



Original: **English**

No.: **ICC-01/04**  
Date: **20 August 2010**

**PRE-TRIAL CHAMBER I**

Before: **Judge Sanji Mmasenono Monageng, Single Judge**

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

Public Redacted Version of  
**Prosecution's Application under Article 58**

Source: **Office of the Prosecutor**

**Document to be notified in accordance with regulation 31 of the *Regulations of the***

***Court to:***

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## Introduction

Pursuant to Article 58(1) of the Rome Statute, the Prosecution applies to Pre-Trial Chamber I for the issuance of an arrest warrant against Callixte MBARUSHIMANA for his criminal responsibility for crimes against humanity and war crimes including attacks against a civilian population, killings, rapes, persecution based on gender and extensive destruction of property committed by the *Forces Démocratiques pour la Libération du Rwanda – Forces Combattantes Abacunguzi* (FDLR-FOCA, referred to as “FDLR” in this application)<sup>1</sup> between 20 January 2009 and the date of this application, in North and South Kivu Provinces, Democratic Republic of the Congo (DRC).

As set out below, on the basis of the evidence it has collected, the Prosecution has concluded that there are reasonable grounds to believe that Callixte MBARUSHIMANA bears criminal responsibility pursuant to Article 25(3)(a) or in the alternative (d) of the Rome Statute for war crimes and crimes against humanity.

The FDLR, a group calling itself a “Liberation Force”, is the most recent incarnation of a succession of Rwandese rebel groups integrated by the *génocidaires* that fled to the DRC after the 1994 Rwandan genocide. Within refugee camps in the DRC, they re-grouped, organised themselves and launched attacks on Rwanda, with the goal of removing its new Government through violence. Their activities triggered the first Congo war of 1996. They were also actively involved during the second Congo war between mid-1998 and 2002. Since then and until the date of this application, the FDLR has committed crimes against the civilian population of North and South Kivu Provinces.

In December 2008, the Congolese and Rwandan Governments agreed to conduct joint military operations on DRC territory against the FDLR in order to stop the group’s criminal activities. The joint DRC-Rwanda operations were launched in January 2009. The FDLR leadership’s response was to conduct a widespread and systematic attack against the civilian population in order to force a political negotiation with Rwanda. This is the subject of this case.

The Prosecution submits that Ignace MURWANASHYAKA, Sylvestre MUDACUMURA and Callixte MBARUSHIMANA bear the greatest responsibility for the crimes committed by the FDLR in the Kivus since early 2009.

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<sup>1</sup> Witnesses and sources refer to the FDLR’s armed wing, interchangeably, as either the FDLR or the *Forces Combattantes Abacunguzi* (FOCA). Within this application, the name FDLR is used to refer to either or both components of the group.

MURWANASHYAKA, based in Germany, is the FDLR President since 2001, and is currently under arrest in Germany.<sup>2</sup> MUDACUMURA, based in the Kivus, he has been the commander of thousands of FDLR combatants since 2002. [REDACTED]

[REDACTED] MBARUSHIMANA, based in France, is the Executive Secretary of the FDLR since 17 July 2007, at the latest. MBARUSHIMANA is said to have filled the role left void after President MURWANASHYAKA's arrest.

Together, they adopted a common criminal plan and, performing different functions, ensured the FDLR's coordinated implementation of the plan.

At the end of 2008 and over the course of 2009, the three FDLR leaders and other FDLR members agreed to conduct widespread and systematic attacks against the civilian population in order to create a "humanitarian catastrophe" and an international campaign to persuade the DRC and Rwanda Governments and the international community that the FDLR could not be defeated militarily and to extort from them concessions of political power for the FDLR in Rwanda to stop atrocities against civilians. The FDLR leadership used the violence against civilians as the means by which they would force Rwanda and the international community to give political power to the FDLR, including impunity for its leaders. Callixte MBARUSHIMANA is responsible for the crimes committed by the FDLR in pursuit of this goal as a co-perpetrator or, in the alternative, as contributor to the common purpose of the FDLR.

## **A. CONCISE STATEMENT OF FACTS WHICH CONSTITUTE THE CRIMES**

### **(Article 58(2)(c))**

1. The Prosecution submits that the facts relevant to this application –between January 2009 and the date of this application– took place within the context of an armed conflict in the Kivu Provinces. The presence of the Rwandan army on Congolese territory gave an international character to the armed conflict between 20 January 2009 and 25 February 2009. Once the Rwandan army withdrew, an internal armed conflict was waged by Congolese forces supported by MONUC forces that carried on the fight against the FDLR.

2. MBARUSHIMANA made the FDLR leadership's intentions known on 9 December 2008, days after the announcement of the launch of the joint Congolese-Rwandan military operation *Umoja Wetu* against the FDLR. MBARUSHIMANA warned that "[a]ny solution

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<sup>2</sup> The FDLR President was arrested in November 2009. He is in pre-trial detention on the basis of an arrest warrant issued for his alleged responsibility as the ringleader of the FDLR, an alleged foreign terrorist organisation under German law, and for his responsibility for war crimes and crimes against humanity allegedly committed in North and South Kivu Provinces in DRC in 2009.

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 FDLR would plunge the region into a long and dreadful war, “the consequences of which are immeasurable”.<sup>3</sup> MBARUSHIMANA was not formulating empty threats. He is a leader of the FDLR, a combatant force with a long tradition of attacking civilians.

3. In the (excerpted) words of a former FDLR soldier [REDACTED]: “January 2009 [...] we received a message... from MURWANASHYAKA stating that this fight is going to be against the whole world ... that they would destroy ... development work and we... shooting [phon.] ... targeting the population [...]”.<sup>4</sup>

4. As announced, the FDLR leadership launched a campaign of attacks targeting the civilian population of the Kivus. The purpose of this offensive, as it was formulated at the highest reaches of the FDLR and transmitted to units in the field, was “to create a humanitarian catastrophe”<sup>5</sup> “so that the Congo government and the foreign leaders stop to disturb the FDLR”.<sup>6</sup>

5. According to [REDACTED], the order was issued shortly after the launch of *Umoja Wetu*<sup>7</sup> by the Commander of the FDLR army, General Sylvestre MUDACUMURA,<sup>8</sup> although one witness explained that it originally came from the FDLR President MURWANASHYAKA.<sup>9</sup> The order was transmitted to all FDLR commanders<sup>10</sup> and read out to their subordinates and units in the field.<sup>11</sup>

<sup>3</sup> AFP and Reuters, “DRC Hutu rebels warn against use of force”, 9 December 2008, DRC-OTP-2020-0504, available at <http://www.mg.co.za/article/2008-12-09-drc-hutu-rebels-warn-against-use-of-force>, last accessed on 19 August 2010. In a press release, MBARUSHIMANA said: “The FDLR offer the way of dialogue and peace; those who offer the war as a solution to the crisis of the Great Lakes region of Africa should be held responsible for any consequences thereof”. FDLR press release of 14/01/09 authored by MBARUSHIMANA, DRC-OTP-2003-0589; In a press release from mid February 2009, he “warn[ed] MONUC against a danger resulting of its alignment with the Rwandan-Congolese troops” and stated that the FDLR “continue to favour the path of peace, but if the armed coalition against them continue to chase and shoot at the Rwandan refugees and Congolese innocent people, they will have no other choice but to protect Rwandan refugees and civilian populations”.

<sup>4</sup> Audio recording of OTP interview with witness [REDACTED].

Transcript of order given by MUDACUMURA and read out by an FDLR radio operator to the Group of Experts on the Democratic Republic of the Congo, at Annex 18, DRC-OTP-2010-0045 at 0168, as corroborated by witness [REDACTED] in audio recording of OTP interview with witness [REDACTED].

Audio recording of OTP interview with witness [REDACTED].

<sup>7</sup> Audio recording of OTP interview with witness [REDACTED]; Audio recording of OTP interview with witness [REDACTED]; Audio recording of OTP interview with witness [REDACTED].

Audio recording of OTP interview with witness [REDACTED]; and Audio recording of OTP interview with witness [REDACTED].

Audio recording of OTP interview with witness [REDACTED].

<sup>10</sup> Audio recording of OTP interview with witness [REDACTED].

6. The primary target of this order was the civilian population. According to one witness, MUDACUMURA said that the civilian population “*have to suffer.*” According to another witness, “*there was an order, a permanent regulation, that whenever the population were mixed with FARDC<sup>12</sup> and they refused to flee they would be killed*”. By design, thus, the attacks were to be launched against and involved killing civilians.<sup>13</sup>

7. In implementation of the leaders’ orders, FDLR units committed crimes against civilians through one of two discernible patterns: they attacked and razed villages, and they assaulted civilians before and after such attacks. In both scenarios, the FDLR perpetrated killings, rapes and other forms of sexual violence, inhumane acts, and persecution based on gender. Together, these two patterns of violence combined with the actions of the other armed groups produced a humanitarian catastrophe. Over one million people were displaced in the DRC in 2009 alone, most of them in North Kivu.<sup>14</sup> Between January and July 2009 alone, the United Nations High Commissioner for Refugees reported that repeated attacks by the FDLR in North and South Kivu had driven more than 370,000 people from their homes and into the forests or to other places of refuge.<sup>15</sup>

8. In late January 2009, when the DRC and Rwandan armies (FARDC-RDF<sup>16</sup>) advanced towards the key FDLR bases in Ufamandu (Walikale territory), including Kibua and Katoyi, the FDLR abducted civilians and took them to the FDLR camp, intending to use them as human shields against the impending attack. When the FARDC-RDF forces attacked these sites, the trapped civilians tried to flee, but many were killed by the FDLR and others died in the cross-fire. On 30 January 2009, FDLR killed dozens of civilians in the villages of Malembe, Mianga and Busurungi, in Waloa-Loanda *groupement*. Towards the end of January

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<sup>11</sup> Audio recording of OTP interview with witness [REDACTED]

<sup>12</sup> The official name of the Congolese army is *Forces Armées de la République Démocratique du Congo* (FARDC).

<sup>13</sup> See para. 83 below.

<sup>14</sup> IDMC, Internal Displacement - Global Overview of Trends and Developments in 2009, DRC-OTP-2014-0008 at DRC-OTP-2014-0042, available at [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/8980F134C9CF4373C1257725006167DA/\\$file/Global\\_Overview\\_2009.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/8980F134C9CF4373C1257725006167DA/$file/Global_Overview_2009.pdf), last accessed on 20 August 2010. There are reasonable grounds to believe that a major share of the internal displacement is directly linked to military operations involving the FDLR. See “At least 35,000 Congolese civilians displaced by fighting in South Kivu province”, 24 July 2009, DRC-OTP-2021-0032, available at UNHCR media releases at <http://www.unhcr.org/4a69d0fe9.html>, last accessed on 20 August 2010; “UNHCR concerned about atrocities against civilians in the eastern DRC, 22 May 2009, DRC-OTP-2021-0034, available at <http://www.unhcr.org/4a1696f56.html>, last accessed on 20 August 2010; and “Rebel raids displace more than 100,000 civilians in eastern Congo”, 21 April 2009, DRC-OTP-2021-0035, available at <http://www.unhcr.org/49ede9672.html>, last accessed on 20 August 2010.

<sup>15</sup> UNHCR Briefing Notes, “UNHCR concerned about atrocities against civilians in the eastern DRC”, 22 May 2009, DRC-OTP-2021-0034, available at <http://www.unhcr.org/4a1696f56.html>, last accessed on 20 August 2010.

<sup>16</sup> Rwandan Defence Forces (RDF).

2009 and February, FDLR attacked civilians in Remeka several times. A further FDLR attack took place on 12-13 February in Kipopo.<sup>17</sup>

9. On 17 February 2009, shortly before the launch of the DRC and MONUC's further military operation against the FDLR, *Kimia II*, MBARUSHIMANA continued with the FDLR's international campaign to persuade the international community that the FDLR could not be defeated militarily and to extort from them concessions of political power for the FDLR in Rwanda to stop atrocities against civilians. He "warn[ed] MONUC against a danger resulting of its alignment with the Rwandan-Congolese troops" and stated that the FDLR

*"continue to favour the path of peace, but if the armed coalition against them continue to chase and shoot at the Rwandan refugees and Congolese innocent people, they will have no other choice but to protect Rwandan refugees and civilian populations".*<sup>18</sup>

10. After MBARUSHIMANA's warning to MONUC and the DRC, FDLR combatants, following orders, attacked in Mianga (12 April 2009), Luofu and Kasiki (18 April), Busurungi (10 May), Manje (20-21 July), and Malembe (10-11 August).

11. Preferring guerrilla tactics and surprise attacks, the FDLR assaults initially focused on FARDC deployments in the various localities, proceeding to raze the villages and attack civilians once the military opposition had been neutralised. In some cases, the FDLR deliberately perpetrated attacks on completely undefended places, burning them to the ground. In many cases, whether in attacks on specific locations, in transit, or while located and deployed, FDLR carried out widespread and systematic rapes and other sexual atrocities on the basis of gender against civilians.

12. The message that the FDLR could not be defeated militarily, and the extortive demands for concessions of political power for the FDLR in Rwanda to stop atrocities against civilians, was consistently presented by FDLR leaders. [REDACTED]

[REDACTED] FDLR President MURWANASHYAKA repeatedly said that the group's laying down of its arms and its return to Rwanda is conditional on negotiations with the Rwandese government. This same goal is addressed in numerous FDLR documents authored by Executive Secretary MBARUSHIMANA and in interviews given by the top FDLR leaders including MBARUSHIMANA to the media.<sup>19</sup>

<sup>17</sup> See paras. 100 to 102 below.

<sup>18</sup> FDLR press release of 17/02/09 authored by MBARUSHIMANA, DRC-OTP-2003-0566.

<sup>19</sup> BBC, "Rebels 'threaten DR Congo deal", 24 January 2008, DRC-OTP-2017-0090 at 0091, available at <http://news.bbc.co.uk/2/hi/africa/7206720.stm>, last accessed on 19 August 2010. MBARUSHIMANA said to the BBC: "Should the government of Rwanda sit down with us at the negotiating table we are going to stop everything"; FDLR press release of 28/04/10, DRC-OTP-2001-0924, FDLR press release of 14/01/10, DRC-OTP-2014-3509; FDLR press release of 18/11/09, DRC-OTP-2014-3476; FDLR press release of 20/10/09, DRC-OTP-2014-3543; FDLR press release of 05/10/09, DRC-OTP-2001-0065; FDLR press release of 21/09/09, DRC-OTP-2014-3499; FDLR press release of 06/08/09, DRC-OTP-2014-3495; FDLR press release of 30/07/09, DRC-OTP-2014-3535; FDLR press release of 09/07/09, DRC-OTP-2014-3436; FDLR press release of 25/06/09,



13. True to its word, the FDLR was diligent in its aim to create a humanitarian catastrophe. FDLR units burnt down civilian houses on a massive scale, fuelling internal displacement in both North and South Kivu Provinces. On the basis of documentation and testimonies collected by its members, the United Nations Group of Experts on the Democratic Republic of the Congo (UN Group of Experts) confirmed the focus of the attacks on civilians.<sup>20</sup> The non-governmental organisation Human Rights Watch (HRW) attributed to the FDLR over 700 killings, 290 cases of rape and over 7,000 houses or other structures destroyed between January and September 2009.<sup>21</sup> It also reported gang-rape on a mass scale, often perpetrated by seven to eight soldiers or more, and noted the extreme brutality of FDLR sexual attacks, which included mutilation, disfigurement, and savage rape, often culminating in murder.<sup>22</sup> The United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, noted that the FDLR have raped women “*so brutally that they die [...] from their injuries.*”<sup>23</sup> Victims were reportedly tied to trees and had a range of objects forcefully inserted into their vaginas by way of, or in addition to, being raped.<sup>24</sup> During these assaults, victims were reportedly forcefully beaten and sometimes raped so brutally and repeatedly that they suffered afterwards from multiple internal injuries and massive internal bleeding.<sup>25</sup> Some victims were reportedly shot in their vaginas for resisting rape, or had foetuses cut out of their bodies.<sup>26</sup> The acts of sexual violence reportedly committed by the FDLR were not limited to women; boys were reportedly forced, in certain cases, to rape female victims under threat of being killed.<sup>27</sup>

14. The FDLR leadership supervised the execution of the order to attack civilians [REDACTED]

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DRC-OTP-2020-0518; FDLR press release of 22/06/09, DRC-OTP-2020-0561; FDLR press release of 7/05/09, DRC-OTP-2014-3488; FDLR press release of 20/05/09, DRC-OTP-2020-0566; FDLR press release of 01/05/09, DRC-OTP-2014-3532; FDLR press release of 30/03/09, DRC-OTP-2014-3520; FDLR press release of 09/03/09, DRC-OTP-2014-3447; FDLR press release of 05/03/09, DRC-OTP-2001-0054; FDLR press release of 17/02/09, DRC-OTP-2003-0556; FDLR press release of 02/02/09, DRC-OTP-2001-0047; FDLR press release of 30/12/08, DRC-OTP-2003-0582; FDLR press release of 08/12/08, DRC-OTP-2003-0587; FDLR press release of 14/03/08, DRC-OTP-2003-0791; FDLR press release of 25/01/08, DRC-OTP-2002-0842; FDLR press release of 23/10/07, DRC-OTP-2002-0838; FDLR press release of 19/10/07, DRC-OTP-2002-0830; FDLR press release of 13/09/07, DRC-OTP-2002-0794; FDLR press release of 26/07/07, DRC-OTP-2001-0026; FDLR press release of 17/07/07, DRC-OTP-2001-0024.

<sup>20</sup> Group of Experts Final Report, DRC-OTP-2010-0045 at 0125, para. 346.

<sup>21</sup> Human Rights Watch, ‘You Will Be Punished’, December 2009 Report, Annexes I, III and V, DRC-OTP-2014-0240 (hereinafter “HRW December 2009 Report”), at 0304, 0318 and 0322.

<sup>22</sup> HRW December 2009 Report, p. 52. DRC-OTP-2014-0240, at 0298.

<sup>23</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Mission to the Democratic Republic of the Congo, A/HRC/14/24/Add.3, (hereinafter “Alston report”), 1 June 2010, para. 10, DRC-OTP-2020-0360.

<sup>24</sup> Alston report, para. 10. DRC-OTP-2020-0360.

<sup>25</sup> Alston report, para. 62-64, DRC-OTP-2020-0360, at 0375; HRW December 2009 Report, p. 52, DRC-OTP-2014-0240 at 0298.

<sup>26</sup> Alston report, paras. 62-64, DRC-OTP-2020-0360. HRW December 2009 Report, pp. 52, 64 and 72-74, DRC-OTP-2014-0240, at 0298, 0310 and 0318-0322.

<sup>27</sup> HRW December 2009 Report, p. 75 and 76, DRC-OTP-2014-0240 at 0321 and at 0322.

[REDACTED]

15. The war crimes and crimes against humanity perpetrated by the FDLR were carried out in execution of an organisational policy to attack civilians and commit such crimes and implement an international campaign to achieve the FDLR's goals. The warnings issued by MBARUSHIMANA, together with MURWANASHYAKA's and MUDACUMURA's orders to attack civilians and their supervision of the progress of the attacks, demonstrate that the FDLR leaders had an organisational policy to encourage or promote the acts constituting an attack against a civilian population within the meaning of Article 7(2)(a). The widespread and systematic nature of the attack (Article 7(1)) is established through the evidence relating to the crimes mentioned above.

16. The strategy of committing crimes in order to force a negotiation to acquire or retain political relevance has been successful for other militias in the Great Lakes region. These include Jean-Pierre Bemba's *Mouvement de Libération du Congo* (MLC), who became one of the four Congolese Vice-Presidents during the transition, and Bosco Ntaganda, leader of the *Congrès national pour la Défense du Peuple* (CNDP), who became a General in the Congolese army, despite the existence of an arrest warrant against him issued by this Court. Even Joseph Kony's Lord's Resistance Army received offers of impunity and political reintegration as an incentive to stop its crimes.

17. The FDLR leaders were aware of the success of this strategy, and requested similar treatment at the commencement of the DRC-Rwanda operation. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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28 [REDACTED]

30 [REDACTED]

18. Callixte MBARUSHIMANA, Executive Secretary of the FDLR, made two contributions as a co-perpetrator to the criminal plan. As an active FDLR top leader and member of the *Comité directeur* (Steering Committee), he contributed to its adoption. Additionally, MBARUSHIMANA led the implementation of the plan through his extortive international campaign.

19. The Steering Committee<sup>31</sup> is the highest functioning FDLR decision-making body and *inter alia*, develops the group's defence and security policies. To persuade the international community that the FDLR could not be defeated militarily was a critical defence and security policy for the FDLR. Such a policy had to be adopted by the top leaders that integrated the Steering Committee. As active top leaders of the FDLR and members of its Steering Committee, MURWANASHYAKA, MUDACUMURA, MBARUSHIMANA, agreed, adopted, and implemented the plan.

20. The evidence will show that MBARUSHIMANA's responsibility as Executive Secretary and member of the Steering Committee was not a formality, but that he performed in accordance with his role. He was in near and constant contact with the FDLR President and other prominent FDLR members, and played a very active role in the leadership of the organisation. The FDLR is not a political party; it is solely a combatant force dedicated to committing crimes to gain political power. MBARUSHIMANA's official duties included his engagement with the criminal plan. He played a central role in the leadership structure that adopted the criminal plan and his work was necessary for its implementation. These actions make him responsible pursuant to Article 25(3)(a) of the Rome Statute as a co-perpetrator.

21. In the alternative, the Prosecution submits that Callixte MBARUSHIMANA bears criminal responsibility pursuant to Article 25(3)(d) for the crimes committed by the FDLR in the Kivus in 2009. MBARUSHIMANA is one of the top leaders of the FDLR. He shares and sought to further the FDLR's common purpose of carrying out widespread and systematic attacks against the civilian population to create a "humanitarian catastrophe" and an international campaign to persuade the DRC and Rwanda Governments and the international community that the FDLR could not be defeated militarily and to extort from them concessions in order to stop atrocities against civilians. Orchestrating and implementing the international campaign was MBARUSHIMANA's contribution to the achievement of the purposes of the FDLR.

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<sup>31</sup> FDLR Statute, DRC-OTP-2009-0055 at 0072, Article 39. See Annex 4.

**B. PERSON AGAINST WHOM A WARRANT OF ARREST IS SOUGHT (Article 58(2)(a))**

22. Callixte MBARUSHIMANA,<sup>32</sup> son of Sendogoro and Concessa Ruvugundi, was born on 24 July 1963 in Ndusu, Ruhengeri Northern Province, Rwanda.<sup>33</sup> He is believed to be of Hutu ethnicity, and is otherwise known as “Maneza”.<sup>34</sup> He is married and has three sons, all of whom reside with him and his wife in Paris, France,<sup>35</sup> where he has refugee status.<sup>36</sup> MBARUSHIMANA holds a residence permit issued by the Police Department of Paris, valid from 31 December 2003 until 31 December 2013.<sup>37</sup>

23. MBARUSHIMANA is a graduate in information technology engineering from the University of Constantine, Algeria. He reportedly pursued further studies in France.

24. He worked as a computer technician with the United Nations Development Program (UNDP) in Kigali between July 1992 and July 1994. After the evacuation from Rwanda of foreign United Nations staff in April 1994, MBARUSHIMANA is said to have appointed himself Officer-in-Charge of UNDP between 10 April and 4 July 1994. During this time, he is alleged to have participated in two massacres and to be responsible for the murders of Rwandans of Tutsi ethnicity employed by the UNDP.<sup>38</sup> MBARUSHIMANA was investigated by the International Criminal Tribunal for Rwanda (ICTR) for these accusations, although the Office of the Prosecutor did not present the case.<sup>39</sup> MBARUSHIMANA is wanted on charges

<sup>32</sup> Photos of Callixte MBARUSHIMANA are attached as Annex 1.

<sup>33</sup> [REDACTED]; Interpol, DRC-OTP-2014-0574, [REDACTED] available at [http://www.interpol.int/public/Data/Wanted/Notices/Data/2004/74/2004\\_52874.asp](http://www.interpol.int/public/Data/Wanted/Notices/Data/2004/74/2004_52874.asp), last accessed on 20 August 2010.

<sup>34</sup> The Leadership of Rwandan Armed Groups Abroad on the Focus on the FDLR and RUD/URUNANA, report by Rakiya OMAAR, (hereinafter “OMAAR report”), December 2008, DRC-OTP-2001-0125, page 30, available at <http://www.rdc.org.rw/Documentation/The%20Leadership%20of%20Rwandan%20Armed%20Groups%20abroad%20with%20a%20focus%20on%20the%20FDLR%20and%20RUD%20Urunana.pdf>, last accessed on 19 August 2010.

<sup>35</sup> [REDACTED]

[REDACTED] UN Administrative Tribunal, Judgement No. 1192, DRC-OTP-2012-0002 at DRC-OTP-2012-0007, available at <http://americanradioworks.publicradio.org/features/rwanda/cmdecision.pdf>, last accessed on 19 August 2010.

of genocide and crimes against humanity in Rwanda, where there is a warrant for his arrest pending execution since October 2004.<sup>40</sup>

25. MBARUSHIMANA worked as a United Nations Volunteer with the UNDP in Luanda, Angola, between December 1996 and December 1999, and as an Electronic Data Processing Assistant with the United Nations Interim Mission in Kosovo (UNMIK) between 10 November 2000 and 30 April 2001. On 24 April 2001 he was informed that his contract would not be renewed in view of the allegations about his implication in the genocide.<sup>41</sup>

26. In 2002 or 2003 MBARUSHIMANA moved to France, where he was granted refugee status in 2003, and has remained there since.

27. MBARUSHIMANA's first known association with the FDLR appears to have been through his appointment as FDLR Commissioner for Finance in 2004. MBARUSHIMANA was elected Deputy Executive Secretary of the FDLR on 25 June 2005 for a five-year term.<sup>42</sup> As of 17 July 2007, at the latest, he began exercising functions as the FDLR Executive Secretary.<sup>43</sup> In this capacity, he is one of the highest-ranking members in the FDLR's political structure.

## **C. CRIMES COMMITTED BY CALLIXTE MBARUSHIMANA (Article 58(2)(b))**

### **Count 1**

#### **Attack against the civilian population constituting war crimes**

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

From on or about 20 January 2009 to the date of this application, Callixte MBARUSHIMANA, as a co-perpetrator or in the alternative as part of a group of persons acting with a common purpose, committed, or contributed to the direction of, an intentional attack against the civilian population of North and South Kivu Provinces, DRC, including the populations of Remeka, Pinga, Kipopo, Mianga, Luofu, Kasiki, Busurungi and neighbouring villages, Manje and Malembe constituting war crimes perpetrated by the FDLR.

### **Count 2**

<sup>40</sup> [REDACTED]

<sup>41</sup> United Nations Administrative Tribunal Judgment, No. 1192, 30 September 2004, DRC-OTP-2012-0002, at 0010.

<sup>42</sup> FDLR press release of 27/06/05, DRC-OTP-2001-0087.

<sup>43</sup> FDLR press release of 17/07/07, DRC-OTP-2001-0024. MBARUSHIMANA began authoring FDLR press releases as Executive Secretary at the latest on this date.

### **Destruction of property constituting war crimes**

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

From on or about 20 January 2009 to the date of this application, Callixte MBARUSHIMANA, as a co-perpetrator or in the alternative as part of a group of persons acting with a common purpose, committed, or contributed to the commission of, war crimes in the form of destruction of the adversaries' property or extensive destruction of property not justified by military necessity by the FDLR at various locations in North and South Kivu Provinces, DRC, including Kipopo, Mianga, Luofu, Kasiki, Busurungi and neighbouring villages, Manje and Malembe.

### **Count 3**

#### **Murders or wilful killings constituting war crimes**

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

From on or about 20 January 2009 to the date of this application, Callixte MBARUSHIMANA, as a co-perpetrator or in the alternative as part of a group of persons acting with a common purpose, committed, or contributed to the commission of, war crimes in the form of murders or wilful killings perpetrated by the FDLR upon members of the civilian population of various locations in North and South Kivu Provinces, DRC, including Malembe, Remeka, Pinga, Busheke, Kipopo, Mianga, Luofu, Kasiki, Busurungi and surrounding villages, and Manje.

### **Count 4**

#### **Murders constituting crimes against humanity**

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

From on or about 20 January 2009 to the date of this application, Callixte MBARUSHIMANA, as a co-perpetrator or in the alternative as part of a group of persons acting with a common purpose, committed, or contributed to the commission of, crimes against humanity which in fact occurred, namely murders perpetrated by the FDLR upon members of the civilian population of various locations in North and South Kivu Provinces, DRC, including Malembe, Remeka, Pinga, Busheke, Kipopo, Mianga, Luofu, Kasiki, Busurungi and surrounding villages, and Manje.

### **Count 5**

#### **Torture constituting a war crime**

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

From on or about 20 January 2009 to the date of this application, Callixte MBARUSHIMANA, as a co-perpetrator or in the alternative as part of a group of persons acting with a common purpose, committed, or contributed to the commission of, a war crime in the form of torture perpetrated by the FDLR upon members of the civilian population of Busurungi, DRC, inflicted through rape, at various locations in North and South Kivu Provinces, DRC.

### **Count 6**

#### **Torture constituting a crime against humanity**

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

From on or about 20 January 2009 to the date of this application, Callixte MBARUSHIMANA, as a co-perpetrator or in the alternative as part of a group of persons acting with a common purpose, committed, or contributed to the commission of, a crime against humanity which in fact occurred, namely torture perpetrated by the FDLR upon members of the civilian population of Busurungi, DRC, inflicted through rape at various locations in North and South Kivu Provinces, DRC, and through the mutilation of their genitals at Busurungi, on or about 10 May 2009.

### **Count 7**

#### **Rape constituting a war crime**

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

From on or about 20 January 2009 to the date of this application, Callixte MBARUSHIMANA, as a co-perpetrator or in the alternative as part of a group of persons acting with a common purpose, committed, or contributed to the commission of, war crimes in the form of rape of civilian women at various locations of North and South Kivu, DRC, including, but not limited to Busheke, Pinga, Miriki, Remeka, Busurungi and surrounding villages, Manje, and Malembe.

### **Count 8**

**Rape constituting a crime against humanity**

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

From on or about 20 January 2009 to the date of this application, Callixte MBARUSHIMANA, as a co-perpetrator or in the alternative as part of a group of persons acting with a common purpose, committed, or contributed to the commission of, crimes against humanity which in fact occurred, namely rape of women at various locations of North and South Kivu, DRC, including, but not limited to Busheke, Pinga, Miriki, Remeka, Busurungi, Manje, and Malembe.

**Count 9**

**Inhumane acts constituting crimes against humanity**

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

From on or about 20 January 2009 to the date of this application, Callixte MBARUSHIMANA, as a co-perpetrator or in the alternative as part of a group of persons acting with a common purpose, committed, or contributed to the commission of, crimes against humanity which in fact occurred, namely inhumane acts perpetrated by the FDLR upon male members of the civilian population of various locations of North and South Kivu, DRC, including, but not limited to Miriki, who were forced to rape women, as well as upon women who were mutilated on 28 April and 5 May 2009, and pregnant women who had their stomachs cut open and their foetuses forcibly removed at Busurungi on 10 May 2009.

**Count 10**

**Inhuman treatment constituting war crimes**

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

From on or about 20 January 2009 to the date of this application, Callixte MBARUSHIMANA, as a co-perpetrator or in the alternative as part of a group of persons acting with a common purpose, committed, or contributed to the commission of, war crimes in the form of inhuman treatment perpetrated by the FDLR upon male members of the civilian population of various locations of North and South Kivu, DRC, including, but not limited to Miriki, who were forced to rape women, as well as upon women who were mutilated on 28 April and 5 May 2009, and pregnant women who had their stomachs cut open and their foetuses forcibly removed on 10 May 2009 at Busurungi.



## Count 11

### Persecution constituting a crime against humanity

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

From on or about 20 January 2009 to the date of this application, Callixte MBARUSHIMANA, as a co-perpetrator or in the alternative as part of a group of persons acting with a common purpose, committed, or contributed to the commission of, the crime against humanity of persecution by intentionally and in a discriminatory manner targeting women and men seen to be affiliated with the FARDC on the basis of their gender, through torture, rape, inhumane acts and inhuman treatment, in various locations in North and South Kivu Provinces, DRC.

#### **D. SUMMARY OF EVIDENCE AND OTHER INFORMATION ESTABLISHING REASONABLE GROUNDS TO BELIEVE THAT CALLIXTE MBARUSHIMANA COMMITTED CRIMES WITHIN THE JURISDICTION OF THE COURT (Article 58(2)(d))**

##### **1. Categories of evidence relied on primarily**

28. Consistent with the requirements of Article 58(2)(d) of the Rome Statute, the Prosecution furnishes in the present application a summary of evidence and other information sufficient to establish reasonable grounds to believe that MBARUSHIMANA has committed crimes within the jurisdiction of the Court.

29. For the purposes of this application, the Prosecution relies primarily on the following categories of evidence and information:

a. FDLR press releases authored by Callixte MBARUSHIMANA obtained from the now defunct FDLR website and from other sources;<sup>44</sup>

b. other FDLR documents, including a copy of the FDLR Statute;<sup>45</sup>

c. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>44</sup> The press releases are provided as Annex 4.

<sup>45</sup> A copy of the FDLR Statute is provided as Annex 4.

[REDACTED]

d. [REDACTED]

[REDACTED]

e. [REDACTED]

[REDACTED]

f. [REDACTED]

[REDACTED]

g. statements taken by the Prosecution from [REDACTED]

[REDACTED] witnesses;<sup>49</sup>

h. witness statements taken by [REDACTED]; and

i. documents and reports authored by a variety of other sources, including, but not limited to United Nations bodies and agencies, non-governmental organisations, local and international media, and various open sources.<sup>50</sup>

<sup>46</sup>

[REDACTED]

30. These materials are relied upon for the purposes of establishing both reasonable grounds to believe that MBARUSHIMANA has committed crimes within the jurisdiction of the Court pursuant to Article 58(1)(a) of the Rome Statute and the necessity of his arrest pursuant to Article 58(1)(b) of the Rome Statute.<sup>51</sup>

31. The Prosecution informs the Pre-Trial Chamber that the investigation is ongoing. The Prosecution is in ongoing contact with the relevant authorities of several States Parties and non-States Parties for the purposes of expediting the Prosecution's various requests for assistance and collection of evidence.

## 2. The historical roots of the FDLR's use of violence

32. The FDLR's reliance on violence to achieve its goals goes back to the group's historical roots in the Rwandan genocide. When the forces led by Paul Kagame overthrew the genocidal regime in Rwanda, members of the former *Forces Armées Rwandaises*<sup>52</sup> (ex-FAR) and members of the *interahamwe* militias who had masterminded and executed the death of almost one million people fled Rwanda for the two Kivu Provinces, in the Eastern part of the country then called Zaire. While in the camps, they began to recruit and train troops and organised themselves in structured political-military groups designed to oppose the new Rwanda government through violent means.

33. In early 1995, a group of ex FAR leaders, including MUDACUMURA, created the *Rassemblement pour le retour des Réfugiés Rwandais* (RDR), the earliest Rwandese rebel group and a predecessor of the FDLR. The RDR recruited a force of between 50,000 and 70,000 men from within the refugee camps. Between 1995 and 1996, operating from the refugee camps, the RDR launched military attacks on Rwandan territory, in pursuit of the goal of returning to power there. These attacks triggered the first Congo war. The RDR was dispersed around mid-1996, when the Rwandan Patriotic Army (RPA) entered the DRC to,

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The Prosecution recalls that the Appeals Chamber has held that “*when disposing of an application for a warrant of arrest under article 58(1) of the Statute, a Pre-Trial Chamber should not require a level of proof that would be required for the confirmation of charges or for conviction.*” *Prosecutor v. Omar Hassan Ahmad Al Bashir*, 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, 3 February 2010, para. 30.

<sup>52</sup> The FAR were the Rwandan armed forces until 1994.

among other objectives, disband the refugee camps in joint operations with the Ugandan armed forces (UPDF) and with the *Alliance des Forces Démocratiques pour la Libération du Congo* (AFDL), the Congolese rebel group that would soon be led by Laurent Desiré Kabila.

34. From the remnants of the RDR, a second Rwandese Hutu rebel group, the *Armée de Libération du Rwanda* (ALIR) was created. Like the RDR, ALIR was partially composed of ex-FAR leaders and sought to overthrow the Rwandan Government and install its leaders in control in Rwanda. A Western faction of the group, called ALIR II, was led by MUDACUMURA. It would later give birth to the FDLR.<sup>53</sup>

35. The second Congo war started in mid-1998, when relations deteriorated between Laurent-Désiré Kabila, the new DRC President, and his former allies. In order to maintain the balance of military power with his neighbours, Laurent-Désiré Kabila decided to rely on foreign armed groups, including Rwandese rebel groups present on DRC territory. Those groups fought in the second Congo war in support of Kabila and against Rwanda and Uganda.

36. In 1999, DRC, Uganda, Rwanda and other states involved in the conflict signed the Lusaka Ceasefire Agreement,<sup>54</sup> which required disarming armed groups present on Congolese soil and invited States Parties to the agreement to offer amnesty and political asylum to former combatants, “*except for génocidaires*”.

37. As a result of this exclusion, Rwandese rebel groups needed to cover up their connection to the Rwandan genocide, so as to avoid isolation and gain international legitimacy, clearing the way for their participation in political negotiations.

38. By early 2000, following an internal power struggle, the FDLR was created, from a splinter group of ALIR leaders based in the city of Lubumbashi. These developments led to the appointment of MURWANASHYAKA as FDLR Vice-President and then, in late 2001, to his being named President of the group. MURWANASHYAKA had been a student in Germany in 1994 and was not implicated in the genocide. However, in 1997, he was the RDR’s representative in Germany, was later associated with ALIR II (see para. 34 above), and finally joined the FDLR once it was created.

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<sup>53</sup> Other future leaders or influential FDLR members were part of ALIR as well, including Gaston IYAMUREMYE, currently the FDLR 2<sup>nd</sup> Vice-President and Idelphonse NIZEYIMANA, an advisor to IYAMUREMYE who is currently in detention at the ICTR, facing charges of genocide and crimes against humanity. OMAAR report, DRC-OTP-2001-0125, p. 64.

<sup>54</sup> The 10 July 1999 Lusaka Ceasefire Agreement signed by the DRC, Namibia, Angola, Zimbabwe, Burundi, Rwanda and Uganda called for the set-up of a mechanism for the tracking, disarmament and cantonment of all armed groups in the DRC. The agreement mentioned the ex-FAR and *Interahamwe* militias as two of the groups that ought to be disarmed, and called for the handing over to the International Criminal Tribunal for Rwanda of mass killers, perpetrators of crimes against humanity and war criminals. The agreement also called on signatory states to create conditions conducive to the disarmament of the armed groups, including amnesty and political asylum, “*except for génocidaires*”. In between the adoption of the Lusaka Agreement and June 2002, the UN Security Council adopted various resolutions and made statements calling for the implementation, on a voluntary basis, of the disarmament, demobilization, reintegration, repatriation and resettlement of the FDLR.

39. In order to strengthen his allies, Laurent-Desiré Kabila supported the idea of a new FDLR leadership that was not obviously connected to the Rwandan genocide. His Government supported the attempts to cover up the FDLR's genocidal connections on several occasions. In September 2001 the DRC government presented the FDLR to MONUC and the diplomatic community as "*legitimate opposition to a sanguinary government in Kigali*". In this phase of their activities, some members of the FDLR went as far as admitting the genocide and condemning it publicly, in an attempt to legitimise their political activities.

40. When Joseph Kabila succeeded his late father as DRC President in January 2001, the Congolese Government's support of the FDLR generally declined.

41. On 19 April 2002, the States involved in the second Congo war and some of the main Congolese armed groups reached an agreement to end the war at Sun City, South Africa. In July of that year, the DRC and Rwandan Governments signed the Pretoria Accords, whereby the DRC undertook to track, disarm and repatriate to Rwanda, without conditions, the Rwandese rebel groups. In exchange, Rwanda agreed to the withdrawal from the DRC of 20,000 of its soldiers, whose presence it had believed to be necessary until that time to control the FDLR and its predecessors.

42. In September 2002, the DRC and Ugandan Governments agreed on the withdrawal of the Ugandan army from the DRC. The second Congo war was officially over. Close to 4 million people are estimated to have died in DRC as a result of the two Congo wars.

43. At that time, Joseph Kabila officially supported the demobilization and repatriation of FDLR combatants initiated by MONUC. In September 2002, the DRC government banned all FDLR activities on Congolese territory and issued an expulsion order affecting the leaders of the FDLR present in DRC, in implementation of the Pretoria Accords. However, the group neither dismantled nor disarmed. Instead, the FDLR continuously used violence against civilians<sup>55</sup> in North and South Kivu Provinces in order to survive as an actor on the international scene and to gain political power.

44. In 2003, MURWANASHYAKA faced an internal leadership challenge, fuelled by the return to Rwanda of the then FDLR Commander in Chief, General Paul RWARAKABIJE, in

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<sup>55</sup> Eighteenth report of the Secretary-General on MONUC, S/2005/506, 2 August 2005, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/445/73/PDF/N0544573.pdf?OpenElement>, DRC-OTP-0128-0215, at 0221 para. 33; [Report of the Secretary-General on measures to prevent the illegal exploitation of natural resources financing armed groups and militias in the eastern part of the Democratic Republic of the Congo, including through a certificate-of-origin regime](#), S/2007/68, 8 February 2007, DRC-OTP-0185-1890, at 1898, para. 29, available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/DRC%20S200768.pdf>, last accessed on 19 August 2010; Twenty-fifth report of the Secretary-General on MONUC, S/2008/218, 2 April 2008, DRC-OTP-2020-0484, at 0487 para. 15; [Twenty-sixth report of the Secretary-General on MONUC](#), S/2008/433, 3 July 2008, DRC-OTP-2003-0476, at 0477, para. 3, available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/DRC%20S2008433.pdf>, last accessed on 19 August 2010.

November 2003. In the August 2003 election, Paul Kagame had been elected Rwandan President. The new Government had promised a secure return of RWARAKABIJE and a number of other high-ranking officers.

45. The FDLR leadership was divided as to the question of whether the group should disband and return to Rwanda, following RWARAKABIJE's example. MURWANASHYAKA's view was that they should not, and he received the support of MUDACUMURA, who replaced RWARAKABIJE and became the overall FDLR Commander.

46. In March 2005, the Catholic Sant'Egidio community facilitated a meeting between the Government of the DRC and the FDLR leadership in Rome. At the conclusion of the meeting the FDLR President, MURWANASHYAKA, who had led the FDLR delegation in Rome, travelled to the Kivus to discuss the outcome of the meeting with the organisation's military leaders.<sup>56</sup> MURWANASHYAKA signed a declaration on 31 March 2005 (the "Rome Declaration"), pursuant to which the FDLR committed itself to renounce its armed struggle in favour of a political one and to disarm and repatriate its fighters –subject to unspecified conditions or "*accompanying measures*".<sup>57</sup>

47. In numerous statements, as well as in international agreements, Rwanda expressed its concerns about the presence of the FDLR in the DRC, describing it as a direct threat to the security of Rwanda. The Peace and Security Council of the African Union, meeting in Libreville, Gabon, declared on 10-11 January 2005 that the presence of the ex-FAR and *interahamwe* in the DRC "*endangers the security of this country and that of neighbouring countries*".<sup>58</sup>

48. Between 2002 and 2010, the UN Security Council repeatedly expressed serious concerns about the military activities of the FDLR in Eastern DRC. It characterised the group as a threat to the peace and security of the Great Lakes region, as well as a cause of insecurity and instability there; as a threat to the local civilian population; and as an impediment to good-neighbourly relations between the DRC and Rwanda.<sup>59</sup> The Security Council has

<sup>56</sup> [REDACTED]

<sup>57</sup> FDLR March 2005 Rome Declaration, DRC-OTP-2001-0451, authored by Ignace MURWANASHYAKA.

<sup>58</sup> African Union, Peace and Security Council, Report of the Chairperson of the Commission on the situation in the East of the Democratic Republic of Congo (DRC) and the relations between DRC and Rwanda, PSC/AHG/3(XXIII), 10-11 January 2005, DRC-OTP-2020-0093, at 0105, available at [http://www.africa-union.org/root/AU/AUC/Departments/PSC/ps/PSC\\_2004\\_2007/pdfs/2005/2005\\_23\\_R1E.pdf](http://www.africa-union.org/root/AU/AUC/Departments/PSC/ps/PSC_2004_2007/pdfs/2005/2005_23_R1E.pdf), last accessed on 19 August 2010.

<sup>59</sup> UNSC Resolution 1445 (2002), 4 December 2002 (referring to groups referred to in the Lusaka Ceasefire Agreements, which includes the ex-FAR and *interahamwe*), DRC-OTP-0131-0144; UNSC Presidential statement S/PRST/2004/15, 14 May 2004, DRC-OTP-2020-0043; UNSC Presidential statement S/PRST/2005/31, 13 July 2005, DRC-OTP-2020-0060; UNSC Presidential statement S/PRST/2005/46, 4 October 2005, DRC-OTP-0128-0148; UNSC Resolution 1649 (2005), 21 December 2005, DRC-OTP-0185-1917, available at <http://www.cnvnr.ro/pdf/alerte/resolution-1649-2006.pdf>, last accessed on 19 August 2010;

repeatedly mandated MONUC to support the FARDC in the disarmament of various armed groups, including the FDLR.<sup>60</sup>

### 3. Armed conflict in the provinces of North and South Kivu in 2009

49. In December 2008 the DRC and Rwanda Governments held bilateral meetings seeking to address the problems arising out of the FDLR's continued presence and operations in DRC territory. On 5 December 2008, they announced their agreement on a joint military plan, which revolved around removing the FDLR from North Kivu, and targeting the group's economic interests there.

50. On 16 January 2009, Bosco Ntaganda, the then-Chief of Staff of the CNDP, announced that the CNDP and the Government of the DRC had reached an agreement on an immediate cessation of hostilities, on the participation of the CNDP in the operation against the FDLR, and on the immediate integration of CNDP combatants into the FARDC. The CNDP's announcement was followed by similar statements from the leaders of other Congolese armed groups, including the *Coalition des Patriotes Résistants Congolais* (PARECO).

51. On 20 January 2009, the FARDC and RDF jointly launched operation *Umoja Wetu*. An estimated 3,500 to 4,000 RDF troops crossed into the DRC. The two national forces sought to forcefully dislodge the FDLR from its bases in North Kivu and enable willing FDLR troops to demobilise and reintegrate into civilian life in Rwanda.

52. On 26 January, the FARDC initiated the accelerated integration of CNDP and other Congolese armed groups into its ranks. The coalition established to fight the FDLR came to include more than 25,000 elements from FARDC, CNDP, PARECO and the traditional armed groups known as the Mayi-Mayi.

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UNSC Presidential statement S/PRST/2007/28, 23 July 2007, DRC-OTP-2020-0056; UNSC Resolution 1804 (2008), 13 March 2008, DRC-OTP-2020-0019, available at [http://www.unic.or.jp/security\\_co/pdf/res1804\(2008\).pdf](http://www.unic.or.jp/security_co/pdf/res1804(2008).pdf), last accessed on 19 August 2010, "expressing its grave concern at the continued presence of the Forces démocratiques de libération du Rwanda (FDLR), ex-Rwandan Armed Forces (ex-FAR)/Interahamwe, and other Rwandan armed groups [...] operating in the eastern Democratic Republic of the Congo, which continue to pose a serious threat to the peace and security of the entire Great Lakes region"; UNSC Resolution 1856 (2008), 22 December 2008, DRC-OTP-2014-0945, available at [http://www.unic.or.jp/security\\_co/pdf/res1856\(2008\).pdf](http://www.unic.or.jp/security_co/pdf/res1856(2008).pdf), last accessed on 19 August 2010; UNSC Resolution 1896 (2009), 30 November 2009, available at <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/DRC%20S%20RES%201896.pdf>, last accessed on 19 August 2010; UNSC Resolution 1906 (2009), 23 December 2009, DRC-OTP-2020-0010 available at <http://monuc.unmissions.org/LinkClick.aspx?fileticket=sp3bXfZYFxy%3D&tabid=2615&mid=3905>, last accessed on 19 August 2010; UNSC Resolution 1925 (2010), 28 May 2010, DRC-OTP-2020-0002, available at <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/DRC%20S%20RES%201925.pdf>, last accessed on 19 August 2010.

<sup>60</sup> See *inter alia* UNSC Resolutions 1565(2004), DRC-OTP-1013-0304 and 1856(2008), DRC-OTP-2014-0945.

53. On 27 January, the FARDC-RDF coalition attacked key FDLR bases at Kibua and Katoyi, villages in Ufamandu *groupement*, Masisi territory,<sup>61</sup> where the FDLR Reserve Brigade had its command centre.<sup>62</sup>

54. On 21 February 2009, all the RDF troops present in North Kivu were ordered to terminate the offensive. They began their return to Rwanda on 25 February 2009.

55. On 2 March 2009, the FARDC, supported by MONUC, began a follow-up operation against FDLR. Operation *Kimia II* was aimed at neutralizing FDLR by preventing it from reoccupying former positions and cutting its lines of economic sustenance.

56. On 31 December 2009, FARDC issued a communiqué announcing the conclusion of operation *Kimia II*; and from January 2010 onwards, the FARDC launched operation *Amani Leo*, supported by MONUC from 25 February 2010 onwards.

#### 4. Characterisation of the armed conflict pursuant to Article 8 of the Rome Statute

57. The Prosecution submits that, on 20 January 2009 at the latest, an international armed conflict started between the FARDC-RDF coalition and the FDLR. This conflict lasted at least until 25 February 2009, when the RDF troops began departing from North Kivu. The existence of a joint FARDC-RDF military operation in North Kivu, DRC, from 20 January until 25 February 2009 was acknowledged by the UN Secretary-General in his March 2009 report to the Security Council on the work of MONUC.<sup>63</sup> The armed conflict was international in nature given the direct intervention of Rwanda through its troops.<sup>64</sup>

58. The foregoing also establishes that as of 2 March 2009, the armed conflict continued in North and South Kivu, between the FARDC, supported by MONUC, and the FDLR. This armed conflict is ongoing. The existence of operations *Kimia II* and *Amani Leo* in North and South Kivu, DRC, from 2 March 2009 until the date of the present application has been acknowledged by the UN Secretary-General in his subsequent periodic reports to the Security Council on the work of MONUC.<sup>65</sup>

<sup>61</sup> HRW December 2009 report, Annex I, page 157, <http://www.hrw.org/node/87151>, DRC-OTP-2014-0240 at -0403; Radio Okapi, « Masisi : opération contre les FDLR, 10 localités passent sous contrôle des FARDC », 28 January 2009, available at <http://radiookapi.net/sans-categorie/2009/01/28/masisi-operation-contre-les-fdlr-10-localites-passent-sous-contrrole-des-fardc/>, last accessed on 19 August 2010.

<sup>62</sup> HRW December 2009 report, page 49 <http://www.hrw.org/node/87151>, DRC-OTP-2014-0240 at 0295

<sup>63</sup> Secretary-General's 27<sup>th</sup> report on the work of MONUC, March 2009 (S/2009/160), paras 8, 9, 12 and 14, DRC-OTP-2014-0865 at 0866 and 0867.

<sup>64</sup> *Prosecutor v Thomas Lubanga Dyilo*, Pre-Trial Chamber I, Decision on the confirmation of charges, ICC-01/04-01/06-796-Conf-tEN, 29 January 2007, para 209.

<sup>65</sup> Secretary-General's 28<sup>th</sup> report on the work of MONUC, 30 June 2009 (S/2009/335), paras 3 and 11, DRC-OTP-2014-0885 and at 0887, available at [http://www.un-casa.org/CASAUpload/ELibrary/S\\_2009\\_335.pdf](http://www.un-casa.org/CASAUpload/ELibrary/S_2009_335.pdf), last accessed on 19 August 2010; Secretary-General's 29<sup>th</sup> report on the work of MONUC, 18 September 2009 (S/2009/472), paras 4-7, DRC-OTP-2014-0904 at 0905, available at



59. UN Security Council Resolution 1856 (2008), adopted pursuant to Chapter VII of the UN Charter, gave MONUC a mandate to support and participate alongside the FARDC in military operations against the FDLR through 31 December 2009.<sup>66</sup> Throughout operation *Kimia II*, MONUC provided logistical, planning and operational support, as well as, at least during *Kimia II*, some fire power, to the 16,000 FARDC troops earmarked for joint FARDC-MONUC operations in North and South Kivu.<sup>67</sup> Since January 2010, the FARDC and MONUC have conducted joint planned operation *Amani Leo*.<sup>68</sup>

60. For the purpose of this application, the Prosecution submits that it is immaterial whether the conflict that took place between 2 March and the date of this application in North and South Kivu is characterized as international or non-international. Each of the war crimes alleged to have been committed arises from conduct which is proscribed in both types of conflicts. Each of the proposed counts thus lists two sub-paragraphs of Article 8(2) as a basis for the counts alleging war crimes. However, the Prosecution asserts that it has established reasonable grounds to believe that an armed conflict of a non-international character existed in North and South Kivu, DRC, between the FARDC, at times in conjunction with MONUC, and the FDLR.<sup>69</sup>

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<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/DRC%20S%202009%20472.pdf>, last accessed on 19 August 2010; Secretary-General's 30<sup>th</sup> report on the work of MONUC, 4 December 2009 (S/2009/623), paras 3-6, DRC-OTP-2014-0921 at 0922, available at [http://www.reliefweb.int/rw/RWFiles2009.nsf/FilesByRWDocUnidFilename/EGUA-7YJTZT-full\\_report.pdf/\\$File/full\\_report.pdf](http://www.reliefweb.int/rw/RWFiles2009.nsf/FilesByRWDocUnidFilename/EGUA-7YJTZT-full_report.pdf/$File/full_report.pdf), last accessed on 19 August 2010.

<sup>66</sup> UNSC Resolution 1856 (2008), Un Doc. S/RES/1856 (2008); paras. 1 and 3 (g), DRC-OTP-2014-0945 at 0947 and 0948

<sup>67</sup> Secretary-General's 27<sup>th</sup> report on the work of MONUC, 27 March 2009 (S/2009/160), paras 10, 11 and 15, DRC-OTP-2014-0865 at 0867; Secretary-General's 28<sup>th</sup> report on the work of MONUC, 30 June 2009 (S/2009/335), paras 3 and 11, DRC-OTP-2014-0885 and at 0887; Secretary-General's 29<sup>th</sup> report on the work of MONUC, 18 September 2009 (S/2009/472), para 9, DRC-OTP-2014-0904 at 0906; Secretary-General's 30<sup>th</sup> report on the work of MONUC, 4 December 2009 (S/2009/623), paras 2 and 5, DRC-OTP-2014-0921 and at 0922; 31<sup>st</sup> Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, 30 March 2010 (S/2010/164), paras 3 and 4, DRC-OTP-2014-1132 at 1133

<sup>68</sup> Interim Report of the Group of Experts on the Democratic Republic of the Congo, 29 April 2010, DRC-OTP-2014-1106 at -1112, para. 25.

<sup>69</sup> The Prosecution submits that the position in international law as to whether the participation of an international force in an otherwise non-international armed conflict renders that conflict international is unsettled. There appears to be no case law on point from this Court, the International Criminal Tribunal for the Former Yugoslavia (ICTY) or the International Court of Justice (ICJ). The Prosecution submits that a 1997 decision by a Belgian military court which dealt with the question of whether an armed conflict existed between the United Nations Operation in Somalia forces and non-governmental armed groups is of limited assistance. *Coelus en Baert*, Cour Militaire, 17 December 1997. Extracts of the decision are reproduced in A. Weyembergh, La notion de conflit armé, le droit international humanitaire et le forces des Nations Unies en Somalie (A propos de l'arrêt de la Cour militaire du 17 décembre 1997), *Revue de Droit pénal et de criminologie*, February 1999, pp. 177-201. Likewise, the decision on confirmation of charges in the *Bemba* case by Pre-Trial Chamber II is of limited assistance because it dealt with a different factual scenario, namely the presence of a limited number of foreign troops on the Central African Republic's territory in support of the authorities of that country. *Prosecutor v Jean-Pierre Bemba*, 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, 15 June 2009, para 246.

61. An armed conflict of a non-international character is defined as a protracted armed conflict between governmental authorities and organised armed groups or between such groups within a State. In order to distinguish an armed conflict of a non-international character from situations of internal disturbances and tensions, the intensity of the conflict and a certain degree of organization of the parties must be established.

62. The involvement of some 16,000 FARDC troops in the conflict and of an estimated 6,000 to 8,000 FDLR troops is indicative of an extremely high degree of intensity in the fighting.

63. As demonstrated below, the FDLR is a political-military organisation that operates on a well-defined decision-making process. In 2009, it was capable of planning operations, executing orders and enforcing discipline.

64. In addition to proving that an armed conflict existed, the Prosecution must establish the geographical and temporal scope of the armed conflict. The FARDC and FDLR conducted operations in all the territories of North and South Kivu, with the hostilities being particularly intense in Masisi, Walikale and Lubero territories in North Kivu and in Kalehe territory in South Kivu. Operation *Kimia II* and reprisal attacks by the FDLR took place throughout the months March to December 2009 in an uninterrupted manner, and have continued to occur through to the date of this application.

## 5. The leadership, structure and functioning of the FDLR in 2009

65. The FDLR is a combatant force that commits war crimes and crimes against humanity in order to achieve political goals. Its Statute<sup>70</sup> describes with precision its structure and its decision-making process. The group is estimated to have numbered between 6,000 to 8,000<sup>71</sup> combatants prior to January 2009, a figure that was reduced by half by April 2010.<sup>72</sup> It is organised in two main divisions, referred to as SONOKI and SOSUKI, for the North and South Kivu Provinces in which each operates. A mobile Reserve Brigade, referred to as Zenith, is based in the provincial border area between the North and the South.<sup>73</sup> The FDLR's chain of command leads to the high command, which is composed of the general staff of the

<sup>70</sup> FDLR Statute, DRC-OTP-2009-0055. See Annex 4.

<sup>71</sup> Audio recording of OTP interview with witness [REDACTED]; Group of Experts' February 2008 Report (S/2008/43), DRC-OTP-2001-0497 at 0505, para. 38; Group of Experts' November 2009 Report (S/2009/603), DRC-OTP-2015-0045 at 0053, para. 19; Secretary-General's 30<sup>th</sup> report on the work of MONUC, 4 December 2009 (S/2009/623), DRC-OTP-2014-0921 at 0921, para. 5..

<sup>72</sup> Interim Report of the Group of Experts on the Democratic Republic of the Congo, 29 April 2010, DRC-OTP-2014-1106 at -1112, para. 25.

<sup>73</sup> Both North and South Kivu Division have four Battalions each and the Reserve Brigade has three Battalions and a special unit in charge of protection. Audio recording of OTP interview with witness [REDACTED]. Each of the three brigades had approximately 2,000 men.

FDLR's military wing (FOCA) and then to the Commander of the Army, General MUDACUMURA,<sup>74</sup> based in the Kivus. MUDACUMURA reported to and received instructions from the FDLR President MURWANASHYAKA, who was based in Germany. In 2009, MURWANASHYAKA was supported by a cabinet based in the Kivus.<sup>75</sup> In order to decide on the group's activities and to promote its goals, the FDLR had a sophisticated political structure with two Vice-Presidents,<sup>76</sup> Executive Secretary Callixte MBARUSHIMANA, a Deputy Executive-Secretary and ten to twelve Executive Commissioners.

66. The Statute aims to ensure that the FDLR army follows the strategy adopted by its top leaders. All of them are joined at the level of *Comité directeur* (Steering Committee), the highest functioning FDLR decision-making body, which is comprised of similar numbers of civilian and military leaders,<sup>77</sup> who take decisions that are approved by a three-fourths majority of the members participating.<sup>78</sup> President MURWANASHYAKA, Commander MUDACUMURA,<sup>79</sup> and Executive Secretary MBARUSHIMANA are members.<sup>80</sup> The *Comité directeur*'s functions are *inter alia* to develop the group's defence and security policies.<sup>81</sup>

<sup>74</sup> A diagram of the FDLR military structure is included as Annex 2.

[REDACTED]; Audio recording of OTP interview with witness [REDACTED]. Other members of the High Command include the Deputy Commander General Stanislas NIZEYIMANA; the Chief of Staff General Leodomir MUGARAGU; the Deputy Chief of Staff Colonel Eliezer NIYIRORA; and five staff officers (G1 to G5). International Crisis Group, Congo: A Comprehensive Strategy to Disarm the FDLR', 9 July 2009, p. 34, DRC-OTP-2014-0431, at 0436, 0469 (hereinafter 'ICG Disarm the FDLR'); Annex 17 p.120 of Group of Experts Final Report Nov 2009, DRC-OTP-2010-0045 at 0164; OMAAR report, pp 85-86, DRC-OTP-2001-0125 at -0209 and -0210.

<sup>75</sup> Its director is Jean-Marie Vianney NYAWENDA (aka David MUKIZA). Another important member of the President's Cabinet is Mathias, alias MULUMBA or LEVITE (LEVITE) [REDACTED].

Straton MUSONI and Gaston IYAMUREMYE, responsible for political mobilization and diplomacy, finances and administration, and for management and defence-related matters and national security. FDLR Statute, DRC-OTP-2009-0055, Article 42, at DRC-OTP-2009-0073 to DRC-OTP-2009-0074. In practice, the 2<sup>nd</sup> Vice-President, General Gaston IYAMUREMYE (aka Rumuli Michel or Victor BYIRINGIRO), who is based in the Kivus, at times functions as a high-ranking military commander, [REDACTED].

[REDACTED]. See Audio recording of OTP interview with witness [REDACTED]; Audio recording of OTP interview with witness [REDACTED]; Audio recording of OTP interview with witness [REDACTED]; Audio recording of OTP interview with witness [REDACTED].

FDLR Statute, DRC-OTP-2009-0055 at 0072, Article 39.

<sup>78</sup> FDLR Statute, DRC-OTP-2009-0055 at 0073, Article 42.

<sup>79</sup> FDLR press release of 27/06/2005, DRC-OTP-2001-0087; OTP interview with [REDACTED].

<sup>80</sup> It is composed of FDLR President, 1<sup>st</sup> Vice-President, 2<sup>nd</sup> Vice-President, Executive Secretary (Callixte MBARUSHIMANA), Deputy Executive Secretary (Col. NDAGIJIMANA aka Rumbago aka Wilson IRATEGEKA), Executive Commissioners and Members of the Supreme Command of the Army. The Statute requires equal numbers of members of the civilian and military branches. The decisions are taken by majority of the members present. FDLR Statute, DRC-OTP-2009-0055 at 0072, Article 39.

<sup>81</sup> FDLR Statute, DRC-OTP-2009-0055, Art. 40.

67. Upon the launch of the Rwandan and Congolese operations against the FDLR, the FDLR's policy to persuade them that it could not be defeated militarily became a priority. In accordance with the Statute, any defence and security policy of this import would have had to be adopted by the Steering Committee.

68. [REDACTED] the *de jure* structure of the Steering Committee, playing a central role in the organisation and setting the course for the FDLR activities, functioned in practice. [REDACTED] MURWANASHYAKA working as the central coordinating figure, emphasizing the need to obtain the agreement of the members of the Steering Committee in connection with decisions taken during a Steering Committee meeting that took place at the latest in mid January 2009.<sup>82</sup>

69. The evidence also shows that members of the FDLR High Command consistently followed the decisions adopted by the top leaders.<sup>83</sup> [REDACTED] MURWANASHYAKA and MBARUSHIMANA, together with the top FDLR leaders based in the field, MUDACUMURA and Gaston IYAMUREMYE, were the most active senior FDLR leaders in 2009.

70. As a consequence of this *de jure* and *de facto* decision-making system, there are reasonable grounds to believe that the FDLR criminal common plan was adopted, at the very least, by MURWANASHYAKA, MUDACUMURA and MBARUSHIMANA, as three of the highest-ranking members of the *Comité directeur* active in 2009.

71. MURWANASHYAKA and MBARUSHIMANA also led the implementation of the FDLR's extortive international campaign. MBARUSHIMANA disseminated the FDLR's discourse through interviews in the media.<sup>84</sup> In addition, in consultation with MURWANASHYAKA, he issued communications, often identified with the letters "CD", which the Prosecution submits refers to *Comité directeur*. The communications, *inter alia*, demanded direct peace talks between the FDLR and the Rwandan authorities (21 times);<sup>85</sup>

<sup>82</sup> [REDACTED]

[REDACTED]  
 Audio recording of OTP interview with witness [REDACTED]  
 . See also Audio recording of OTP interview with witness [REDACTED]  
 [REDACTED]; Audio recording of OTP interview with witness [REDACTED]  
 [REDACTED]; Audio recording of OTP interview with witness [REDACTED]  
 [REDACTED]; Audio recording of OTP interview with witness [REDACTED].

[REDACTED]  
 FDLR press release of 28/04/10, DRC-OTP-2001-0924; FDLR press release of 14/01/10, DRC-OTP-2001-0924; FDLR press release of 18/11/09, DRC-OTP-2014-3476; FDLR press release of 20/10/09, DRC-OTP-2014-3543; FDLR press release of 05/10/09, DRC-OTP-2001-0065; FDLR press release of 21/09/09, DRC-OTP-2014-3498; FDLR press release of 06/08/09, DRC-OTP-2014-3495; FDLR press release of 30/07/09, DRC-OTP-2014-3535 ; FDLR press release of 09/07/09, DRC-OTP-2014-3436; FDLR press release of

denied the FDLR's involvement in crimes<sup>86</sup> (17 times) and shifted the blame to other armed groups (5 times);<sup>87</sup> called on Rwandan authorities to negotiate with its opposition (5 times);<sup>88</sup> called for opening of political space in Rwanda (twice);<sup>89</sup> called for a peaceful solution to the Rwandan "problem" (4 times);<sup>90</sup> expressed attachment to peace and negotiations (15 times);<sup>91</sup> expressed the FDLR's willingness to repatriate in dignity, through dialogue with Rwanda (8 communications);<sup>92</sup> called on the international community, the UN, the African Union and the European Union to support peace talks (6 times);<sup>93</sup> expressed the FDLR's commitment to the

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25/06/09, DRC-OTP-2020-0518; FDLR press release of 22/06/09, DRC-OTP-2020-0561; FDLR press release of 27/05/09, DRC-OTP-2014-3488; FDLR press release of 20/05/09, DRC-OTP-2020-0566; FDLR press release of 01/05/09, DRC-OTP-2014-3532; FDLR press release of 20/03/09, DRC-OTP-2001-0056; FDLR press release of 09/03/09, DRC-OTP-2014-3447; FDLR press release of 05/03/09, DRC-OTP-2001-0054; FDLR press release of 17/02/09, DRC-OTP-2003-0566; FDLR Press Release of 02/02/09, DRC-OTP-2001-0047; FDLR press release of 30/12/08, DRC-OTP-2003-0582; FDLR press release of 08/12/08, DRC-OTP-2003-0587; BBC News, "Rwanda Soldiers Enter DR Congo", 20 January 2009, DRC-OTP-2014-0215 at 0216, available at <http://news.bbc.co.uk/2/hi/africa/7839510.stm>, last accessed on 19 August 2010; Radio France Internationale (RFI), "Hutu fighters in DRC call for talks as Kigali and Kinshasa agree on military operation", 06 December 2008, DRC-OTP-2014-0815, [http://www.rfi.fr/actuen/articles/108/article\\_2352.asp](http://www.rfi.fr/actuen/articles/108/article_2352.asp), last accessed on 19 August 2010.

<sup>86</sup> FDLR press release of 27/11/09 DRC-OTP-2014-3510; FDLR press release, of 18/11/09, DRC-OTP-2014-3476; FDLR press release of 30/10/09, DRC-OTP-2001-0099; FDLR press release of 20/10/09, DRC-OTP-2014-3543; FDLR press release of 05/10/09, DRC-OTP-2001-0065; FDLR press release of 15/09/09, DRC-OTP-2001-0063; FDLR press release of 07/09/09, DRC-OTP-2001-0061; FDLR press release of 27/08/09, DRC-OTP-2014-3533; FDLR press release of 14/07/09, DRC-OTP-2001-0060; FDLR press release of 20/04/09, DRC-OTP-2001-0058; FDLR press release of 20/03/09, DRC-OTP-2001-0056; FDLR press release of 05/03/09, DRC-OTP-2001-0054; FDLR press release of 23/02/09, DRC-OTP-2003-0631; FDLR press release of 20/02/09, DRC-OTP-2001-0052; FDLR press release of 14/02/09, DRC-OTP-2001-0050; FDLR press release of 02/02/09, DRC-OTP-2001-0047; FDLR press release of 15/12/08, DRC-OTP-2001-0045; "Crossing Continents: Congo Connection", interview by Peter GRESTE for BBC East Africa, 21 November 2009, DRC-OTP-2010-0041, available at [www.bbc.co.uk/programmes/p0053dr8#broadcasts](http://www.bbc.co.uk/programmes/p0053dr8#broadcasts), last accessed on 19 August 2010.

<sup>87</sup> FDLR press release of 30/10/09, DRC-OTP-2001-0099; FDLR press release of 20/10/09, DRC-OTP-2014-3543.; FDLR press release of 07/09/09, DRC-OTP-2001-0061; FDLR press release of 20/03/09, DRC-OTP-2001-0056.; FDLR press release of 20/02/09, DRC-OTP-2001-0052.

<sup>88</sup> FDLR press release of 27/11/09, DRC-OTP-2014-3510; FDLR press release of 25/05/09, DRC-OTP-2001-0447; FDLR press release of 20/04/09, DRC-OTP-2001-0058; FDLR press release of 17/04/09, DRC-OTP-2014-3521 ; FDLR press release of 03/03/09, DRC-OTP-2014-3517.

<sup>89</sup> FDLR press release of 23/02/10, DRC-OTP-2014-3506; FDLR press release of 20/05/09, DRC-OTP-2020-0566.

<sup>90</sup> FDLR press release of 28/04/10, DRC-OTP-2001-0924 ; FDLR press release of 21/10/09, DRC-OTP-2001-0112; FDLR press release of 21/09/09, DRC-OTP-2014-3498; FDLR press release of 12/03/09, DRC-OTP-2014-3521.

<sup>91</sup> FDLR press release of 02/06/10, DRC-OTP-2014-3501; FDLR press release of 04/03/10, DRC-OTP-2014-3505; FDLR press release of 14/01/10, DRC-OTP-2014-3509; FDLR press release of 27/11/09, DRC-OTP-2014-3510; FDLR press release of 24/08/09, DRC-OTP-2014-3537 ; FDLR press release of 25/06/09, DRC-OTP-2014-3439; FDLR press release of 23/03/09, DRC-OTP-2020-0564; FDLR press release of 12/03/09, DRC-OTP-2014-3521; FDLR press release of 30/01/09, DRC-OTP-2014-3451; FDLR press release of 19/12/07, DRC-OTP-2002-0816; FDLR press release of 03/09/07, DRC-OTP-2002-0797; FDLR press release of 14/07/09, DRC-OTP-2001-0060; FDLR press release of 23/02/09, DRC-OTP-2003-0631; FDLR press release of 26/01/09, DRC-OTP-2003-0576; FDLR press release of 08/12/08, DRC-OTP-2003-0587.

<sup>92</sup> FDLR press release of 20/10/09, DRC-OTP-2014-3543; FDLR press release of 09/07/09, DRC-OTP-2014-3436; FDLR press release of 27/05/09, DRC-OTP-2014-3488; FDLR press release of 26/01/09, DRC-OTP-2003-0576; FDLR press release of 14/01/09, DRC-OTP, 2003-0589.

<sup>93</sup> FDLR press release of 21/09/09, DRC-OTP-2014-3498; FDLR press release of 25/05/09, DRC-OTP-2001-0447; FDLR press release of 05/03/09, DRC-OTP-2001-0054; FDLR press release of 14/01/09, DRC-OTP-2003-0589; FDLR press release of 08/12/08, DRC-OTP-2003-0587.

2005 Rome peace process (10 times);<sup>94</sup> defined the FDLR's objective as the liberation of Rwanda from the RPF "regime" (7 times);<sup>95</sup> and encouraged and glorified FDLR members (4 times).<sup>96</sup>

72. The international campaign was also essential to maintain the FDLR's military strength; it kept up the morale of the FDLR troops and encouraged them to stay in the FDLR army and to follow the commanders' orders. Former FDLR combatants said they were encouraged by the many statements made by MURWANASHYAKA and MBARUHISMANA to the BBC and other media outlets.<sup>97</sup> Another witness told the Prosecution that the statements made by MURWANASHYAKA and MBARUSHIMANA were motivation for the troops and kept them going.<sup>98</sup>

73. The FDLR leaders combined the international campaign with threats to kill deserters in order to keep control of the combatants. They also denied information heard by the troops on the radio about the demobilisation and reintegration programs available through MONUC in Rwanda, or prevented the troops from having access to such information.<sup>99</sup> Witness ██████ told the Prosecution that FDLR troops were told by their leaders that combatants returning to Rwanda would be killed on arrival, or prosecuted.<sup>100</sup> Witness ██████ said "*We were told that people who went to Rwanda were killed or had a very hard life but then I found out that those who were young during the genocide had no problem.*"<sup>101</sup>

<sup>94</sup> FDLR press release of 21/09/09, DRC-OTP-2014-3498; FDLR press release of 30/07/09, DRC-OTP-2014-3535; FDLR press release of 20/03/09, DRC-OTP-2001-0056; FDLR press release of 30/01/09, DRC-OTP-2014-3451; FDLR press release of 26/01/09, DRC-OTP-2003-0574; FDLR press release of 26/01/09, DRC-OTP-2003-0576; FDLR press release of 21/01/09, DRC-OTP-2014-3487; FDLR press release of 14/01/09, DRC-OTP-2003-0589; FDLR press release of 30/12/08, DRC-OTP-2003-0582; FDLR press release of 08/12/08, DRC-OTP-2003-0587.

<sup>95</sup> FDLR press release of 18/11/09, DRC-OTP-2014-3476; FDLR press release of 06/11/09, DRC-OTP-2014-3502; FDLR press release of 30/10/09, DRC-OTP-2001-0099; FDLR press release of 05/10/09, DRC-OTP-2001-0065; FDLR press release of 27/08/09, DRC-OTP-2014-3533 ; FDLR press release of 24/08/09, DRC-OTP-2014-3537 ; FDLR press release of 06/08/09, DRC-OTP-2014-3495; "Crossing Continents: Congo Connection", 21 November 2009, interview by Peter GRESTE for BBC East Africa, DRC-OTP-2010-0041, available at [www.bbc.co.uk/programmes/p0053dr8#broadcasts](http://www.bbc.co.uk/programmes/p0053dr8#broadcasts) , last accessed on 20 August 2010.

<sup>96</sup> FDLR press release of 21/09/09, DRC-OTP-2014-3498; FDLR press release of 05/10/09, DRC-OTP-2001-0065; FDLR press release of 20/02/09, DRC-OTP-2001-0052; FDLR press release of 26/01/09, DRC-OTP-2003-0576.

<sup>97</sup> Transcript of interview with witness ██████

<sup>98</sup> Audio recording of OTP interview with witness ██████

Pole Institute, "La question des FDLR et les perspectives de paix au kivu", DRC-OTP-2020-0462 at 0468, available at <http://www.pole-institute.org/documents/Security%20update.pdf>, last accessed on 19 August 2010.

<sup>100</sup> Audio recording of OTP interview with witness ██████

██████; Audio recording of OTP interview with witness ██████

██████; Audio recording of OTP interview with witness ██████

Audio recording of OTP interview with witness ██████

75. [REDACTED]

76. However, MBARUSHIMANA was the only high-ranking FDLR leader who could present the FDLR's extortive position before the international community, as MURWANASHYAKA's political activities were banned in Germany,<sup>103</sup> and MUDACUMURA was commanding the troops from undisclosed locations in the Kivus.

77. In addition, MBARUSHIMANA now exercises the overall leadership role left void by MURWANASHYAKA's arrest in Germany in November 2009.<sup>104</sup>

## **6. Existence of an organisational policy to commit an attack against a civilian population (Article 7(2)(a) of the Rome Statute)**

78. The Prosecution addresses one of the contextual elements of crimes against humanity in this section. Article 7(2)(a) requires proof that an attack against a civilian population was carried out pursuant to or in furtherance of a State or organisational policy to commit such an attack. In addition, the Prosecution submits that the evidence discussed in this section is relevant to the jurisdictional element of war crimes, namely to the provision in Article 8(1),

<sup>102</sup> [REDACTED]

[REDACTED], MURWANASHYAKA was barred by the city of Mannheim, Germany, from expressing himself politically and from working for the FDLR. Following his violation of this ban through the publication of press statements and press releases on the internet in between September 2007 and November 2008, MURWANASHYAKA was convicted by the Regional Court of Mannheim of multiple violations of Alien Residence Act. [REDACTED]

MURWANASHYAKA was sentenced to six months imprisonment. The execution of the sentence was suspended in favour of probation.

<sup>104</sup> Audio recording of OTP interview with witness [REDACTED]; The Washington Times, Rukmini Callimachi, Accused genocide leader safe in Paris, giving orders, 28 January 2010, DRC-OTP-2014-0827, at <http://www.washingtontimes.com/news/2010/jan/28/accused-genocide-leader-safe-in-paris-giving-order>, last accessed on 19 August 2010.

according to which the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy.<sup>105</sup>

79. Before late January 2009, the FDLR leadership decided to launch a campaign of attacks targeting the civilian population of the Kivus. The purpose of this offensive, as it was formulated at the highest reaches of the FDLR and transmitted to units in the field, was “*to create a humanitarian catastrophe*”,<sup>106</sup> “*so that the Congo government and the foreign leaders stop to disturb the FDLR*”<sup>107</sup>

80. MBARUSHIMANA made the FDLR leadership’s intentions known on 9 December 2008, days after of the announcement of the launch of joint Congolese-Rwandan military operation *Umoja Wetu* against the FDLR. MBARUSHIMANA warned 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 FDLR would plunge the region into a long and dreadful war, “*the consequences of which are immeasurable*”.<sup>108</sup>

81. In the (excerpted) words of a former FDLR soldier ██████████ in the FDLR, interviewed by the Prosecution:

“*January 2009 [...] we received a message... from MURWANASHYAKA stating that this fight is going to be against the whole world ... that they would destroy ... development work and we... shooting [phon.] ... targeting the population*”<sup>109</sup>

82. The order to create a humanitarian catastrophe was issued by the Commander of the FDLR army, General MUDACUMURA,<sup>110</sup> although one witness explained that it originally came from the FDLR President MURWANASHYAKA.<sup>111</sup> The order was transmitted to all FDLR commanders<sup>112</sup> and read out to their subordinates and units in the field.<sup>113</sup> ██████████

██████████ told the Prosecution that they had learnt

<sup>105</sup> The Prosecution submits that the requirements of both articles are established through the same set of facts, as described in this section.

<sup>106</sup> Transcript of order given by MUDACUMURA and read out by an FDLR radio operator to the Group of Experts on the Democratic Republic of the Congo, at Annex 18 of Group of Experts Final Report, DRC-OTP-2010-0045 at 0168, as corroborated by witness ██████████ in audio recording of OTP interview with witness ██████████.

Audio recording of OTP interview with witness ██████████

<sup>108</sup> AFP and Reuters, “DRC Hutu rebels warn against use of force”, 9 December 2008, DRC-OTP-2020-0504, available at <http://www.mg.co.za/article/2008-12-09-drc-hutu-rebels-warn-against-use-of-force>. In a press release dated 14 January 2009, MBARUSHIMANA said: “*The FDLR offer the way of dialogue and peace; those who offer the war as a solution to the crisis of the Great Lakes region of Africa should be held responsible for any consequences thereof*”. FDLR press release of 14/01/09, authored by MBARUSHIMANA, DRC-OTP-2003-0589.

<sup>109</sup> Audio recording of OTP interview with witness ██████████

<sup>110</sup> Audio recording of OTP interview with witness ██████████

██████████. According to the witness, MUDACUMURA issued a general order.

<sup>111</sup> Audio recording of OTP interview with witness ██████████

<sup>112</sup> Audio recording of OTP interview with witness ██████████

██████████ Audio recording of OTP interview with witness ██████████



about the existence of the order early on in the armed conflict and campaign of crimes against humanity, as early as the time of the launch of operation *Umoja Wetu*.<sup>114</sup>

83. The primary target of this order was the civilian population. According to one witness, MUDACUMURA said that the Congolese population “*have to suffer.*”<sup>115</sup> According to another witness, “*there was an order, a permanent regulation, that whenever the population were mixed with FARDC and they refused to flee they would be killed.*”<sup>116</sup> By design, thus, the attacks to be launched pursuant to this order involved killing civilians.

84. The order also encompassed the razing of villages in North and South Kivu Provinces, with the aim of creating a humanitarian catastrophe by attacking the population for its alleged cooperation with the FARDC and the RDF. As stated by witness [REDACTED], “*it was following the rules that has been given by MUDACUMURA that if they see civilians collaborating with FARDC somewhere they would have to burn the civilian house in the area.*”<sup>117</sup>

85. In addition to killings and extensive destruction of property, pursuant to this order, FDLR troops also engaged in widespread rapes and other forms of sexual violence, visited on women 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.<sup>118</sup>

86. On 17 February 2009, shortly before the launch of the DRC and MONUC’s further military operation against the FDLR, *Kimia II*, MBARUSHIMANA anticipated further FDLR attacks. He “*warn[ed] MONUC against a danger resulting of its alignment with the Rwandan-Congolese troops*” and stated that the FDLR

*“continue to favour the path of peace, but if the armed coalition against them continue to chase and shoot at the Rwandan refugees and Congolese innocent people, they will have no other choice but to protect Rwandan refugees and civilian populations.”*<sup>119</sup>

87. Despite this pretext of non-violent intentions, the FDLR leadership in fact supervised the execution of the order to attack civilians. [REDACTED]

<sup>114</sup> Audio recording of OTP interview with witness [REDACTED]; Audio recording of OTP interview with witness [REDACTED]; Audio recording of OTP interview with witness [REDACTED]

Audio recording of OTP interview with witness [REDACTED].

Audio recording of OTP interview with witness [REDACTED]

<sup>117</sup> Audio recording of OTP interview with witness [REDACTED]

Alston Report, paras. 10-12 and 64, DRC-OTP-2020-0360 at 0366 and at 0375; HRW December 2009 Report, pp. 67-68 and 72-73, DRC-OTP-2014-0240 at 0313, 0314, 0318, 0319, 0320, 0321 and at 0322.

<sup>119</sup> FDLR press release of 17/02/09, authored by MBARUSHIMANA, DRC-OTP-2003-0566.

[REDACTED]  
[REDACTED]  
[REDACTED] the attack on Busurungi was perpetrated in implementation of the FDLR leaders' plans.

88. Before, during and after the attacks, MBARUSHIMANA, [REDACTED] [REDACTED] orchestrated and implemented the FDLR's campaign attempting to justify its actions and extort from Rwanda political power for the FDLR.

89. The Prosecution submits that the existence of the orders to attack the civilian population demonstrates that there was an organisational policy in the FDLR to encourage or promote the acts constituting an attack against a civilian population within the meaning of Article 7(2)(a).<sup>121</sup> The evidence demonstrates, furthermore, that the civilian population was the primary object of the attack and not just an incidental victim thereof.<sup>122</sup> In addition, the Prosecution submits that this evidence establishes that the FDLR leaders had a plan or policy to commit such war crimes within the meaning of Article 8(1).

## **7. Widespread or systematic attack against the civilian population of North and South Kivus in 2009 (Article 7(1))**

90. The Prosecution submits that the evidence provides grounds to believe that the multiple crimes perpetrated by the FDLR described in this section were "widespread or systematic" (Article 7(1) of the Statute). The Prosecution submits that the evidence discussed in this section is relevant to the jurisdictional element of war crimes, namely to the provision in Article 8(1), according to which the Court shall have jurisdiction in respect of war crimes in particular when committed on a large-scale.

91. The evidence discussed below provides grounds to believe that the attack was both systematic, given the improbability of the random occurrence of the acts, as well as widespread, given that the frequent acts were carried out with "considerable seriousness and directed against a large number of civilian victims". The crimes carried out pursuant to or in furtherance of an organisational policy were widespread and systematic insofar as they were

<sup>120</sup> [REDACTED]

Elements of Crimes, Introduction to Art. 7, para. 3. *See also Situation in the Republic of Kenya*, Pre-Trial Chamber II, Article 15 Decision, ICC-01/09-19-Corr, para. 83 (31 March 2010).

<sup>122</sup> *Prosecutor v. Bemba*, Confirmation Decision, ICC-01/05-01/08-424 [PTCII], para. 76 (15 June 2009) (emphasis original). *See also Situation in the Republic of Kenya*, Article 15 Decision, ICC-01/09-19-Corr, para. 82 (31 March 2010).

committed by an armed organization with thousands of combatants, dispersed throughout the Kivu Provinces, and in execution of the orders issued by the FDLR's top leaders.

92. The evidence provides grounds to believe that the FDLR perpetrated a multiplicity of acts that were more than isolated incidents or acts, and that the multiplicity of acts were part of the attack. The high incidence of death and injury among the civilian victims of FDLR attacks was not a random occurrence. HRW has reported at least four major incidents in which 30 or more civilians were killed,<sup>123</sup> four incidents in which at least 10 women or girls were raped,<sup>124</sup> and over 20 cases in which more than 100 houses and other structures were burnt by the FDLR,<sup>125</sup> with at least four of those resulting in the burning of over 500 such structures.<sup>126</sup>

93. The attacks on Manje,<sup>127</sup> Malembe,<sup>128</sup> and Busurungi<sup>129</sup> were reported to have been of a retaliatory nature. The FDLR reportedly addressed explicit threats to "punish" civilians by leaving warning letters, conducting public meetings warning the population against collaboration with enemies or sending such messages by word of mouth<sup>130</sup> and killing local chiefs,<sup>131</sup> in an attempt to intimidate the civilian population. Victims of rape were told by FDLR assailants that they were being punished for joining the DRC Government's "side", because the Government was now chasing the FDLR out, or in punishment for being the "wives" of Rwandan or Congolese army soldiers.<sup>132</sup>

94. The widespread nature of the attack and the large-scale commission of crimes during the attack have been well documented by, among others, the UN Group of Experts on the DRC and other UN sources, and by HRW. A high toll in civilian lives and injuries and in destruction of civilian dwellings has been reported for all territories in both Kivu provinces, and in particular for the adjacent areas of Waloa-Loanda *groupement* in Walikale (North Kivu) and Ufamandu *groupement* in Masisi (North Kivu).<sup>133</sup>

<sup>123</sup> HRW December 2009 report, p. 156, Annex 1, DRC-OTP-2014-0240 at-0402, available at <http://www.hrw.org/node/87151>, last accessed on 19 August 2010.

<sup>124</sup> HRW December 2009 report, pp. 167-171, Annex 3 and pp. 72-76, DRC-OTP-2014-0240 at -0413 to -0417 and at-0318 to -0322, available at <http://www.hrw.org/node/87151>, last accessed on 19 August 2010.

<sup>125</sup> HRW December 2009 report, pp.179-182, Annex 5, DRC-OTP-2014-0240 at-0425 to -0428, available at <http://www.hrw.org/node/87151>, last accessed on 19 August 2010.

<sup>126</sup> HRW December 2009 report, Annex V, DRC-OTP-2014-0240 at-0426and at-0427, available at <http://www.hrw.org/node/87151>, last accessed on 19 August 2010.

<sup>127</sup> HRW December 2009 report, pp 65-66, citing "MONUC weekly human rights report, 2-8 August 2009".

<sup>128</sup> Audio recording of OTP interview with witness [REDACTED]; Audio recording of OTP interview with witness [REDACTED]

Human Rights Watch, December 2009 Report, DRC-OTP-2014-0240, p. 64; Group of Experts Final Report, para. 350; [REDACTED]

[REDACTED] Press statement by Professor Philip Alston, UN Special Rapporteur on extrajudicial executions. Mission to the DR Congo, 5-15 Oct 2009, DRC-OTP-2002-0637, pp. 2 and 3.

<sup>130</sup> HRW December 2009 Report, p. 83, DRC-OTP-2014-0240 at 0329.

<sup>131</sup> HRW December 2009 Report, pp. 69 and 70, DRC-OTP-2014-0240 at 0315 and 0316.

<sup>132</sup> HRW December 2009 report, pp. 72-73, DRC-OTP-2014-0240 at 0318 - 0319.

<sup>133</sup> See HRW December 2009 report, Annexes I-VI, pp. 156-182, DRC-OTP-2014-0420 at 0402-0428.

95. As mentioned above, on the basis of information collected by its researchers from victims and their relatives, eyewitnesses, as well as medical support personnel, HRW attributed to the FDLR the killing of over 700 individuals, 290 cases of rape and over 7,000 houses or other structures destroyed between January and September 2009.<sup>134</sup> On the basis of documentation and testimonies collected by its members, the UN Group of Experts reported that between February and October 2009, attacks on civilians perpetrated by the FDLR resulted in 384 deaths, 135 cases of sexual violence, 521 abductions, 38 cases of torture and 5 cases of mutilation.<sup>135</sup> UN Special Rapporteur Alston asserted that the FLDR averaged ten civilian killings per month in 2008 and that this figure increased five-fold in 2009. Alston's mandate is confined to examining cases involving executions; however, he clearly links sexual violence and civilian killings, noting that the FDLR raped women “*so brutally that they die [...] from their injuries.*”<sup>136</sup>

96. The FDLR perpetrated rape and other forms of sexual violence on hundreds of women throughout the Kivus in 2009. Some of these crimes were perpetrated during the FDLR's well-planned attacks on civilian population centres. In addition, the FDLR produced a humanitarian catastrophe in the Kivu Provinces by perpetrating crimes of sexual violence as threats or in punishment for perceived collaboration with the FDLR's enemies, prior to and after the attacks on villages and towns. Wherever they were perpetrated, the FDLR's sexual violence crimes were characterised by their brutality.

97. Allegations of gender crimes –including rapes, inhumane acts, inhuman treatment, and persecution on the basis of gender– are of particular importance in the orchestration of this catastrophe. Sexual violence –regardless of the gender of the survivor– in addition to being a violation of individuals based on their gender group membership, is a particularly efficient manner to provoke ostracisation of those violated, to break down communities, and to spread disease. In other words, it works well to create a long lasting humanitarian catastrophe. When carried out at the rates reported by international organisations in the Kivu Provinces, it amounts to sexual violence against the individual that is also persecution on the basis of gender against the collective. The rape of women and girls is carried out because they, as females, are easily targeted and can be put forth as objects of FDLR domination vis-à-vis the men in their families. Men and boys, who for example are forced to rape, suffer from persecution on the basis of gender, targeted to show FDLR dominance through violating their manhood in this manner. The total result is that communities live in fear of the FDLR under

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<sup>134</sup> HRW December 2009 report, Annexes I, III and V, DRC-OTP-2014-0240 (Annex I at-0402, Annex III at -0413, Annex V at -0424), available at <http://www.hrw.org/node/87151>, last accessed on 19 August 2010.

<sup>135</sup> UN Group of Experts Final Report, December 2009, para 347, DRC-OTP-2010-0045 at-0125.

<sup>136</sup> Alston Report, para. 10-11. DRC-OTP-2020-0360 at-0366

already difficult circumstances, have to care for survivors and deal with the effects of disease; these combined challenges makes communities more vulnerable and make more effective a campaign to create a humanitarian catastrophe. The international community's appropriate sensitivity to sexual atrocities is also thereby reliably exploited in a particularly calculated manner.

98. The Prosecution's assessment of the evidence obtained from demobilized FDLR combatants and from various open sources is that FDLR troops perpetrated rape and other sexual offenses but that this was denied on a systematic basis. Witness ██████ told the Prosecution:

*"During the fightings the crime of rape they would deny it they wouldn't recognise it if it happens or it doesn't, they would deny it. Congolese victims could shout to us for help but in FDLR they weren't accepting it... if women were to be raped as civilian enemies and it is reported they won't accept it as an offence because anything you could do to an enemy was something seen as acceptable."*<sup>137</sup>

99. The Prosecution submits that at all times relevant to the present application MBARUSHIMANA had knowledge of the existence of the widespread or systematic attack on the civilian population of the Kivus. As the press releases authored by him show, MBARUSHIMANA was well aware of allegations that the FDLR committed crimes through its involvement in the armed conflict. The frequency with which attacks by the FDLR upon civilians were reported in media accessible to MBARUSHIMANA and the magnitude of the acts blamed on the FDLR put MBARUSHIMANA on notice of the existence of the attack. As evidence of such notice, MBARUSHIMANA himself responded to some of the allegations made by United Nations bodies and the non-governmental organisation Human Rights Watch.<sup>138</sup>

#### *FDLR attacks during Umoja Wetu*

100. In late January 2009, when the FARDC-RDF troops advanced towards the key FDLR bases in Ufamandu (Walikale territory), including Kibua and Katoyi, the FDLR Reserve Brigade reportedly abducted scores of civilians and took them to the FDLR camp, intending to use them as human shields against the impending attack. When the FARDC-RDF forces attacked these sites, the trapped civilians tried to flee, but many were killed by the FDLR and

<sup>137</sup> Audio recording of OTP interview with witness ██████

█████ FDLR press release of 14/02/09, N° 04/SE/CD/FEBRUARY/2009, DRC-OTP-2001-0050; FDLR press release of 27/05/09, N° 07/SE/CD/MAI/2009, DRC-OTP-2014-3488.

others died in the cross-fire.<sup>139</sup> On 30 January 2009, FDLR combatants allegedly killed over 36 civilians in the villages of Malembe,<sup>140</sup> Mianga and Busurungi in Waloa-Loanda *groupement*.<sup>141</sup>

101. Towards the end of January 2009, in **Remeka** village, Ufamandu *groupement*, Walikale territory, the FDLR Reserve Brigade alongside FDLR commandos led by Major "Vainqueur" attacked Remeka several times. The FDLR called a meeting at which it accused the population, local leaders and the Mayi-Mayi armed group with whom they had been allied, of having betrayed them. The FDLR told residents they would not be allowed to leave and that they were "*sharpening their spears and machetes.*"<sup>142</sup> Following the meeting, the FDLR erected barriers to prevent people from fleeing. When some tried to flee, the FDLR attacked them, allegedly killing dozens, including women and children, with guns, rocket-propelled grenades, and machetes. In late February, the FDLR abducted at least a dozen women and girls from Remeka. Two women who escaped reported that FDLR combatants killed 9 of the women and girls when they resisted attempts to rape them. The fate of the others is unknown.<sup>143</sup>

102. In late January 2009, FDLR elements attacked **Busheke** village, in Kalehe territory, South Kivu, killing 14 civilians, including 12 women and girls, whom they raped before killing.<sup>144</sup> RDF troops and the FDLR 3<sup>rd</sup> SABENA battalion troops came into contact on about 12 February 2009 at **Pinga**, Masisi territory, North Kivu, and the RDF troops occupied the village for two days. Once they left, the FDLR returned to the village and embarked on a campaign of reprisals and intimidation against civilians. The FDLR perpetrated 28 rapes in or

<sup>139</sup> HRW, "DR Congo: Rwandan Rebels Slaughter Over 100 Civilians", 13 February 2009 (hereafter "HRW February 2009 news release"), available at <http://www.hrw.org/en/news/2009/02/13/dr-congo-rwandan-rebels-slaughter-over-100-civilians>, DRC-OTP-2014-0239; HRW, "Congo Advocacy Coalition Letter to Sir John Holmes", 6 February 2009, available at <http://www.hrw.org/en/news/2009/02/06/congo-advocacy-coalition-letter-sir-john-holmes>, DRC-OTP-2014-0229; REPORT OF HIGH COMMISSIONER ON THE SITUATION OF HUMAN RIGHTS AND THE ACTIVITIES OF HER OFFICE IN THE DEMOCRATIC REPUBLIC OF THE CONGO, Advance unedited version, 1 March 2009, A/HRC/10/58, [DRC-OTP-2021-0037](http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.58.doc), para 9, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.58.doc>, last accessed on 20 August 2010.

<sup>140</sup> HRW December 2009 report, Annex I, page 156-157, DRC-OTP-2014-0240 at -0402 and -0403, available at <http://www.hrw.org/node/87151>, last accessed on 20 August 2010.

<sup>141</sup> Radio Okapi, Les FDLR tuent plus de 50 personnes et incendient tout un village à Masisi et Walikale, 19 February 2009, available at <http://www.reliefweb.int/rw/rwb.nsf/db900sid/FJTC-7PED7D?OpenDocument&rc=1&cc=cod>, last accessed on 19 August 2010.

<sup>142</sup> HRW December 2009 Report, DRC-OTP-2014-0240, pp. 56 and 83, at DRC-OTP-2014-0302 and DRC-OTP-2014-0329, available at <http://www.hrw.org/node/87151>, last accessed on 19 August 2010.

<sup>143</sup> HRW, [DR Congo: Brutal Rapes by Rebels and Army, 8 April 2009, DRC-OTP-2003-0426 at 0427](http://www.hrw.org/en/news/2009/04/08/dr-congo-brutal-rapes-rebels-and-army), available at <http://www.hrw.org/en/news/2009/04/08/dr-congo-brutal-rapes-rebels-and-army>, last accessed on 19 August 2010.

<sup>144</sup> HRW December 2009 Report p.67, DRC-OTP-2014-0240 at-0313, available at <http://www.hrw.org/node/87151>, .

around Pinga and killed a prominent local chief.<sup>145</sup> On 13 February 2009, the FDLR returned to the village of **Kipopo**,<sup>146</sup> Masisi territory, North Kivu, after the coalition troops had passed through. The FDLR locked civilians in their homes and set them on fire. Some 100 houses were burnt, and many people were killed. Also in February, an FDLR unit in **Miriki**, Lubero territory, North Kivu, detained a group of young civilians and forced the three boys in the group to rape the three girls who were with them.<sup>147</sup>

103. The UN Group of Experts and other non-governmental organizations report that FARDC attacks on FDLR positions during *Umoja Wetu* in North Kivu were followed by an increase in the number of FDLR troops in some territories of South Kivu. At the same time, however, some FDLR troops remained in North Kivu, particularly in the Virunga National Park, in the south of Walikale territory, or in the vicinity of their former positions, as in Masisi territory.<sup>148</sup> As documented by UN and non-governmental sources on crimes of sexual violence, the incidence of sexual crimes in both provinces peaked during the times of greatest the FDLR presence there. Thus, there were many more crimes committed in the Lubero and Walikale territories in North Kivu in January and February 2009, and in the Kalehe and Shabunda territories in South Kivu and in Masisi territory in North Kivu in the aftermath of the *Umoja Wetu* operation between March and August 2009. Based on the above, it is reasonable to infer that the geographical spread and the peaks in sexual violence is linked to the FDLR areas of concentration.

### *FDLR attacks during Kimia II*

<sup>145</sup> Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary General. Report of the United Nations High Commissioner on the situation of human rights and the activities of her Office in the Democratic Republic of the Congo, A/HRC/10/58, 2 April 2009, English version, DRC-OTP-2014-0834 at -0839, para. 9, available at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A-HRC-10-58\\_F.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A-HRC-10-58_F.pdf), French version, last accessed on 19 August 2010.

<sup>146</sup> Audio recording of OTP interview with witness [REDACTED]; Audio recording of OTP interview with witness [REDACTED]; HRW December 2009 report, DRC-OTP-2014-0240 at -0306, p.60, Annex V, p. 179; HRW Press release, Over 180 Civilians Killed, Most by Rwandan Rebels, 8 April 2009, DRC-OTP-2003-0426 at 0427.

<sup>147</sup> HRW December 2009 Report, p.75, DRC-OTP-2014-0240 at -0321, available at <http://www.hrw.org/node/87151>, last accessed on 19 August 2010.

<sup>148</sup> Interim Report of the Group of Experts on the Democratic Republic of the Congo, 29 April 2010, DRC-OTP-2014-1106 at p. 12; International Crisis Group, Congo: A Comprehensive Strategy to Disarm the FDLR', 9 July 2009, DRC-OTP-2014-0431, pp. 7-8, 13.

104. The FDLR allegedly carried out a cycle of attacks on **Mianga**,<sup>149</sup> Waloa-Loanda *groupement*, Walikale, North Kivu, where the FARDC reportedly had a small base. The largest scale incident took place on 12 April 2009, when the FDLR attacked the settlement in the early morning, neutralising the FARDC position in the village and leaving the population undefended. The FDLR then killed up to 50 civilians including the local chief, who was decapitated because of his presumed good relationship with the FARDC, and burnt down the village. On 18 April FDLR attacked the villages of **Luofu** and **Kasiki**<sup>150</sup> in Lubero territory, North Kivu, burning over 250 and 50 houses in these villages respectively and killing at least 17 civilians.

105. In the gravest incident perpetrated by the FDLR in 2009, the civilian population was targeted on the night of 9-10 May 2009 by hundreds of FDLR troops in a carefully planned attack<sup>151</sup> on **Busurungi** village, Walikale territory, North Kivu, and nearby settlements. The

<sup>149</sup> Audio recording of OTP interview with witness [REDACTED]  
 [REDACTED]; Audio recording of OTP interview with witness [REDACTED]  
 [REDACTED]; Audio recording of OTP interview with witness [REDACTED]

[REDACTED] HRW December 2009 Report, DRC-OTP-2014-0240, at 0426; HRW, “DR Congo: Massive Increase In Attacks on Civilians, 2 July 2009, DRC-OTP-2014-0233, p. 2, <http://www.hrw.org/en/news/2009/07/02/dr-congo-massive-increase-attacks-civilians>, last accessed on 19 August 2010; HRW, December 2009 Report, DRC-OTP-2014-0240, p.62; Group of Experts Final Report, DRC-OTP-2010-0045 at 0126, para. 352; Reuters – “Rwandan rebels kill 14 in eastern Congo attack”, 22 April 2009, DRC-OTP-2020-0513; Pole Institute, “La question des FDLR et les perspectives de paix au kivu”, pp 12, DRC-OTP-2020-0462, available at <http://www.pole-institute.org/documents/Securty%20update.pdf>, last accessed on 19 August 2010.

<sup>150</sup> Audio recording of OTP interview with witness [REDACTED]  
 [REDACTED] Radio Okapi: Lubero : les FDLR encore à la charge, 17 villageois tués dont 4 enfants, DRC-OTP-2014-0807; Human Rights Watch, “Children Burned to Death by Rwandan Hutu Militia.” 23 April 2009, DRC-OTP-2002-0865 at 0865, available at <http://www.hrw.org/en/news/2009/04/23/children-burned-death-rwandan-hutu-militia>, last accessed on 19 August 2010; IRIN, “Thousands of civilians trapped in east as clashes resume” 24 April 2009, DRC-OTP-2002-0777, available at <http://www.globalsecurity.org/military/library/news/2009/04/mil-090424-irin05.htm>, last accessed on 19 August 2010.

<sup>151</sup> Audio recording of OTP interview with witness [REDACTED]  
 [REDACTED]; Audio recording of OTP interview with witness [REDACTED]  
 [REDACTED] Audio recording of [REDACTED]  
 OTP interview with witness [REDACTED]; Audio recording of [REDACTED]  
 OTP interview with witness [REDACTED]; Audio recording of [REDACTED]  
 [REDACTED]; Audio recording of OTP interview with witness [REDACTED]  
 [REDACTED]; Audio recording of OTP interview with witness [REDACTED]  
 [REDACTED] Audio recording of OTP interview with witness [REDACTED]  
 [REDACTED] Audio recording of OTP interview with witness [REDACTED]  
 [REDACTED]; Audio recording of OTP interview with witness [REDACTED]  
 of OTP interview with witness [REDACTED]  
 [REDACTED]  
 [REDACTED]; HRW



attack had a high toll on civilian lives, with at least 60 civilians killed by the FDLR, and resulted in the destruction of over 700 civilian lodgings.

106. The FDLR had raped, mutilated, and killed several women in the Busurungi vicinity in the days prior to the attack. The remains of three female victims were found on 28 April 2009, just outside Busurungi while a fourth woman who was abducted at the same time managed to escape. The three victims were found tied up, with sticks in their vaginas, cuts over their bodies, and crushed skulls. On 5 May 2009, FDLR members raped and mutilated another three women in Busurungi.

107. The FADRC battalion located in Busurungi was the initial military target of the 10 May 2009 attack. The FDLR then turned against the civilian population, whom they perceived as having harbored the FARDC. The intention, reflected in the orders by FDLR commanders to burn down the entire village, was for the civilians to have nothing to which to return once the FDLR had passed through.

108. The attack on Busurungi had been carefully planned in advance. A reconnaissance mission was conducted in Busurungi approximately a week before the attack. According to demobilised FDLR combatants interviewed by the Prosecution, at least 200 and possibly up to 1000 FDLR troops were involved in the attack. All troops assembled at a location two hours from Busurungi prior to the attack and received orders from high-ranking FDLR commanders as to how to carry out the attack.

109. During the fighting, houses and military positions alike were set on fire. FDLR troops went from door to door, burning and looting houses and killing civilians in a systematic fashion. [REDACTED], when the FARDC fled and shouted to the civilians to flee, FDLR troops had positioned themselves at the doors of the houses, preventing the population from fleeing. Victims were thrown back by the FDLR into the burning houses if they managed to get out.

110. FDLR soldiers raped female residents of Busurungi, and in some cases cut their wombs open and removed foetuses from their bodies.<sup>152</sup>

111. [REDACTED] told the Prosecution that FDLR Lieutenant MANDALIN, a notorious FDLR torturer who had led the reconnaissance operation prior to

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December 2009 Report, DRC-OTP-2014-0240, at 0309 to 0311; MONUC, “RD Congo: La MONUC continue à sécuriser les populations civiles dans le Nord Kivu”, 20 May 2009, DRC-OTP-2014-0706, available at <http://monuc.unmissions.org/Default.aspx?tabid=1173&ctl=Details&mid=1143&ItemID=3951>, last accessed on 20 August 2010; Press statement by Professor Philip Alston, UN Special Rapporteur on extrajudicial executions – Mission to the DR Congo, 5-15 Oct 2009, DRC-OTP-2002-0637.

<sup>152</sup> HRW December 2009 Report, DRC-OTP-2014-0240 at 0309 to 0310, pp. 63 -64.

the attack on Busurungi, participated in the attack and boasted to the witness about having performed *gushahura*, a term used to describe genital mutilation, while at Busurungi.<sup>153</sup>

112. Busurungi was heavily damaged by the attack. According to witnesses [REDACTED] and [REDACTED], nothing remained standing in Busurungi. Two days after the attack, a patrol mission was sent to the village. According to a demobilised FDLR soldier interviewed by Prosecution, who took part in it, there was nobody in the town; only corpses, including those of women and children. The witness estimates that he saw between 35 and 40 dead bodies. Six months after the attack, in November 2009, the village was still empty of any inhabitants.

113. On 20-21 July 2009, the FDLR attacked the village of **Manje**,<sup>154</sup> Masisi, North Kivu. When the FDLR troops reached Manje, the place was deserted. The FARDC had run away as they heard the FDLR approaching. According to MONUC, at least 16 civilians were killed during the attack. The FDLR burnt over 180 houses that day. According to HRW, at least 10 women were taken to the forest, raped repeatedly, and held captive for a week.

114. In August the FDLR perpetrated a further attack on the village of **Malembe**<sup>155</sup> in Waloa-Loanda *groupement*, Walikale, North Kivu. FDLR combatants attacked Malembe at least once and likely twice in the time period of 11 to 16 August 2009, and again in mid-September. The attack by over 250 soldiers had been carefully planned in advance. [REDACTED] indicated that support troops had been sent in prior to the attack. Soldiers participating in the attack were briefed by a high-ranking FDLR commander, and given the order to destroy everything so that there would be nothing to come back to. When the troops arrived, Malembe was deserted. The FDLR nevertheless burned down the village's approximately 600 houses.

<sup>153</sup> Audio recording of OTP interview with witness [REDACTED]

Audio recording of OTP interview with witness [REDACTED]

[REDACTED]; Audio recording of OTP interview with witness [REDACTED]; Audio recording of OTP interview with witness [REDACTED]; OCHA Rapport hebdomadaire du 29 Juillet au 04 Août 09, DRC-2003-0120 at 0120; HRW December 2009 report, pp 65-66, citing "MONUC weekly human rights report, 2-8 August 2009"; [REDACTED]

[REDACTED]; HRW December 2009 Report, DRC-OTP-2014-0240, at 0312 and 0403; Radio Okapi; Walikale: 6 morts et 600 maisons incendiées par les FDLR à Malembe. 14 August 2009; OCHA, Rapport Mensuel Nord Kivu Août 2009, DRC-OTP-2016-0023, available at [http://www.rdc-humanitaire.net/IMG/pdf/NK-Rapport\\_mensuel\\_clusters\\_Aout2009-20090825.pdf](http://www.rdc-humanitaire.net/IMG/pdf/NK-Rapport_mensuel_clusters_Aout2009-20090825.pdf), last accessed on 19 August 2010.

<sup>155</sup> Audio recording of OTP interview with witness [REDACTED]

Audio recording of OTP interview with witness [REDACTED]

Audio recording of OTP interview with witness [REDACTED]

Audio recording of OTP interview with witness [REDACTED]; Audio recording of OTP interview with witness [REDACTED]

## 8. Legal requirements of modes of liability

### I. Co-perpetration (Article 25(3)(a))

115. The Prosecution submits that Callixte MBARUSHIMANA bears responsibility for the crimes committed by FDLR soldiers in North and South Kivu Provinces in 2009, pursuant to Article 25(3)(a) as a co-perpetrator of the crimes.

116. Pre Trial Chamber I has stated that

*“the concept of co-perpetration or joint control over the crime is rooted in the principle of the division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner. Hence, although none of the participants has overall control over the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task.”*<sup>157</sup>

117. This mode of liability has two objective elements, addressed in this section. Its three subjective elements are analysed in paragraphs 146 to 160 below (MBARUSHIMANA’s awareness):

118. The objective elements of co-perpetration are:

- (a) the existence of an agreement or common plan between two or more persons, which must include an element of criminality but does not need to be specifically directed at the commission of a crime;<sup>158</sup> and
- (b) the co-ordinated essential contribution made by each co-perpetrator resulting in the realisation of the objective elements of the crime.<sup>159</sup>

#### *Existence of agreement or common plan including MBARUSHIMANA*

119. MBARUSHIMANA, together with MURWANASHYAKA and MUDACUMURA, adopted and implemented the common plan of conducting widespread and systematic attacks against the civilian population in order to create a “humanitarian catastrophe” and an

<sup>156</sup> [REDACTED]

ICC-01/04-01/06-796-Conf-tEN, para. 342.

<sup>158</sup> *Prosecutor v. Lubanga*, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tEN, paras. 343-4.

<sup>159</sup> ICC-01/04-01/06-803-tEN, para. 346 (emphasis added).

international campaign to persuade the DRC and Rwanda Governments and the international community that the FDLR could not be defeated militarily and extort from them concessions of political power for the FDLR in Rwanda to stop atrocities against civilians.

120. The existence of this common plan is evident from the warnings personally issued by MBARUSHIMANA<sup>160</sup> in December 2008 and February 2009; from the issuance and supervision of orders by MURWANASHYAKA and MUDACUMURA; from the widespread and systematic implementation of the attacks by the FDLR troops; and from the development of the international campaign, including consultations between the three leaders to deny the crimes and shift the blame.

*MBARUSHIMANA's co-ordinated essential contribution resulting in the realisation of the objective elements of the crime*

121. MBARUSHIMANA, as an active, top FDLR leader with decision-making capacity, and as a member of the *Comité directeur*, made the following co-ordinated essential contributions: he agreed to the adoption by the FDLR leadership of the criminal plan, and he planned and implemented an essential part of the criminal plan, by conducting an extortive international campaign to persuade the DRC and Rwanda Governments and the international community that the FDLR could not be defeated militarily and extort from them political power for the FDLR in Rwanda to stop atrocities against civilians.

122. Together with, at least, MURWANASHYAKA and MUDACUMURA, MBARUSHIMANA had joint control over and was crucial to the adoption of the criminal plan. Without such a decision, the FDLR would not have carried out the attacks and the international campaign. Without MBARUSHIMANA's contribution, the FDLR would not have implemented the extortive international campaign designed as an essential part of the crimes.

123. The international campaign was considered essential by the FDLR leaders themselves. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>160</sup> AFP and Reuters, "DRC Hutu rebels warn against use of force", 9 December 2008, DRC-OTP-2020-0504, available at <http://www.mg.co.za/article/2008-12-09-drc-hutu-rebels-warn-against-use-of-force>, last accessed on 20 August 2010; FDLR press release of 17/02/09 authored by MBARUSHIMANA, DRC-OTP-2003-0566.

[REDACTED]

124. In addition to being perceived as essential by the FDLR leaders, the international campaign was in itself essential to the continued commission of crimes, insofar as it reached and helped keep up the morale of the FDLR troops and reduce the number of deserters.

125. MBARUSHIMANA's extortive campaign was an essential contribution to the criminal plan. Information operations are essential to modern armies. This has been defined as

*“the integrated employment of the core capabilities of electronic warfare, computer network operations, psychological operations, military deception, and operations security, in concert with specified supporting and related capabilities, to influence, disrupt, corrupt or usurp adversarial human and automated decision making while protecting our own.”*<sup>162</sup>

126. MBARUSHIMANA was one of the most active and influential FDLR leaders during 2009 and now exercises the overall leadership role left void by MURWANASHYAKA's arrest in Germany in November 2009.<sup>163</sup> The organization cannot carry out such a criminal plan without his participation.

127. As mentioned above, MBARUSHIMANA was the only high-ranking FDLR leader who could represent the FDLR before the international community, as MURWANASHYAKA's political activities were banned in Germany, and MUDACUMURA was commanding the troops from undisclosed locations in the Kivus.

128. As set out in paragraphs 146 to 160 below (MBARUSHIMANA's awareness), Callixte MBARUSHIMANA was aware that, pursuant to the FDLR's strategic policy, FDLR troops would commit such crimes in the ordinary course of events. His awareness derived from his position in the FDLR and his access to information from internal and external sources.

<sup>161</sup> [REDACTED]

U.S. Joint Chiefs of Staff, Information Operations Manual, 13 February 2006, DRC-OTP-2021-0065, at p. GL-9, at [http://www.fas.org/irp/doddir/dod/jp3\\_13.pdf](http://www.fas.org/irp/doddir/dod/jp3_13.pdf), last accessed 19 August 2010.

<sup>163</sup> Audio recording of OTP interview with witness [REDACTED] The Washington Times, Rukmini Callimachi, Accused genocide leader safe in Paris, giving orders, 28 January 2010, DRC-OTP-2014-0827, available at <http://www.washingtontimes.com/news/2010/jan/28/accused-genocide-leader-safe-in-paris-giving-order>, last accessed on 19 August 2010 .

## II. Common purpose (Article 25(3)(d))

129. In the alternative, the Prosecution submits that MBARUSHIMANA bears responsibility for the crimes committed by FDLR soldiers in North and South Kivu Provinces in 2009 pursuant to Article 25(3)(d) of the Statute. A person is criminally responsible and liable for punishment for a crime within the jurisdiction of the Court pursuant to that provision if that person

*“In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:*

- (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, were such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or*
- (ii) Be made in the knowledge of the intention of the group to commit the crime”.*

130. The differences between Article 25(3)(d) sub-paragraphs (i) and (ii) have not been elaborated upon by the Court.<sup>164</sup> Pre-Trial Chamber I has held that Article 25(3)(d) is a residual form of accessorial liability which criminalises “*contributions to a crime which cannot be characterised as ordering, soliciting, inducing, aiding and abetting or assisting within the meaning of Article 25(3)(b) or 25(3)(c) of the Statute, by reason of the state of mind in which the contributions were made*”.<sup>165</sup>

131. A plain reading of sub-section (d) indicates that common purpose liability is comprised of the following elements:

- (a) the existence of a plurality of persons that acts with a common purpose;
- (b) the existence of a criminal activity or a criminal purpose;
- (c) the making of any voluntary contribution by the person
- (d) with the aim of furthering the group’s criminal activity or purpose, or in the knowledge of the group’s intention to commit the crime.

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<sup>164</sup> Pre-Trial Chamber I found reasonable grounds to believe that Ahmad Harun and Ali Kushayb are criminally responsible pursuant to this mode of liability, but did not elaborate on its elements. Furthermore, the Chamber made a finding of reasonable grounds on the basis of Article 25(3)(d) as a whole, without commenting on the different constitutive elements of each of its two variants. *Prosecutor v. Harun and Kushayb*, Pre-Trial Chamber I, Decision on the Prosecution Application under Article 58(2) of the Statute, 27 April 2007, ICC-02/05-01/07-1-Corr, paras 88-89 and 106-107.

<sup>165</sup> ICC-01/04-01/06-803, para 337.

### *Objective requirements*

132. In the Prosecution's submission, the wording of Article 25(3)(d) indicates that the suspect need only make a voluntary contribution to the group crime, and that the contribution need not be criminal in itself. Seen in isolation, the acts carried out by the person may well be lawful acts. However, given that the contribution is made in order to further the group's criminal activity or purpose, or with the knowledge of the group's intention to commit the crime, it is criminal under the Rome Statute. The Prosecution must, however, show that the person's contribution to the crime is made knowingly or in order to further the criminal element of the group's purpose or activities.

133. From an objective standpoint, it is immaterial whether the person's contribution is effective, as this is not required by the Statute. It is sufficient for the person to seek to "*promote the practical acts and ideological objectives of the group*"<sup>166</sup> through his contribution. There is also no requirement that the contribution be essential to the commission of the crime, nor for it to have a substantive effect on its commission, as would be required in cases of aiding and abetting.<sup>167</sup>

### *Subjective requirements*

134. The person's contribution must be intentional, meaning that he meant to engage in the conduct, and that it was not coerced or accidental.

135. Furthermore, the person must be aware of the criminal element in the group's purpose or activity in order for common purpose liability to arise. The Prosecution submits that the wording of Article 25(3)(d)(i) does not require specific knowledge of each incident. Only pursuant to Article 25(3)(d)(ii) is the person required to have knowledge of the intention of the group to commit the crime.

136. Finally, in the Prosecution's submission, the person must make his contribution with the aim of furthering at least some criminal activity or purpose of the group, or in the knowledge of the group's intention to commit the crime.

## **9. The existence of a plurality of persons that act with a common purpose**

137. The Prosecution submits that MURWANASHYAKA, MUDACUMURA, MBARUSHIMANA and other members of the FDLR leadership constituted a group of persons acting with the common purpose, in the sense of Article 25(3)(d) of the Statute.

<sup>166</sup> Ambos, commentary to article 25 in Triffterer, section 24 at p 486.

<sup>167</sup> While aiding and abetting liability pursuant to Article 25(3)(c) requires that the person act with the specific purpose of "*facilitating the commission of such a crime*", common purpose liability (variant (i)) does not stipulate a similar subjective requirement.

138. As set out above, the FDLR is not a political party. It is solely a combatant force dedicated to committing crimes to gain political power, led by a leadership that operates in an integrated manner. [REDACTED] as well as other evidence, show that the three leaders mentioned, among others, were active in their roles as FDLR's members.

#### **10. The FDLR's common purpose**

139. As described in detail in this application, the FDLR leaders mentioned above acted with the common purpose of conducting a widespread and systematic attack against the civilian population in order to create a "humanitarian catastrophe", and an international campaign to persuade the DRC and Rwanda Governments and the international community that the FDLR could not be defeated militarily and to extort from them concessions of political power for the FDLR in Rwanda to stop atrocities against civilians.

140. In addition to the evidence discussed above, Witness [REDACTED] stated that the FDLR leaders sought a place at the negotiating table.<sup>168</sup> Witness [REDACTED] also heard MURWANASHYAKA say that the FDLR would have to be part of the government in Rwanda as a condition to their return.<sup>169</sup> MBARUSHIMANA went even further, advocating for the overthrow of the Rwanda Government.<sup>170</sup>

#### **11. MBARUSHIMANA's contributions to the FDLR's commission of crimes**

141. Callixte MBARUSHIMANA contributed to the commission of FDLR crimes by agreeing with MURWANASHYAKA and MUDACUMURA to the FDLR's adoption and implementation of the criminal plan described above.

142. MBARUSHIMANA also personally contributed to the implementation of the criminal plan by orchestrating and leading the extortive international campaign, an essential aspect of the criminal plan.

143. As part of this campaign, in liaison with MURWANASHYAKA, MBARUSHIMANA disseminated the FDLR's views in several languages.

<sup>168</sup> Audio recording of OTP interview with witness [REDACTED].

Audio recording of OTP interview with witness [REDACTED].

FDLR press release of 30/10/09, DRC-OTP-2001-0099; FDLR press release of 05/10/09, DRC-OTP-2001-0065; FDLR press release of 15/09/09, DRC-OTP-2001-0063; FDLR press release of 27/08/09, DRC-OTP-2014-3533



144. MBARUSHIMANA's public communications were the main tool through which the FDLR sought to extort from Rwanda, the DRC and the international community concessions of political power for the FDLR in Rwanda to stop crimes against civilians. MBARUSHIMANA issued over 130 documents since mid-2007 in the name of the FDLR, and at least 50 in 2009, published on the FDLR's website and other websites. He also disseminated the FDLR's discourse through interviews and other interaction with the media.<sup>171</sup>

#### **I. MBARUSHIMANA's aim of furthering the FDLR's criminal activities or purpose**

145. MBARUSHIMANA had indicated in the name of the FDLR, in the days leading up to the armed conflict and throughout it, the FDLR's preparedness to produce more civilian victims in the Kivus, so long as the international community, the DRC, and Rwanda did not give in to the FDLR's demands. MBARUSHIMANA warned 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 FDLR would plunge the region into a long and dreadful war, "the consequences of which are immeasurable".<sup>172</sup> Later, on 17 February 2009, shortly before the launch of further military operations against the FDLR, *Kimia II*, he "warn[ed] MONUC against a danger resulting of its alignment with the Rwandan-Congolese troops" and stated that the FDLR "continue to favour the path of peace, but if the armed coalition against them continue to chase and shoot at the Rwandan refugees and Congolese innocent people, they will have no other choice but to protect Rwandan refugees and civilian populations".<sup>173</sup>

<sup>171</sup> [REDACTED]

AFP and Reuters, "DRC Hutu rebels warn against use of force", 9 December 2008, DRC-OTP-2020-0504, available at <http://www.mg.co.za/article/2008-12-09-drc-hutu-rebels-warn-against-use-of-force>, last accessed on 19 August 2010; In another press release, MBARUSHIMANA said: "The FDLR offer the way of dialogue and peace; those who offer the war as a solution to the crisis of the Great Lakes region of Africa should be held responsible for any consequences thereof". FDLR press release of 14/01/09 authored by MBARUSHIMANA, DRC-OTP-2003-0589; In a press release from mid February 2009, he "warn[ed] MONUC against a danger resulting of its alignment with the Rwandan-Congolese troops" and stated that the FDLR "continue to favour the path of peace, but if the armed coalition against them continue to chase and shoot at the Rwandan refugees and Congolese innocent people, they will have no other choice but to protect Rwandan refugees and civilian populations".

<sup>173</sup> FDLR press release of 17/02/09 authored by MBARUSHIMANA, DRC-OTP-2003-0566.

## II. MBARUSHIMANA's awareness of the criminal activities and purpose of the FDLR

146. By virtue of his position in the FDLR, his permanent activity and his access to information from internal and external sources, MBARUSHIMANA contributed to the commission of crimes by the FDLR in 2009 in full awareness that, pursuant to the group's strategic policy, FDLR troops would commit such crimes in the ordinary course of events.

147. MBARUSHIMANA's awareness of the fact that FDLR would commit crimes in the ordinary course of events derives, firstly, from his position as FDLR Executive Secretary, member of the Steering Committee and one of the four active top leaders.

148. MBARUSHIMANA has been a high-ranking FDLR member since 25 June 2005,<sup>174</sup> at the latest, and has been the group's Executive Secretary since at least 17 July 2007.<sup>175</sup> Throughout 2009, as Executive Secretary, MBARUSHIMANA was technically fourth in command in the political structure of the organisation, but a variety of sources indicate that he was in fact a core member of the top leadership. Witness ██████ said to the Prosecution that MBARUSHIMANA was second in command:

*"From what I know about MBARUSHIMANA, and from hearing him talk on the radio I believe he had a crucial role because he was considered a second to MURWANASHYAKA. We were told this by our leaders, including MUDACUMURA".*<sup>176</sup>

149. MBARUSHIMANA's role gave him access to details about the FDLR's operations. For instance, he acknowledged that the FDLR soldiers seized military materials from FARDC/RDF troops during the attack on Busurungi on 10 May 2009 and offered to make them available for inspection.<sup>177</sup> In an interview on 28 January 2010, MBARUSHIMANA identified himself as the man who coordinates the FDLR rebels' daily activities.<sup>178</sup>

150. By virtue of his position, MBARUSHIMANA is wholly aware of the FDLR's goals and activities. MBARUSHIMANA knows, in particular, that the FLDR is a combatant force that commits crimes against civilians in North and South Kivu. Membership in the group is inseparable from participation in its criminal activities, particularly among the leaders, given

<sup>174</sup> FDLR press release of 27/06/05, DRC-OTP-2001-0087.

<sup>175</sup> FDLR press release of 17/07/07, DRC-OTP-2001-0024. MBARUSHIMANA began authoring FDLR press releases as Executive Secretary on this date.

<sup>176</sup> Audio recording of OTP interview with witness ██████.

<sup>177</sup> 27 May 2009 FDLR press release authored by MBARUSHIMANA, DRC-OTP-2014-3488. See also 9 July 2009 FDLR press release authored by MBARUSHIMANA, DRC-OTP-2014-3436.

<sup>178</sup> The Washington Times, Rukmini Callimachi, Accused genocide leader safe in Paris, giving orders, 28 January 2010, DRC-OTP-2014-0827 at 0827.

the broad scope of their powers pursuant to the FDLR Statute and in light of the concerted manner in which they operate in practice. As a long-time member of the group and one of its most representative leaders internationally, MBARUSHIMANA is enmeshed in the group's criminal activities, which he actively seeks to re-characterise as political and paint in the most positive, albeit false, light possible. The FDLR's alleged crimes<sup>179</sup> have consistently been the object of MBARUSHIMANA's public information activities.

151. MBARUSHIMANA's awareness of the fact that the FDLR would commit crimes in the ordinary course of events also derives from his access to publicly available information and reports from credible sources about the ongoing commission of crimes by the FDLR. As is apparent from the content of his press releases, MBARUSHIMANA stayed abreast of developments in the armed conflict in the Kivus and in the Great Lakes region of Africa throughout 2009 and continues to do so at present. He had timely access to published allegations made by UN bodies and agencies and other credible sources that the FDLR had attacked civilians or civilian structures in various locations throughout 2009. As the press releases also show, MBARUSHIMANA was fully aware of the seriousness of the allegations which he denied or for which he sought to shift the blame from the FDLR.<sup>180</sup>

<sup>179</sup> FDLR press releases of 27/11/09, DRC-OTP-2014-3510; FDLR press release of 18/11/09, DRC-OTP-2014-3476 ; FDLR press release of 30/10/09, DRC-OTP-2001-0099; FDLR press release of 20/10/09, DRC-OTP-2014-3543; FDLR press release of 05/10/09, DRC-OTP-2001-0065; FDLR press release of 15/09/09, DRC-OTP-2001-0063; FDLR press release of 07/09/09, DRC-OTP-2001-0061; FDLR press release of 27/08/09, DRC-OTP-2014-3533; FDLR press release of 14/07/09, DRC-OTP-2001-0060; FDLR press release of 20/04/09, DRC-OTP-2001-0058; FDLR press release of 20/03/09, DRC-OTP-2001-0056; FDLR press release of 05/03/09, DRC-OTP-2001-0054; FDLR press release of 23/02/09, DRC-OTP-2003-0631; FDLR press release of 20/02/09, DRC-OTP-2001-0052; FDLR press release of 14/02/09, DRC-OTP-2001-0050; FDLR press release 02/02/09, DRC-OTP-2001-0047; FDLR press release 15/12/08, DRC-OTP-2001-0045; FDLR press release of 20/05/08, DRC-OTP-2001-0037; FDLR press release of 14/03/08, DRC-OTP-2002-0791; FDLR press release of 27/08/07, DRC-OTP-2001-0031; FDLR press release of 24/08/07, DRC-OTP-2001-0029; FDLR press release of 26/07/07, DRC-OTP-2001-0026; FDLR press release of 17/07/07, DRC-OTP-2001-0024; "Crossing Continents: Congo Connection", interview by Peter GRESTE for BBC East Africa, 21 November 2009, DRC-OTP-2010-0041, available at [www.bbc.co.uk/programmes/p0053dr8#broadcasts](http://www.bbc.co.uk/programmes/p0053dr8#broadcasts), last accessed on 20 August 2010.

<sup>180</sup> FDLR press release of 2/02/09 authored by MBARUSHIMANA, DRC-OTP-2001-0047, denying the killing of 36 civilians in villages in Masisi and Walikale and referring to the "serious crimes" allegedly committed by the coalition; FDLR press release of 14/02/09 authored by MBARUSHIMANA, DRC-OTP-2001-0050, denying allegations made by Human Rights Watch of February 2009 that the FDLR had killed at least 100 people since start of the war, and denying the existence of a letter addressed by the FDLR to the Governor of South Kivu threatening to kill civilians; FDLR press release of 20/02/09 authored by MBARUSHIMANA, DRC-OTP-2001-0052, denying the occurrence of "the so-called massacre of 100 people in Pinga" and "the famous alleged massacres of Kashebere and Remeka or in South Kivu" and alleging that it was the coalition "who are committing war crimes and crimes against humanity including robbery, rape, destruction of property, forced displacements of civilians, the use of people as human shields, harassment of people, and trampling on the fundamental principles of international humanitarian law"; FDLR press release of 20/03/09 authored by MBARUSHIMANA, DRC-OTP-2001-0056, referring to "atrocities and violations of human rights committed against civilians"; FDLR press release of 07/09/09 authored by MBARUSHIMANA, DRC-OTP-2001-0061, referring to "serious crimes against humanity" allegedly committed by the coalition with MONUC's support; FDLR press release of 20/10/09 authored by MBARUSHIMANA, DRC-OTP-2014-3543, referring to the "abominable crimes" allegedly committed in the war waged by the APR/RDF – FARDC coalition and MONUC; and FDLR press release of 30/10/09 authored by MBARUSHIMANA, DRC-OTP-2001-0099, referring to "atrocities" committed by agents of the criminal Kigali regime, including mass killings.

152. [REDACTED]

153. [REDACTED]

154. Moreover, the Prosecution submits that the content of FDLR press releases authored by MBARUSHIMANA also indicates that MURWANASHYAKA and other FDLR members transmitted insiders' information to MBARUSHIMANA, enhancing his knowledge of the FDLR's criminal activities. This is apparent, in particular, from an analysis of MBARUSHIMANA's denials of crimes, seen against the background of information exchanged between MURWANASHYAKA, MUDACUMURA and other high-ranking FDLR military commanders.

155. In a press release dated 27 May 2009, MBARUSHIMANA explicitly denied allegations that the FDLR committed crimes at Mianga and Busurungi in early May 2009.<sup>183</sup>

<sup>181</sup> [REDACTED]

[REDACTED] Audio recording of OTP interview with witness [REDACTED];  
[OMAAR report, DRC-OTP-2001-0183 at](#) [REDACTED];

<sup>182</sup> [REDACTED]

[REDACTED]  
 FDLR press release of 27/05/09 authored by MBARUSHIMANA, DRC-OTP-2014-3488.

<sup>184</sup> FDLR press release of 02/06/09 authored by MBARUSHIMANA, DRC-OTP-2001-0449.

<sup>185</sup> FDLR press release of 09/07/09 authored by MBARUSHIMANA, DRC-OTP-2014-3436.

<sup>186</sup> The 2 June 2009 press release (DRC-OTP-2001-0449) contains a list of 63 refugees allegedly killed by FARDC/RPA coalition troops at Shalio; [REDACTED]

[REDACTED]  
 The 27 May and 9 July 2009 press releases (DRC-OTP-2014-3488 and DRC-OTP-2014-3436) contain details of the military material allegedly seized by the FDLR from the FARDC/RPA at Mianga and Busurungi; [REDACTED]

156. [REDACTED]

157. The Prosecution submits that there are grounds to believe that the inclusion of detailed information in the press releases results from MBARUSHIMANA's access to insider information through his contact with the FDLR President and other FDLR sources. The Prosecution maintains that this level of access to information establishes reasonable grounds to believe that MBARUSHIMANA was fully aware of the fact that, pursuant to the FDLR's strategic policy, FDLR troops would commit crimes in the ordinary course of events.

158. MBARUSHIMANA's intent, shared by MURWANSHYAKA, to defraud the international community with a false account of the events strongly indicates that the former's contribution was voluntary. His collaboration with MURWANASHYAKA in preparation of

press releases relating to Busurungi makes it evident that MBARUSHIMANA's account of such events was a voluntary fabrication, calculated to counter the reports of MONUC and the UN Office for the Coordination of Humanitarian Affairs (OCHA) published in mid to late May 2009, which attributed responsibility for the attack on Busurungi and the resulting crimes exclusively to the FDLR.<sup>192</sup> [REDACTED]

[REDACTED] When MBARUSHIMANA published his 27 May press release denying the FDLR's responsibility for the events at Busurungi, he shifted the blame for the killings of civilians at Busurungi to the FARDC/RDF coalition troops.<sup>195</sup>

159. MBARUSHIMANA's conduct with respect to the events at Busurungi is part of his pattern of conduct during 2009. On several occasions, MBARUSHIMANA published denials of alleged crimes [REDACTED]

[REDACTED] Through his press releases of 14 and 20 February 2009, he denied the series of attacks against the civilian population attributed to the FDLR in Malembe and Mianga, Waloa-Loanda *groupement*, and in Katoyi and Remeka, Ufamandu

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<sup>192</sup> OCHA Situation Report #1 as of 19 May 2009, DRC-OTP-2002-0693 at 0693; Google Actualités/AFP, RDCongo: plusieurs dizaines de civils tués lors d'attaques des FDLR, dated 11 May 2009, DRC-OTP-2002-0319.

<sup>193</sup>

[REDACTED]

27 May 2009 FDLR press release authored by MBARUSHIMANA, DRC-OTP-2014-3488. MBARUSHIMANA alleged that the FDLR troops were attacked by the coalition troops, and only then counter-attacked. Faced with the FDLR's counter-attack, the coalition troops fled towards the civilian population and, according to MBARUSHIMANA, used the civilians as human shields.

*groupement*, Masisi, in the last days of January 2009.<sup>196</sup> [REDACTED]

[REDACTED] Another example relates to the incidents at Pinga, Kashebere and Remeka, which occurred between late January and mid-February 2009. [REDACTED]

[REDACTED] MBARUSHIMANA authored a press release denying the commission of crimes at those locations by the FDLR.<sup>200</sup>

160. In the Prosecution's submission, the evidence provides grounds to believe that MBARUSHIMANA's contribution to the FDLR's crimes was made knowingly and intentionally.

161. There are reasonable grounds to believe that the requirements of co-perpetration or alternatively, of common purpose criminal liability (Articles 25(3)(a) and alternatively (d)) have been met.

## **E. BACKGROUND TO INVESTIGATION / LEGAL FRAMEWORK**

### **I. Procedural history**

162. On 3 March 2004, the Government of the DRC referred the situation in the DRC to the Office of the Prosecutor. The referral includes crimes within the jurisdiction of the Court committed in the territory of the DRC since 1 July 2002. Following detailed analysis of the information concerning the situation referred pursuant to Article 53 of the Rome Statute and Rule 104 of the Rules of Procedure and Evidence, the Prosecutor concluded that all

<sup>196</sup> FDLR press release of 14/02/09 authored by MBARUSHIMANA and published on the FDLR website, DRC-OTP-2001-0050 (denial of crimes in Waloa-Loanda and Ufamandu); FDLR press release of 20/02/09 authored by MBARUSHIMANA and published on the FDLR website, DRC-OTP-2001-0052 (denial of crimes in Katoyi).

<sup>197</sup> [REDACTED]

[REDACTED] FDLR press release of 20/02/09 authored by MBARUSHIMANA, DRC-OTP-2001-0052.

requirements of Article 53(1) of the Rome Statute were satisfied. Accordingly, on 16 June 2004, the Prosecutor decided to initiate an investigation.

163. By letter of 17 June 2004, the decision was communicated to the President of the Court. On 22 and 23 June 2004, the Prosecutor sent letters of notification, dated 21 June 2004, to the States Parties to the Rome Statute, as well as to other states, which within the terms of Article 18(1) of the Rome Statute would normally exercise jurisdiction over the crimes concerned. Following the notification, no information pursuant to Article 18(2) of the Rome Statute was received. On 23 June 2004, the Prosecutor publicly announced the commencement of an investigation of alleged crimes committed in the DRC.

## II. Issues of victim and witness protection

164. Article 68(1) imposes on the Prosecutor the obligation to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In an effort to minimize the risk to victims and witnesses at this stage of proceedings, the Prosecution has [REDACTED]

[REDACTED], [REDACTED], [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]. [REDACTED]  
[REDACTED]

165. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]



### III. Admissibility

166. The Prosecution submits that the case against Callixte MBARUSHIMANA is admissible. The information available to the Prosecution indicates that there are no ongoing investigations or prosecutions by any State in relation to the conduct that forms the subject of the Prosecution's application against MBARUSHIMANA.<sup>201</sup> Moreover, on the basis of the evidence relied on in this application, the Prosecution submits that the case is of sufficient gravity to justify further action by the Court.

a) *The case has not been and is not being investigated or prosecuted by a State which has jurisdiction over it, in accordance with article 17(1) (a) and (b)*

167. Pursuant to the Chamber's finding in the *Lubanga* case, the jurisprudence of the Court has been held that "it is a *condition sine qua non* for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court."<sup>202</sup> As shown below, no investigation or prosecution has been undertaken in any State in relation to the conduct which forms the subject of the Prosecutor's application. While there has been some domestic activity in relation to the alleged criminal responsibility of Callixte MBARUSHIMANA in the events which occurred in Rwanda during 1994, such efforts relate to conduct which is irrelevant to the present case.

### DRC

168. The crimes for which this application is made were committed on the territory of the Democratic Republic of the Congo. According to the information available to the Prosecution, no investigations or prosecutions have been or are being undertaken in the DRC 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 MBARUSHIMANA in particular.<sup>203</sup>

<sup>201</sup> *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.

<sup>202</sup> *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.

<sup>203</sup>

## RWANDA

169. Callixte MBARUSHIMANA is a Rwandan national.<sup>204</sup> He is currently wanted on at least one warrant of arrest, issued by the then Rwandan National Deputy Public Prosecutor on or around 15 March 2001, for genocide and crimes against humanity in relation to the 1994 Rwanda genocide.<sup>205</sup> According to available information, on 27 October 2004, the then Rwanda Deputy National Prosecutor issued another warrant of arrest against MBARUSHIMANA for the same alleged crimes. On 29 August 2008, the Rwandan National Public Prosecution Authority issued an indictment<sup>206</sup> against MBARUSHIMANA, on charges of genocide, complicity in genocide, conspiracy to commit genocide, murder and extermination as crimes against humanity and formation, membership, leadership, and participation in an association of a criminal gang, whose purpose and existence is to do harm to people or their property, as ordinary crimes.<sup>207</sup> As with the warrants of arrests, the facts underlying the indictment relate to MBARUSHIMANA's alleged participation in the 1994 Rwandan genocide.

170. To this day, and on the basis of this arrest warrant, MBARUSHIMANA is named on the publicly available Interpol Red Notice list for Crimes against life and health, genocide, organized crime / transnational crime on the basis of this arrest warrant.<sup>208</sup>

## FRANCE

171. Callixte MBARUSHIMANA currently resides in France,<sup>209</sup> where he was granted refugee status<sup>210</sup> in late 2003.<sup>211</sup> On 6 February 2008, a group of genocide victims, together with the French non-governmental organization *Collectif des Parties Civiles pour le Rwanda*, lodged a complaint against Callixte MBARUSHIMANA in France before the competent

<sup>204</sup> He was born on 24 July 1963 in Ndusu, Ruhengeri, Rwanda. See [REDACTED]

[REDACTED] Interpol notice, DRC-OTP-2014-0574, available at [http://www.interpol.int/public/Data/Wanted/Notices/Data/2004/74/2004\\_52874.asp](http://www.interpol.int/public/Data/Wanted/Notices/Data/2004/74/2004_52874.asp), last accessed on 19 August 2010.

<sup>205</sup> United Nations Administrative Tribunal Judgment, No. 1192, 30 September 2004, DRC-OTP-2012-0002, at 0004 to 0006; see also International Justice Tribune, *undated*, which gives the date of 12 March 2001.

<sup>206</sup> [REDACTED]

<sup>208</sup> [REDACTED] Interpol website, DRC-OTP-2014-0574, available at [http://www.interpol.int/public/Data/Wanted/Notices/Data/2004/74/2004\\_52874.asp](http://www.interpol.int/public/Data/Wanted/Notices/Data/2004/74/2004_52874.asp), last accessed on 19 August 2010.

<sup>209</sup> See [REDACTED]

<sup>210</sup> See [REDACTED]

<sup>211</sup> "Callixte Mbarushimana, Just Who is the Fugitive Arrested in Germany", 11 July 2008, DRC-OTP-2020-0541.

prosecution office (*Parquet de Paris*) for his alleged involvement in the commission of crimes during the events of 1994 in Rwanda.<sup>212</sup> On 13 March 2008, the *Parquet de Paris* opened an investigation (*enquête préliminaire*) and tasked the central criminal police brigade (*Brigade Criminelle*) to conduct a preliminary inquiry.<sup>213</sup> Since then some investigative activities have been ongoing in relation to these allegations relating to his involvement in the 1994 Rwanda genocide.

## GERMANY

172. The German Federal Public Prosecutor General's office conducted an investigation into crimes committed by the FDLR in North and South Kivu in 2009. As a result of the investigation, MURWANASHYAKA and MUSONI were accused of being responsible for war crimes and crimes against humanity. [REDACTED]

[REDACTED] Callixte MBARUSHIMANA was considered a potential suspect in the investigation, but the German Federal Public Prosecutor General's office took no measures to question him, to conduct search and seizure operations of his living quarters, or to have him arrested in France and extradited to Germany.

173. The Federal Public Prosecutor General's office has assisted the Prosecution with its own investigation into the crimes committed in North and South Kivu in 2009 by sharing information and evidence at the OTP's request, consistent with Article 93 of the Statute. [REDACTED]

<sup>212</sup> See Collectif des parties civiles pour le Rwanda, DRC-OTP-2014-0218, available at <http://www.collectifpartiescivilesrwanda.fr/affairesjudiciaire.html>, last accessed on 19 August 2010; see also: Callixte Mbarushimana, Just Who is the Fugitive Arrested in Germany, 11 July 2008, DRC-OTP-2020-0541.

<sup>213</sup> [REDACTED]; see also the [REDACTED] CPR press release, DRC-OTP-2014-0218, available at [http://www.collectifpartiescivilesrwanda.fr/communiqu%C3%A9\\_cpr\\_arrestationmbarushimana.html](http://www.collectifpartiescivilesrwanda.fr/communiqu%C3%A9_cpr_arrestationmbarushimana.html), last accessed on 19 August 2010.

<sup>214</sup> [REDACTED]

174. Therefore, no investigation or prosecution has been or is being undertaken by any national jurisdictions, including those of the DRC, Rwanda, France and Germany, in relation to the person and the conduct which forms the subject of the Prosecutor's application.

*b) The case has not been tried before any national or international jurisdiction for conduct which is the subject of the Prosecution's application for a warrant of arrest, in accordance with articles 17 (1)(c) and 20 (3) of the Rome Statute*

175. The Prosecution submits that, according to the information available, there has not been any trial before any competent national jurisdiction for the conduct which forms the subject of the Prosecution's application for a warrant of arrest.

*c) The case is of sufficient gravity to justify further action by the Court*

176. In accordance with Regulation 29(2) of the Regulations of the Office of the Prosecutor, in assessing the gravity of the case, the Prosecution took into consideration 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 the case which is the subject of the current application is of sufficient gravity to justify further action by the Court.

#### **F. NECESSITY OF ARREST OF CALLIXTE MBARUSHIMANA (Article 58(1)(b) and (2)(e))**

177. The issuance of an arrest warrant for Callixte MBARUSHIMANA is warranted based on grounds that it is necessary to ensure MBARUSHIMANA's appearance at trial, ensure that he does not obstruct or endanger the investigation or the court proceedings, and prevent him from continuing with the commission of crimes within the jurisdiction of the Court arising out of the same circumstances.

178. First, there are reasonable grounds to believe that MBARUSHIMANA will not appear for trial unless compelled to do so by arrest. Callixte MBARUSHIMANA lives in Paris, France, and holds a French residency permit (*titre de séjour*) valid until 30 December 2013,<sup>216</sup> with which he is able to travel on French territory freely. Legal French residency status makes him eligible for travel throughout the European Union Schengen area where the free movement of persons is guaranteed, despite UN and EU travel bans imposed on him. MBARUSHIMANA is thus theoretically able to travel unnoticed and without facing any administrative formality from France to or through Austria, Belgium, the Czech Republic,

<sup>216</sup> See [REDACTED]

Denmark, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxemburg, Malta, The Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, and Sweden.<sup>217</sup> In addition, Iceland, Liechtenstein, Norway and Switzerland are associated with the EU Schengen *acquis* by an agreement on free movement of persons between those States and the Schengen area, extending the area into which MBARUSHIMANA is in principle able to travel without being checked at borders.<sup>218</sup>

179. [REDACTED], [REDACTED]  
[REDACTED] [REDACTED], [REDACTED] [REDACTED] [REDACTED]  
[REDACTED] [REDACTED], [REDACTED] [REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED] [REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

180. [REDACTED] [REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED] [REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

<sup>217</sup> See Schengen Agreement of 1985 on Schengen cooperation, as incorporated into the EU legal framework by the 1997 Treaty of Amsterdam, at [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/), last accessed on 19 August 2010.

<sup>218</sup> See Agreement on the European Economic Area in the cases of Iceland, Norway and Liechtenstein and Agreement on the free movement of persons in the case of Switzerland, at [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/), last accessed on 19 August 2010.

<sup>219</sup> [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

221  
222

[REDACTED]

181. It can therefore be considered that there are reasonable grounds to believe that Callixte MBARUSHIMANA has the means and the available support to change location unnoticeably in the extended Schengen area, and most likely beyond, as well as to abscond from the reach of the Court.

182. In addition, the FDLR in itself has a significant international support network based in Africa, Europe and North America and this network assists *inter alia* via fund-raising, promotion of propaganda and money-laundering activities through coordination with the FDLR's military leaders who are based in the DRC.<sup>223</sup> Taking into account MBARUSHIMANA's past and current positions and his prominent role, as the Executive Secretary of the FDLR, at the highest political level in the FDLR, the Prosecution believes that MBARUSHIMANA will be able to access the financial means necessary to escape prosecution, either through other members of the FDLR, or through members of other affiliated groups/parties.<sup>224</sup>

183. Second, given his network of contacts and resources, it is reasonable to conclude that MBARUSHIMANA may obstruct and endanger the investigations and court proceedings.

184. [REDACTED]

MBARUSHIMANA has the means to get access to victims and witnesses or persons who are perceived as potential witnesses through FDLR supporters who may have an interest in preventing information about the FDLR's criminal activities becoming known and brought before the Court.

<sup>223</sup> See Group of Experts Final Report, DRC-OTP-2010-0045 at 0067 to 0072, paras. 90 to 110.

<sup>224</sup> See Group of Experts Final Report, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/601/43/PDF/N0960143.pdf?OpenElement> DRC-OTP-2010-0045 at 0070 and 0071, paras. 102 and 103.

<sup>225</sup> [REDACTED]

185. [REDACTED]

[REDACTED] It is therefore reasonable to believe that MBARUSHIMANA will become aware of the fact that he is the focus of the Prosecution's investigation. [REDACTED]

[REDACTED]. It is reasonable to believe that MBARUSHIMANA's motivation for attempting to obstruct the Prosecution's investigation and evade justice will be heightened.

186. The Prosecution submits that, in light of his senior role within the FDLR's leadership, of his ongoing contact with FDLR members in the field, and of his ability to disseminate messages on behalf of the FLDR at will, MBARUSHIMANA is able to obstruct the investigation, as well as to foster an atmosphere of intimidation against FDLR victims, potential ICC witnesses and FDLR rank-and-file soldiers with a desire to demobilise.

187. Third, a warrant of arrest is necessary to prevent MBARUSHIMANA from continuing with the commission of crimes within the jurisdiction of the Court arising out of the same circumstances.

188. As mentioned above, according to some sources, since the arrests of MURWANAHYAKA, and MUSONI in Germany, Callixte MBARUSHIMANA has assumed a greater role in the daily management of the FDLR activities on the ground, becoming the temporary leader of the organization and its primary decision-maker.<sup>226</sup> Gregory ALEXANDER, the current Director of the MONUC DDRRR program in Goma, DRC, was also reported recently saying that since MURWANASHYAKA's arrest, MBARUSHIMANA

<sup>226</sup> Audio recording of OTP interview with witness [REDACTED]:  
 "...Now the person who can ... who can take decision is the executive secretary Callixte MBARUSHIMANA.[...] the person who is going to take over in terms of decision-making is Callixte MBARUSHIMANA [...]MBARUSHIMANA had ... uh ... a speech on the ra... on the BBC [...]And he ... uhm ... MBARUSHIMANA did say that sin... the ... temporary, since that the president and his deputy have been arr... arrested he will be the one ... uh ... taking decision ... temporary...".

essentially has slipped into the role of group leader and is preventing the others from surrendering.<sup>227</sup> According to The Washington Times, MBARUSHIMANA himself said during an interview on 28 January 2010 that he is the man who coordinates the FDLR rebels' daily activities.<sup>228</sup> In 2010, MBARUSHIMANA has continued to conduct FDLR activities from French territory and thus to contribute to the commission of crimes. The FDLR has continued to perpetrate attacks on civilians in 2010.<sup>229</sup> In the meantime, Callixte MBARUSHIMANA has continued representing the FDLR.<sup>230</sup>

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>227</sup> The Washington Times, Rukmini Callimachi, Accused genocide leader safe in Paris, giving orders, 28 January 2010, DRC-OTP-2014-0827, available at <http://www.washingtontimes.com/news/2010/jan/28/accused-genocide-leader-safe-in-paris-giving-order>, last accessed on 19 August 2010.

<sup>228</sup> The Washington Times, Rukmini Callimachi, Accused genocide leader safe in Paris, giving orders, 28 January 2010, DRC-OTP-2014-0827, available at <http://www.washingtontimes.com/news/2010/jan/28/accused-genocide-leader-safe-in-paris-giving-order>, last accessed on 19 August 2010.

<sup>229</sup> See in particular reports from UNOCHA from 29 January 2010, DRC-OTP-2014-0732, at [http://www.reliefweb.int/rw/RWFiles2010.nsf/FilesByRWDocUnidFilename/ASHU-826RG2-rapport\\_complet.pdf/\\$File/rapport\\_complet.pdf](http://www.reliefweb.int/rw/RWFiles2010.nsf/FilesByRWDocUnidFilename/ASHU-826RG2-rapport_complet.pdf/$File/rapport_complet.pdf), last accessed on 20 August 2010, and from 5 February 2010, DRC-OTP-2014-0730, at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1162167>, last accessed on 20 August 2010; and from Radio Okapi, 14 May 2010, DRC-OTP-2021-0185, at <http://radiookapi.net/actualite/2010/05/14/shabunda-liberation-des-45-otages-apres-de-violents-affrontements/>, last accessed on 20 August 2010.

<sup>230</sup> See Press Release No 01/SE/CD/January/2010, DRC-OTP-2014-3509, at <http://www.congoinfos.com/article-communicque-de-presse-n-01-se-cd-janvier-2010-des-fdlr-42916770.html>, last accessed on 19 August 2010; Press Release No 01/SE/CD/February /2010, DRC-OTP-2001-0047 at <http://www.congoinfos.com/article-communicque-de-presse-n-01-se-cd-fevrier-2010-des-fdlr-45669526.html>, last accessed on 19 August 2010 and Press Release No 01/SE/CD/MArch /2010, DRC-OTP-2014-3517 at <http://www.congoinfos.com/article-communicque-de-presse-n-01-se-cd-mars-2010-des-fdlr-46030154.html>, last accessed on 19 August 2010.



[REDACTED]

**H. OTHER REQUESTS**

**Request for Urgent Consideration of the Application**

193. The Prosecution respectfully requests that the present application be considered on an expedited basis in order to maximize the possibility of successfully executing the warrant of arrest – should the Chamber decide to issue one.

[REDACTED]

197. In the Prosecution’s assessment, the likelihood that MBARUSHIMANA will decide to attempt to evade justice increases by the day, in light of the increased public pressure exercised on the FDLR members abroad, the military pressure on the FDLR on the ground,

[REDACTED]

and the increased diplomatic efforts directed towards a resolution of the situation in the Kivu provinces.

### **Expected filing of a request to add to the charges**

198. Because of the Prosecution's request that this application be considered on an urgent basis, and in light of [REDACTED] the Prosecution respectfully informs the Chamber that it anticipates having to request authorisation to add to the charges presented in this application in due course, as well as having to request a waiver of the requirements of paragraph 1 of Article 101 of the Statute in coming months.

### **Request for sealing and *ex parte* and closed proceedings**

199. In order to maximize the possibility to execute the warrant of arrest – should the Chamber decide to issue one –, the Prosecution requests that this application be received by the Pre-Trial Chamber under seal, that the fact of the existence of this application also be sealed, and that any proceedings conducted in connection with this application be held *ex parte* and in closed session. The Prosecution also requests that any determination by the Pre-Trial Chamber to issue any warrant of arrest be sealed from the public until such time as the necessary arrangements are in place to allow for the unsealing.

200. The Prosecution therefore submits that it would be appropriate, as occurred in the proceedings in the *Lubanga*,<sup>232</sup> *Ntaganda*,<sup>233</sup> *Katanga and Ngudjolo*,<sup>234</sup> and *Bemba*<sup>235</sup> cases, for the existence of this application and any warrant of arrest to be unsealed only after it is

<sup>232</sup> See *Prosecutor v. Thomas Lubanga Dyilo*, "Decision To Unseal the Warrant of Arrest Against Mr. Thomas Lubanga Dyilo and Related Documents", ICC-02-04-01/06-37 (public version), 17 March 2006, p. 3 (noting LUBANGA DYILO's entry into the custody of officials of the Court); *Prosecutor vs. Thomas Lubanga Dyilo*, "Prosecution's Request for Unsealing the Arrest Warrant", ICC-01/04-01/06-30-US-Exp (remains under seal), 10 March 2006, paras. 11-12 (requesting unsealing of the warrant of arrest once aircraft carrying LUBANGA DYILO left airspace of the DRC). The Decision was issued after the arrestee had reached European airspace.

<sup>233</sup> See *Prosecutor v. Bosco NTAGANDA*, "Decision to Unseal the warrant of Arrest Against Bosco NTAGANDA and related Documents", ICC-01/04-02/06 (public version), 28 April 2008, "Prosecution's Application for Warrants of Arrest, article 58", ICC-01/04-98-US-Exp, 12 January 2006.

<sup>234</sup> See *Prosecutor v. Germain Katanga*, "Decision to Unseal the warrant of Arrest Against Germain Katanga and related Documents", ICC-01/04-01/07 (SEALED), 02 July 2009; *Prosecutor v. Germain Katanga* "Prosecution's Application for a warrant of arrest for Germain Katanga", ICC-01/04-348-US-Exp and ICC-01/04-350-US-Exp (25 June 2007); and *Prosecutor v. Mathieu NGUDJOLO*, "Decision to Unseal the warrant of Arrest Against Mathieu NGUDJOLO and related Documents", ICC-01/04-02/07 (public version), 7 February 2008; *Prosecutor v. Mathieu NGUDJOLO* "The Prosecution's application for warrants of arrest under article 58 of the Statute, part one and two", ICC-01/04-348-US-Exp and ICC-01/04-350-US-Exp.

<sup>235</sup> See *Prosecutor v. Jean Pierre BEMBA*, "Decision to Unseal the warrant of Arrest Against Jean Pierre BEMBA and related Documents", ICC-01/05-01/08 (public version), 24 May 2008, "Prosecutor's Application for Unsealing the Arrest Warrant against Jean Pierre BEMBA", ICC-01/05-01/08-4-US-Exp.

confirmed that MBARUSHIMANA has been transferred to a location in which his own security and the integrity of his conditions of detention are allegedly assured. At the earliest, this would occur once the person is presented to the relevant judicial authorities in the country of arrest.

### **Transmission of request for arrest and surrender and request for search and seizure**

201. The information available to the Prosecution indicates that MBARUSHIMANA is currently located in Paris, France. The Prosecution has sent requests for assistance to France in the course of its investigation related to MBARUSHIMANA and has had numerous exchanges with the competent French authorities. Pursuant to Article 89(1) of the Statute, the Prosecution requests that the transmission by the Registry of any request for arrest and surrender to the competent French authorities be done in consultation and coordination with the Prosecution.

202. In particular, and in accordance with Article 57(3)(a) of the Statute, the Prosecution requests that the Pre-Trial Chamber issue a warrant for France to take measures for the search and seizure of the apartment where MBARUSHIMANA resides as well as of any other relevant premises, as part of or in conjunction with the arrest operation.

203. [REDACTED]

**I. 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 Callixte MBARUSHIMANA 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 January 2009 and the date of this application, pursuant to Article 25(3)(a) or, in the alternative, Article 25(3)(d) of the Statute;
2. Find that the arrest of Callixte MBARUSHIMANA is necessary;
3. Issue a warrant of arrest for Callixte MBARUSHIMANA;
4. Direct the Registry, in consultation and coordination with the Prosecution, to prepare and transmit, on a confidential basis, a request for arrest and surrender of MBARUSHIMANA to the competent authorities of France;
5. Direct the Registry, in consultation and coordination with the Prosecution, to prepare and transmit, on a confidential basis, in accordance with Article 57(3)(a) of the Statute, a request to the competent authorities of France to take measures for the search and seizure of the apartment in which MBARUSHIMANA resides as well as of any other relevant premises, as part of or in conjunction with the arrest operation;

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## ANNEXES

1. Photographs of Callixte MBARUSHIMANA
2. Diagram of FDLR's leadership
3. Maps of areas of North and South Kivu with information about crimes
4. Press releases and other FDLR documents
5. [REDACTED]
6. [REDACTED]
7. Group of Experts November 2009 report
8. HRW December 2009 report
9. Consolidated Travel Ban and Asset Freeze List maintained by the Security Council Committee established pursuant to resolution 1533 (2004) concerning the DRC
10. [REDACTED]
11. [REDACTED]



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Luis Moreno-Ocampo, Prosecutor

Dated this 20<sup>th</sup> day of August 2010  
At The Hague, The Netherlands