" was issued on Mr. Mudacumura's authority,³⁰ discussed further below in the next section. During the time period charged by the Prosecutor, the civilian population was affected as a result of the FDLR operations in the Kivu Provinces.³¹ Between 2009 and 2010, civilians were killed,³² abducted,³³ raped,³⁴ subjected to cruel treatment³⁵ or mutilated³⁶ and homes were destroyed.³⁷ FDLR military operations also caused population displacement.³⁸

²⁶ Prosecutor's Application, Annex 104, pp. 10, 22; Prosecutor's Application, Annex 59, para. 17; Prosecutor's Application, Annex 76, pp. 14-28; Prosecutor's Application, Annex 89, pp. 10, 12, 24-25, 54, 55; Prosecutor's Application, Annex 118, p. 56.

²⁷ Prosecutor's Application, Annex 73, pp. 14, 19, 20; Prosecutor's Application, Annex 74, pp. 27, 83-84; Prosecutor's Application, Annex 77, pp. 44-46.

²⁸ Prosecutor's Application, Annex 21, p. 644; Prosecutor's Application, Annex 43, p. 75.

²⁹ Prosecutor's Application, Annex 19, p. 424; Prosecutor's Application, Annex 20, pp. 171-73; Prosecutor's Application, Annex 39, pp. 151-52.

³⁰ Prosecutor's Application, Annex 21, p. 426-27; Prosecutor's Application, Annex 30, pp. 91, 94, 122; Prosecutor's Application, Annex 118, pp. 84-90.

³¹ Prosecutor's Application, Annex 42, pp. 36-37; Prosecutor's Application, Annex 42, p. 15; Prosecutor's Application, Annex 57, p. 11; Prosecutor's Application, Annex 79, p. 14; Prosecutor's Application, Annex 21, pp. 842-50; Prosecutor's Application, Annex 48, p. 2; Prosecutor's Application, Annex 96, p. 5; Prosecutor's Application, Annex 69, p. 2; Prosecutor's Application, Annex 42, p. 42; Prosecutor's Application, Annex 65, p. 2; Prosecutor's Application, Annex 97, p. 2; Prosecutor's Application, Annex 123, pp. 5-8; Prosecutor's Application, Annex 118, pp. 164-69, 175-79, 187-90.

³² Prosecutor's Application, Annex 42, pp. 22, 25-28, 39, 42; Prosecutor's Application, Annex 48, p. 2; Prosecutor's Application, Annex 118, pp. 164-69.

³³ Prosecutor's Application, Annex 19, p. 497; Prosecutor's Application, Annex 69, p. 2; Prosecutor's Application, Annex 74, p. 82.

26. However, nearly all of the FDLR attacks alleged by the Prosecutor were retaliatory attacks against military positions. A great deal of evidence also points to it being the FDLR's policy not to harm civilians or to abuse them³⁹ and that members of the FDLR leadership did not want civilians to be killed during FDLR operations.⁴⁰ The incidents charged by the Prosecutor are often close in time to *Forces Armées de la République Démocratique du Congo* ("FARDC") attacks against the FDLR in the same area,⁴¹ which is also consistent with a retaliatory approach. Although in some instances the retaliatory attacks were launched in a manner which targeted military objectives as well as individual civilians not taking direct part in hostilities, it still cannot be reasonably inferred that the order to commit a humanitarian catastrophe was actually applied by the FDLR troops on the ground in accordance with an *organisational policy* to attack the civilian population as such. The failure to observe the principles of international humanitarian law does not in itself, particularly in the context of the circumstances of the present case as portrayed in the material submitted, reveal the existence of such policy.

27. It follows that the Chamber does not find sufficient evidence to reasonably conclude that the FDLR operations were part of a large organised campaign the primary object of which was directed against the civilian population.

28. The Chamber recalls that Pre-Trial Chamber I found in September 2010 that there were reasonable grounds to believe that the FDLR did have an organisational policy to attack

³⁴ Prosecutor's Application, Annex 18, pp. 770-76; Prosecutor's Application, Annex 58, p. 5; Prosecutor's Application, Annex 69, p. 2; Prosecutor's Application, Annex 118, pp. 175-79.

³⁵ Prosecutor's Application, Annex 18, pp. 775-76; Prosecutor's Application, Annex 48, p. 2; Prosecutor's Application, Annex 42, p. 39.

³⁶ Prosecutor's Application, Annex 42, p. 36; Prosecutor's Application, Annex 58, p. 5; Prosecutor's Application, Annex 74, p. 82.

³⁷ Prosecutor's Application, Annex 19, p. 497; Prosecutor's Application, Annex 42, pp. 22, 25-28; Prosecutor's Application, Annex 21, p. 801; Prosecutor's Application, Annex 49, pp. 6-7; Prosecutor's Application, Annex 51, p. 3; Prosecutor's Application, Annex 118, pp. 187-88.

³⁸ Prosecutor's Application, Annex 42, p. 15; Prosecutor's Application, Annex 65, p. 2; Prosecutor's Application, Annex 67, pp. 3-8, 71; Prosecutor's Application, Annex 72, p. 160; Prosecutor's Application, Annex 74, pp. 10-45, 82; Prosecutor's Application, Annex 75, paras 29-30, 48; Prosecutor's Application, Annex 76, p. 40; Prosecutor's Application, Annex 81, pp. 16-37.

³⁹ Prosecutor's Application, Annex 5, pp. 10-11; Prosecutor's Application, Annex 7, p. 18; Prosecutor's Application, Annex 17, p. 810; Prosecutor's Application, Annex 21, pp. 426-29, 433-34.

⁴⁰ Prosecutor's Application, Annex 15, pp. 180-81; Prosecutor's Application, Annex 16, pp. 91, 615; Prosecutor's Application, Annex 21, pp. 813-15.

⁴¹ Prosecutor's Application, Annex 11, p. 45; Prosecutor's Application, Annex 13, pp. 47-48; Prosecutor's Application, Annex 18, pp. 229-31; Prosecutor's Application, Annex 20, p. 167; Prosecutor's Application, Annex 30, p. 76.

the civilian population in 2009.⁴² However, on the basis of the current evidentiary record (which has significantly expanded since September 2010), the Chamber does not consider that the existence of an organisational policy is reasonably tenable.

29. For these reasons, the Chamber finds that, in the absence of an organisational policy, there are no reasonable grounds to believe that crimes against humanity were committed by the FDLR from 20 January 2009 until the end of September 2010.

B. War crimes

(1) Contextual elements of war crimes

30. The Chamber will first analyse whether the contextual elements for war crimes are established before evaluating the material presented by the Prosecutor. As outlined below, the Chamber finds there are reasonable grounds to believe that the contextual elements for war crimes alleged in the Application have been satisfied.

31. The Chamber considers that there are reasonable grounds to believe that an armed conflict of a certain intensity took place in the Kivu provinces of the DRC between the DRC governmental FARDC, fighting alone or in coalition with, *inter alia*, Rwandan forces or the United Nations Organization Mission in the DRC (“MONUC” or “MONUSCO”) forces, and the FDLR, fighting alone or in coalition with other armed groups.⁴³ The FDLR has a hierarchical structure with a responsible command and has the ability to plan and carry out military operations.⁴⁴

32. The armed conflict began on 20 January 2009, when the Rwanda Defence Forces (“RDF”) entered the territory of the DRC for the purpose of participating in a joint operation with the FARDC, known as *Umoja Wetu*, aimed at forcefully dislodging the FDLR from its bases in the North Kivu and enabling willing FDLR troops to demobilise

⁴² Pre-Trial Chamber I, “Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana”, ICC-01/04-01/10-1, para. 26.

⁴³ Prosecutor’s Application, Annex 71, paras. 3-13; Prosecutor’s Application, Annex 73, pp. 13-14; Prosecutor’s Application, Annex 83, pp. 12, 15.

⁴⁴ Prosecutor’s Application, Annex 59, para. 17; Prosecutor’s Application, Annex 76, pp. 14-28; Prosecutor’s Application, Annex 89, pp. 10, 12, 24-25, 54, 55; Prosecutor’s Application, Annex 104, pp. 10, 22; Prosecutor’s Application, Annex 118, p. 56.

and reintegrate into civilian life in Rwanda.⁴⁵ The attacks perpetrated by the FDLR from January to late February 2009 were carried out while fighting against the coalition formed by the FARDC and the RDF.⁴⁶ On 25 February 2009, RDF troops began departing from North Kivu⁴⁷ and a follow up military operation, *Kimia II*, was launched by the FARDC, supported by forces of MONUC, across the North and South Kivus with the purpose of neutralising the FDLR by preventing it from reoccupying former positions, as well as by cutting its lines of economic sustenance.⁴⁸ In response to the *Kimia II* operations, the FDLR conducted a series of reprisal attacks against the population as well as FARDC positions.⁴⁹ *Kimia II* started on 2 March 2009 and lasted until 31 December 2009.⁵⁰

33. A joint FARDC/MONUC military operation against the FDLR, *Amani Leo*, was launched in January 2010, following the conclusion of operation *Kimia II* on 31 December 2009; it was aimed primarily at protecting civilians, preventing the FDLR and other armed groups from mounting reprisal attacks in North Kivu and South Kivu, and maintaining control over the territory and strategic areas from which the FDLR had been dislodged.⁵¹ FDLR reprisals continued, while at the same time making alliances with other armed groups and moving to increasingly remote areas.⁵² While FARDC undertook some independent operations in January 2010, FARDC/MONUC jointly planned and MONUSCO-supported operations were launched on 26 February 2010 in the Kivu provinces in the context of operation *Amani Leo*,⁵³ which was extended to concentrate on operations against specific targets.⁵⁴ It has been reported that, in summer 2010, 60,000

⁴⁵ Prosecutor's Application, Annex 9, p. 27; Prosecutor's Application, Annex 50, pp. 3, 4; Prosecutor's Application, Annex 64, p. 3; Prosecutor's Application, Annex 73, pp. 7, 13; Prosecutor's Application, Annex 74, p. 8; Prosecutor's Application, Annex 83, p. 12.

⁴⁶ Prosecutor's Application, Annex 50, p. 4; Prosecutor's Application, Annex 64, p. 4; Prosecutor's Application, Annex 74, p. 8.

⁴⁷ Prosecutor's Application, Annex 50, p. 4.

⁴⁸ Prosecutor's Application, Annex 19, pp. 323-326; Prosecutor's Application, Annex 50, p. 4; Prosecutor's Application, Annex 51, pp. 2-4; Prosecutor's Application, Annex 52, p. 3.

⁴⁹ Prosecutor's Application, Annex 52, p. 3; Prosecutor's Application, Annex 73, p. 14; Prosecutor's Application, Annex 74, p. 9.

⁵⁰ Prosecutor's Application, Annex 51, pp. 2-3; Prosecutor's Application, Annex 53, p. 3; Prosecutor's Application, Annex 64, p. 4; Prosecutor's Application, Annex 118, p. 51.

⁵¹ Prosecutor's Application, Annex 42, p. 35; Prosecutor's Application, Annex 53, p. 16; Prosecutor's Application, Annex 71, p. 3; Prosecutor's Application, Annex 76, p. 14; Prosecutor's Application, Annex 83, p. 12.

⁵² Prosecutor's Application, Annex 76, p. 14.

⁵³ Prosecutor's Application, Annex 71, p. 3.

⁵⁴ Prosecutor's Application, Annex 71, p. 3.

FARDC troops and 10 MONUC peacekeeping battalions were deployed in the Kivus,⁵⁵ while the FDLR was continuing with its reprisal attacks.⁵⁶

34. On the basis of the material presented, the Chamber considers that there are reasonable grounds to believe that: (i) during the periods of 20 January 2009 to 25 February 2009, 2 March 2009 to 31 December 2009 and January 2010 to end of September 2010, there was an armed conflict in the territory of the DRC, of a certain level of intensity and of a non-international character within the meaning of article 8(2)(f) of the Statute, over a prolonged period of time in the Kivu Provinces of the DRC, (ii) this armed conflict was between the FDLR, sometimes in coalition with other groups, and the FARDC, in coalition with the RDF during *Umoja Wetu* and with MONUC during *Kimia II* and *Amani Leo* and (iii) the FDLR is an organized armed group within the meaning of article 8(2)(f) of the Statute. The Chamber thus finds that the acts allegedly constituting crimes committed by the FDLR, as analysed below, took place in the context of and were associated with an armed conflict not of an international character.

(2) Underlying acts constituting war crimes in the context of an armed conflict not of an international character or in relation thereto

35. The Prosecutor alleges 9 counts of war crimes. The Chamber will analyse the incidents alleged in the Prosecutor's application to determine whether there are reasonable grounds to believe that war crimes were committed within the meaning of article 8 of the Statute.

Attack against the civilian population constituting a war crime (article 8(2)(e)(i) of the Statute)
(Count 1)

36. The Prosecutor alleges in Count 1 that:

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;

⁵⁵ Prosecutor's Application, Annex 83, p. 12.

⁵⁶ Prosecutor's Application, Annex 65, p. 2; Prosecutor's Application, Annex 76, p. 14; Prosecutor's Application, Annex 83, p. 15.

Malembe, Walikale territory, North Kivu, in late July, early August, on or about 11-13 August and 15 September 2009; [REDACTED].⁵⁷

37. On the basis of the overall material presented, the Chamber finds reasonable grounds to believe that individual civilians were attacked by the FDLR, within the meaning of article 8(2)(e)(i) of the Statute, in: (i) Kipopo on or about 12-13 February 2009,⁵⁸ (ii) Mianga on or about 12 April 2009,⁵⁹ (iii) Busurungi and surrounding villages on or about 9-10 May 2009,⁶⁰ (iv) Manje on or about 20-21 July 2009,⁶¹ (v) Malembe in late July 2009,⁶² early August 2009,⁶³ 11-13 August 2009⁶⁴ and on or about 15 September 2009,⁶⁵ [REDACTED],⁶⁶ [REDACTED],⁶⁷ [REDACTED]⁶⁸ and [REDACTED].⁶⁹

38. The Chamber emphasises that these incidents involve indiscriminate targeting against mixed civilian-military positions. Such attacks do fall within the ambit of article 8(2)(e)(i) of the Statute, as the war crime of attacking civilians “does not presuppose that the civilian population is the sole and exclusive target of the attack”.⁷⁰ However, the Chamber considers indiscriminate targeting to be distinguishable from attacking the civilian population as such within the meaning of article 7 of the Statute, where the civilian population must be the primary object of the attack.

Murder constituting a war crime (article 8(2)(c)(i) of the Statute) (Count 2)

39. The Prosecutor alleges in Count 2 that:

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

⁵⁷ Prosecutor’s Application, para. 31.

⁵⁸ Prosecutor’s Application, Annex 13, pp. 206-215; Prosecutor’s Application, Annex 17, pp. 454-57; Prosecutor’s Application, Annex 42, pp. 16-18, 20.

⁵⁹ Prosecutor’s Application, Annex 17, pp. 440, 442-43; Prosecutor’s Application, Annex 39, pp. 215-16; Prosecutor’s Application, Annex 57, pp. 4, 7, 13.

⁶⁰ Prosecutor’s Application, Annex 11, p. 45; Prosecutor’s Application, Annex 12, pp. 221, 229, 267-84.

⁶¹ Prosecutor’s Application, Annex 17, pp. 458-60; Prosecutor’s Application, Annex 18, pp. 474-91.

⁶² Prosecutor’s Application, Annex 37, pp. 7-8.

⁶³ Prosecutor’s Application, Annex 37, pp. 8-10.

⁶⁴ Prosecutor’s Application, Annex 13, p. 186-188; Prosecutor’s Application, Annex 37, p. 10; Prosecutor’s Application, Annex 56, pp. 4-5; Prosecutor’s Application, Annex 122, p. 7.

⁶⁵ Prosecutor’s Application, Annex 37, p. 11; Prosecutor’s Application, Annex 56, p. 5.

⁶⁶ [REDACTED].

⁶⁷ [REDACTED].

⁶⁸ [REDACTED].

⁶⁹ [REDACTED].

⁷⁰ Pre-Trial Chamber I, “Decision on the confirmation of charges”, ICC-01/04-01/10-465-Red, para. 218.

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].⁷¹

40. On the basis of the overall material presented, the Chamber finds reasonable grounds to believe that murder was committed, within the meaning of article 8(2)(c)(i) of the Statute, whereby the FDLR killed one or more civilians taking no active part in the hostilities in: (i) Kipopo on or about 12-13 February 2009,⁷² (ii) Busurungi on or about 3 March 2009⁷³ and on or about 9-10 May 2009,⁷⁴ (iii) Mianga on or about 12 April 2009,⁷⁵ (iv) Manje on or about 20-21 July 2009,⁷⁶ (v) Malembe during the period 11-13 August 2009⁷⁷ and on or about 15 September 2009,⁷⁸ [REDACTED]⁷⁹ and [REDACTED].⁸⁰

41. As to the Prosecutor's allegations at Mutakato on or about 2 December 2009, the Chamber notes that the only evidence provided by the Prosecutor is a witness who says that all the civilians had fled and only soldiers were killed⁸¹ and a United Nations report says that two "persons" had been killed.⁸² Thus, the Chamber does not consider that the evidence for this incident is sufficient to find that there are reasonable grounds to believe that the persons killed were *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.

Mutilation constituting a war crime (article 8(2)(c)(i) of the Statute) (Count 4)

42. The Prosecutor alleges in Count 4 that:

⁷¹ Prosecutor's Application, para. 31.

⁷² Prosecutor's Application, Annex 17, pp. 454-57; Prosecutor's Application, Annex 42, pp. 16-17, 20.

⁷³ Prosecutor's Application, Annex 23, p. 7; Prosecutor's Application, Annex 24, p. 5; Prosecutor's Application, Annex 31, p. 6.

⁷⁴ Prosecutor's Application, Annex 12, pp. 266-68; Prosecutor's Application, Annex 17, pp. 711-12, 717-18; Prosecutor's Application, Annex 34, pp. 5-6.

⁷⁵ Prosecutor's Application, Annex 16, p. 483; Prosecutor's Application, Annex 32, p. 8; Prosecutor's Application, Annex 54, p. 7.

⁷⁶ Prosecutor's Application, Annex 17, p. 459; Prosecutor's Application, Annex 33, para. 31; Prosecutor's Application, Annex 188, p. 73.

⁷⁷ Prosecutor's Application, Annex 37, p. 10; Prosecutor's Application, Annex 56, p. 4; Prosecutor's Application, Annex 122, p. 7.

⁷⁸ Prosecutor's Application, Annex 37, p. 11; Prosecutor's Application, Annex 56, p. 5.

⁷⁹ [REDACTED].

⁸⁰ [REDACTED].

⁸¹ Prosecutor's Application, Annex 39, p. 264.

⁸² Prosecutor's Application, Annex 55, pp. 3-5.

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 2009.⁸³

43. On the basis of the overall material presented, the Chamber finds reasonable grounds to believe that mutilation was committed, within the meaning of article 8(2)(c)(i) of the Statute, in Busurungi on or about 9-10 May 2009, where a pregnant woman had her eyes pierced by bayonets by FDLR soldiers and a FDLR Lieutenant was cutting the genitals off of persons who were either civilians or *hors de combat* within the context of a reprisal attack against the FARDC.⁸⁴

Cruel treatment constituting a war crime (article 8(2)(c)(i) of the Statute) (Count 6)

44. The Prosecutor alleges in Count 6 that:

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].⁸⁵

45. On the basis of the overall material presented, the Chamber finds reasonable grounds to believe that cruel treatment was committed, within the meaning of article 8(2)(c)(i) of the Statute, in: (i) Busurungi and surrounding villages on or about 9-10 May 2009, where [REDACTED],⁸⁶ (ii) Manje on or about 20-21 July 2009, where [REDACTED],⁸⁷ [REDACTED]⁸⁸ and [REDACTED].⁸⁹

Rape constituting a war crime (article 8(2)(e)(vi) of the Statute) (Count 7)

46. The Prosecutor alleges in Count 7 that:

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

⁸³ Prosecutor's Application, para. 31.

⁸⁴ Prosecutor's Application, Annex 17, pp. 412-414; Prosecutor's Application, Annex 18, pp. 333, 751-52; Prosecutor's Application, Annex 34, p. 5.

⁸⁵ Prosecutor's Application, para. 31.

⁸⁶ [REDACTED].

⁸⁷ Prosecutor's Application, Annex 33, pp. 5-10.

⁸⁸ [REDACTED].

⁸⁹ [REDACTED].

May 2009; [REDACTED]; Manje, Masisi territory, North Kivu, on or about 20-21 July 2009; [REDACTED].⁹⁰

47. On the basis of the overall material presented, the Chamber finds reasonable grounds to believe that rape was committed, within the meaning of article 8(2)(e)(vi) of the Statute, whereby FDLR soldiers invaded the body of a person by conduct resulting in penetration with a sexual organ, by force or by threat of force or coercion, in: (i) Busurungi and surrounding villages on or about 9-10 May 2009,⁹¹ [REDACTED],⁹² (iii) Manje on or about 20-21 July 2009,⁹³ [REDACTED]⁹⁴ and [REDACTED].⁹⁵

48. The Chamber notes that the Prosecutor makes reference to an incident which occurred in Busurungi “in late April or early May [2009]”, but provides no description of this incident in the Prosecutor’s Application and does not give a summary of the evidence underlying this incident. Thus, the Chamber considers that there are not reasonable grounds to believe that rape occurred at Busurungi in late April or early May 2009.

Torture constituting a war crime (article 8(2)(c)(i) of the Statute) (Count 9)

49. The Prosecutor alleges in Count 9 that:

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].⁹⁶

50. On the basis of the overall material presented, the Chamber finds reasonable grounds to believe that torture was committed, within the meaning of article 8(2)(c)(i) of the Statute, whereby FDLR soldiers inflicted severe physical or mental pain or suffering upon one or more civilians for the purpose of punishment in: (i) Busurungi and surrounding villages on or about 9-10 May 2009, where civilians were beaten, raped, mutilated and

⁹⁰ Prosecutor’s Application, para. 31.

⁹¹ Prosecutor’s Application, Annex 24, p. 8; Prosecutor’s Application, Annex 25, p. 8; Prosecutor’s Application, Annex 34, p. 5.

⁹² [REDACTED].

⁹³ Prosecutor’s Application, Annex 118, pp. 73-74.

⁹⁴ [REDACTED].

⁹⁵ [REDACTED].

⁹⁶ Prosecutor’s Application, para. 31.

subjected to inhumane acts by the FDLR to punish them for their perceived support of FARDC forces,⁹⁷ [REDACTED]⁹⁸ and [REDACTED].⁹⁹

Destruction of property constituting a war crime (article 8(2)(e)(xii) of the Statute) (Count 11)

51. The Prosecutor alleges in Count 11 that:

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; [REDACTED].¹⁰⁰

52. On the basis of the overall material presented, the Chamber finds reasonable grounds to believe that acts of destruction of property were committed, within the meaning of article 8(2)(e)(xii) of the Statute, whereby FDLR soldiers destroyed or seized, in a manner not required by military necessity, an adversary's property which was protected under the international law of armed conflict in: (i) Kipopo on or about 12-13 February 2009, where the FDLR burned down several houses in the village during an attack which also targeted a military position,¹⁰¹ (ii) Mianga on or about 12 April 2009, where the FDLR burned down civilian houses both during and after they successfully attacked a FARDC military position,¹⁰² (iii) Busurungi and surrounding villages on or about 9-10 May 2009, where many civilian houses were burned during and after another confrontation with the FARDC,¹⁰³ (iv) Manje on or about 20-21 July 2009, where civilian houses were burned down by the FDLR after the FARDC had fled the village,¹⁰⁴ (v) Malembe in early August

⁹⁷ Prosecutor's Application, Annex 25, pp. 4, 6; Prosecutor's Application, Annex 31, p. 4; Prosecutor's Application, Annex 18, p. 752.

⁹⁸ Prosecutor's Application, Annex 28, pp. 6-7; Prosecutor's Application, Annex 29, pp. 5-6; Prosecutor's Application, Annex 38, p. 6.

⁹⁹ Prosecutor's Application, Annex 26, pp. 9-10; Prosecutor's Application, Annex 61, pp. 1-8; Prosecutor's Application, Annex 70, p. 14.

¹⁰⁰ Prosecutor's Application, para. 31.

¹⁰¹ Prosecutor's Application, Annex 13, pp. 212-213; Prosecutor's Application, Annex 17, pp. 454-455; Prosecutor's Application, Annex 30, pp. 152-155; Prosecutor's Application, Annex 57, p. 11.

¹⁰² Prosecutor's Application, Annex 20, pp. 174-176; Prosecutor's Application, Annex 39, pp. 215-216; Prosecutor's Application, Annex 74, p. 83.

¹⁰³ Prosecutor's Application, Annex 13, p. 53; Prosecutor's Application, Annex 18, p. 428; Prosecutor's Application, Annex 23, pp. 11, 13.

¹⁰⁴ Prosecutor's Application, Annex 18, pp. 483-484; Prosecutor's Application, Annex 33, pp. 6, 9; Prosecutor's Application, Annex 118, p.73.

2009,¹⁰⁵ 11-13 August 2009¹⁰⁶ and on or about 15 September 2009,¹⁰⁷ where the FDLR burned down civilian houses on multiple occasions, [REDACTED],¹⁰⁸ [REDACTED]¹⁰⁹ and [REDACTED].¹¹⁰

Pillaging constituting a war crime (article 8(2)(e)(v) of the Statute) (Count 12)

53. The Prosecutor alleges in Count 12 that:

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].¹¹¹

54. On the basis of the overall material presented, the Chamber finds reasonable grounds to believe that acts constituting pillaging were committed within the meaning of article 8(2)(e)(v) of the Statute, whereby FDLR soldiers appropriated certain property for private or personal use without consent of the owner in: (i) Mianga on or about 12 April 2009, where the FDLR were looking for food and clothes during the incident and took certain civilian property away with them,¹¹² (ii) Busurungi and surrounding villages on or about 9-10 May 2009, where the FDLR took animals, clothes and items from civilian houses during the attack,¹¹³ (iii) Manje on or about 20-21 July 2009, where the FDLR took food from civilians, as well as household goods,¹¹⁴ (iv) Malembe in late July 2009¹¹⁵ and 11-13 August 2009,¹¹⁶ where civilian houses were looted on multiple occasions, [REDACTED],¹¹⁷

¹⁰⁵ Prosecutor's Application, Annex 37, pp. 8-10.

¹⁰⁶ Prosecutor's Application, Annex 13, pp. 130-131; Prosecutor's Application, Annex 18, p. 392; Prosecutor's Application, Annex 37, p. 10; Prosecutor's Application, Annex 122, p. 7.

¹⁰⁷ Prosecutor's Application, Annex 37, p. 11.

¹⁰⁸ [REDACTED].

¹⁰⁹ [REDACTED].

¹¹⁰ [REDACTED].

¹¹¹ Prosecutor's Application, para. 31.

¹¹² Prosecutor's Application, Annex 16, p. 483; Prosecutor's Application, Annex 39, p. 242.

¹¹³ Prosecutor's Application, Annex 17, pp. 396-97, 754-55; Prosecutor's Application, Annex 18, p. 263; Prosecutor's Application, Annex 54, p. 6.

¹¹⁴ Prosecutor's Application, Annex 33, p. 8.

¹¹⁵ Application, Annex 37, pp. 7-8.

¹¹⁶ Application, Annex 37, p. 10; Prosecutor's Application, Annex 122, p. 7.

¹¹⁷ [REDACTED].

(vi) Mutakato on or about 2-3 December 2009, where civilian property, including animals, were taken by the FDLR,¹¹⁸ [REDACTED]¹¹⁹ and [REDACTED].¹²⁰

Outrage upon personal dignity constituting a war crime (article 8(2)(c)(ii) of the Statute) (Count 14)

55. The Prosecutor alleges in Count 14 that:

MUDACUMURA is criminally responsible for the war crime of **outrage upon personal dignity** at various locations in the Kivu Provinces, DRC, including [REDACTED].¹²¹

56. On the basis of the overall material presented, the Chamber finds reasonable grounds to believe that an outrage upon personal dignity was committed, within the meaning of article 8(2)(c)(ii) of the Statute, whereby FDLR soldiers humiliated, degraded or otherwise violated the dignity of one or more civilians to such a degree as to be generally recognised as an outrage against personal dignity in [REDACTED].¹²²

(3) Conclusion

57. In light of the foregoing, the Chamber considers that there are reasonable grounds to believe that the alleged underlying acts were committed in the context of the armed conflict in the Kivu Provinces, as discussed above, and in association with this conflict. Attacking civilians, murdering, mutilating, cruelly treating, raping, torturing, destroying property, pillaging and committing outrages against personal dignity were closely related to the ongoing hostilities insofar as the existence of the conflict played a substantial role in the commission of the crimes.

58. On the overall basis of the material presented, the Chamber also concludes that there are reasonable grounds to believe that the physical perpetrators fulfil the subjective elements of the crimes discussed above, including any ulterior intent required, and accordingly finds that the war crimes of attack against a civilian population, murder, mutilation, cruel treatment, rape, torture, destruction of property, pillaging and outrages

¹¹⁸ Prosecutor's Application, Annex 39, p. 264; Prosecutor's Application, Annex 55, p. 4.

¹¹⁹ [REDACTED].

¹²⁰ [REDACTED].

¹²¹ Prosecutor's Application, para. 31.

¹²² [REDACTED].

against personal dignity – punishable under articles 8(2)(c)(i), 8(2)(c)(ii), 8(2)(e)(i), 8(2)(e)(v), 8(2)(e)(vi), 8(2)(e)(xii) of the Statute – were committed by the FDLR.

III. Whether there are reasonable grounds to believe that Mr. Mudacumura is criminally responsible for the crimes presented in the Prosecutor’s Application

59. In the Application, the Prosecutor presents three alternative modes of liability for Mr. Mudacumura’s individual criminal responsibility in the paragraph containing the alleged counts, namely: (i) indirect co-perpetration pursuant to article 25(3)(a) of the Statute, (ii) ordering pursuant to article 25(3)(b) of the Statute and (iii) command responsibility pursuant to article 28(a) of the Statute.¹²³

60. Turning to the first mode of liability pleaded in the Prosecutor’s Application, namely indirect co-perpetration, the Chamber recalls that this mode of participation requires, *inter alia*, that the person must be part of a common plan or agreement which involves an element of criminality.¹²⁴

61. The Chamber notes that the Prosecutor’s allegation as to the FDLR’s common plan was that the organisation’s political and military leadership agreed to conduct, and in fact conducted, a widespread and systematic attack against the civilian population in the Kivus, along with a parallel media campaign designed to extort political concessions for the FDLR in Rwanda.¹²⁵

62. In this regard, the Chamber wishes to point out that, although the notions of a common plan and policy for the purposes of crimes against humanity may overlap as in the present case, they are actually not one and the same. Given that the Chamber has already found that there was no FDLR policy to attack the civilian population as such,¹²⁶ the Chamber does not consider that the Prosecutor has established reasonable grounds to believe that the alleged common plan is also proven in view of the fact that the Prosecutor

¹²³ Prosecutor’s Application, para. 31.

¹²⁴ Pre-Trial Chamber II, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, ICC-01/09-01/11-373, paras 301, 305, 313, 333; Pre-Trial Chamber II, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, ICC-01/09-02/11-382-Red, para. 297; Pre-Trial Chamber I, “Decision on the confirmation of charges”, ICC-01/04-01/07-717, paras 500-14, 527-39.

¹²⁵ Prosecutor’s Application, para. 70.

¹²⁶ *Supra*, paras 22-29.

has linked these two different concepts in her Application. In particular, there is no evidence that the political and military leadership of the FDLR had a prior or subsequent agreement or plan to attack the civilian population as its primary target. Further, the evidence is insufficient to show that the order to commit a humanitarian catastrophe in the Kivu Provinces was a product of any discussion or agreement, so that the order could be described as the subject of a common plan of the FDLR political and military leadership. In light of these facts, the Chamber finds that there are not reasonable grounds to believe that Mr. Mudacumura is criminally responsible as an indirect co-perpetrator within the meaning of article 25(3)(a) of the Statute for the war crimes committed as set out in the previous section.

63. Turning to the next alternative mode of liability presented by the Prosecutor, the Chamber recalls that ordering under article 25(3)(b) of the Statute is a form of accessorial liability at this Court.¹²⁷ Taking note of the way ordering liability is analysed at the *ad hoc* tribunals,¹²⁸ the Chamber considers that, to be responsible under article 25(3)(b) of the Statute it must be established that: (a) the person is in a position of authority,¹²⁹ (b) the person instructs another person in any form¹³⁰ to either: (i) commit a crime which in fact occurs or is attempted or (ii) perform an act or omission in the execution of which a crime is carried out,¹³¹ (c) the order had a direct effect on the commission or attempted commission of the crime,¹³² and (d) the person is at least aware that the crime will be committed in the ordinary course of events as a consequence of the execution or

¹²⁷ Pre-Trial Chamber I, “Decision on the Confirmation of Charges”, ICC-01/04-01/07, para. 517; Pre-Trial Chamber I, “Decision on the Confirmation of Charges”, ICC-01/04-01/06-803-tEN, paras 320-21.

¹²⁸ See article 21(1)(b) of the Statute.

¹²⁹ ICTY, Appeals Chamber, *Prosecutor v. D. Milošević*, “Judgement”, 12 November 2009, IT-98-29/1-A, para. 290; ICTY, Appeals Chamber, *Prosecutor v. Kordić and Čerkez*, “Judgement”, 17 December 2004, IT-95-14/2-A, para. 28.

¹³⁰ ICTR, Appeals Chamber, *Kamuhanda v. The Prosecutor*, “Judgement”, 19 September 2005, ICTR-99-54A-A, para. 76.

¹³¹ ICTR, Appeals Chamber, *Karera v. The Prosecutor*, “Judgement”, 2 February 2009, ICTR-01-74-A, para. 211; ICTR, Appeals Chamber, *Nahimana et al. v. The Prosecutor*, “Judgement”, 28 November 2007, ICTR-99-52-A, para. 481.

¹³² *But see* ICTR, Appeals Chamber, *Kamuhanda v. The Prosecutor*, “Judgement”, 19 September 2005, ICTR-99-54A-A, para. 75; ICTR, Appeals Chamber, *Prosecutor v. Kayishema and Ruzindana*, “Judgement (Reasons)”, 1 June 2001, ICTR-95-1-A, para. 186.

implementation of the order. The person can give the order through an intermediary and need not give the order directly to the physical perpetrator.¹³³

64. The Chamber finds reasonable grounds to believe that Mr. Mudacumura acted in a position of authority throughout the time period referred to in the Prosecutor's Application. Mr. Mudacumura was the top military commander of the FDLR for the relevant time period.¹³⁴ As described previously, the FDLR is a large, well organised organisation which has a clear hierarchical structure.¹³⁵ Mr. Mudacumura had control over his forces and authority over recruiting, promoting, removing and disciplining them.¹³⁶ Mr. Mudacumura's dominance of and control over FDLR troops went so far as to take efforts to prevent soldiers from demobilising,¹³⁷ to authorise their marriage¹³⁸ and to control the information they received from the outside world¹³⁹ or even from within the FDLR.¹⁴⁰ Compliance with Mr. Mudacumura's orders was required.¹⁴¹

65. The Chamber finds reasonable grounds to believe that Mr. Mudacumura instructed others to conduct a particular kind of military campaign in the execution of which the war crimes deemed established by the Chamber above were carried out. On Mr. Mudacumura's authority, a general order to create a humanitarian catastrophe was issued

¹³³ See ICTY, Trial Chamber, *Prosecutor v. Đorđević*, "Judgement", 23 February 2011, IT-05-87/1-T, para. 1871; ICTY, Trial Chamber, *Prosecutor v. Kordić and Čerkez*, "Judgment", 26 February 2001, IT-95-14/2-T, para. 388; ICTY, Trial Chamber, *Prosecutor v. Blaskić*, "Judgment", 3 March 2000, IT-95-14-T, para. 282.

¹³⁴ Prosecutor's Application, Annex 11, pp. 5, 10, 158; Prosecutor's Application, Annex 12, pp. 84-85; Prosecutor's Application, Annex 15, pp. 97, 334; Prosecutor's Application, Annex 18, pp. 171-173; Prosecutor's Application, Annex 30, pp. 183, 183; Prosecutor's Application, Annex 44, p. 9; Prosecutor's Application, Annex 46, p. 3; Prosecutor's Application, Annex 72, p. 34; Prosecutor's Application, Annex 94, p. 6; Prosecutor's Application, Annex 117, p. 38; Prosecutor's Application, Annex 118, pp. 89-91.

¹³⁵ Prosecutor's Application, Annex 13, p. 94; Prosecutor's Application, Annex 14, p. 205; Prosecutor's Application, Annex 15, p. 81; Prosecutor's Application, Annex 16, p. 89; Prosecutor's Application, Annex 18, pp. 537-543; Prosecutor's Application, Annex 19, pp. 170-183; Prosecutor's Application, Annex 27, pp. 177-179; Prosecutor's Application, Annex 59, para. 17; Prosecutor's Application, Annex 78, p. 28; Prosecutor's Application, Annex 79, p. 40; Prosecutor's Application, Annex 89, p. 10.

¹³⁶ Prosecutor's Application, Annex 11, p. 56; Prosecutor's Application, Annex 12, p. 366; Prosecutor's Application, Annex 13, p. 94; Prosecutor's Application, Annex 15, pp. 81, 183, 214; Prosecutor's Application, Annex 19, p. 204; Prosecutor's Application, Annex 20, pp. 123, 188; Prosecutor's Application, Annex 27, p. 158; Prosecutor's Application, Annex 30, pp. 181, 183, 188; Prosecutor's Application, Annex 39, pp. 185-187; Prosecutor's Application, Annex 94, p. 6; Prosecutor's Application, Annex 118, p. 89.

¹³⁷ Prosecutor's Application, Annex 12, pp. 191-94; Prosecutor's Application, Annex 21, pp. 646-647.

¹³⁸ Prosecutor's Application, Annex 30, p. 213.

¹³⁹ Prosecutor's Application, Annex 16, p. 211.

¹⁴⁰ Prosecutor's Application, Annex 16, p. 284.

¹⁴¹ Prosecutor's Application, Annex 13, p. 94; Prosecutor's Application, Annex 19, pp. 206, 212; Prosecutor's Application, Annex 27, p. 178.

in early 2009.¹⁴² Mr. Mudacumura also approved of a general order to pillage civilian property in order to sustain the FDLR's military efforts.¹⁴³ FDLR units in the field carried out operations which had been outlined or approved by Mr. Mudacumura,¹⁴⁴ and at least large operations required his permission.¹⁴⁵ There is also evidence that Mr. Mudacumura specifically gave prior approval to the attacks on Mianga¹⁴⁶ and Busurungi.¹⁴⁷

66. Accordingly, the Chamber finds reasonable grounds to believe that Mr. Mudacumura's orders had a direct effect on the crimes which were found to be established by the Chamber in the preceding section. His proven authority over the direct perpetrators supports the conclusion that his orders had a direct effect on the commission of the crimes. The compliance with his broad order to create a humanitarian catastrophe is an indicator. For example, one witness acknowledges that the May 2009 Busurungi attack in particular was pursuant to this order.¹⁴⁸

67. Finally the Chamber finds reasonable grounds to believe that Mr. Mudacumura: (i) was aware of the factual circumstances that established the existence of the armed conflict and (ii) was at least aware that by issuing said orders, crimes would be committed in the ordinary course of events as a consequence of the execution of his orders. In particular, sophisticated communications systems were maintained so that Mr. Mudacumura regularly received reports on military operations.¹⁴⁹ He was informed of allegations of crimes.¹⁵⁰ He was also informed of the accusations towards forces under his authority

¹⁴² Prosecutor's Application, Annex 14, pp. 106-07, 224-26, 269, 284-85, 287, 353-54; Prosecutor's Application, Annex 16, pp. 417-20; Prosecutor's Application, Annex 19, p. 232.

¹⁴³ Prosecutor's Application, Annex 18, pp. 524-525, 620-624; Prosecutor's Application, Annex 20, pp. 229-230; Prosecutor's Application, Annex 21, pp. 829-839.

¹⁴⁴ Prosecutor's Application, Annex 11, p. 107; Prosecutor's Application, Annex 14, pp. 113, 125-126, 205; Prosecutor's Application, Annex 16, pp. 91-92, 117-118, 166, 308-15; Prosecutor's Application, Annex 19, p. 490; Prosecutor's Application, Annex 21, pp. 393, 421-422, 668-669, 845, 848; Prosecutor's Application, Annex 118, pp. 60-61.

¹⁴⁵ Prosecutor's Application, Annex 16, pp. 166-168, 308-312; Prosecutor's Application, Annex 18, pp. 626-627; Prosecutor's Application, Annex 21, p. 393; Prosecutor's Application, Annex 118, pp. 60, 89.

¹⁴⁶ Prosecutor's Application, Annex 13, p. 138; Prosecutor's Application, Annex 16, pp. 154-155; Prosecutor's Application, Annex 17, pp. 440-443.

¹⁴⁷ Prosecutor's Application, Annex 11, p. 45; Prosecutor's Application, Annex 13, p. 76; Prosecutor's Application, Annex 14, p. 113.

¹⁴⁸ Prosecutor's Application, Annex 30, p. 122.

¹⁴⁹ Prosecutor's Application, Annex 12, pp. 84-85, 383; Prosecutor's Application, Annex 14, p. 205; Prosecutor's Application, Annex 16, pp. 117-125; Prosecutor's Application, Annex 19, pp. 205-212; Prosecutor's Application, Annex 20, p. 123; Prosecutor's Application, Annex 21, pp. 421-422, 668-689.

¹⁵⁰ Prosecutor's Application, Annex 12, p. 383; Prosecutor's Application, Annex 21, pp. 393, 421-422, 845-848; Prosecutor's Application, Annex 112, pp. 115, 135.

concerning the commission of crimes which were reported by international organisations and non-governmental organisations.¹⁵¹

68. With respect to the attacks in Mianga and Busurungi in May 2009, there is also evidence that Mr. Mudacumura participated in trying to cover up the exact nature of the FDLR's criminal actions there.¹⁵² Mr. Mudacumura would not publicly acknowledge that crimes had been committed by his troops.¹⁵³ Instead, in some instances, commanders accused of offences were promoted upon his orders.¹⁵⁴

69. The Chamber thus finds that there are reasonable grounds to believe that Mr. Mudacumura is criminally responsible under article 25(3)(b) of the Statute for the war crimes committed as set out in the previous section. The Chamber underlines that this conclusion does not prejudice any subsequent finding regarding the applicability of a different mode of liability at a later stage of the proceedings.

IV. The need to arrest Mr. Mudacumura under Article 58(1)(b) of the Statute

70. The Chamber notes that, according to article 58(1) of the Statute, a warrant of arrest shall be issued if the Chamber is satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and that the arrest of the person appears necessary: (i) to ensure the person's appearance at trial, (ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings or (iii) where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances. For the purposes of the arrest warrant, it is sufficient for the Chamber to establish the existence of one of the requirements as set out in article 58(1)(b) of the Statute.

¹⁵¹ Prosecutor's Application, Annex 43, p. 52; Prosecutor's Application, Annex 44, pp. 202, 204.

¹⁵² Prosecutor's Application, Annex 4 (and further citations therein).

¹⁵³ Prosecutor's Application, Annex 14, p. 381; Prosecutor's Application, Annex 17, pp. 797-798; Prosecutor's Application, Annex 44, pp. 202-04.

¹⁵⁴ Prosecutor's Application, Annex 39, p. 298.

71. The Chamber has already determined that there are reasonable grounds to believe that criminal responsibility under article 25(3)(b) of the Statute can be attributed to Mr. Mudacumura for the occurrence of the war crimes discussed in section II(B) above.

72. The Chamber considers that Mr. Mudacumura's arrest appears necessary to ensure his appearance at trial, as Mr. Mudacumura may face serious charges, allegedly lives in a remote area in the North Kivu Province of the DRC and has access to an international support network which is capable of assisting his evasion from the Court's jurisdiction.¹⁵⁵

73. The Chamber also considers that Mr. Mudacumura's arrest appears necessary to ensure that he does not obstruct or endanger the investigation or the court proceedings, as Mr. Mudacumura: (i) still appears to be the top military commander in the FDLR, (ii) may have assumed even greater authority in the organisation following the arrest of Mr. Mbarushimana¹⁵⁶ and (iii) has sophisticated means of acquiring information in the area of the eastern DRC where he is located.¹⁵⁷ Furthermore, the Prosecutor alleges that many of the victims, witnesses and potential witnesses in this case reside in areas of the DRC under FDLR control.¹⁵⁸

74. Finally, the Chamber considers that Mr. Mudacumura's arrest appears necessary to prevent him from continuing with the commission of crimes within the jurisdiction of the Court which arise out of the same circumstances, as he is alleged to retain control over the FDLR to the present day and the group appears to still be militarily active in the Kivus after September 2010.¹⁵⁹

75. On the basis of the material it has received and without prejudice to any subsequent decision under article 60 of the Statute and rule 119 of the Rules, the Chamber finds that

¹⁵⁵ Prosecutor's Application, para. 88; Prosecutor's Application, Annex 74, pp. 24-30; Prosecutor's Application, Annex 94, p. 6.

¹⁵⁶ Prosecutor's Application, Annex 39, pp. 128-129, Prosecutor's Application, Annex 94, p. 6.

¹⁵⁷ *Supra*, para. 67.

¹⁵⁸ Prosecutor's Application, para. 89.

¹⁵⁹ Prosecutor's Application, para. 89; Prosecutor's Application, Annex 9, pp. 56-59 (United Nations Security Council Resolution of 29 November 2011 demanding that the FDLR lay down their arms and "immediately cease all forms of violence, human rights abuses and international humanitarian law violations against the civilian population in the Democratic Republic of the Congo").

the arrest of Mr. Mudacumura appears necessary pursuant to article 58(1)(b)(i), (ii) and (iii) of the Statute.

V. Conclusion

76. In view of the foregoing, the Chamber is satisfied that there are reasonable grounds to believe that, between 20 January 2009 and the end of September 2010, Mr. Mudacumura is responsible under article 25(3)(b) of the Statute for the crimes identified in paragraphs 30-58 of the present decision.

77. The Chamber therefore decides to issue a warrant for Mr. Mudacumura's arrest, pursuant to article 58(1) of the Statute.

78. [REDACTED].¹⁶⁰

79. [REDACTED].

FOR THESE REASONS, THE CHAMBER HEREBY

DECIDES

that the case against Sylvestre Mudacumura falls within the jurisdiction of the Court and that a warrant of arrest appears necessary for his responsibility under article 25(3)(b) of the Statute, to the required standard, for the following war crimes committed in the Kivu Provinces of the Democratic Republic of the Congo, between 20 January 2009 and the end of September 2010, and established by the statement of facts contained in paragraphs 30-58 of this Decision:

¹⁶⁰ [REDACTED].

- (i) **Murder constituting a war crime (article 8(2)(c)(i) of the Statute) (Count 2)**
- (ii) **Mutilation constituting a war crime (article 8(2)(c)(i) of the Statute) (Count 4)**
- (iii) **Cruel treatment constituting a war crime (article 8(2)(c)(i) of the Statute) (Count 6)**
- (iv) **Torture constituting a war crime (article 8(2)(c)(i) of the Statute) (Count 9)**
- (v) **Outrage upon personal dignity constituting a war crime (article 8(2)(c)(ii) of the Statute) (Count 14)**
- (vi) **Attack against the civilian population constituting a war crime (article 8(2)(e)(i) of the Statute) (Count 1)**
- (vii) **Pillaging constituting a war crime (article 8(2)(e)(v) of the Statute) (Count 12)**
- (viii) **Rape constituting a war crime (article 8(2)(e)(vi) of the Statute) (Count 7)**
- (ix) **Destruction of property constituting a war crime (article 8(2)(e)(xii) of the Statute) (Count 11);**

ACCORDINGLY ISSUES A WARRANT OF ARREST

for Sylvestre Mudacumura, born in 1954 in *cellule* Ferege, Gatumba sector, Kibilira commune, Gisenyi prefecture, Rwanda. He is otherwise known as Pierre Bernard Mupenzi, Commander Pharaon, Pharaoh, Mudac, Mukanda or Radja; at the time of the crimes and until the date of the Prosecutor's Application, Sylvestre Mudacumura served as the Supreme Commander of the Army for the *Forces Démocratiques pour la Libération du Rwanda*;

ORDERS THE REGISTRAR

1) to prepare and transmit, in consultation and coordination with the Prosecutor, a request for cooperation to the competent authorities of the DRC for the arrest and surrender of Sylvestre Mudacumura; this request should contain the information and documents as

required by articles 89(1) and 91 of the Statute and rules 176(2) and 187 of the Rules of Procedure and Evidence (the “Rules”);

2) to prepare and transmit to any other State any additional request for arrest and surrender which may be necessary for the arrest and surrender of Sylvestre Mudacumura to the Court pursuant to articles 89 and 91 of the Statute;

3) to prepare and transmit, if the circumstances so require, a request for provisional arrest in accordance with article 92 of the Statute;

4) to prepare and transmit to any State any request for transit which may be necessary for the surrender of Sylvestre Mudacumura to the Court, pursuant to article 89(3) of the Statute;

5) to liaise with the Prosecutor in order to invite the DRC and the Kingdom of The Netherlands to request an exemption from the travel ban imposed by the UN Security Council and the Council of the European Union to allow the surrender of Sylvestre Mudacumura to the Court and to enter the territory of the The Netherlands;


[REDACTED]; and

REQUESTS THE PROSECUTOR


1) to transmit to the Chamber and to the Registrar, as far as the Prosecutor’s confidentiality obligations allow, all information available to her that may assist in averting any risks to victims and/or witnesses associated with the transmission of the above-mentioned cooperation requests; and

2) to transmit to the Chamber and to the Registrar, as far as the Prosecutor’s confidentiality obligations allow, all information available to her that, in her view, would facilitate the transmission and execution of the above-mentioned cooperation requests.


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



Judge Ekaterina Trendafilova
Presiding Judge



Judge Hans-Peter Kaul
Judge



Judge Cuno Tarfusser
Judge

Dated this Friday, 13 July 2012
At The Hague, The Netherlands