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Pénale
Internationale**



**International
Criminal
Court**

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PRE-TRIAL CHAMBER I

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

***IN THE CASE OF
THE PROSECUTOR V. CALLIXTE MBARUSHIMANA***

Public Redacted version

Decision on the confirmation of charges

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*,
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**Victims Participation and Other
Reparations Section**

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PRE-TRIAL CHAMBER I of the International Criminal Court (respectively, “Chamber” and “Court”), in the case of the *Prosecutor v. Callixte Mbarushimana*;

HEREBY RENDERS THE FOLLOWING DECISION.

I. INTRODUCTION

1. Callixte Mbarushimana

1. The suspect, Callixte Mbarushimana (“Mr Mbarushimana” or “the Suspect”), was born on 24 July 1963 in Ndusu, in Ruhengeri, Northern Province of Rwanda. He is a Rwandan national, allegedly of Hutu ethnicity and is a computer engineer. In 2003, he acquired refugee status in France, holding a residence permit which expires on 31 December 2013.¹

2. The Document Containing the Charges (“DCC”) alleges that Mr Mbarushimana has been associated with the *Forces Démocratiques pour la Libération du Rwanda* (“FDLR”) since at least 2004.² According to their statute, the FDLR is an armed group seeking to “reconquérir et défendre la souveraineté nationale” of Rwanda.³

3. According to the information provided by the Prosecution, in the aftermath of the 1994 genocide in Rwanda, as the rebel group, the Rwandan Patriotic Front, gained control of the country, members of the former *Forces Armées Rwandaises* (“ex-FAR”) and members of the *interahamwe*⁴ militias allegedly responsible for the Rwandan genocide

¹ ICC-01/04-01/10-330-AnxA-Red, para. 1; *see also* ICC-01/04-01/10-T-6-Red2-ENG CT WT, p. 3, line 17.

² DCC, para. 2.

³ EVD-PT-OTP-01080, « Manifeste-programme et statuts des Forces Démocratique de Libération du Rwanda » (“FDLR Statute”), at 1515.

⁴ Literally in Kinyarwanda “those who work together”, the name given to Rwandan Hutu militias trained to kill Tutsi during the Rwandan genocide. *See* EVD-PT-D06-01265, Expert report of Witness 2, at 0015-6.

fled to the Kivu Provinces in the eastern part of what was then Zaire, now the Democratic Republic of the Congo (“DRC”).⁵ Over time, members of the ex-FAR and *interahamwe*, as well as exiled Rwandans seeking political change in Rwanda, began to organise themselves into structured political and military groups designed to oppose the new Rwandan government, both politically and militarily.⁶

4. The first of these groups was called *Rassemblement pour le retour des Réfugiés Rwandais* which was created in 1995,⁷ the remnants of which would later form the *Armée de Libération du Rwanda* (“ALIR”) in 1997.⁸ It was the stated purpose of both these groups to return to Rwanda and overthrow the incumbent government.⁹ In or around early 2000, a splinter group of ALIR leaders broke away and formed the FDLR.¹⁰ Ignace

⁵ EVD-PT-OTP-00054, *Report: Conflict and Transition Consultancies, Opportunities and Constrains for the Disarmament & reparations of Foreign Armed Groups in the Democratic Republic of the Congo*, Hans Romkema De Veenhoop, June 2007 (“Hans Romkema De Veenhoop Report”), at 0345; EVD-PT-OTP-00761, *Rwanda: Arming the perpetrators of the genocide*, Amnesty International, June 1995 (“Amnesty International Article 1995”), at 0036, 0042; EVD-PT-OTP-00277, *A Welcome Expression of Intent. The Nairobi Communiqué and the Ex-FAR/Interahamwe*, African Rights Working for Justice, December 2007 (“African Rights Report”), at 0128, 0131; EVD-PT-OTP-00343, United Nations, *Consolidated Report on Investigations Conducted by the United Nations Joint Human Rights Office (UNJHRO) into Massacres and Serious Human Rights Abuses in Busurungi and Mianga, North Kivu, in April and May 2009* (“UNJHRO Report”), at 0039; EVD-PT-OTP-00865, Letter dated 9 November 2009 from the Group of Experts on the Democratic Republic of the Congo addressed to the Chairman of the Security Council Committee established pursuant to resolution 1533 (2004), at 0510.

⁶ EVD-PT-OTP-00277, African Rights Report, at 0128, 0131; EVD-PT-OTP-00761, Amnesty International Article 1995, at 0043-4.

⁷ EVD-PT-OTP-00054, Hans Romkema De Veenhoop Report, at 0345; EVD-PT-OTP-00277, African Rights Report, at 0134; EVD-PT-OTP-00761, Amnesty International Article 1995, at 0044; EVD-PT-OTP-00286, *The Rwandan Political Opposition in Exile: A valid interlocutor vis-à-vis Kigali?*, IDPM-UA Discussion paper, 2004-1 (“IDPM-UA Discussion paper”), at 0534.

⁸ EVD-PT-OTP-00286, IDPM-UA Discussion paper, at 0535; EVD-PT-OTP-00054, Hans Romkema De Veenhoop Report, at 0346; EVD-PT-D06-01285, Transcript of Interview of Witness 4/BKA-3, at 0034.

⁹ EVD-PT-OTP-00286, IDPM-UA Discussion paper, at 0539; EVD-PT-OTP-00767, *South Kivu: a Sanctuary for the rebellion of the Democratic Forces for the Liberation of Rwanda*, IOB Discussion Paper, 2006.05 (“IOB Discussion Paper”), at 0186.

¹⁰ EVD-PT-OTP-00277, African Rights Report, at 0142; EVD-PT-OTP-00054, Hans Romkema De Veenhoop Report, at 0346; EVD-PT-D06-01275, Transcript of Interview of Witness 672, at 0841; EVD-PT-OTP-00630, Transcript of Interview of Witness 561, at 1233; EVD-PT-OTP-00643, Transcript of Interview of Witness 552, at 0224; EVD-PT-OTP-00701, Transcript of Interview of Witness 544, at 0951.

Murwanashyaka was appointed as President of the FDLR in late 2001¹¹ and held this position until his arrest by the German authorities in November 2009.¹²

5. The Prosecution alleges that the Suspect is a member of the FDLR *Comité Directeur* (Steering Committee), an organ responsible for the group's general policy composed of representatives from both its military and its political wing,¹³ and that his role within the organisation has expanded over the years. Firstly appointed Commissioner for Finance in 2004, Mr Mbarushimana became Deputy Executive Secretary in 2005 and Executive Secretary in 2007. Following the arrest of FDLR President Murwanashyaka and Vice President Straton Musoni in Germany in November 2009, Mr Mbarushimana remained the last high-ranking FDLR representative based in Europe; he subsequently became the *de facto* leader of the FDLR and was appointed FDLR first Vice President *ad interim* in 2010.¹⁴

2. Prosecution's allegations

6. The Prosecution alleges that, in January 2009, the FDLR hierarchy launched a campaign aimed at attacking the civilian population and creating a "humanitarian catastrophe" in the Kivu provinces of DRC, in order to draw the world's attention to the FDLR's political demands. The Prosecution submits that attacks were carried out by FDLR troops in pursuance of this strategy, which resulted in the commission of several war crimes and crimes against humanity.¹⁵

7. The Prosecution alleges that a significant part of the strategy of attacking the civilian population consisted in publicly denying any responsibility of the FDLR for the

¹¹ EVD-PT-OTP-00277, African Rights Report, at 0143.

¹² EVD-PT-OTP-00834, Transcript of Interview of Witness 632, at 0423; EVD-PT-OTP-00644, Transcript of Interview of Witness 552, at 0278.

¹³ EVD-PT-OTP-01080, FDLR Statute, at 1525-6.

¹⁴ DCC, para. 2.

¹⁵ DCC, para. 34.

losses entailed by those attacks, in some instances blaming other armed parties to the conflict, in particular the DRC governmental *Forces Armées de la République Démocratique du Congo* ("FARDC").¹⁶ The systematic denial was aimed at preventing the FDLR's leaders from being labelled as mass murderers, on the one hand, and at exploiting the international attention on the FDLR and its political agenda triggered by the attacks, on the other.¹⁷

8. According to the DCC, in his capacity as Executive Secretary of the FDLR, Mr Mbarushimana was the individual responsible for the implementation of this part of the FDLR strategy. On the one hand, whilst having full knowledge of the attacks perpetrated by the FDLR against the civilian population, he issued several press releases on behalf of the organisation in the aftermath of operations, systematically denying any responsibility of the group. On the other hand, he engaged in international peace talks and negotiations, shrewdly portraying the FDLR as an actor seeking peace and stability in the Kivu area.¹⁸ In the words of the Prosecution, the Suspect was the "linchpin" of the overall FDLR strategy, namely "because of his ability to transform the FDLR's crimes on the ground into political capital".¹⁹ As such, he is to be held criminally responsible under Article 25(3)(d) of the Rome Statute ("Statute"), since he knowingly and intentionally contributed "in any other way" – i.e., in a way other than the ones listed in article 25(3) (a), (b) and (c) of the Statute - to the commission of the war crimes and crimes against humanity charged by the Prosecution under Counts 1 to 13.

3. Defence Submissions

¹⁶ DCC, para. 41.

¹⁷ ICC-01/04-01/10-T-7-Red-ENG WT, p. 35, lines 2-12.

¹⁸ DCC, paras 119-26.

¹⁹ ICC-01/04-01/10-T-7-Red-ENG WT, p. 33, lines 8-11.

9. The main arguments submitted by the Defence in response to these allegations are threefold. First, it points out that the evidence fails to support the finding that the attacks were carried out by the FDLR. According to the Defence, the identification of the perpetrators by the victims, usually based on the language spoken by the attackers, is often unreliable, since many different Kinyarwanda-speaking militias are active in the DRC and members of some groups deliberately conceal their identity.²⁰ Second, as regards those attacks where the involvement of the FDLR may be considered to have been established, the target of the attack was not the civilian population as such.²¹ Deaths of civilians were rather the “collateral damage” of operations aimed at engaging the stronghold of the FARDC,²² who located their troops among the civilian population.²³ Finally, the Defence submits that, even if some civilians did perish at the hands of FDLR soldiers, those killings were not authorised by the FDLR leadership, namely by President Murwanashyaka and Commander Mudacumura.²⁴

10. Against this background, the Defence argues that Mr Mbarushimana, far from being responsible for any of the attacks attributed to the FDLR, can at the most be blamed for having shown sympathy for the FDLR’s political goals, which sympathy falls entirely within the scope of his freedom of association.²⁵ In the view of the Defence, the Prosecution failed to prove that the Suspect’s conduct gave any causal contribution to the commission of the “humanitarian catastrophe” attributed to the FDLR, as well as to prove that such alleged contribution was intentional within the meaning of article 25(3)(d) of the Statute, since the evidence shows neither the intent of the Suspect to harm civilians, nor his positive knowledge of the criminal intent of the FDLR.²⁶

²⁰ ICC-01/04-01/10-450, Defence written submissions Pursuant to the Oral Order of Pre-Trial Chamber I of 16 September 2011 (“Defence Final Submissions”), paras 52-6.

²¹ Defence Final Submissions, paras 46-50.

²² ICC-01/04-01/10-T-7-Red-ENG WT, p. 71, lines 2-7; ICC-01/04-01/10-T-8-Red2-ENG CT WT, p. 44, lines 23-25 and p. 45, line 1.

²³ ICC-01/04-01/10-T-7-Red-ENG WT, p. 70, lines 8-9, *see also* Defence Final Submissions, paras 46-50.

²⁴ For the attack on Mianga, *see* ICC-01/04-01/10-T-8-Red2-ENG CT WT, p. 46, lines 21-5 and p. 47, line 1; for Busurungi *see* ICC-01/04-01/10-T-8-Red2-ENG CT WT, p. 57, lines 6-23.

²⁵ Defence Final Submissions, paras 1-3.

²⁶ Defence Final Submissions, paras 35-7.

Accordingly, the Defence requests the Chamber not to confirm the charges against Mr Mbarushimana.²⁷

4. Submissions of Legal Representatives of Victims

11. The victims authorised to participate in the proceedings (“Victims”) challenge the merits of the Defence’s arguments on various grounds. First, they submit that their identification of the FDLR as the perpetrators is reliable, both because many of them are former hostages who had been living together with their offenders for weeks, and since the perpetrators themselves claimed to be FDLR members.²⁸ They further submit that the use of severe cruelty against the defenceless population is a particular fighting technique peculiar to the FDLR.²⁹ In their view, the involvement of civilians in the attacks carried out by the FDLR, far from being mere “collateral damage”, resulted from a planned strategy to target the civilian population,³⁰ for the purposes illustrated by the Prosecution.³¹ Finally, regarding the role of the Suspect, the Victims argue that, due to his position within the FDLR, Mr Mbarushimana could not have been unaware of the criminal plan of the organisation³².

12. From a procedural standpoint, the Victims argue that the Chamber should avoid conducting a “mini-trial” and base its decision solely on the existence of concrete and tangible elements of evidence.³³ They submit that the evidence available to the

²⁷ Defence Final Submissions, para. 91.

²⁸ ICC-01/04-01/10-446, « Observations de victimes autorisées à participer à la procédure au terme de l'audience de confirmation des charges retenues contre M. Callixte Mbarushimana » (“First Victims Final Submissions”), para. 23 ; ICC-01/04-01/10-447, « Observations et “conclusions finales” aux fins de confirmation des charges retenues contre C:MBARUSHIMANA Par les 37 victimes en vertu de l'article 68 alinéa 3 du Statut de Rome. En vertu de la jurisprudence ICC n°ICC-01/04-0iy07-474-tFRA ch.prél.du 13 mai 2008 par.127 à 133 » (“Second Victims Final Submissions”), para. 8.

²⁹ First Victims Final Submissions, paras 25-7; Second Victims Final Submissions, para. 14.

³⁰ First Victims Final Submissions, para. 29; Second Victims Final Submissions, para. 1, ICC-01/04-01/10-T-9-ENG CT WT, p. 22, lines 1-2.

³¹ See above, paras 6-8.

³² Second Victims Final Submissions, para. 6, see also First Victims Final Submissions, para. 39.

³³ First Victims Final Submissions, para. 12-15, see also Second Victims Final Submissions, para. 5.

Chamber at this early stage of the proceedings is sufficient to establish that there are substantial grounds to believe that the Suspect is responsible for the alleged crimes and, accordingly, request the Chamber to confirm the charges against Mr Mbarushimana.³⁴

II. PROCEDURAL HISTORY

13. On 20 August 2010, the Prosecution submitted the “Prosecutor’s Application under Article 58” (“Application for a Warrant of Arrest”),³⁵ requesting the Chamber to issue a warrant of arrest for Mr Mbarushimana, alleging that he was criminally responsible under article 25(3)(a) or, in the alternative, under article 25(3)(d), both of the Statute, for war crimes and crimes against humanity committed by the FDLR in the North and South Kivu Provinces of the DRC between January 2009 and the date of the Application for a Warrant of Arrest.

14. On 28 September 2010, the Chamber rendered the “Decision on the Prosecutor’s Application for the Warrant of Arrest against Callixte Mbarushimana” (“Decision on Warrant of Arrest”)³⁶ and issued a “Warrant of Arrest for Callixte Mbarushimana”.³⁷

15. On 11 October 2010, Mr Mbarushimana was arrested at his residence in Paris (France) by the French authorities. On 25 January 2011, he was transferred to the ICC detention centre in The Hague.

16. On 28 January 2011, Mr Mbarushimana made his first appearance before the Chamber pursuant to article 60 of the Statute. At the hearing, the Chamber satisfied itself that the Suspect had been informed of the crimes he was alleged to have committed and of his rights pursuant to the Statute and the Rules of Procedure and Evidence (“Rules”), noted that Judge Sanji Mmasenono Monageng had been appointed

³⁴ First Victims Final Submissions, p. 19; Second Victims Final Submissions, p. 19.

³⁵ ICC-01/04-01/10-11-Red2 with public annexes 1-4, 7-9 and confidential annexes 5-6, 10-11.

³⁶ ICC-01/04-01/10-1.

³⁷ ICC-01/04-01/10-2-tENG with annex.

as Single Judge in relation to the case and scheduled the commencement of the hearing on the confirmation of the charges for 4 July 2011.³⁸ The hearing was subsequently postponed to 17 August 2011³⁹ and finally to 16 September 2011.⁴⁰

17. On 11 February 2011, the Prosecution filed the “Prosecution’s request for a review of potentially privileged material”.⁴¹ The Prosecution submitted that, among the material seized at the premises of Mr Mbarushimana and processed by the Registry, it had identified a number of potentially privileged documents and requested that such documents be screened by the Chamber, the Office of Public Counsel for the Defence or “an outside practitioner” with a view to identifying the privileged items. The identification and review of the potentially privileged material triggered as many as seven decisions by either the Chamber or the Single Judge, addressing issues ranging from procedural and technical matters⁴² to the merits.⁴³

18. On 14 February 2011, a status conference on issues relating to disclosure for the purposes of the confirmation hearing was held.⁴⁴ The “Decision on issues relating to disclosure”, establishing the relevant principles and time-frame, was issued on 30 March 2011.⁴⁵

19. On 30 March 2011, the first “Defence request for interim release”⁴⁶ was filed. On 19 May 2011, the Chamber issued its “Decision on the ‘Defence Request for Interim Release’”,⁴⁷ rejecting the request; the Appeals Chamber confirmed this decision on 14

³⁸ ICC-01/04-01/10-T-1-ENG.

³⁹ ICC-01/04-01/10-207. For the reasons triggering this postponement, *see infra*, para. 23.

⁴⁰ ICC-01/04-01/10-374. For the reasons triggering this postponement, *see infra*, para. 29.

⁴¹ ICC-01/04-01/10-54 with annex.

⁴² ICC-01/04-01/10-67; ICC-01/04-01/10-105; ICC-01/04-01/10-158.

⁴³ ICC-01/04-01/10-237, with conf. ex parte annexes 1-4; ICC-01/04-01/10-277, with confidential *ex parte* annexes 1-4; ICC-01/04-01/10-286, with conf. ex parte annexes 1-3; ICC-01/04-01/10-314 with confidential *ex parte* annex.

⁴⁴ ICC-01/04-01/10-T-2-ENG, in compliance with the Single Judge “Decision Scheduling a Hearing on Issues relating to Disclosure between the Parties”: ICC-01/04-01/10-52.

⁴⁵ ICC-01/04-01/10-87.

⁴⁶ ICC-01/04-01/10-86 with annexes 1-4, 6-7, 9, 11, conf. annexes 5, 8, 10; ICC-01/04-01/10-99, with confidential *ex parte* annexes A-F.

⁴⁷ ICC-01/04-01/10-163.

July 2011.⁴⁸ A “Second Defence request for interim release”⁴⁹, filed on 20 July 2011, was dismissed by the Single Judge on 28 July 2011;⁵⁰ the Appeals Chamber confirmed the Single Judge’s decision on 21 September 2011.⁵¹ The “Third Defence request for interim release”⁵² was submitted pursuant to Article 60(4) of the Statute on 19 August 2011 and rejected by the Chamber on 16 September 2011.⁵³

20. On 12 May 2011, the Single Judge issued the “Decision on the Prosecution’s request for the assessment of the English proficiency of Callixte Mbarushimana” (“Language Proficiency Decision”),⁵⁴ ordering, *inter alia*, the Prosecution to disclose to the Defence, no later than 1 June 2011, the French translations of all witness statements which had not been disclosed in Kinyarwanda.

21. On 20 May 2011 and on 6 July 2011, the Single Judge issued the “Decision on the Prosecutor’s applications⁵⁵ for redactions pursuant to Rule 81(2) and Rule 81(4)”⁵⁶ and the “Decision on the Prosecution’s request for variation of time limit and fourth⁵⁷ and fifth⁵⁸ applications for authorisation to redaction pursuant to Rules 81(2) and (4)”, respectively.⁵⁹

⁴⁸ ICC-01/04-01/10-283.

⁴⁹ ICC-01/04-01/10-294.

⁵⁰ ICC-01/04-01/10-319.

⁵¹ ICC-01/04-01/10-438.

⁵² ICC-01/04-01/10-383.

⁵³ ICC-01/04-01/10-428.

⁵⁴ ICC-01/04-01/10-145.

⁵⁵ ICC-01/04-01/10-112-Red, dated 18 April 2011 and Addendum thereto ICC-01/04-01/10-148 with confidential *ex parte* annexes A and G and 1-8, dated 13 May 2011; ICC-01/04-01/10-135-Red2 with confidential *ex parte* annexes A-N and 1-22, dated 4 May 2011; ICC-01/04-01/10-151-Red with confidential *ex parte* annexes 1-3 and A-C, dated 13 May 2011.

⁵⁶ ICC-01/04-01/10-167 with confidential *ex parte* annexes I-II.

⁵⁷ ICC-01/04-01/10-208-Corr-Red with confidential *ex parte* corr. annex.

⁵⁸ ICC-01/04-01/10-249-Conf-Corr-Red with confidential *ex parte* corr. annex.

⁵⁹ ICC-01/04-01/10-268 with confidential *ex parte* annex.

22. On 24 May 2011, the Defence filed the “Defence request for a permanent stay of proceedings”,⁶⁰ alleging an abuse of process to the detriment of the Suspect. The Chamber rejected the request on 1 July 2011.⁶¹

23. On 25 May 2011, the Prosecution submitted the “Prosecution’s request in terms of Rule 121(7) for the postponement of the confirmation hearing to preserve the fairness of the proceedings”,⁶² alleging that only a very limited portion of the large amount of electronic material seized at Mr Mbarushimana’s premises upon his arrest had been recently made available to it, and that further time-consuming processes would be required to make the remaining portion of the relevant material available for review. Accordingly, the Prosecution requested the Chamber to set a new date for the confirmation hearing, in order to allow it to access the relevant material and to include it, as appropriate, in its list of evidence. On 31 May 2011,⁶³ the Chamber granted the request, rescheduled the commencement of the confirmation hearing for 17 August 2011 and accordingly amended the relevant deadlines.

24. On 15 July 2011, the Prosecution filed the “Prosecution’s document containing the charges and List of Evidence submitted pursuant to article 61(3) and Rule 121(3)”.⁶⁴ On 20 July 2011, the Prosecution, having identified “errors, internal inconsistencies, omissions and duplications” in the DCC and in the list of evidence (“LoE”), filed amended versions of both documents as an “Addendum” to the DCC and LoE.⁶⁵ On 21 July 2011, the Defence filed two requests⁶⁶ to exclude the Prosecution’s amended DCC and amended LoE; on 22 July 2011, it submitted a request “to strike out portions of [the] document containing the charges for lack of specificity”.⁶⁷

⁶⁰ ICC-01/04-01/10-177 with confidential annexes 1-3; ICC-01/04-01/10-209 with confidential annexes 1-4.

⁶¹ ICC-01/04-01/10-264; the request for leave to appeal this decision was rejected by the Chamber on 15 July 2011 (ICC-01/04-01/10-288).

⁶² ICC-01/04-01/10-189.

⁶³ ICC-01/04-01/10-207.

⁶⁴ ICC-01/04-01/10-287 with confidential annexes A-E.

⁶⁵ ICC-01/04-01/10-298 with annex 1 and confidential annexes A-B.

⁶⁶ ICC-01/04-01/10-301; ICC-01/04-01/10-303.

⁶⁷ ICC-01/04-01/10-305.

25. On 22 July 2011, the Chamber issued the “Decision on the ‘Defence request to exclude the Prosecution’s amended document containing the charges and amended list of evidence’”,⁶⁸ whereby it (i) noted that the DCC and LoE filed as “Addendum” were “materially and substantially different” from the versions of the same documents filed on 15 July 2011; (ii) considered that it would be more appropriate to address and decide upon the issues raised by the Defence request to strike out portions of the DCC in the context of the decision on the confirmation of the charges; and (iii) ordered the Registrar to strike out the Addendum and its English version from the record and the Prosecution to re-file a new version of the DCC, which would “not add to, or anyway expand upon” the information contained in the original DCC. In compliance with the deadline set by the Chamber, the Prosecution re-filed both the DCC and the LoE on 25 July 2011.⁶⁹

26. On 1 August 2011, the Defence filed its LoE in compliance with the “Decision on the Prosecution’s request for the postponement of the confirmation hearing”.⁷⁰

27. On 3 August 2011, the Defence filed its “Request for a ruling on the admissibility of two categories of evidence”, requesting the Chamber to refuse to admit into evidence two categories of items: “all materials seized from Mr Mbarushimana’s house” upon his arrest pursuant to the Chamber’s warrant and “all communications intercepted by the French and German authorities”.⁷¹ On 14 September 2011, the Defence filed its “Challenge to the admissibility of all materials emanating from Human Rights Watch and contained in the Prosecution LoE for use at the confirmation hearing”.⁷²

⁶⁸ ICC-01/04-01/10-306.

⁶⁹ ICC-01/04-01/10-311 with redacted annex A and confidential annexes B-C.

⁷⁰ ICC-01/04-01/10-322 with confidential annex A.

⁷¹ ICC-01/04-01/10-329 with annex; ICC-01/04-01/10-329-Corr. with Corr. annex. The Prosecution replied on 10 August 2011 (ICC-01/04-01/10-347-Conf.).

⁷² ICC-01/04-01/10-423-Conf-Exp with confidential *ex parte* annex. The Prosecution replied on 15 September 2011 (ICC-01/04-01/10-426-Conf-Exp).

28. On 11 August 2011, the Single Judge issued the “Decision on the 138 applications for victims’ participation in the proceedings”, pursuant to which 130 applicants were authorised to participate in the proceedings.⁷³

29. On 7 August 2011, the Defence filed its “Request to deny the use of certain incriminating evidence at the confirmation hearing”,⁷⁴ requesting the Chamber to deny the use by the Prosecution, for the purposes of the confirmation hearing, of all witness interviews for which either no written transcript in Kinyarwanda or French, or no associated audio files, had been submitted to the Defence. On 16 August 2011,⁷⁵ on the basis of the Prosecution’s response⁷⁶ and of supplementary information submitted by both the Defence⁷⁷ and the Prosecution,⁷⁸ the Chamber, whilst expressing its profound dissatisfaction with the belated submission of such a critical issue, found that the fairness of the proceedings required that the Defence be provided with either full written translations of the interviews in French or transcriptions in Kinyarwanda, or with French summaries of those interviews. Accordingly, it ordered that such translations or summaries be provided to the Defence by 31 August 2011 and postponed the commencement of the confirmation hearing to 16 September 2011.

30. On 30 August 2011, the Prosecution filed the “Prosecution’s filing of amended list of evidence in compliance with decision ICC-01/04-01/10-378”,⁷⁹ from which, *inter*

⁷³ ICC-01/04-01/10-351 with confidential annex; out of the 130 victims, 37 victims were represented by Me Mayombo Kassongo and 93 by Me Ghislain Mabanga; 30 of the victims authorised to participate in the proceedings were initially represented by Me Hervé Diakiese, either by appointment or designation of the Registry according to the Chamber’s instructions (ICC-01/04-01/10-379, with public annex 1 and confidential annexes 2-4). On 19 August 2011 (ICC-01/04-01/10-385, with annexes I and II), the Registrar informed the Chamber that, since Me Diakiese had been struck off the list of admitted counsels in the DRC for a disciplinary offence, he no longer satisfied the criterion set out in regulation 67(2) of the Regulations of the Court (“Regulations”) and, accordingly, had been removed from the ICC list of counsel. The Registrar’s decision was upheld by the Presidency (ICC-RoC72-01/II-4) and triggered the reassignment of the victims represented by Me Diakiese to Me Kassongo, by Single Judge Decision dated 9 September 2011 (ICC-01/04-01/10-409).

⁷⁴ ICC-01/04-01/10-343.

⁷⁵ ICC-01/04-01/10-378.

⁷⁶ ICC-01/04-01/10-353.

⁷⁷ ICC-01/04-01/10-368 with confidential annexes 1-3.

⁷⁸ ICC-01/04-01/10-373.

⁷⁹ ICC-01/04-01/10-392 with public annex 3 and confidential annexes 1-2, 4.

alia, a number of transcripts of witness interviews had been removed and replaced with summaries. On 5 September 2011, the Defence filed a submission⁸⁰ arguing that, since the Language Proficiency Decision had been issued for the benefit of the Suspect, compliance with it could and should not result in adversely affecting his position. Accordingly, it notified the Chamber that the Defence would retain, on its LoE, all those transcripts which the Prosecution had originally disclosed and subsequently excluded from its LoE and replaced with summaries in compliance with the Chamber's order dated 16 August 2011.

31. On 8⁸¹ and 9⁸² September 2011, pursuant to an order by the Single Judge dated 7 September 2011,⁸³ updated versions of the lists of evidence were resubmitted by the Prosecution and the Defence respectively. On 12 September 2011, noting that the Defence had included in its LoE the same witness statements that it had previously successfully sought to exclude, and that it would be illogical and inconsistent to allow the Defence alone to rely on materials which had been excluded by the Prosecution in compliance with an order aimed at preserving the rights of the Defence, the Single Judge decided *inter alia* that both witness statements and summaries were part of the evidence to be considered for the purposes of the confirmation hearing and that both parties would be able to rely on them in full.⁸⁴

32. On the same day, the Single Judge filed the "Second decision on the schedule of the confirmation hearing".⁸⁵ The hearing was held from 16 to 21 September 2011. Final written submissions were filed by the Prosecution⁸⁶ and the legal representatives of the victims⁸⁷ on 6 October 2011 and by the Defence on 21 October 2011.⁸⁸

⁸⁰ ICC-01/04-01/10-398.

⁸¹ ICC-01/04-01/10-403 with confidential annexes 1-5.

⁸² ICC-01/04-01/10-405 with conf. annex A corr. and public annex B.

⁸³ ICC-01/04-01/10-401.

⁸⁴ ICC-01/04-01/10-419.

⁸⁵ ICC-01/04-01/10-413 with annex.

⁸⁶ ICC-01/04-01/10-448-Red.

⁸⁷ ICC-01/04-01/10-446; ICC-01/04-01/10-447.

⁸⁸ ICC-01/04-01/10-450.

33. On 26 October 2011, the Chamber issued the “Decision on the Defence Challenge to the Jurisdiction of the Court”,⁸⁹ whereby it rejected the Defence’s challenge under article 19(2) of the Statute⁹⁰ and held that the crimes referred to in the Prosecution’s Application for a Warrant of Arrest were sufficiently linked to the situation of crisis which triggered the jurisdiction of the Court through the referral by the DRC and, as such, fell within the scope of such jurisdiction.

34. On 8 December 2011, the Defence filed its « Requête urgente de la Défense relative aux délais de recours qui affecteront la décision de confirmation ou d’infirmité des charges », ⁹¹ in which it requested that (i) the time limit, set out in rule 155 of the Rules, for filing an application for leave to appeal the decision on the confirmation of charges, begin to run when the French translation of the decision is notified to the parties; and (ii) should the French version of the decision on the Confirmation of Charges be notified to Mr Mbarushimana during the court recess, the time limit, under Rule 155 of the Rules, should start running after the court recess. The Prosecution responded on 9 December 2011,⁹² requesting the Chamber to deny the first request and declaring that it does not oppose that the time limit set out in Rule 155 start running –for all parties – from the date that the Court resumes its activities on the 9 January 2012.

III. CONSIDERATIONS BY THE CHAMBER ON THE CONDUCT OF THE PROCEEDINGS BY THE PARTIES

35. Before going into the merits of the case, the Chamber wishes to express its dissatisfaction with both parties’ conduct throughout the proceedings leading to the confirmation of the charges.

⁸⁹ ICC-01/04-01/10-451.

⁹⁰ ICC-01/04-01/10-290 with public annexes A, D and confidential annexes B-C; see also the submissions made by the Prosecution, Legal Representatives of Victims, the Office of Public Counsel for Victims and the DRC: ICC-01/04-01/10-320; ICC-01/04-01/10-406 ICC-01/04-01/10-406-Corr with annex and ICC-01/04-01/10-411; ICC-01/04-01/10-417-Red with public redacted annexes 1-5; and ICC-01/04-01/10-440 with confidential annex respectively.

⁹¹ ICC-01/04-01/10-462.

⁹² ICC-01/04-01/10-463.

36. First, there were significant oversights and mistakes regarding vital aspects of the case. Among these, the “errors, internal inconsistencies, omissions and duplications” identified by the Prosecution in the version of the DCC and LoE originally filed⁹³ stand out as particularly unfortunate. The Defence’s request to readmit evidence it had previously successfully sought to exclude on grounds of violation of the Suspect’s rights⁹⁴ caused unnecessary further delays in the proceedings. Such problems have not helped in streamlining the proceedings: in most cases they triggered additional petitioning and litigation, such as when the Chamber was encumbered by the Prosecution with the unnecessary burden of authorising redactions to a document which had already been previously disclosed in unredacted form.⁹⁵

37. Second, both parties failed to comply with it or complied erroneously, which required the Registry to review the relevant numbers assigned to the evidence twice.⁹⁶ [

38. The Chamber believes that the Court is meant to become a beacon for litigation in international criminal law. For these reasons, it invites both parties to critically assess their conduct throughout these proceedings, with the hope that such critical assessment will allow them to learn important lessons for their future engagements before this Court.

IV. EVIDENTIARY MATTERS

1. “Substantial grounds to believe” Standard

⁹³ See ICC-01/04-01/10-306,p.4.

⁹⁴ ICC-01/04-01/10-298, Anx1 and Conf-Anxs A and B. Pursuant to Decision ICC-01/04-01/10-306 this document ICC-01/04-01/01-289 and the attached annexes have been removed from the case record; ICC-01/04-01/10-343; ICC-01/04-01/10-348; ICC-01/04-01/10-353.

⁹⁵ ICC-01/04-01/10-222-Conf-Red; ICC-01/04-01/10-258.

⁹⁶ ICC-01/04-01/10-424 and Conf-Anxs 1-2; ICC-01/04-01/10-442 and Conf-Anxs 1-2; ICC-01/04-01/10-449 and Conf-Anxs 1-2.

39. Pursuant to article 61(7) of the Statute, the Chamber shall, on the basis of the confirmation hearing, “determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”.

40. The standard of substantial grounds to believe has been interpreted by the Chamber in light of article 21(3) of the Statute and the jurisprudence of the European Court of Human Rights to mean “strong grounds for believing”, such that the Prosecution “must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations”.⁹⁷

41. This standard accords with the purpose of the confirmation hearing which “is limited to committing for trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought”, a mechanism “designed to protect the rights of the Defence against wrongful and wholly unfounded charges”⁹⁸ and a means to ensure judicial economy by distinguishing those cases that should go to trial from those that should not.⁹⁹

2. Approach to the Evidence

42. For the purposes of making its determination under article 61(7) of the Statute, the Chamber will consider all items of evidence included in the Prosecution’s Amended List of Evidence,¹⁰⁰ and the items of evidence included in the Defence Updated List of Evidence¹⁰¹ which were deemed to have been submitted in the Decision on Amended

⁹⁷ ICC-01/04-01/06-803-tEN, *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, “Decision on the Confirmation of Charges”, 29 January 2007, paras 38-9; ICC-01/04-01/07-717, *The Prosecutor v. Germain Katanga*, Pre-Trial Chamber I, “Decision on the Confirmation of Charges”, 1 October 2008, paras 62-5; ICC-02/05-02/09-243-Red, *The Prosecutor v. Bahar Idriss Abu Garda*, Pre-Trial Chamber I, “Decision on the Confirmation of Charges”, 8 February 2010, paras 35-9; ICC-02/05-03/09-121-Corr-Red, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Pre-Trial Chamber I, “Corrigendum of the “Decision on the Confirmation of Charges””, 7 March 2011, paras 29-31.

⁹⁸ ICC-01/04-01/06-803-tEN, para. 37.

⁹⁹ ICC-02/05-03/09-121-Corr-Red, para. 31.

¹⁰⁰ ICC-01/04-01/10-403-Conf-Anx2 and ICC-01/04-01/10-403-Conf-Anx3.

¹⁰¹ ICC-01/04-01/10-405-Conf-AnxA-Corr.

List of Evidence.¹⁰² The Chamber notes the Prosecution's submission that it had obtained information which may cast doubt on the reliability of the version of events contained in the statement of Witness 692¹⁰³ and the agreement of the Defence that this statement should not be relied upon.¹⁰⁴ Accordingly, the Chamber will not use the statement of Witness 692 to support its findings.

43. The Chamber will refrain from entering into an assessment pursuant to article 69(4) of the Statute as to the admissibility of each item of evidence submitted for the purposes of the confirmation hearing, in the absence of a challenge in this regard from either of the parties. This approach is consistent with the evidentiary rules applicable to and the scope of the evidentiary analysis undertaken at the pre-trial stage of proceedings.¹⁰⁵ In particular, an in-depth assessment as to the admissibility of the evidence submitted for the purposes of the confirmation hearing is rendered essentially meaningless in view of the fact that the Prosecution may, for the purposes of the confirmation of charges, rely on documentary or summary evidence, including redacted versions of witness statements and summaries of statements of anonymous witnesses, and need not call the witnesses expected to testify at trial.¹⁰⁶

44. This approach is further justified by the limited object and purpose of the confirmation hearing which, as highlighted above, is to separate those cases which should go to trial from those which should not. In this regard, the Chamber's consideration of the evidence is not undertaken for the purposes of determining the

¹⁰² ICC-01/04-01/10-419.

¹⁰³ Summary of the Statement of Witness 692, EVD-PT-OTP-00759.

¹⁰⁴ ICC-01/04-01/10-456 and ICC-01/04-01/10-458.

¹⁰⁵ In this regard, the Appeals Chamber has previously held that "[a]s the threshold for the confirmation of the charges is lower than for a conviction, the Prosecutor may be able to convince the Pre-Trial Chamber that the threshold for the confirmation of the charges has been reached even if the reliability of the witnesses and other evidence was not fully tested." (ICC-01/04-01/06-774, *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81"", 14 December 2006, para. 47).

¹⁰⁶ Article 61(6) of the Statute; ICC-01/04-01/06-773, *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81"", 14 December 2006, paras 41-51; and ICC-01/04-01/06-774, paras 43-7.

guilt or innocence of the suspect. A wholesale assessment as to the admissibility of each item of evidence at this stage would unjustifiably delay the proceedings and give rise to an inappropriate pre-determination of evidentiary matters which should be properly decided in light of the whole of the evidence presented at trial. Such an approach, in the view of the Chamber, would be incompatible with the fair trial rights of the suspect guaranteed under article 67 of the Statute, and in particular, the right to be tried without undue delay under article 67(1)(c) of the Statute.

45. The Chamber underlines that this assessment of the evidence does not entail, as suggested by the Prosecution, that all evidence that is “not incredible on its face” should be accepted, or that “the Prosecution’s evidence is “entitled to credence unless incapable of belief””.¹⁰⁷ There is no provision in the statutory framework of the Court which expressly states that inconsistencies, ambiguities or contradictions in the evidence should be resolved in favour of the Prosecution. Furthermore, the procedures before the international criminal tribunals, on which the Prosecution relies in support of its theory of evidence assessment, are so fundamentally different to the proceedings relating to the confirmation of charges that such a principle cannot be applied by analogy.¹⁰⁸

46. In addition, article 61(6) of the Statute allows for the Defence to challenge the evidence brought by the Prosecution and to present its own evidence. The introduction of conflicting evidence by the Defence necessarily engages the Chamber in an assessment of the credibility and weight of this evidence in light of the whole of the evidence submitted for the purposes of the confirmation hearing. There is no basis to

¹⁰⁷ ICC-01/04-01/10-448-Red at paras 32-4.

¹⁰⁸ The Prosecution cites rule 98 bis of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, Rev. 46, 20 October 2011: “At the close of the Prosecution’s case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction.” This procedure is clearly distinguishable from that applicable at the confirmation hearing as set out in article 61 of the Statute, on the basis of which the Chamber must determine, in light of the evidence submitted by both the Prosecution and Defence, whether there are substantial grounds to believe that the suspect committed the crimes charged.

apply a different approach to such an assessment where the conflict or contradiction is between items of evidence submitted by the Prosecution.

47. Accordingly, and consistent with the approach adopted in other cases, the Chamber will assess the intrinsic coherence of each item of evidence in light of the whole of the evidence submitted for the purposes of the confirmation hearing. Where such evidence is found to contain inconsistencies, ambiguities or contradictions, the Chamber will exercise caution in using it to affirm or reject any assertion made by the Prosecution.

48. The Chamber also points out that the lack of specific reference to a piece of evidence in the present decision does not mean that this evidence has been found to be inadmissible. It is important to emphasise that the evidence referred to in the present Decision is for the purpose of providing the underlying reasoning for the findings of the Chamber, without prejudice to additional items of evidence that could also support the same findings.¹⁰⁹

3. Anonymous Witnesses' Statements and Summaries of Witness Statements

49. The Chamber reaffirms previous findings that, although the use of anonymous witnesses' statements and summaries of anonymous witnesses' statements is permitted at the pre-trial stage, such evidence may be taken to have a lower probative value in order to counterbalance the disadvantage that it might cause to the Defence.¹¹⁰ Furthermore, anonymous hearsay contained in witness statements will be used only for the purposes of corroborating other evidence, while second degree and more remote anonymous hearsay contained in witness statements will be used with caution, even as a means of corroborating other evidence.¹¹¹ Hearsay from a known source will be

¹⁰⁹ See ICC-02/05-02/09-243-Red, para. 45.

¹¹⁰ ICC-01/04-01/07-717, paras 159-60; ICC-01/05-01/08-424, *The Prosecutor v. Jean-Pierre Bemba Gombo*, 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", 15 June 2009, para. 49; ICC-02/05-02/09-243-Red, paras 49-51; and ICC-02/05-03/09-121-Corr-Red, para. 41.

¹¹¹ ICC-01/04-01/06-803-tEn, paras 101-106; ICC-01/04-01/07-717, paras 118-20, 137-40.

analysed on a case by case basis, “taking into account factors such as the consistency of the information itself and its consistency with the evidence as a whole, the reliability of the source and the possibility for the Defence to challenge the source”.¹¹²

50. The Chamber further notes that a number of the statements relied on by the Prosecution were given by former members of the FDLR, some of whom participated in the events alleged in the present case. The Chamber will assess the information contained in these statements in light of the evidence presented as a whole and, mindful of the risks that attach to the statements of insider witnesses, will exercise caution in using such evidence to support its findings.¹¹³

51. Finally, the Chamber wishes to highlight its concern at the technique followed in several instances by some Prosecution investigators, which seems utterly inappropriate when viewed in light of the objective, set out in article 54(1)(a) of the Statute, to establish the truth by “investigating incriminating and exonerating circumstances equally”. The reader of the transcripts of interviews is repeatedly left with the impression that the investigator is so attached to his or her theory or assumption that he or she does not refrain from putting questions in leading terms and from showing resentment, impatience or disappointment whenever the witness replies in terms which are not entirely in line with his or her expectations. Suggesting that the witness may not be “really remembering exactly what was said”,¹¹⁴ complaining about having “to milk out” from the witness details which are of relevance to the investigation,¹¹⁵ lamenting that the witness does not “really understand what is important” to the investigators in the case,¹¹⁶ or hinting at the fact that the witness may be “trying to cover” for the Suspect,¹¹⁷ seem hardly reconcilable with a professional and impartial technique of witness questioning. Accordingly, the Chamber cannot refrain from deprecating such

¹¹² ICC-01/04-01/07-717, para. 141.

¹¹³ ICC-02/05-03/09-121-Corr-Red, para. 42.

¹¹⁴ EVD-PT-D06-01349, Transcript of Interview of Witness 632, at 0376, lines 492-3.

¹¹⁵ EVD-PT-D06-01349, Transcript of Interview of Witness 632, at 0382, lines 717-8.

¹¹⁶ EVD-PT-OTP-00668, Transcript of interview of Witness 564, at 1162, line 177.

¹¹⁷ EVD-PT-D06-01322, Transcript of Interview of Witness 559, at 1679, line 279.

techniques and from highlighting that, as a consequence, the probative value of evidence obtained by these means may be significantly weakened.

4. Defence Challenges to the Admissibility of Evidence

52. The Defence has challenged the admissibility of the following items of evidence:

(i) materials, electronic or documentary, seized from Mr Mbarushimana's house at the time of his arrest,¹¹⁸ (ii) communications intercepted by the French and German authorities,¹¹⁹ and (iii) documents emanating from Human Rights Watch.¹²⁰

53. Consistent with its findings above, the Chamber notes that the following rulings as to the admissibility of the categories of evidence challenged by the Defence are made for the purposes and in the context of the confirmation hearing only and are "without prejudice to the Trial Chamber's exercise of its functions and powers to make a final determination as to the admissibility and probative value" of any evidence.¹²¹

(i) Materials Seized from Mr Mbarushimana's House at the Time of his Arrest

54. The Defence challenged the admissibility of materials seized from Mr Mbarushimana's house at the time of his arrest ("Seized Materials") on the grounds that the Prosecution failed to produce a judicial order or warrant authorising the search, in the absence of which the Defence is unable to determine whether the search was authorised and conducted in accordance with the law.¹²²

55. The Defence went on to raise two other issues relating to the subsequent treatment of the Seized Materials, including (i) the fact that the seals on the bags

¹¹⁸ ICC-01/04-01/10-329-Corr and annex.

¹¹⁹ *Ibid.*

¹²⁰ ICC-01/04-01/10-423-Conf-Exp and annex.

¹²¹ ICC-01/04-01/06-803-tEn, para. 90; ICC-01/04-01/07-717, para. 71.

¹²² ICC-01/04-01/10-329-Corr, paras 3-6.

containing the Seized Materials were broken by members of the Registry in the absence of a Defence representative, and pursuant to a protocol which was not subject to judicial approval by way of a decision which could have been appealed, and (ii) the fact that a number of hard drives amongst the Seized Materials were found to be faulty after they had been handled by the French gendarmerie as well as the Registry and, in one instance, the Prosecution.¹²³

56. In response, the Prosecution submitted that the burden of proving that the evidence was obtained, not just illegally, but in violation of the Suspect's internationally recognised human rights, falls on the Defence.¹²⁴ The Prosecution further noted that (i) the seizure of the materials in question was the result of a request for co-operation in this regard directed by the Registry to the French authorities in compliance with an order of the Chamber, (ii) a *procès verbal* filed by the Prosecution shows that the search was authorised by a French Judge, and (iii) Mr Mbarushimana took no steps to challenge the legality of the search and seizure when he appeared before the French Courts prior to his surrender.¹²⁵

57. In addition, the Prosecution underlined that the Defence had failed to provide any support for the conclusion that evidence obtained through the alleged breach of the Suspect's rights should be excluded on the grounds that (i) the violation casts substantial doubt on the reliability of the Seized Materials or (ii) the admission of such evidence would be antithetical to and would seriously damage the integrity of the proceedings under article 69(7) of the Statute.¹²⁶

58. At the outset, the Chamber notes that it may be presumed that the investigative activities carried out by national judicial and executive authorities in pursuance of domestic investigations or further to a request for co-operation by the Court have been carried out in accordance with the legal provisions applicable in that State.

¹²³ *Ibid.*, paras 7-10.

¹²⁴ ICC-01/04-01/10-347-Conf, paras 13-5.

¹²⁵ *Ibid.*, para. 18.

¹²⁶ *Ibid.*, para. 23.

59. The Chamber further recalls its previous findings that “unless a party provides information which can reasonably cast doubt on the authenticity of [...] items presented by the opposing party, such items must be considered authentic in the context of the confirmation hearing.”¹²⁷ The Chamber is of the view that this principle is equally applicable to challenges raised to the admissibility of evidence under article 69(7) of the Statute.

60. The Defence has not provided any information that would cast doubt on the legality of the domestic procedures. The Chamber is thus of the view that in the circumstances there is no burden on the Prosecution to prove that the impugned procedures were legal and that the evidence in question was not obtained in violation of the Statute or internationally recognised human rights.

61. Even if it were to be accepted that there were procedural shortcomings in the investigative procedures complained of, article 69(7) of the Statute does not mandate automatic exclusion of evidence thus obtained. In each case, the striking of an appropriate balance between the Statute’s fundamental values is at the discretion of the Chamber and items of evidence obtained in violation of the Statute or internationally recognised human rights will be found to be inadmissible only in circumstances where (a) the violation casts substantial doubt on the reliability of the evidence, or (b) the admissibility of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.¹²⁸

¹²⁷ See ICC-01/04-01/06-803-tEn, para. 97. This is consistent with the findings of the Appeals Chamber that “the right to challenge the evidence [...] must be understood in the context of the confirmation hearing, which does not amount to a determination of the guilt or innocence of the accused. [...] As the threshold for the confirmation of the charges is lower than for a conviction, the Prosecution may be able to convince the Pre-Trial Chamber that the threshold for the confirmation of charges has been reached even if the reliability of the witnesses and other evidence was not fully tested.”, ICC-01/04-01/06-774, para. 47.

¹²⁸ ICC-01/04-01/06-803-tEn, para. 84; ICTY, Trial Chamber, *The Prosecutor v. Delalić*, “Decision on the Tendering of Prosecution Exhibits 104-108”, 9 February 1998, Case No. IT-96-21, at paras 19-21; ICTY, Trial Chamber II, *The Prosecutor v. Radoslav Brđanin*, “Decision on the Defence “Objection to Intercept Evidence””, 3 October 2003, Case No. IT-99-36-T, at para. 7.

62. The Defence challenge to the admissibility of the Seized Materials is based on the presumption that the search and seizure was carried out illegally. No factual basis is provided by the Defence in support of this assertion and no submissions are made, speculative or otherwise, as to how the alleged illegality of the search would render the evidence inadmissible under article 69(7) of the Statute.

63. The Chamber similarly views the Defence's arguments in relation to the breaking of the seals of the bags containing the Seized Materials and the faulty hard drives as unsubstantiated and speculative. In particular, the Defence has failed to establish that the breaking of the seals on the bags, in the absence of a representative of the Defence team, amounts to a violation of the Statute or internationally recognised human rights.¹²⁹

64. Moreover, the Defence's arguments in this regard are centred on the possibility that materials or hard drives containing exculpatory information may have been lost or damaged in the processing of the evidence. No factual basis is given in support of these allegations and no indication is given as to how this alleged violation, even if established to the requisite degree, would operate to render the evidence that was successfully recovered inadmissible under article 69(7) of the Statute.

65. Therefore, the defence challenge to the admissibility of the Seized Materials is rejected.

(ii) Communications Intercepted by the French and German Authorities

¹²⁹ As the Prosecution pointed out, the ICTR Trial Chamber decision which was cited by the Defence in support of this proposition (ICTR, Trial Chamber III, *The Prosecutor v. Nzirorera*, "Decision on Defence Third Motion for Return of Property and Sanctions for Violations of Court Order", 13 October 2003, Case No. ICTR-98-44-1), is relevant to the specific circumstances of that case alone. It must be emphasised that the requirement that the seals on the evidence bags be broken in the presence of a Defence representative in the Nzirorera case was established by order of the Trial Chamber dated 7 September 2000, which was issued in response to a Defence challenge, and is not, as such, indicative of the existence of a broader principle that the breaking of seals on evidence bags must be carried out in the presence of a Defence representative.

66. The Defence objected to the admission into evidence of communications intercepted by the French and German authorities on the grounds that no judicial authorisations or warrants had been produced for the intercepts carried out.¹³⁰

67. The Defence further objected to the Prosecution's reliance on a French intercept on the grounds that it is irrelevant, as the recording took place on 18 July 2010 and thus after the time period of the charges against Mr Mbarushimana.¹³¹ In addition, the Defence noted that the German intercepts were performed on communication devices allegedly belonging to Mr Ignace Murwanashyaka and argued that the evidence arising from these intercepts could only be used to incriminate Mr Murwanashyaka as the judicially authorised subject of the intercepts.¹³² The Defence further observed that the Prosecution had failed to provide telecom data proving that Mr Murwanashyaka was the subscriber to the intercepted telephone line.¹³³

68. The Defence also objected to the fact that the Prosecution did not provide evidence as to (i) the working practices in accordance with which the German intercepts were carried out, (ii) the identities of the persons responsible for carrying out the intercepts, or (iii) the means by which the authors of the metadata accompanying the intercepts identified Mr Mbarushimana as one of the interlocutors in the conversations. The Defence asserted that, in these circumstances, there can be no guarantee that the audio files and intercepts relied on by the Prosecution accurately reflect the intercepted communications in their entirety.¹³⁴

69. The Prosecution submitted that the Defence has not established (i) that the intercepts were carried out in violation of internationally recognised human rights, or (ii) that the evidence should be excluded as the purported violation would cast substantial

¹³⁰ ICC-01/04-01/10-329, paras 11-5.

¹³¹ *Ibid.*, para. 19.

¹³² *Ibid.*, para. 15.

¹³³ *Ibid.*

¹³⁴ *Ibid.*, paras 17-8.

doubt on the reliability of the evidence, or because admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.¹³⁵

70. The Prosecution further submitted that the French intercept of 18 July 2010 is relevant, as events before and after the time period relevant to the crimes charged can provide cogent evidence of the criminal purpose and activity of the FDLR in 2009.¹³⁶ In relation to the German intercepts, the Prosecution rejected as unsupported the Defence's argument that the evidence arising out of these intercepts can only be used to incriminate the person who was the subject of the intercept.¹³⁷ Regarding the attribution of the telephone lines to Mr Mbarushimana, the Prosecution submitted that, "given the limited nature and purpose of the confirmation hearing, the Prosecution cannot be expected to call witnesses to explain precisely how each and every telephone call is attributed to each caller".¹³⁸

71. In relation to the Defence's request that the intercept evidence be excluded under article 69(7) of the Statute, the Chamber reaffirms its findings set out in paragraphs 61-65 above.¹³⁹ The Chamber notes that the Defence's suggestion that the interception of the communications in question was carried out illegally is ill founded, as it has not been substantiated in any way. Moreover, the Defence has failed to make any submissions to the effect that a lack of authorisation of the intercepts would have any impact on the reliability of the evidence thereby obtained, or that their admission into evidence would be antithetical to or would seriously damage the integrity of the proceedings. Accordingly, the Chamber rejects the defence challenge to the admissibility of the intercepts under article 69(7) of the Statute.

¹³⁵ ICC-01/04-01/10-347-Conf, paras 19-23.

¹³⁶ *Ibid.*, para. 38.

¹³⁷ *Ibid.*, para. 40.

¹³⁸ *Ibid.*, para. 42.

¹³⁹ See, ICC-01/04-01/06-1981, *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, "Decision on the admission of material from the "bar table"", 24 June 2009, paras 21-31; See also ICTY, Trial Chamber II, *The Prosecutor v. Mićo Stanišić and Stojan Župljanin*, "Decision Denying the Stanišić Motion for Exclusion of Recorded Intercepts", 16 December 2009, Case No. IT-08-91-T, para.21; ICTY, Trial Chamber, *The Prosecutor v. Radovan Karadžić*, "Decision on the Accused's Motion to Exclude Intercepted Conversations", 30 September 2010, Case No: It-95-5/18-T, para. 8.

72. In relation to the Defence challenge to the relevance and reliability of the intercepted communications, the Chamber recalls article 69(4) of the Statute, pursuant to which the Court “may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence”. In addition, rule 63(2) of the Rules provides that “[a] Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69”.¹⁴⁰

73. The Chamber is of the view that it would exceed the limited scope and purpose of the confirmation hearing to require the Prosecution to introduce extensive evidence at this stage of the proceedings as to the work practices of national judicial systems in accordance with which the intercepts in question were carried out.

74. Considering (i) the particular relevance of the intercept evidence in light of the mode of criminal responsibility alleged against Mr Mbarushimana, (ii) the fact that there is no allegation of any bias or interest in the outcome of these proceedings or the events to which the charges relate on the part of the States which collected the intercept evidence, (iii) the context in which and the purpose for which the evidence was obtained, and (iv) the specific evidence used to identify the individuals involved, the Chamber is satisfied that the intercept evidence is both relevant and admissible.

(iii) Documents Emanating from Human Rights Watch

¹⁴⁰ These provisions have been found to indicate that “the drafters of the Statute framework have clearly and deliberately avoided proscribing certain categories or types of evidence” or limiting in any way the Chamber’s ability to freely assess all available evidence (ICC-01/04-01/06-1399-Corr, *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, “Decision on the Admissibility of Four Documents”, 13 June 2008, para. 24). The broad discretion of the Chamber to freely assess all available evidence is necessary in view of the nature of the cases that come before the Court, in the context of which evidence is often obtained under very difficult circumstances, such as during an armed conflict, as well as the limited means available to the organs of the Court and their dependence on the co-operation of sovereign states and domestic law enforcement authorities for the collection and retrieval of evidence.

75. The Defence objected to the admissibility of documents emanating from Human Rights Watch, based on [REDACTED].¹⁴¹

76. The Prosecution submitted that (i) [REDACTED], (ii) the Defence's arguments as to the insufficiency of the details of the methodology employed by Human Rights Watch relate only to one document and, in any event, are relevant only to the assessment of the evidentiary weight to be attached to such a document and not to its admissibility, and (iii) admission of these materials would not be prejudicial to the Defence.¹⁴²

77. In the view of the Chamber, the arguments of the Defence in relation to the documents emanating from Human Rights Watch are not such as would affect the admissibility of this evidence, although they may have an impact on the evidentiary weight to be attached thereto. Considering the source of the documents, the purpose for which the information contained therein was gathered and the nature and relevance of the information contained therein, the Chamber is satisfied that the documents emanating from Human Rights Watch are relevant and have some probative value, which is not outweighed by their prejudicial effect and are therefore admissible.

78. The evidentiary weight to be attached to the information contained in documents emanating from Human Rights Watch will be assessed on a case-by-case basis. As a general principle, the Chamber finds that information based on anonymous hearsay must be given a low probative value in view of the inherent difficulties in ascertaining the truthfulness and authenticity of such information. Accordingly, such information will be used only for the purpose of corroborating other evidence.

5. Specificity of the Document Containing the Charges

¹⁴¹ ICC-01/04-01/10-423-Conf-Exp.

¹⁴² ICC-01/04-01/10-426-Conf-Exp.

the truthfulness and authenticity of such information. Accordingly, such information will be used only for the purpose of corroborating other evidence.

5. Specificity of the Document Containing the Charges

79. The Defence requested that the following words be struck out for lack of specificity where they appear in the DCC as the description of the locations where and dates on which the crimes allegedly occurred:

- (i) these locations “include but are not limited to”;
- (ii) “and neighbouring villages” or “and surrounding villages”, and
- (iii) “the village of W673 and W674 [...] in Masisi territory in the second part of 2009”.¹⁴³

80. The Prosecution responded that use of the words “include but not limited to” allows it to prove other events to establish the same crime, provided that adequate notice has been given to the Defence prior to the confirmation hearing, and assured the Chamber that similar notice would be given prior to the trial.¹⁴⁴ The Prosecution further submitted that it is permissible to charge a pattern of crimes in a defined period and geographical area and to include specific incidents as examples.¹⁴⁵ Finally, the Prosecution argued that redaction of information relating to the date and location of the events which allegedly took place in the village of Witness 673 and Witness 674 was authorised by the Single Judge on 20 May 2011¹⁴⁶ and that the lack of specificity in relation to these events is necessary for the protection of the witnesses in question.¹⁴⁷

81. Pursuant to articles 61(3)(a) and 67(1)(a) of the Statute, rule 121 (3) of the Rules and regulation 52 of the Regulations of the Court (“Regulations”), the suspect must be informed in detail of the facts underlying the charges against him or her at least 30 days

¹⁴³ ICC-01/04-01/10-305.

¹⁴⁴ ICC-01/04-01/10-T-6-Red2-ENG, at pp. 22-3.

¹⁴⁵ *Ibid.*, at p. 23.

¹⁴⁶ ICC-01/04-01/10-167.

¹⁴⁷ ICC-01/04-01/10-T-6-Red2-ENG, at p. 27.

before the commencement of the confirmation hearing. Article 74(2) of the Statute¹⁴⁸ makes it clear that it is those facts and circumstances that form the basis for the charges confirmed at the pre-trial stage which are determinative of “the factual ambit of the case for the purposes of the trial and circumscribe [the trial] by preventing the Trial Chamber from exceeding that factual ambit” .¹⁴⁹ In light of the above provisions, and the mentioned precedent, the approach adopted by the Prosecution is untenable insofar as it attempts to reserve for the Prosecution the right to expand the factual basis of the charges through the addition of entirely new material facts after the charges have been confirmed.

82. The Chamber is concerned by this attempt on the part of the Prosecution to keep the parameters of its case as broad and general as possible, without providing any reasons as to why other locations where the alleged crimes were perpetrated cannot be specifically pleaded and without providing any evidence to support the existence of broader charges, seemingly in order to allow it to incorporate new evidence relating to other factual allegations at a later date without following the procedure established under article 61(9) of the Statute. The Prosecution must know the scope of its case, as well as the material facts underlying the charges that it seeks to prove, and must be in possession of the evidence necessary to prove those charges to the requisite level in advance of the confirmation hearing. The DCC must contain a statement of the material facts underlying the charges, to include the dates and locations of the alleged incidents to the greatest degree of specificity possible in the circumstances.

83. For these reasons, the Chamber finds that the words “include but are not limited to” are meaningless in the circumstances of this case. Accordingly, the Chamber will assess the charges only in relation to the locations specified under each count contained in the DCC.

¹⁴⁸ The Trial Chamber’s decision “shall not exceed the facts and circumstances described in the charges and any amendments to the charges”.

¹⁴⁹ ICC-02/05-03/09-121-Corr-Red, para. 34.

84. With regard to the Defence challenge to the references to “Busurungi and surrounding villages” and “Busurungi and neighbouring villages”, the Chamber finds the description of the location in question to be sufficiently precise, particularly given the relatively narrow geographic area involved and the fact that the relevant details as to the wider locations surrounding Busurungi are to be found when the DCC is read in conjunction with the LoE.¹⁵⁰

85. In relation to the last Defence challenge, the Chamber recalls that redaction of information from witness statements must not be “prejudicial to or inconsistent with the rights of the suspect, including the right to a fair and impartial trial.”¹⁵¹ The information which has been provided to the Defence in relation to the location and dates of the incidents in question is limited to “the village of W673 and W674 in Masisi territory, during the second half of 2009.” In the view of the Chamber, such broad geographic and temporal parameters are not sufficiently detailed to inform the Suspect as to the location and dates of the alleged crimes. As highlighted above, the location and dates of the alleged crimes are material facts which, pursuant to regulation 52(b) of the Regulations, must be pleaded in the DCC. In these circumstances, the Suspect cannot be said to have been informed of the charge against him within the meaning of article 67(1)(a) of the Statute. Accordingly, the Chamber will not analyse those crimes alleged to have occurred in “the village of W673 and W674 in Masisi territory, during the second half of 2009”.

¹⁵⁰ For example, EVD-PT-OTP-00703, Statement of Witness 562, at 1094-1095, 1100-1101 and 1104-1105.

¹⁵¹ ICC-01/04-01/10-167, para. 6; and ICC-01/04-01/07-475, *The Prosecutor v. Germain Katanga*, Appeals Chamber, “Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements””, 13 May 2008, para. 72, wherein the Appeals Chamber found that the following factors should be considered in determining whether the rights of the suspect will be restricted only as far as strictly necessary: a) [...] whether an alternative measure short of redaction is available and feasible in the circumstances. If a less restrictive protective measure is sufficient and feasible, that measure should be chosen; b) [...] the non-disclosure is sought at the stage of the proceedings in relation to the hearing to confirm the charges [...]; c) [...] the relevance of the information in question to the Defence. If, having carried out that assessment, the Chamber concludes that the information concerned is not relevant to the Defence, that is likely to be a significant factor in determining whether the interests of the person potentially placed at risk outweigh those of the Defence. If, on the other hand, the information may be of assistance to the case of the suspect or may affect the credibility of the case of the Prosecutor, the Pre-Trial Chamber will need to take particular care when balancing the interests at stake; d) if non-disclosure would result in the hearing to confirm the charges, viewed as a whole, to be unfair to the suspect, the requested redactions should not be authorised.

6. Rule of Speciality

86. At the confirmation hearing, the Defence argued that the Prosecution had added to the DCC the war crimes of mutilation and pillaging which were not included in the warrant of arrest, thereby infringing the rule of speciality contained in article 101 of the Statute.¹⁵² The Defence argued that the mode of behaviour encompassed by pillaging is not a constituent element of the crimes for which the warrant for Mr Mbarushimana's arrest was issued and that the charge of pillaging under article 8(2)(e)(v) of the Statute should, therefore, be removed from the DCC. The Defence also submitted that the addition of the charges of mutilation under articles 8(2)(c)(i)-2 or 8(2)(e)(xi)-1 of the Statute were unnecessary as the same underlying mode of behaviour was already encompassed in other charges.

87. The Prosecution submitted that the facts relating to the charges of pillaging and mutilation by the FDLR troops were set out in the Prosecution's application for an arrest warrant under article 58 and formed the basis of the charges of attack against the civilian population under article 8(2)(e)(i) of the Statute and torture under articles 7(1)(f) and 8(2)(c)(i) of the Statute.¹⁵³

88. The Chamber is of the view that, in principle, the description of facts and their related legal characterisations, as contained in any request for a warrant of arrest and in the decision issuing such order, are provisional. There should be no requirement that the formulation of charges in the DCC strictly follow the factual and legal foundations of the warrant of arrest, especially in view of the fact that, in accordance with article 61(4) of the Statute and as the Appeals Chamber has held, the Prosecution can continue his investigations and amend or withdraw charges without the permission of the Pre-Trial Chamber prior to the confirmation hearing.¹⁵⁴

¹⁵² ICC-01/04-01/10-T-6-Red2-Eng, at p. 17.

¹⁵³ ICC-01/04-01/10-448-Red, pp. 21-22.

¹⁵⁴ ICC-01/04-01/06-568, *The Prosecutor v Thomas Lubanga Dyilo*, Appeals Chamber, "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General

89. The Chamber acknowledges, on the other hand, the rule of speciality, contained in article 101 of the Statute, which, in principle, should prevent the Prosecution from including in the DCC a crime which had not been described in any way in the warrant of arrest, on the basis of which the requested State agreed to arrest and surrender the person.

90. In the view of the Chamber, the DCC is to be understood as the document which frames the confirmation hearing. This is the document which, in accordance with article 67(1) of the Statute and rule 121 of the Rules, must establish in detail the nature, cause and content of the charges brought against the suspect and which forms the basis for preparation for the confirmation hearing. Rule 121(3) refers to the DCC as the document containing "a detailed description of the charges." In its request for a warrant of arrest, on the other hand, the Prosecution is required, under article 58(2)(b) and (c) of the Statute, to submit to the Chamber only a "specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed", together with a "concise statement of facts which are alleged to constitute those crimes".

91. Therefore, in the view of the Chamber, the rule of speciality is not, in principle, violated by the inclusion in the DCC of one or more crimes, which were not explicitly described or legally characterised in the warrant of arrest, but are otherwise implicit in the description of the course of conduct underlying the crimes in relation to which a "concise statement of the facts", in accordance with article 58(2)(c) of the Statute, has been provided by the Prosecution.

92. For the reasons above, the Chamber finds that the allegations forming the basis for the crimes of mutilation under articles 8(2)(c)(i)-2 or 8(2)(e)(xi)-1 of the Statute, and pillaging under article 8(2)(e)(v) of the Statute, are encompassed in the course of conduct which formed the basis for the counts, for instance, of attacks on the civilian population under article 8(2)(e)(i) of the Statute and destruction of property under article 8(2)(e)(xii) of the Statute allegedly committed in the North and South Kivus, specifically in Busurungi,

Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, para. 53.

Malembe and Mianga between January and December 2009. Therefore, the factual allegations of mutilation and pillaging, as described in the DCC, form part of the course of conduct underlying the crimes detailed in the “Warrant of Arrest for Callixte Mbarushimana”¹⁵⁵ and the “Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana”,¹⁵⁶ on the basis of which the Suspect was surrendered to the Court by the French authorities.¹⁵⁷ Accordingly, no issue arises in relation to the rule of speciality contained in article 101 of the Statute.

V. WAR CRIMES

1. Contextual elements

93. In the DCC, the Prosecution charges Mr Mbarushimana, *inter alia*, with eight Counts of war crimes. In accordance with the Elements of Crimes, the war crimes charged by the Prosecution require that (a) the conduct took place in the context of and was associated with an armed conflict not of an international character; and (b) the perpetrator was aware of factual circumstances that established the existence of an armed conflict.

94. Furthermore, article 8(1) of the Statute states that the Court “shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes”. The article therefore does not articulate a strict requirement for the exercise of the Court’s jurisdiction over war crimes only in these circumstances, but only gives “a particular guideline for the Court”.¹⁵⁸ Accordingly, a single act could also amount to a war crime within the jurisdiction of the Court if it was committed in the context of and was associated with an armed conflict.

¹⁵⁵ ICC-01/04-01/10-2-tEng.

¹⁵⁶ ICC-01/04-01/10-1.

¹⁵⁷ ICC-01/04-01/10-34.

¹⁵⁸ ICC-01/05-01/08-424, para. 211. See also comment on article 8(1), M. Cottier in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observer’s Notes, Article by Article* (C.H. Beck, Hart, Nomos, Verlag 2nd ed., 2008) pp. 299-300.

Existence of an armed conflict

95. On the basis of the evidence presented, the Chamber finds that there are substantial grounds to believe that an armed conflict of a certain intensity took place in the Kivu provinces of the DRC between the FDLR and the FARDC-RDF (from 20 January 2009 to 25 February 2009) and between the FDLR and the FARDC, at times in conjunction with the United Nations Organization Mission in the Democratic Republic of the Congo (“MONUC”) (from 2 March 2009 to 31 December 2009).¹⁵⁹ In particular, the Chamber finds substantial grounds to believe that the relevant armed conflict in the eastern DRC began on 20 January 2009, when the Rwanda Defence Forces (RDF) entered the territory of the DRC for the purpose of participating in a joint operation with the FARDC, known as *Umoja Wetu*, aimed at forcefully dislodging the FDLR from its bases in the North Kivu and enabling willing FDLR troops to demobilise and reintegrate into civilian life in Rwanda.¹⁶⁰ On 25 February 2009, RDF troops began departing from North Kivu¹⁶¹ and a follow up military operation, *Kimia II*, was launched by the FARDC, supported by the MONUC forces, across the North and South Kivus with the purpose of neutralising the FDLR by preventing it from reoccupying former positions, as well as by cutting its lines of economic sustenance.¹⁶² This operation started on 2 March 2009 and lasted until 31 December 2009.¹⁶³

¹⁵⁹ EVD-PT-OTP-00301, Twenty-seventh report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, 27 March 2009 (“S/2009/160”), at 0866-0868, paras 8, 9, 12-5; EVD-PT-OTP-00302, Twenty-eighth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, 30 June 2009 (“S/2009/335”), at 0885-0887, paras 3, 11; EVD-PT-OTP-00303, Twenty-ninth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, 18 September 2009 (“S/2009/472”), p. 0905, paras 4 – 7; EVD-PT-OTP-00304, Thirtieth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, 4 December 2009 (“S/2009/623”), at 0922, paras 3-5; EVD-PT-OTP-00308, Thirty-first report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, 30 March 2010 (“S/2010/164”), at 1133, para. 3; EVD-PT-OTP-00282, Human Rights Watch report “You Will Be Punished” (“HRW Report”), 1 December 2009, at 0288-0290; EVD-PT-OTP-00305, UN Security Council Resolution 1856, 22 December 2008 (“S/RES/1856”).

¹⁶⁰ EVD-PT-OTP-00301, S/2009/160, at 0866, para. 8; EVD-PT-OTP-00282, HRW Report, at 0288.

¹⁶¹ EVD-PT-OTP-00301, S/2009/160, at 0867, para. 14.

¹⁶² EVD-PT-OTP-00301, S/2009/160, at 0866-0867, para. 15; EVD-PT-OTP-00302, S/2009/335, at 0885-0887, paras 3, 11; EVD-PT-OTP-00304, S/2009/623, at 0922, paras 3-6.

¹⁶³ EVD-PT-OTP-00302, S/2009/335, at 0885-0887, paras 3; EVD-PT-OTP-00282, HRW Report, at 0289; EVD-PT-OTP-00308, S/2010/164, at 1133, para. 3.

96. The Chamber notes that neither the parties, nor the participants challenged the existence of an armed conflict in the Kivu provinces of the DRC at all times relevant to the DCC.

Nature of the armed conflict

97. At the outset, the Chamber notes that in the DCC¹⁶⁴ and during the confirmation hearing,¹⁶⁵ the Prosecution argues, contrary to that which was stated in the Application for a Warrant of Arrest, that operation *Umoja Wetu* had to be characterised as a non-international armed conflict. Since the presence of the RDF in the DRC during *Umoja Wetu* was limited to providing support to the DRC army in its military effort targeting the FDLR, the armed conflict had to be characterised as non-international.¹⁶⁶ The Defence criticised the “zigzagging performed by the Prosecution on the issue of the characterization of the armed conflict”¹⁶⁷ and requested the Chamber to uphold its initial finding (purportedly made upon issuance of the warrant of arrest) which qualified *Umoja Wetu* as an international conflict¹⁶⁸ or, in the alternative, to order the Prosecution to produce evidence to demonstrate that, in the interim period between *Umoja Wetu* and *Kimia II* (i.e., between 26 February and 1 March 2009), “there was an ongoing military engagement of sufficient intensity for it to be defined as a non-international armed conflict for the purpose of the contextual requirements of war crimes”.¹⁶⁹

98. The Chamber notes that the first limb of the Defence request is premised on the erroneous assumption that the Chamber, when issuing the warrant of arrest for Mr Mbarushimana, characterised the period corresponding to the operation *Umoja Wetu* as an international armed conflict. In the Decision on the Prosecutor’s Application for a Warrant

¹⁶⁴ DCC, para. 22.

¹⁶⁵ ICC-01/04-01/10-T-6-Red2-ENG, p. 79, lines 9-25, p. 80, lines 1-20.

¹⁶⁶ ICC-01/04-01/10-T-6-Red2-ENG, p. 80, lines 14-20.

¹⁶⁷ ICC-01/04-01/10-T-8-Red2-ENG, p. 37, lines 8-10.

¹⁶⁸ ICC-01/04-01/10-T-8-Red2-ENG, p. 38, line 10.

¹⁶⁹ ICC-01/04-01/10-T-8-Red2-ENG, p. 38, lines 10-5.

of Arrest, the Chamber found that, at that stage, it was not necessary to characterise the armed conflict, “since the conduct which forms the basis of the counts proposed under the heading of war crimes is criminalized by the Statute irrespective of whether it is carried out in the context of an international or internal armed conflict”.¹⁷⁰

99. In regard to the second limb of the Defence request, the Chamber observes that no incidents charged by the Prosecution are alleged to have occurred between 26 February and 1 March 2009, which makes it unnecessary to address the issue of the intensity of the armed conflict during those days.

100. Common Article 2 of the 1949 Geneva Conventions provides, *inter alia*, that the Conventions “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties”.¹⁷¹ As noted in legal writing, “any difference arising between two states and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2”.¹⁷²

101. The Chamber finds substantial grounds to believe that the presence and involvement of Rwandan troops in DRC territory during *Umoja Wetu* was aimed at assisting and supporting the FARDC in its efforts aimed at neutralising the FDLR. It was a joint military operation, whereby the presence of the Rwandan forces was, at all times, with the consent of the authorities of the DRC.¹⁷³ The participation of Rwanda in operation *Umoja Wetu* cannot therefore be characterised as arising from a “difference arising between two states”¹⁷⁴, since the two governmental forces (FARDC and RDF) fought side by side against a common enemy, the FDLR.

¹⁷⁰ ICC-01/04-01/10-1, para. 20.

¹⁷¹ Article 2, *Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field*, United Nations –Treaty Series, 1950, volume 75-I-970, p. 32.

¹⁷² J. Pictet, *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Fields*, ICRC, Geneva, 1952, p.32.

¹⁷³ EVD-PT-OTP-00301, S/2009/160, at 0865-0866, paras. 3, 8; EVD-PT-OTP-00631, Transcript of Interview of Witness 561, at 1308, lines 717-728; EVD-PT-OTP-00282, HRW Report, at 0288-0289.

¹⁷⁴ J. Pictet, *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Fields*, ICRC, Geneva, 1952, p.32.

102. Accordingly, the Chamber finds that the armed conflict waged in the Kivus during operation *Umoja Wetu* does not satisfy the conditions that would establish the existence of an international armed conflict within the meaning of international humanitarian law.¹⁷⁵

103. As to whether the conflict can be qualified as non-international in character, article 8(2)(d) and (f) of the Statute requires such conflict reach a certain level of intensity which exceeds that of “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of similar nature”. Furthermore, the designation “conflicts of a non-international character” applies to armed conflicts that take place in the territory of a state, when there is a protracted armed conflict between government authorities and organised armed groups or between such groups. Consistent with the case law of the Chamber, for the purpose of Article 8(2)(f) of the Statute, an organised armed group must have “the ability to plan and carry out military operations for a prolonged period of time.”

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104. In this respect, the evidence provided to the Chamber, including witness statements, United Nations (“UN”) documents and non-governmental organisations’ reports, shows that, throughout 2009, the FDLR was a well-organised combatant force with a political wing, whose top leaders were based mainly in Europe,¹⁷⁷ and a military wing stationed in the eastern DRC.¹⁷⁸ These two branches of the organisation were coordinated by a Steering Committee, which was comprised of equal numbers of civilian

¹⁷⁵ Common Article 2 to the Geneva Conventions of 1949 states that the Conventions “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the State is not recognized by one of them. The Convention[s] shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance”.

¹⁷⁶ ICC-01/04-01/10-1 para. 17. See also ICC-01/04-01/06-803-tEN, para. 234; ICC-02/05-01/09-3, para. 60.

¹⁷⁷ EVD-PT-OTP-00029, Omaar Report, The leadership of Rwandan armed groups abroad with a focus on the FDLR and RUD/URUNANA, December 2008 (“Omaar Report”), at 0179-0185; EVD-PT-OTP-00667, Transcript of Interview of Witness 564, at 1123, lines 262-265; EVD-PT-OTP-00036, Interim report of the Group of Experts on the Democratic Republic of Congo, 18 May 2009 (“S/2009/253”), at 0697, paras 60-1; EVD-PT-D06-01367, Transcript of Interview of Witness 529, pp. 0860-0861, lines 503-13.

¹⁷⁸ EVD-PT-D06-01361, Transcript of Interview of Witness 529, at 0737, line 208; EVD-PT-OTP-00029, Omaar Report, at 0209-0224; EVD-PT-OTP-00283, International Crisis Group, Congo: A Comprehensive Strategy to Disarm the FDLR, 9 July 2009, at 0469.

and military leaders.¹⁷⁹ For almost all times relevant to the charges brought by the Prosecution,¹⁸⁰ the political leader of the FDLR was Ignace Murwanashyaka, while the leader of the military wing was General Sylvestre Mudacumura.¹⁸¹ The evidence further shows that the FDLR was characterised by a hierarchical structure and a high level of internal organisation.¹⁸² Its constitutive instruments included a statute, a “*réglement d’ordre intérieur*” and a disciplinary code which provided the organisation’s internal disciplinary system.¹⁸³

105. The military section of the FDLR, known as the *Forces Combattantes Abacunguzi* (“FOCA”),¹⁸⁴ numbered thousands of combatants¹⁸⁵ organised as a conventional army.¹⁸⁶ It

¹⁷⁹ EVD-PT-OTP-01080, FDLR Statute, at 1525; EVD-PT-OTP-00373, FDLR Steering Committee Diagram provided by Witness 587; EVD-PT-OTP-00834, Transcript of Interview of Witness 632, at 0414-0417, lines 77-197, and at 0458-0642, lines 1653-1801; EVD-PT-OTP-00860, Summary of the Statement of Witness 587, at 1426-7, para. 87.

¹⁸⁰ On 17 November 2009, the FDLR President Murwanashyaka and Vice-President Musoni were arrested in Germany upon charges of war crimes and crimes against humanity.

¹⁸¹ EVD-PT-OTP-00721, Transcript of Interview of Witness 542, at 2001-2, lines 1036-62; EVD-PT-OTP-00644, Transcript of Interview of Witness 552, at 0276-7, lines 394-424; EVD-PT-OTP-00577, Statement of Witness 559/BKA-1, at 0155; EVD-PT-OTP-00665, Transcript of Interview of Witness 564, at 1003, lines 976-980.

¹⁸² EVD-PT-OTP-01080, FDLR Statute; EVD-PT-OTP-00851, Summary of the Statement of Witness 530, 1183, para. 22.

¹⁸³ EVD-PT-OTP-01080, FDLR Statute; EVD-PT-OTP-01079, *Réglement d’ordre intérieur des FDLR*; EVD-PT-D06-01409, *Code de discipline des FDLR*; EVD-PT-D06-01373, Transcript of Interview of Witness 530, at 1038-1042, lines 173-342; EVD-PT-OTP-00646, Transcript of Interview of Witness 0552, at 0328-0330, lines 737-782; EVD-PT-D06-01310, Transcript of Interview of Witness 527, at 585-587, lines 1131-1189.

¹⁸⁴ EVD-PT-OTP-00007, Final report of the Group of Experts on the Democratic Republic of Congo, 13 February 2008 (“S/2008/43”), at 0252, para. 11; EVD-PT-D06-01265, Expert Report of Witness 2, at 0019; EVD-PT-OTP-00054, Report, Conflict and Transition Consultancies, Opportunities and Constraints for the Disarmament and Repatriation of Foreign Armed Groups in the Democratic Republic of Congo, 1 June 2007, at 0309, 0346.

¹⁸⁵ EVD-PT-D06-01265, Expert Report of Witness 2, at 0019; EVD-PT-OTP-00476, *Analyse de contexte du territoire de Kalehe*, at 0439; EVD-PT-OTP-00578, Statement of Witness 564, at 0182; EVD-PT-OTP-00075, Final Report of the Group of Experts on the Democratic Republic of Congo, 23 November 2009 (“S/2009/603”), at 0052-0053, para. 19; EVD-PT-OTP-00034, Final report of the Group of Experts on the Democratic Republic of Congo Group of Experts, 13 February 2008 (“S/2008/43”), at 0505, para. 38; EVD-PT-OTP-00860, Summary of the Statement of Witness 587, at 1415, para. 28; EVD-PT-OTP-00308, S/2010/164, at 1133, para. 3.

¹⁸⁶ EVD-PT-OTP-00355, Diagram of the current structure of FDLR/FOCA drafted by Witness 559; EVD-PT-OTP-00576, Notes of Witness 632, at 0052-R01; EVD-PT-D06-01312, Transcript of Interview of Witness 0528, at 1095-1111, lines 1349-1913; EVD-PT-D06-01313, pp. 1117-1125, lines 120-409; EVD-PT-D06-01361, Transcript of Interview of Witness 529, at 0731-0739, lines 28-272; EVD-PT-D06-01364, at 0799-0806, lines 19-244; EVD-PT-D06-01367, at 0846-0857, lines 17-404; EVD-PT-D06-01373, Transcript of Interview of Witness 530, at 1045-1058, lines 444-843; EVD-PT-OTP-00854, Summary of the Statement of Witness 542, at 1225-1226, paras. 15-22; EVD-PT-OTP-00665, Transcript of interview with W-564, at 0999-1003, lines 826-980; EVD-PT-

was composed of two main divisions, one based in the North Kivu, called “SONOKIA” (Operational Sector North Kivu), the other based in the South Kivu, called “SOSUKI” (Operational Sector South Kivu).¹⁸⁷ A further mobile Reserve Brigade was based in the provincial border area between the North and the South Kivus.¹⁸⁸

106. Based on the evidence discussed above, as well as on the fact that the military wing of the FDLR was able to oppose the FARDC-RDF coalition (during *Umoja Wetu*) and then the FARDC-MONUC coalition (during *Kimia II*) throughout 2009, the Chamber is satisfied that there are substantial grounds to believe that the FDLR as an armed group possessed the degree of organisation required under Article 8(2)(f) of the Statute.

107. Accordingly, the Chamber finds that there are substantial grounds to believe that, from at least 20 January 2009 until at least 31 December 2009, an armed conflict not of an international character took place in the North and South Kivus between the DRC government forces, supported at times by Rwandese or MONUC forces, on the one side, and at least one organised armed group (the FDLR),¹⁸⁹ on the other.

2. Specific war crimes charged by the Prosecution

OTP-00029, Omaar Report, at 0209-0224; EVD-PT-OTP-00054, Report, Conflict and Transition Consultancies, Opportunities and Constraints for the Disarmament and Repatriation of Foreign Armed Groups in the Democratic Republic of Congo, at 0414-0415; EVD-PT-OTP-00283, International Crisis Group, Congo: A Comprehensive Strategy to Disarm the FDLR, 9 July 2009, at 0469.

¹⁸⁷ EVD-PT-OTP-00665, Transcript of the interview of Witness 564, at 0993-0994, lines 613-640; EVD-PT-OTP-00355, Diagram of the current structure of FDLR/FOCA; EVD-PT-OTP-00848, Summary of the Statement of Witness 559, at 0991, para. 110; EVD-PT-OTP-00851, Summary of the Statement of Witness 530, at 1183-1184, para. 23; EVD-PT-OTP-00283, International Crisis Group, Congo: A Comprehensive Strategy to Disarm the FDLR, 9 July 2009, at 0469.

¹⁸⁸ EVD-PT-OTP-00854, Summary of the Statement of Witness 542, at 1225-1226, paras. 15-22; EVD-PT-OTP-00665, Transcript of Interview of Witness 564, at 0994, line 648 and at 996-998, lines 718-800; EVD-PT-OTP-00848, Summary of the Statement of Witness 559, at 0991-0992, para. 111; EVD-PT-OTP-00826, Summary of the Statement of Witness 526, at 0125-0126, paras 8-12.

¹⁸⁹ For the purposes of its determination as to the existence of the contextual elements of the war crimes, the Chamber deems it unnecessary to address the issue of the presence on the Eastern part of the DRC of armed groups other than the FDLR and the extent of their involvement in the conflict.

108. The Prosecution charges Mr Mbarushimana with the following war crimes, which were allegedly committed during at least twenty-five separate incidents: (a) attacking civilians, pursuant to article 8(2)(e)(i) of the Statute (Count 1); (b) murder, pursuant to article 8(2)(c)(i) of the Statute (Count 3); (c) mutilation, pursuant to articles 8(2)(c)(i)-2 or 8(2)(e)(xi)-1 of the Statute (Count 4); (d) cruel treatment, pursuant to article 8(2)(c)(i) of the Statute (Count 6); (e) rape, pursuant to article 8(2)(e)(vi) of the Statute (Count 8); (f) torture, pursuant to article 8(2)(c)(i) of the Statute (Count 10); (g) destruction of property, pursuant to article 8(2)(e)(xii) of the Statute (Count 11); and (h) pillaging, pursuant to article 8(2)(e)(v) of the Statute (Count 12).

109. The Chamber refers to the Elements of Crimes,¹⁹⁰ reiterates its established case law in relation to the objective and subjective elements of all offences constituting war crimes¹⁹¹ charged by the Prosecution and stresses that it will not list in detail or enter into an in-depth analysis of every element when they have already been settled by consistent case law and/or clarifications are not relevant for the purposes of the assessment of the evidence and determination of the facts of the case.

110. At the outset, the Chamber wishes to highlight that the charges and the statements of facts in the DCC have been articulated in such vague terms that the Chamber had serious difficulties in determining, or could not determine at all, the factual ambit of a number of the charges. For example, in the charges section of the DCC under count 1 (attacking civilians), the Prosecution includes twenty-two different alleged attacks,¹⁹² but, in the relevant part of the DCC, it only provides a factual

¹⁹⁰ As adopted by the Assembly of States Parties as reproduced in the *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3-10 September 2002* (United Nations publication, Sales No. E-09.V-2 and corrigendum), part II.B, and amended at the 2010 Kampala Review Conference as replicated in the *Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May-11 June 2010* (International Criminal Court Publication, RC/11).

¹⁹¹ See in particular ICC-02/05-02/09-243-Red; ICC-01/04-01/07-717; ICC-01/05-01/08-424.

¹⁹² DCC, at pages 36-37, where the Prosecution lists the following attacks: Kibua and Katoyi in early January 2009, Katoyi, Remeka, Malembe, Mianga, Busurungi and Busheke in late January 2009, Pinga on or about 14 February 2009, Kipopo on or about 12-13 February 2009, Miriki also in February, Mianga on or about 12 April 2009, Luofu and Kasiki on or about 18 April 2009, Busurungi and neighbouring villages on or about 28 April 2009, and on or about 9-10 May 2009, the village of W-673 and W-674 in Masisi territory in the second

description of seven of these alleged attacks.¹⁹³ Similarly, under count 3 (murder), the Prosecution charges twelve different incidents,¹⁹⁴ yet it provides factual allegations to support only four of these alleged incidents.¹⁹⁵ By the same token, under count 6 (cruel treatment), the Prosecution specifies that the crime was carried out “by assaulting people and/or forcing people to carry heavy loads of pillaged goods, thus inflicting great pain and suffering or serious injury to body or mental or physical health”.¹⁹⁶ It appears that only one incident of a person being forced to carry heavy loads of pillaged goods has been described in the facts section of the DCC.¹⁹⁷ Furthermore, although the term “assault” is not defined, a combined reading of the DCC and the LoE reveals that the Prosecution has included under the heading of cruel treatment several other acts which would not seem to be adequately captured within the term “assault”, including: abducting and raping women,¹⁹⁸ beating persons to death,¹⁹⁹ a number of particularly violent attacks also charged as rape, torture and mutilation,²⁰⁰ rape and other forms of sexual violence,²⁰¹ forcing family members to witness the perpetration of rape, sexual violence and atrocities on their loved ones,²⁰² and an incident in which a number of women were allegedly captured, raped, tortured and killed by the FDLR.²⁰³ In the view of the Chamber, if the intention of the Prosecution was to include all of these acts within the term “assault”, it should have clearly stated so. In any event, the extent to which these acts can be characterised as “assault” is also questionable given that the

half of 2009, Manje on or about 20-21 July and Malembe on or about 11-16 August and 15 September, Ruvundi in October 2009, Mutakato on or about 2-3 December 2009 and Kahole on or about 6 December 2009.

¹⁹³ DCC, at pages 15-17, where the Prosecution describes the following attacks: Mianga on or about 12 April 2009, the vicinity of Busurungi in late April or early May, Busurungi on or about 9-10 May 2009, Manje on the 20 and 21 July 2009, Malembe “at least once, and likely twice, in the period 11 to 16 August 2009, and again mid-September” and the village of Witness 673 and Witness 674 in the second part of 2009.

¹⁹⁴ DCC, at page 38, where the Prosecution adds the following incidents: Malembe in late January 2009, Pinga on or about 12 February 2009 and Busurungi on or about 28 April 2009.

¹⁹⁵ See DCC at pages 19-20, where killings at Busurungi, Manje and the village of Witness 673 and Witness 674 are described, and at para. 51, where killings at Mianga are described.

¹⁹⁶ DCC, p. 39.

¹⁹⁷ DCC, para. 72.

¹⁹⁸ DCC, para. 58.

¹⁹⁹ DCC, paras 61, 64.

²⁰⁰ DCC, paras 70, 82.

²⁰¹ DCC, para. 74.

²⁰² DCC, para. 75.

²⁰³ DCC, para. 80.

Prosecution has also characterised “severe assaults” as torture. The Prosecution has not defined “assault” or “severe assault” and the Chamber is therefore unable to determine how the Prosecution differentiates the legal characterisation of the acts detailed above, if at all.

111. Pursuant to article 67(1)(a) of the Statute, rule 121(3) of the Rules and regulation 52 of the Regulations, the Prosecution was obliged to produce a DCC framing the charges in a coherent manner, providing sufficient detail of the factual allegations underlying each of the charges and supporting each of the factual allegations with sufficient evidence, in order to provide the Chamber with substantial grounds to believe that the crimes have been committed as alleged.²⁰⁴

112. The duty of the Prosecution to provide sufficient factual details in the DCC is the corollary of the right of the suspect to be clearly informed of the charges against him, so that he is in a position to properly defend himself against these charges. The suspect cannot be expected to go through the voluminous evidence disclosed by the Prosecution in order to identify for himself the factual basis of the charges against him.²⁰⁵ The Chamber is cognizant of the fact that, in cases such as the present which involve mass criminality to which the Suspect is indirectly related, the Prosecution may not be in a position to bring detailed information as to the precise number of victims, the identity of those victims, the identity of the direct perpetrators or the means by which each of the crimes was carried out.²⁰⁶ However, this does not absolve the Prosecution from its duty to inform the Suspect of the factual allegations underlying the charges against him.

²⁰⁴ ICC-01/05-01/08-424 at para. 208; See also *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, ICC-01/04/01/06-2205, at footnote 163; ICTY, *The Prosecutor v. Kupreškić et al*, Case No.: IT-95-16-A, Appeal Judgement, 23 October 2001, at para. 98; ICTY, *The Prosecutor v. Kupreškić et al*, Case No.: IT-95-16-A, Appeal Judgement, 23 October 2001 at paras 88-98; *The Prosecutor v. Krnojelac*, Case No.: IT-97-25, 24 February 1999, at para. 38.

²⁰⁵ ICTY, *The Prosecutor v. Krnojelac*, Case No.: IT-97-25, 11 February 2000, at para. 23; *The Prosecutor v. Krnojelac*, Case No.: IT-97-25, 24 February 1999, at para. 15.

²⁰⁶ ICC-01/05-01/08-424 at para. 49; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, I ICC-01/04-01/07-648, at paras 28-34; See also ICTY, *The Prosecutor v. Kvočka et al*, Case No. IT-98-30/1, 12 April 1999; *The Prosecutor v. Krnojelac*, Case No.: IT-97-25, 24 February 1999, at para. 40

113. In view of the foregoing, given the insufficient information about the material facts underlying the charges against Mr Mbarushimana, the charges and the evidence submitted in support thereof should only be analysed with respect to locations and dates included in the charges in relation to which sufficient factual description was provided by the Prosecution in the DCC. Without prejudice to the inconsistency of the charges and the DCC and having regard to the fact that the Suspect presented his submissions with respect to them, the Chamber notes that, in any event and as demonstrated in the following paragraphs, the evidence is so scant that the Chamber cannot properly assess, let alone satisfy itself to the required threshold, whether any of the war crimes charged by the Prosecution were committed by the FDLR in the villages of Kibua and Katoyi in early January 2009; Remeka, Mianga, Malembe and Busheke in late January 2009; Pinga on 14 February 2009; Miriki in February 2009; Ruvundi in October 2009; Mutakato on 2-3 December 2009; and Kahole on 6 December 2009.

114. In the case of Kibua and Katoyi, as also stated by the Prosecution in the DCC,²⁰⁷ the evidence submitted tends to demonstrate that it was the FDLR who were attacked in January 2009 in those locations. Indeed, out of the three Witnesses (529, 564 and 559/BKA-1) that declare to have heard of an attack in Kibua on the radio, two clarified that the FDLR was the one attacked.²⁰⁸ The closest direct evidence of an attack in Kibua is from Witness 526, who said that he could hear the weapons going off in Kibua. However, he also says that the attack occurred in August 2009²⁰⁹ and not in early January as charged by the Prosecution. Similarly, Witnesses 528 and 526 both state that the FDLR was the one attacked at Katoyi.²¹⁰

115. In relation to Remeka, Witnesses 559, 542, 632, 528 and 677 only mention having heard that the FDLR had fought in Remeka. When these testimonies are analysed in

²⁰⁷ DCC, para. 16.

²⁰⁸ EVD-PT-D06-01365, Transcript of Interview of Witness 529, at 0820-3; EVD-PT-OTP-00661, Transcript of Interview of Witness 564, at 0821; EVD-PT-OTP-00848, Transcript of Interview of Witness 559/BKA-1, at 0995; EVD-PT-OTP-00669, Transcript of Interview of Witness 564, at 1261.

²⁰⁹ EVD-PT-D06-01307, Transcript of Interview of Witness 526, at 0357-8.

²¹⁰ EVD-PT-D06-01313, Transcript of Interview of Witness 528, at 1152; EVD-PT-D06-01325, Transcript of Interview of Witness 526, at 1807.

light of what is stated in UN Reports, Human Rights Watch Reports and media coverage, there are clear inconsistencies in relation to the dates on which the battle occurred and crimes that were allegedly committed.²¹¹

116. The only piece of evidence which the Prosecution brings forth in relation to the alleged attack in Mianga in January 2009 is the statement of Witness 528, who states that it was “around the same time or a bit later than *Kimia II*”, without any explicit reference to the exact date of the alleged attack or to civilians being the target of the attack.²¹² The Chamber notes that, according to the allegations of the Prosecution and the evidence provided in support thereof, operation *Kimia II* only started on 2 March 2009.²¹³

117. Only a single UN Report refers to the alleged attack in Malembe in January 2009, stating that [REDACTED].²¹⁴ By the same token, the only reference to the village of Busheke comes from a Human Rights Watch Report claiming fourteen civilians were killed, including twelve women and girls who were also raped.²¹⁵ In both cases the Prosecution relied only on a single UN or Human Rights Watch Report and has not provided any other evidence in order for the Chamber to ascertain the truthfulness and/or authenticity of those allegations. The sources of the information contained in both the UN and Human Rights Watch Report are anonymous.

118. In relation to the alleged attack in Pinga on 14 February 2009, Witnesses 528 and 529 only heard of an attack at Pinga, but they do not provide any information about the

²¹¹ EVD-PT-D06-01322, Transcript of Interview of Witness 559/BKA-1 at 1708; EVD-PT-D06-01323, Transcript of Interview of Witness 559/BKA-1, at 1810; EVD-PT-D06-01326, Transcript of Interview of Witness 559/BKA-1, at 1836-8, EVD-PT-OTP-00720, Transcript of Interview of Witness 542, at 1959-60; EVD-PT-OTP-2040-1234, summary of Statement of Witness 542, at 1234; EVD-PT-D06-01333, Transcript of Interview of Witness 542, at 2184-6, EVD-PT-D06-01351, Transcript of Interview of Witness 632, at 0459-62, EVD-PT-D06-01314 Transcript of Interview of Witness 528, at 1199, EVD-PT-OTP-00762, summary of Statement of Witness 677, at 0065, EVD-PT-OTP-00040, UN report, at 0477-8; and EVD-PT-OTP-00036, S/2008/43, at 0697; EVD-PT-OTP-00282, HRW Report, at 0338; and EVD-PT-OTP-00055, press article, at 0427.

²¹² EVD-PT-OTP-01313, Transcript of Interview of Witness 528, at 1154.

²¹³ DCC, para. 18.

²¹⁴ EVD-PT-OTP-00343, UNJHRO Report, at 0043, para. 59.

²¹⁵ EVD-PT-OTP-00282, HRW Report, at 0313.

circumstances of the attack or the date on which it occurred.²¹⁶ Witness 552 talks about an attack in Pinga, but does not mention the date on which it occurred, and it is not clear from his testimony whether the FDLR attacked or was attacked in that location.²¹⁷ The only piece of evidence referring to Pinga in February 2009 is a UN Report which mentions the murder of the chief of the village on 14 February 2009; it also refers to twenty-eight rapes in the area without reference to specific dates and states clearly that “since the beginning of February 2009, there is no reference to any attack in the village.”²¹⁸

119. In relation to the alleged attack in Miriki in February 2009, Witness 530 states that the FARDC attacked the FDLR in Miliki (and not Miriki), and the FDLR defended themselves, without making any reference to civilians being harmed in the process.²¹⁹ Witness 632 states that [REDACTED] that no FDLR soldier has ever burned a house down there.²²⁰ It is unclear whether Miriki and Miliki are actually the same place. Witness 529 indicated that the population had fled but it is unclear whether this was before or after the confrontation between the FARDC and FDLR in Miriki.²²¹ None of this evidence could be corroborated, since most reports claim that other military groups were responsible for the attack in Miriki. One report says the *Ralliement pour l'Unité et la Démocratie* (“RUD”) left notes warning people to leave, while another says the FARDC killed civilians and burnt down houses.²²²

120. The only piece of evidence that refers to Ruvundi is a UN report that briefly mentions an attack by the FDLR on 22-23 October 2009.²²³ By the same token, Mutakato is only incidentally referred to by one UN Report, which does not contain any reference to the circumstances in which the alleged attack would have occurred or sufficient

²¹⁶ EVD-PT-D06-01314, Transcript of Interview of Witness 528, at 1198; EVD-PT-D06-01365, Transcript of Interview of Witness 529, at 0820-3.

²¹⁷ EVD-PT-OTP-00656, Transcript of Interview of Witness 552, at 0657-9.

²¹⁸ EVD-PT-OTP-00300, UN Report, at 0839.

²¹⁹ EVD-PT-D06-01372, Transcript of Interview of Witness 530, at 1028.

²²⁰ EVD-PT-D06-01351, Transcript of Interview of Witness 632, at 0449 and 0451.

²²¹ EVD-PT-D06-01369, Transcript of Interview of Witness 529, at 0897.

²²² EVD-PT-OTP-00036, S/2009/253, at 0704; EVD-PT-OTP-00282, HRW Report, at 0301.

²²³ EVD-PT-OTP-00310, UN Report, at 1193.

information as to the crimes committed.²²⁴ Similarly, the only piece of evidence referring to Kahole is a UN report that briefly mentions an attack by the FDLR in the area of Kalole (and not Kahole), on 6 December, in which it reports that nine civilians had been executed, the village looted and a clinic and a primary school razed.²²⁵ It is unclear whether Kalole and Kahole are actually the same place. Given (i) the paucity of the information provided in these UN reports, (ii) the identified inconsistencies between the information provided and the Prosecution's allegations, and (iii) the lack of any corroborating evidence, the Chamber is of the view that the evidence submitted by the Prosecution is not sufficient to establish substantial grounds to believe that the alleged attacks occurred in Ruvundi, Mutakato, or Kahole.

121. Furthermore, and as indicated in paragraph 85 above, the Chamber upholds the Defence challenge with respect to the lack of specificity in relation to the crimes alleged to have been committed in "the village of W673 and W674 in the Masisi territory, during the second half of 2009" and, therefore, will not analyse them.

122. Therefore, the Chamber will now analyse the evidence regarding the facts alleged by the Prosecution in the DCC in order to determine whether the allegations are substantiated by sufficient evidence to establish substantial grounds to believe that war crimes, as charged, were committed in: (i) Busurungi and surrounding villages, in late January 2009, on 3 March or March 2009, on or about 28 April 2009 and on or about 9-10 May 2009; (ii) Manje, on 20-21 July 2009 (iii) Malembe, on or about 11 to 16 August 2009 and on the 15 September 2009 (iv) Mianga, on or about 12 April 2009 (v) Kipopo, on or about 12-13 February 2009 and (vi) Luofu and Kasiki, on or about 18 April 2009.

(a) Busurungi and surrounding villages

²²⁴ EVD-PT-OTP-00310, UN Report, at 1193-8.

²²⁵ EVD-PT-OTP-00575, UN Report, at 2825.

i. The allegations of the Prosecution

123. The Prosecution has charged the Suspect with the war crimes of attacking civilians (Count 1), murder (Count 3), mutilation (Count 4), cruel treatment (Count 6), rape (Count 8), torture (Count 10), destruction of property (Count 11) and pillaging (Count 12), which were allegedly committed in Busurungi and neighbouring villages in (i) late January 2009 (Count 1); (ii) 3 March or March 2009 (Counts 3 and 4); (iii) 28 April 2009 (Counts 1, 3, 4, 8 and 10); and (iv) on or about 9-10 May 2009 (Counts 1, 3, 4, 6, 8, 10, 11 and 12).

124. In the statement of facts contained in the DCC, the Prosecution describes alleged murder of a civilian [REDACTED] whose throat was slit, head severed from his body and genitals put in his mouth. This crime was allegedly committed by FDLR troops near Busurungi in March 2009.²²⁶

125. In an incident, the date of which is unclear from the description given by the Prosecution,²²⁷ FDLR soldiers allegedly raped, mutilated, and killed several women in the vicinity of Busurungi, in the days prior to the main attack on that village.²²⁸

126. In relation to the so-called “main attack” on Busurungi, the Prosecution alleges that the civilian population of Busurungi was targeted on or about the night of 9-10 May 2009 by hundreds of FDLR troops.²²⁹ The attack took a high toll on civilian lives and was carefully planned in advance with a reconnaissance mission taking place approximately a week before.²³⁰ The Prosecution further submits that, prior to the attack, all troops were assembled at a location two hours from Busurungi, where they received

²²⁶ DCC, para. 66.

²²⁷ Paragraph 52 of the DCC indicates that the events took place “in late April or early May 2009,” paragraph 67 of the DCC referring to the same assault indicates that it was in late April 2009 and paragraph 80 of the DCC indicates that on or about 18 April 2009, Witness 650 [REDACTED] was found lying in a field together with other two women. At the hearing it was indicated again that the attack took place in late April or early May 2009, *see* ICC-01/04-01/10-T-6-CONF-ENG, page 87 line 7.

²²⁸ DCC, paras 52, 67, 80.

²²⁹ DCC, para. 53.

²³⁰ DCC, paras 53 and 55.

orders from high-ranking FDLR commanders on how to carry out the attack.²³¹ The intention, as reflected in the orders by FDLR commanders, was for the civilians to have nothing to return to once the FDLR had passed through.²³² The FARDC battalion located in Busurungi was the initial military target of the attack, but once all military resistance had been overcome, the FDLR turned against the civilian population, whom they accused of aligning with DRC government forces.²³³ According to the DCC, “during the fighting, houses and military positions alike were set on fire. FDLR troops went from door to door, pillaging and burning houses and killing civilians in a systematic fashion. Anything of value that was not pillaged was destroyed.”²³⁴ Women were raped and beaten during and after the attack.²³⁵ Busurungi was almost completely destroyed in the attack; nothing remained intact.²³⁶ Seven hundred civilian lodgings were destroyed.²³⁷

127. The Prosecution alleges that FDLR troops were instructed to kill anything that moved.²³⁸ FDLR soldiers fired upon civilians and burned down houses with people still inside.²³⁹ Civilians who managed to get out of their houses were shot, others were killed with machetes and small hoes and some were decapitated.²⁴⁰ In the DCC, the Prosecution claims that people, including young children, lay dead on the streets. Babies were pounded to death; people were beaten, raped and killed. The Prosecution further stresses the account of some witnesses, such as Witness 650, who counted 79 bodies in Busurungi after the attack, while FDLR troops reported that over 150 civilians were killed;²⁴¹ Witness 694 [REDACTED] was repeatedly raped and beaten by FDLR soldiers [REDACTED] her eyes pierced, her throat and stomach cut, causing her

²³¹ DCC, para. 55.

²³² DCC, para. 54.

²³³ DCC, paras 54, 101.

²³⁴ DCC, para. 56.

²³⁵ DCC, para. 56.

²³⁶ DCC, para. 57.

²³⁷ DCC, para. 91.

²³⁸ DCC, para. 68.

²³⁹ DCC, para. 68.

²⁴⁰ DCC, para. 68.

²⁴¹ DCC, para. 69.

moving foetus to fall out, and her body dismembered and the parts scattered around after she had been killed;²⁴² and Witness 692, who was captured in Busurungi, taken into the forest, heavily beaten and repeatedly raped by three FDLR soldiers, who also [REDACTED] inflicted deep cuts on her legs and left her there to die.²⁴³

128. By the same token, the Prosecution relies on the account of events provided by Witness 683, who, while trying to escape, was captured by two FDLR soldiers, armed with machetes, who took turns raping her;²⁴⁴ and that of Witness 656 who [REDACTED] was raped by FDLR soldiers in the forest.²⁴⁵ The Prosecution also alleges that a man was [REDACTED].²⁴⁶

129. The Prosecution further describes a practice of torture allegedly performed by the FDLR Lieutenant Mandarin, called *gushahura*, which consisted of genital mutilation.²⁴⁷ There is no clear indication of the date on which this act may have been carried out, but, the allegation appears in a paragraph which describes the alleged murder of [REDACTED] in March 2009 and which subsequently indicates that Mandarin participated “in the attack”. In this regard, the Chamber observes that the Prosecution has, however, identified in Count 1 at least three attacks in Busurungi and neighbouring villages in late January 2009, on or about 29 April 2009 and on or about 9-10 May 2009. The Chamber notes that the evidence relied upon by the Prosecution to substantiate this allegation appears to suggest that the act of genital mutilation was committed during the alleged attack of 9-10 May 2009 in Busurungi, and, therefore, the allegation will be analysed only in relation to that attack.

ii. The findings of the Chamber

a. Crimes allegedly committed in Busurungi in late January 2009

²⁴² DCC, paras 70, 81.

²⁴³ DCC, paras 70, 81.

²⁴⁴ DCC, para. 81.

²⁴⁵ DCC, para. 81.

²⁴⁶ [REDACTED].

²⁴⁷ DCC, para. 66.

Whether the war crime of attacking civilians (Count 1) was committed

130. The Chamber notes that the Prosecution charges in Count 1 an attack on Busurungi which is alleged to have occurred in late January 2009. Reference to this attack was also made at the confirmation hearing²⁴⁸ and in the Prosecution's written submissions, wherein the Prosecution added the allegation that murder was also perpetrated during the January attack on Busurungi.²⁴⁹ The Chamber notes, however, that the Prosecution has not provided any statement of facts which may offer the Chamber a sufficient legal and factual basis to analyse this attack.

131. In its analysis of the evidence, the Chamber has found nonetheless that only Witness 6/BKA-5 mentioned an attack on Busurungi around January or February 2009, but the Witness did not provide any further details in relation to this attack.²⁵⁰ The evidence submitted in support of this charge is not sufficient for the Chamber to be satisfied to the required threshold that the war crime of attack against the civilian population under article 8(2)(e)(i) of the Statute was committed by FDLR soldiers in Busurungi and surrounding villages in late January 2009.

b. Crimes allegedly committed in Busurungi and surrounding villages on 3 March or in March 2009

Whether the war crimes of murder (Count 3) and mutilation (Count 4) were committed

132. Based on the statements of Witnesses 650, 655 and 683 the Chamber is satisfied that there are substantial grounds to believe that the civilian [REDACTED] was murdered, although there are some slight differences in relation to the date on which the murder occurred: Witness 655 says that it happened on 22 February 2009, Witness

²⁴⁸ ICC-01/04-01/10-T-6-CONF-ENG, p. 83, lines 21-4.

²⁴⁹ Prosecution's written submissions, ICC-01/04-01/10-448-Red, para. 10. The January 2009 attack in Busurungi is however not included in the charges in counts 2 or 3 of murder as a crime against humanity or war crime.

²⁵⁰ EVD-PT-D06-01270, Transcript of Interview of Witness 6/BKA-5, at 0951.

650 says it was on 3 March 2009 and Witness 683 only says March.²⁵¹ Witness 683 further states that one of the individuals who buried [REDACTED] said that “his body had cuts all over, they had cut off his head and cut off his male parts and put his male parts in his mouth”.²⁵²

133. The Defence alleges that the Prosecution has not provided sufficient evidence to demonstrate the participation of FDLR soldiers in the alleged commission of this crime.²⁵³ However, the Chamber finds that the evidence submitted by the Prosecution provides sufficient indicia regarding the identity of the perpetrators. In particular, the Chamber notes the statement of Witness 650, who indicates that [REDACTED], who had escaped the attack, reported that the Rwandese soldiers had captured [REDACTED] and when questioned as to whether [REDACTED] knew the identity of the soldiers, [REDACTED] responded that [REDACTED] were among them.²⁵⁴ The same witness subsequently identifies these two soldiers as having participated in the alleged FDLR attack on Busurungi of the 9-10 May 2009.²⁵⁵ Witness 655 confirms that a man who escaped the attack on [REDACTED] told the villagers that the FDLR were responsible for the killing.²⁵⁶ Similarly, Witness 683 states that the “Interahamwe” or “Rwandese” began to attack the civilian population in March or April 2009 and reports having heard about the killing of [REDACTED] at that time.²⁵⁷ This witness uses the terms “Rwandese” and “Interahamwe” to refer to the FDLR, including in his description of the alleged attack on Busurungi of 9-10 May 2009.²⁵⁸ The Chamber is further satisfied that the FDLR soldiers who killed [REDACTED] did so intentionally and were aware of the civilian status of the victim. Accordingly, the Chamber is satisfied that there is sufficient evidence establishing substantial grounds to believe that the crime of murder

²⁵¹ EVD-PT-OTP-00596, Transcript of Interview of Witness 655, at 0073; EVD-PT-OTP-00597, Transcript of Interview of Witness 650, at 0112; EVD-PT-OTP-00699, Transcript of Interview of Witness 683, at 803.

²⁵² EVD-PT-OTP-00699, Transcript of Interview of Witness 683, at 803.

²⁵³ ICC-01/04-01/10-T-8-Red2-ENG, p. 40, lines 2-19. *See also* Defence Final Submissions, p. 39-40.

²⁵⁴ EVD-PT-OTP-00597, Transcript of Interview of Witness 650, at 0112.

²⁵⁵ *Ibid.*, at 0118.

²⁵⁶ EVD-PT-OTP-00596, Transcript of Interview of Witness 655, at 0073.

²⁵⁷ EVD-PT-OTP-00699, Transcript of Interview of Witness 683, at 0803.

²⁵⁸ *Ibid.*, at 0805, para. 28.

under article 8(2)(c)(i) of the Statute was committed by FDLR soldiers in Busurungi and surrounding villages in March 2009.

134. The Prosecution does not specifically allege that the acts relied on to support the charge of mutilation were carried out [REDACTED] was still alive and no evidence is provided to support the view that he was mutilated before, as opposed to after, he was killed. Accordingly, the Chamber is not satisfied that there is sufficient evidence establishing substantial grounds to believe that the crime of mutilation under either article 8(2)(c)(1)-2 or 8(2)(e)(xi)-1 of the Statute was committed by FDLR soldiers in Busurungi and surrounding villages in March 2009.

c. Crimes allegedly committed in Busurungi and surrounding villages on or about 28 April 2009

Whether the war crimes of attacking civilians (Count 1), murder (Count 3), mutilation (Count 4), rape (Count 8) and torture (Count 10) were committed

135. No evidence was provided to the Chamber in relation to an attack against the civilian population in Busurungi on or about 28 April 2009. However, based on the statements of Witnesses 650, 655 and 683, read together with UN and Human Rights Watch Reports, the Chamber is satisfied that there are substantial grounds to believe that three women were found dead near Busurungi, with wounds and signs of rape, as well as sticks inserted in their private parts.²⁵⁹ There is some discrepancy as to the date on which this occurred, but the accounts provided by the witnesses and in the reports are so consistent in their descriptions that they clearly refer to the same events.²⁶⁰ The details provided by the evidence demonstrate the cruelty the victims suffered: their

²⁵⁹ EVD-PT-OTP-00597, Transcript of Interview of Witness 650, at 0113-4; EVD-PT-OTP-00596, Transcript of Interview of Witness 655, at 0073-4; EVD-PT-OTP-00699, Transcript of Interview of Witness 683, at 803; EVD-PT-OTP-00344, UNJHRO Report, at 0056, 0058; EVD-PT-OTP-00309, UNHRO Report, at 1172; EVD-PT-OTP-00343, UNJHRO Report, at 0043-4; EVD-PT-OTP-00282, HRW Report, at 0311.

²⁶⁰ Witness 650 says that this happen on the 28 April 2009 (EVD-PT-OTP-00597, Transcript of Interview of Witness 650, at 0113-4); Witness 655 says that it was on the 27 February (EVD-PT-OTP-00596, Transcript of Interview of Witness 655, at 0073-4); Witness 683 says that it happen in March (EVD-PT-OTP-00699, Transcript of Interview of Witness 683, at 803).

heads had been cut off,²⁶¹ their necks were broken,²⁶² their skulls were crushed,²⁶³ and their eyes and ears had been pierced with knives.²⁶⁴

136. The Defence alleges that the Prosecution has not succeeded in demonstrating the identity of the perpetrators of the violence committed against these women.²⁶⁵ The Chamber indeed finds that the evidence submitted by the Prosecution does not provide any reliable indicia with regard to who the perpetrators were. All of the information provided by the witnesses in relation to the identity of the perpetrators is either based on accounts of third parties, or assumptions.²⁶⁶ Accordingly, the Chamber cannot find substantial grounds to believe that the war crimes of attacking civilians under article 8(2)(e)(i) of the Statute, murder under article 8(2)(c)(i) of the Statute, mutilation under articles 8(2)(c)(i)-2 or 8(2)(e)(xi)-1 of the Statute, rape under article 8(2)(e)(vi) of the Statute or torture under article 8(2)(c)(i) of the Statute were committed by FDLR soldiers in Busurungi and surrounding villages on or about 28 April 2009.

d. Crimes allegedly committed in Busurungi and surrounding villages on or about 9-10 May 2009

(i) Whether the war crimes of attacking civilians (Count 1) and murder (Count 3) were committed

²⁶¹ [REDACTED].

²⁶² [REDACTED]; EVD-PT-OTP-00309, UNHRO Report, at 1172,

²⁶³ EVD-PT-OTP-00282, HRW Report, at 0311.

²⁶⁴ EVD-PT-OTP-00343, UNJHRO Report, at 0043; EVD-PT-OTP-00309, UNHRO Report, at 1172.

²⁶⁵ ICC-01/04-01/10-T-8-Red2-ENG, p. 38, lines 23-5 and p. 39, lines 1-18.

²⁶⁶ Witness 650 stated that the perpetrators were the "Interhamwe" or "the Rwandese soldiers from the forest," explaining they had done this before and [REDACTED], EVD-PT-OTP-00597, Transcript of Interview of Witness 650, at 0114. Witness 655's says that a women who escaped the attack said to the villagers, the attack had been committed by the FDLR, EVD-PT-OTP-00596, Transcript of Interview of Witness 655, at 0073-4, however witness 650, [REDACTED] does not say anything about any women that may have escaped. A UN Report also attributes the attack to the FDLR but without giving the source of the information, EVD-PT-OTP-00344, UNJHRO Report, at 0058. Witness 683 did not explain how he knew the crimes had been committed by the "Interhamwe," EVD-PT-OTP-00699, Transcript of Interview of Witness 683, at 803.

137. Based on the statements of Witnesses 561, 562, 677, 544, 542, 632 and 672²⁶⁷ the Chamber is satisfied that there are substantial grounds to believe that around March 2009²⁶⁸ the FARDC, supported by Mai Mai soldiers attacked the FDLR headquarters killing Rwandan refugees in Shario or Shalio. In response, the FDLR launched a retaliatory attack²⁶⁹ against the FARDC/Mai Mai soldiers who were stationed in the village of Busurungi.²⁷⁰

138. About a week before the actual attack,²⁷¹ Lieutenant Mandarine had sent some soldiers to Busurungi to conduct a reconnaissance mission.²⁷² During the reconnaissance, the FDLR identified several FARDC positions within and on the outskirts of the village of Busurungi.²⁷³ They also discovered that the FARDC's military positions were located

²⁶⁷ EVD-PT-OTP-00634, Transcript of Interview of Witness 561, at 1519-24; EVD-PT-OTP-00703, Transcript of Interview of Witness 562, at 1089-90; EVD-PT-OTP-00762, Transcript of Interview of Witness 677, at 0056; EVD-PT-D06-01290, Transcript of Interview of Witness 544, at 1540; EVD-PT-D06-01291, Transcript of Interview of Witness 544, at 1545-7; EVD-PT-D06-01292, Transcript of Interview of Witness 544, at 1571-2; EVD-PT-OTP-00854, summary Statement of Witness 542, at 1236; EVD-PT-D06-01330, Transcript of Interview of Witness 542, at 2112; EVD-PT-D06-01348, Transcript of Interview of Witness 632, at 0340-1; EVD-PT-D06-01277, Transcript of Interview of Witness 672 at 0885.

²⁶⁸ Witness 542 states the attack in Shario took place in March 2009, EVD-PT-OTP-00854, summary Statement of Witness 542, at 1236. Witness 562 says that the planning for the attack in Busurungi started after the attack to the FDLR by FARDC/Mai Mai in Shario, after a Rwandan civilian was cut into pieces when trying to get some bananas from Busurungi, EVD-PT-OTP-00703, Transcript of Interview of Witness 562, at 1085-90.

²⁶⁹ Some witnesses gave a broader explanation regarding the retaliatory aspect of the Busurungi attack, *see* EVD-PT-OTP-00597, Transcript of Interview of Witness 650, at 0114-5; EVD-PT-OTP-00596, Transcript of Interview of Witness 655, at 0072; EVD-PT-D06-01286, Transcript of Interview of Witness 5/BKA-4, at 0064; EVD-PT-D06-01271, Transcript of Interview of Witness 8/BKA-8, at 0997; EVD-PT-OTP-00738, MONUC interview with a demobilised FDLR soldier, at 0262.

²⁷⁰ EVD-PT-OTP-00075, *Final report of the Group of Experts on the Democratic Republic of the Congo*, 23 November 2009, at 0126; EVD-PT-OTP-00282, HRW Report, at 0310-1; EVD-PT-OTP-00309, UNHRO Report, at 1169 and 1172; EVD-PT-OTP-00343, UNJHRO Report, at 0045; EVD-PT-OTP-00041, UN Special Rapporteur on extrajudicial executions, at 0638; EVD-PT-OTP-00357, UN Report, at 0367-9.

²⁷¹ EVD-PT-OTP-00703, Transcript of Interview of Witness 562, at 1093; EVD-PT-OTP-00762, summary Statement of Witness 677, at 0060.

²⁷² EVD-PT-OTP-00633, Transcript of Interview of Witness 561, at 1418; EVD-PT-OTP-00634, Transcript of Interview of Witness 561, at 1480; EVD-PT-OTP-00703, Transcript of Interview of Witness 562, at 1090-1; EVD-PT-OTP-00762, summary Statement of Witness 677, at 0060.

²⁷³ EVD-PT-OTP-00703, Transcript of Interview of Witness 562, at 1093-4, 1100-1, 1104-5, describing the military positions in the village, Witness 562 says that they were "at the outskirts of the village" apart from "1 particular position which was in the middle of the population", also "in the primary school, there was a position there" (at 1093) the school was at the outskirt of Busurungi (at 1094), describes the headquarters of the FARDC battalion which was working on Busurungi, to be in Omingine (at 1100) which is part of Busurungi (at 1101). There was another position on the way to Mangeri (at 1101), a small position at the edge (south) of the village (at 1104), another position in the direction to Biriko (at 1104), another at the north west of the village (at 1105); EVD-PT-OTP-00632, Transcript of Interview of Witness 561, at 1377-80.

among the dwellings of the civilian population that was living together with FARDC and Mai Mai soldiers.²⁷⁴ Furthermore, Witness 562 [REDACTED] says that the results of the mission were reported back to the superiors and that “they knew it, they knew even before [...] they knew that the [...] the civilians were living there.”²⁷⁵

139. In preparation for the attack, the day before it took place, the FDLR soldiers were all gathered for a rally at an assembly point in order to receive instructions.²⁷⁶ According to Witness 562, there were “many, many, many soldiers” at the rally.²⁷⁷ Although Witnesses 544 and 562 say that the FDLR was the only group involved in the Busurungi attack,²⁷⁸ it is clear from the account given by these and other witnesses that Patriotes Résistants Congolais (PARECO) soldiers²⁷⁹ and civilians who formed the *résistance civile* also participated in the attack.²⁸⁰ Witnesses 561 and 562 explain that all the attackers, FDLR, PARECO and *résistance civile*, were gathered together at the rally, received orders, were briefed by FDLR commanders and all of them launched the attack together as a single group under the instructions of FDLR commanders.²⁸¹

²⁷⁴ EVD-PT-OTP-00633, Transcript of Interview of Witness 561, at 1417-8; EVD-PT-OTP-00703, Transcript of Interview of Witness 562, at 1100; EVD-PT-D06-01277, Transcript of Interview of Witness 672, at 0889-91.

²⁷⁵ EVD-PT-OTP-00703, Transcript of Interview of Witness 562, at 1098.

²⁷⁶ There is some contradiction regarding the name of the place where the soldiers were gathered: Witness 561 refers to Gaseni, EVD-PT-OTP-00631, Transcript of Interview of Witness 561, at 1341, while other witnesses refer to Bucanga, EVD-PT-OTP-00762, summary Statement of Witness 677, at 0057; EVD-PT-OTP-00704, Transcript of Interview of Witness 562, at 1197; EVD-PT-OTP-00703, Transcript of Interview of Witness 562, at 1134; EVD-PT-D06-01332, Transcript of Interview of Witness 542, at 2153.

²⁷⁷ EVD-PT-OTP-00703, Transcript of Interview of Witness 562, at 1134.

²⁷⁸ EVD-PT-D06-01292, Transcript of Interview of Witness 544, at 1570; EVD-PT-OTP-00704, Transcript of Interview of Witness 562, at 1186-7.

²⁷⁹ Group created around March 2007 by fusing several Mai Mai militias and Hutu CNDP deserters, mainly anti-CNDP rebel group in North Kivu. See EVD-PT-D06-01265, Expert Report Witness 2, at 0019.

²⁸⁰ EVD-PT-OTP-00631, Transcript of Interview of Witness 561, at 1342; EVD-PT-OTP-00632, Transcript of Interview of Witness 561, at 1376; EVD-PT-OTP-00704, Transcript of Interview of Witness 562, at 1166-9; EVD-PT-OTP-00705, Transcript of Interview of Witness 562, at 1229; EVD-PT-D06-01278, transcript of interview, of Witness 672, at 0912.

²⁸¹ According to Witness 561, all these attackers were gathered in an assembly point receiving orders from FDLR leaders in preparation for the attack, EVD-PT-OTP-00631, Transcript of Interview of Witness 561, at 1342-4. Witness 561 says that PARECO soldiers were also in the assembly point with their leader, Colonel Tambwisa, receiving orders from FDLR commanders, EVD-PT-OTP-00631, Transcript of Interview of Witness 561, at 1344; EVD-PT-OTP-00632, Transcript of Interview of Witness 561, at 1375. In the same token, Witness 562, affirms that the *résistance civile* was briefed by Kalume together with FDLR soldiers in the assembly point prior to the attack, EVD-PT-OTP-00722, Transcript of Interview of Witness 562, at 1319-21; PARECO soldiers speak the same way and look the same as FDLR, and “when they come to join the FDLR

140. The main FDLR commander at the rally was Colonel Kalume.²⁸² There is also evidence that shows that Colonel Sirius (or Sirusi or Cyrus), Major Fidele, Lieutenant Colonel Matovu, Captain Vainqueur, Captain Salomon and Lieutenant Mandarine were also present at the rally, giving orders and briefing the troops.²⁸³ The orders issued to the soldiers were to attack the military positions and “push FARDC as far as possible” in order to guarantee security,²⁸⁴ and to prevent the FARDC from killing more Rwandan civilians.²⁸⁵

141. The Defence argues that the attack on Busurungi was simply planned as a military assault on an enemy stronghold in the more general context of a defensive military campaign.²⁸⁶ The Defence also suggests that civilians were killed only as “collateral damage”.²⁸⁷

142. In the view of the Chamber, the war crime of attacking civilians pursuant to article 8(2)(e)(i) of the Statute does not presuppose that the civilian population is the sole and exclusive target of the attack. The crime may be perpetrated in any of the two following scenarios: (i) when individual civilians not taking direct part in the hostilities or the civilian population are the sole target of the attack²⁸⁸ or (ii) when the perpetrator launches the attack with two distinct specific aims: (a) a military objective, within the meaning of articles 51 and 52 of the Protocol Additional to the Geneva Conventions of 12 August 1949 (“the AP I”); *and simultaneously*, (b) the civilian population or individual civilians not taking direct part in the hostilities.²⁸⁹ The latter scenario must be

they are all FDLR” and receive orders from FDLR command, EVD-PT-OTP-00709, Transcript of Interview of Witness 562, at 1191 and 1194 respectively.

²⁸² EVD-PT-OTP-00703, Transcript of Interview of Witness 562, at 1135.

²⁸³ EVD-PT-D06-01314, Transcript of Interview of Witness 528, at 1192; EVD-PT-OTP-00631, Transcript of Interview of Witness 561, at 1340-53; EVD-PT-OTP-00703, Transcript of Interview of Witness 562, at 1127-8.

²⁸⁴ EVD-PT-OTP-00703, Transcript of Interview of Witness 562, at 1136; EVD-PT-OTP-00704, Transcript of Interview of Witness 562, at 1152.

²⁸⁵ EVD-PT-D06-01330, Transcript of Interview of Witness 542, at 2118.

²⁸⁶ ICC-01/04-01/10-T-7-Red2-ENG, p. 70, lines 22-24.

²⁸⁷ ICC-01/04-01/10-T-7-Red2-ENG, p. 71, lines 3-10.

²⁸⁸ See *Katanga* Decision, para. 272.

²⁸⁹ See *Katanga* Decision, para. 273. According to this scenario, a “crime is committed when an attack is launched against a village which has significant military value because of its strategic location and when the village contains two distinct targets: (i) the defending forces of the adverse or hostile party in control of the

distinguished from situations where, in violation of the principle of proportionality, a disproportionate attack is intentionally launched with the specific aim of targeting a military objective, with the awareness that incidental loss of life or injury to civilians will or may occur as a result of such an attack.²⁹⁰ In such a case, the targeting of the civilian population is not the aim of the attack but only an incidental consequence thereof.

143. The Chamber further notes that reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, regardless of the behaviour of the other party, since “no circumstances would legitimise an attack against civilians even if it were a response proportionate to a similar violation perpetrated by the other party”.²⁹¹

144. In the case at hand, the Chamber finds that the evidence provides substantial grounds to believe that the FDLR soldiers were directly ordered to take revenge on both civilians and soldiers,²⁹² as the name of the operation, i.e. “eye for eye”, also suggests.²⁹³ The orders for the attack were clear: “everything which has breath shouldn’t be there at all.”²⁹⁴ Orders were given: “destroy everything, because everybody who was considered as [their] enemy,”²⁹⁵ “we don’t want to hear anything, anybody there, anything in Busurungi,”²⁹⁶ and “everything that moves should be killed.”²⁹⁷ The soldiers were then

village (that is, when only the defeat of these forces would permit the attacking party to seize control of the village); and (ii) the civilian population of the village, if its allegiance is with the adverse or hostile party in control of the village thus leading the attacking forces to consider the ‘destruction’ of that civilian population as the best method for securing control of the village once it has been seized.”

²⁹⁰ See J. Henckaerts and L. Doswald-Beck. *International Committee of the Red Cross, Customary International Humanitarian Law, Volume I: Rules* (Cambridge University Press, 2005), pp. 46-50; H. Olásolo, *Unlawful Attacks in Combat Situations* (Martinus Nijhoff Publishers, 2008), p. 85. The Rome Statute includes such a violation of the principle of proportionality in the provision of article 8(2)(b)(iv) which is applicable to international armed conflict. Although the rule of proportionality is recognised as a norm of customary international law applicable in both international and non-international armed conflicts, the Statute does not provide any provision equivalent to article 8(2)(b)(iv) in relation to non-international armed conflicts.

²⁹¹ ICTY, Trial Chamber, *Prosecutor v. Milan Martić*, “Decision”, 8 March 1996, IT-95-11-R61, para. 15.

²⁹² EVD-PT-OTP-00631, Transcript of Interview of Witness 561, at 1345-6.

²⁹³ EVD-PT-OTP-00631, Transcript of Interview of Witness 561, at 1350.

²⁹⁴ EVD-PT-OTP-00631, Transcript of Interview of Witness 561, at 1350.

²⁹⁵ EVD-PT-OTP-00707, Transcript of Interview of Witness 562, at 1353.

²⁹⁶ EVD-PT-OTP-00707, Transcript of Interview of Witness 562, at 1356.

expected to kill anyone they met because the enemy had not shown any pity on them.²⁹⁸ They were also ordered to destroy everything in the village,²⁹⁹ and to “annihilate the whole place [...] as a sign to [...] Congolese.”³⁰⁰ They were to set fire to the village and houses³⁰¹ in order to force the population to flee.³⁰² Some witnesses say that no instructions were given prior to the attack in relation to the treatment of civilians.³⁰³ While some witnesses deny that there was an intention to attack civilians,³⁰⁴ other witnesses explain that the orders to kill were generalised and directed at the “enemy” without any distinction being made between combatants and civilians.³⁰⁵ Witness 562 affirms that the FDLR made no distinction between the Congolese army and civilians as

²⁹⁷ EVD-PT-D06-01303, Transcript of Interview of Witness 562, at 0132 and 0141.

²⁹⁸ EVD-PT-D06-01291, Transcript of Interview of Witness 544, at 1548.

²⁹⁹ EVD-PT-OTP-00632, Transcript of Interview of Witness 561, at 1381-2.

³⁰⁰ EVD-PT-OTP-00631, Transcript of Interview of Witness 561, at 1350.

³⁰¹ EVD-PT-OTP-00632, Transcript of Interview of Witness 561, at 1382; EVD-PT-D06-01314, Transcript of Interview of Witness 528, at 1178-80; EVD-PT-OTP-00854, summary Statement of Witness 542, at 1240. Witness 562 contradicts himself. He first states that the order to burn houses was not given prior to the attack but rather, during it and was directed only at the houses occupied by the Mai Mai, EVD-PT-OTP-00704, Transcript of Interview of Witness 562, at 1212-4, but later he states that at the rally Kalume ordered them to set fire to the entire village, EVD-PT-OTP-00707, Transcript of Interview of Witness 562, at 1315.

³⁰² EVD-PT-D06-01292, Transcript of Interview of Witness 544, at 1564. Some witnesses mention that burning the houses was a task assigned particularly to the Rwandan civilians taking part in the attack on the side of the FDLR (*résistance civile*), EVD-PT-OTP-00632, Transcript of Interview of Witness 561, at 1382; or to a specific group of soldiers, EVD-PT-D06-01314, Transcript of Interview of Witness 528, at 1180.

³⁰³ EVD-PT-OTP-00762, summary Statement of Witness 677, at 0058; EVD-PT-D06-01291, Transcript of Interview of Witness 544, at 1348; EVD-PT-OTP-00703, Transcript of Interview of Witness 562, at 1136; EVD-PT-OTP-00704, Transcript of Interview of Witness 562, at 1163; EVD-PT-OTP-00707, Transcript of Interview of Witness 562, at 1317. Witness 544 says that no instruction had been given to attack the wives of the militaries who lived in Busurungi with them, EVD-PT-D06-01292, Transcript of Interview of Witness 544, at 1568.

³⁰⁴ EVD-PT-D06-01277, Transcript of Interview of Witness 672, at 0883.

³⁰⁵ EVD-PT-D06-01291, Transcript of Interview of Witness 544, at 1548; EVD-PT-OTP-00762, summary Statement of Witness 677, at 0058; EVD-PT-D06-01292, Transcript of Interview of Witness 544, at 1564; EVD-PT-OTP-00707, Transcript of Interview of Witness 562, at 1317, 1353 and 1356. Witness 528, a former FDLR soldier who took part in the attack, states that he received orders not to fight against civilians EVD-PT-D06-01314, Transcript of Interview of Witness 528, at 1192. However, he contradicts himself saying also that he did not expect to find civilians in the village and received no order as regarding how to act if there were civilians, EVD-PT-D06-01314, Transcript of Interview of Witness 528, at 1175. Witness 542 also says he had received order from Sirius not to attack the civilians, EVD-PT-D06-01330, Transcript of Interview of Witness 542, at 2120, but he also states that there were indiscriminate orders to burn all houses, EVD-PT-OTP-00854, summary Statement of Witness 542, at 1240 and that there were people inside the houses which were burned, EVD-PT-D06-01332, Transcript of Interview of Witness 542, at 2159, that they shot anything that moved and went to every house, EVD-PT-OTP-00854, Transcript of Interview of Witness 542, at 1239, and that civilians were killed because they were mixed with soldiers, EVD-PT-OTP-00854, Transcript of Interview of Witness 542, at 1239.

“they considered them [to be] all the same”.³⁰⁶ Witness 677 says that the Congolese population on the side of the FARDC was considered to be the enemy.³⁰⁷ UN and Human Rights Watch Reports further corroborate the allegation that the civilian population was targeted by the attack.³⁰⁸ The Chamber is accordingly satisfied that there are substantial grounds to believe that the attack targeted both the military objectives (several FARDC positions within and on the outskirts of the village) and the civilian population or individual civilians not taking direct part in the hostilities.

145. In light of the evidence submitted by the Prosecution, the Chamber finds substantial grounds to believe that, during the night of 9-10 May 2009,³⁰⁹ the FDLR³¹⁰ launched an attack on Busurungi and its surroundings,³¹¹ which started at approximately 2h00³¹² and lasted until the following morning.³¹³

³⁰⁶ EVD-PT-OTP-00707, Transcript of Interview of Witness 562, at 1317.

³⁰⁷ EVD-PT-OTP-00762, summary of Statement of Witness 677, at 0059-60.

³⁰⁸ EVD-PT-OTP-00738, MONUC interview with a demobilised FDLR soldier, at 0262 ; EVD-PT-OTP-00041, UN Special Rapporteur on extrajudicial executions, at 0638; EVD-PT-OTP-00282, HRW Report, at 0299, 0311; EVD-PT-OTP-00309, UNHRO Report, 28 May 2009, at 1173.

³⁰⁹ EVD-PT-OTP-00631, Transcript of Interview of Witness 561, at 1340; EVD-PT-OTP-00762, summary Statement of Witness 677, at 0056; EVD-PT-OTP-00596, Transcript of Interview of Witness 655, at 0074; EVD-PT-OTP-00743, summary Statement of Witness 694, at 1167; EVD-PT-OTP-00699, Transcript of Interview of Witness 683, at 0803; EVD-PT-OTP-00594, Transcript of Interview of Witness 656, at 0028; EVD-PT-OTP-00707, Transcript of Interview of Witness 562, at 1365. EVD-PT-OTP-00039, Press article, at 0322; EVD-PT-OTP-00041, *UN Special Rapporteur on extrajudicial executions*, at 0638; EVD-PT-OTP-00357, UN Report, at 0367; EVD-PT-OTP-00075, *Final report of the Group of Experts on the Democratic Republic of the Congo*, 23 November 2009 at 0126; EVD-PT-OTP-00282, HRW Report, at 0258, 0309; EVD-PT-OTP-00290, at 0706; EVD-PT-OTP-00729, at 1596. EVD-PT-OTP-00344, UNJHRO Report, at 0053. EVD-PT-OTP-00038, AFP article, at 0319. EVD-PT-OTP-00033, Report, at 0490.

³¹⁰ Many witnesses confirm that the attack in question was directed by the FDLR, including former FDLR members who participated in the attack. *See* EVD-PT-OTP-00631, Transcript of Interview of Witness 561, at 1339; EVD-PT-OTP-00762, summary Statement of Witness 677, at 0056; EVD-PT-D06-01291, Transcript of Interview of Witness 544, at 1550; EVD-PT-OTP-00703, Transcript of Interview of Witness 562, at 1126-8; EVD-PT-D06-01286, Transcript of Interview of Witness 5/BKA-4, at 0066; EVD-PT-D06-01268, Transcript of Interview of Witness 7/BKA-7, at 0895; EVD-PT-D06-01313, Transcript of Interview of Witness 528, at 1159; EVD-PT-OTP-00854, summary Statement of Witness 542, at 1237; EVD-PT-OTP-00075, *Final report of the Group of Experts on the Democratic Republic of the Congo*, 23 November 2009, at 0127.

³¹¹ For the location of the military targets the attack included locations in the outskirts of the village, *See* EVD-PT-OTP-00703, Transcript of Interview of Witness 562, at 1140-2; EVD-PT-OTP-00632, Transcript of Interview of Witness 561, at 1377-88; EVD-PT-OTP-00309, UNHRO Report, at 1173; EVD-PT-OTP-00343, UNJHRO Report, at 0039, 0046.

³¹² EVD-PT-OTP-00633, Transcript of Interview of Witness 561, at 1424; EVD-PT-OTP-00594, Transcript of Interview of Witness 656, at 0029; EVD-PT-D06-01291, Transcript of Interview of Witness 544, at 1550 and 1555; EVD-PT-OTP-00704, Transcript of Interview of Witness 562, at 1162 and 1199; EVD-PT-D06-01286,

146. According to Witnesses 561 and 528, five hundred soldiers participated in the attack.³¹⁴ A UN report estimated that there were about four hundred soldiers.³¹⁵ Witness 562, who participated in the attack, says that the FDLR brought heavy weapons.³¹⁶

147. Witness 562 states that certain Congolese civilians had weapons and engaged in fighting against the FDLR.³¹⁷ The testimony of insider witnesses demonstrates that there was a prevalent belief within the FDLR that the population of Busurungi was supporting the FARDC³¹⁸ and would provide the Congolese forces with information on the FDLR positions after the attack if they were not chased away from the area.³¹⁹

148. As highlighted in the *Abu Garda* Confirmation Decision, there is no customary or treaty law definition of what constitutes direct participation in hostilities,³²⁰ although useful guidance is provided by the International Committee of the Red Cross

Transcript of Interview of Witness 5/BKA-4, at 0064-5; EVD-PT-D06-01268, Transcript of Interview of Witness 7/BKA-7, at 0895; EVD-PT-D06-01271, Transcript of Interview of Witness 8/BKA-8, at 0996; EVD-PT-D06-01313, Transcript of Interview of Witness 528, at 1163; EVD-PT-OTP-00762, summary Statement of Witness 677, at 0060; EVD-PT-OTP-00854, summary Statement of Witness 542, at 1239; EVD-PT-OTP-00309, UNHRO Report, at 1173; EVD-PT-OTP-00343, UNJHRO Report, at 0046. There are slight contradictions in other sources. A report indicates that the fighting started at 1h00, EVD-PT-OTP-00729, Report *How the fighting came to Busurungi*, at 1596. A UN report mentions it started at 1h30, EVD-PT-OTP-00344, UNJHRO Report, at 0053.

³¹³ EVD-PT-OTP-00633, Transcript of Interview of Witness 561, at 1425-6 and 1438-40; EVD-PT-D06-01291, Transcript of Interview of Witness 544, at 1550; EVD-PT-OTP-00704, Transcript of Interview of Witness 562, at 1162; EVD-PT-OTP-00705, Transcript of Interview of Witness 562, at 1221; EVD-PT-D06-01286, Transcript of Interview of Witness 5/BKA-4, at 0066; EVD-PT-D06-01268, Transcript of Interview of Witness 7/BKA-7, at 0895; EVD-PT-D06-01314, Transcript of Interview of Witness 528, at 1174; EVD-PT-OTP-00854, summary Statement of Witness 542, at 1239; EVD-PT-OTP-00762, summary Statement of Witness 677, at 0060.

³¹⁴ EVD-PT-OTP-00631, Transcript of Interview of Witness 561, at 1341; EVD-PT-D06-01313, Transcript of Interview of Witness 528, at 1162.

³¹⁵ EVD-PT-OTP-00343, UNJHRO Report, at 0039.

³¹⁶ EVD-PT-OTP-00704, Transcript of Interview of Witness 562, at 1192-3; EVD-PT-OTP-00707, Transcript of Interview of Witness 562, at 1326.

³¹⁷ EVD-PT-OTP-00704, Statement of Witness 562 at 1209-12; EVD-PT-OTP-00705, Statement of Witness 562 at 1219. Witness 562, mentioned there were also Mai-Mai soldiers in Busurungi (EVD-PT-OTP-00704, Statement of Witness 562 at 1190). He said that, when the government soldiers had left, they started fighting against the Mai-Mai (EVD-PT-OTP-00705, Statement of Witness 562 at 1219). However, the witness later recognises that the houses occupied by the Mai Mai were the minority (EVD-PT-OTP-00709, Statement of Witness 562 at 1204-5) and that, in response to the attack, FDLR soldiers started firing at every house (EVD-PT-OTP-00704, Statement of Witness 562 at 1209).

³¹⁸ EVD-PT-OTP-00699, Statement of Witness 683 at 803.

³¹⁹ EVD-PT-D06-01325, Statement of Witness 559/BKA-1 at 1787.

³²⁰ *Abu Garda* Decision, para. 80.

("ICRC").³²¹ However, loss of protection is only clear when a civilian uses weapons or other means to commit violence against human or material enemy forces, unless in self-defence. Further, practice indicates that supplying food and shelter and sympathising with one belligerent party is an insufficient reason to deny civilians protection against attack.³²² The term "civilian" in accordance with article 50(1) of the AP I, applies to anyone who is not a combatant, and in case of doubt, the person shall be considered to be a civilian. Additionally, a civilian population comprises all civilians as opposed to members of armed forces and any other legitimate combatants. Further, pursuant to article 50(3) of the AP I, the presence within the civilian population of individuals who do not fit within the definition of civilians does not deprive the entire population of its civilian character.³²³ Yet, civilians may lose protection only for such a time as they take direct part in hostilities or combat-related activities and not permanently.³²⁴ Further, the protection does not cease if such persons only use armed force in the exercise of their right to self-defence.³²⁵

³²¹ See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, (2008), pp. 995-996. The ICRC states that "in order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria: (a) be likely to affect adversely military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury or destruction on persons or objects protected against direct attack (threshold of harm); (b) there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); [and] (c) the act must be specifically designated to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)." See also Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, (Cambridge University Press, 2nd ed., 2011), p. 149.

³²² See ICRC, *Protecting Civilians in 21st-Century Warfare, Target selection, Proportionality and Precautionary Measures in Law and Practice* (The Netherland Red Cross, 2001), p. 13. The ICRC recalls the distinction between "direct" and "indirect" participation advanced by the Inter-American Commission on Human Rights in a Report on Human Rights in Colombia in which it stated that: "Civilians whose activities merely support the adverse party's war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve acts of violence which pose an immediate threat of actual harm to the adverse party." See also Henckaerts and Doswald-Beck, pp. 22-24.

³²³ See Abu Garda Decision, para. 79; Katanga Decision, fn. 366-368; Bemba Decision, para. 78; see also ICTY, *Prosecution v. Dragoljub Kunarac, et al., "Judgement"*, 22 February 2001, IT-96-23/1-T, ("Kunarac TJ"), para. 425.

³²⁴ Dörmann, op. cit., p. 454.

³²⁵ *Abu Garda* Decision, para. 83.

149. In the case at hand, the evidence demonstrates that during the attack and even after the FARDC and Mai Mai were chased away,³²⁶ civilians were killed by being directly fired upon, cut into pieces with hooks and machetes or burnt alive inside their homes. Witness 561 saw several corpses of civilians, including women and children.³²⁷ Witness 683 saw civilians being slaughtered and about forty dead bodies lying in the village; the burnt bodies were too many to count.³²⁸ Witness 562 saw civilians being killed with machetes or burned in houses after the Congolese soldiers had been chased away from the village.³²⁹ Witnesses 561 and 562 could hear people crying and shouting for help from inside the houses.³³⁰ Two days after the attack, Witness 562 went to Busurungi on patrol and saw around thirty-five or forty corpses of civilians, including women and children, some of which were burnt, cut into pieces or with skulls broken;³³¹ there was nobody alive in the village, the witness says.³³² Witness 650 counted seventy-nine bodies of adults and children who had been burnt alive in their houses, had gunshot wounds or had been cut with machetes.³³³ He said that some bodies were at the doors of the houses, as people had been locked inside.³³⁴ Witness 5/BKA-4 states that many civilians were killed, that there were people in most houses and that all houses were attacked.³³⁵ Witness 7/BKA-7 saw about twenty dead civilians the day after the attack.³³⁶ According to Witnesses 544 and 562, civilians who tried to escape from their burning houses were shot at.³³⁷ Witnesses 544 and 528 both said that the wives of

³²⁶ EVD-PT-D06-01303, Transcript of Interview of Witness 562, at 0131; EVD-PT-OTP-00707, Transcript of Interview of Witness 562, at 1360.

³²⁷ EVD-PT-OTP-00633, Transcript of Interview of Witness 561, at 1441-2.

³²⁸ EVD-PT-OTP-00699, Transcript of Interview of Witness 683, at 0804-6.

³²⁹ EVD-PT-D06-01303, Transcript of Interview of Witness 562, at 0131-4.

³³⁰ EVD-PT-D06-01303, Transcript of Interview of Witness 562, at 0132; EVD-PT-OTP-00633, Transcript of Interview of Witness 561, at 1437.

³³¹ EVD-PT-OTP-00705, Transcript of Interview of Witness 562, at 1231-2, 1241-3, 1255-8; EVD-PT-OTP-00707, Transcript of Interview of Witness 562, at 1339-40; EVD-PT-D06-01303, Transcript of Interview of Witness 562, at 0132.

³³² EVD-PT-OTP-00705, Transcript of Interview of Witness 562, at 1247.

³³³ EVD-PT-OTP-00597, statement of interview of Witness 650, at 0118-9.

³³⁴ EVD-PT-OTP-00597, statement of interview of Witness 650, at 0119.

³³⁵ EVD-PT-D06-01286, Transcript of Interview of Witness 5/BKA-4, at 0064-5.

³³⁶ EVD-PT-D06-01268, Transcript of Interview of Witness 7/BKA-7, at 0895.

³³⁷ EVD-PT-D06-01291, Transcript of Interview of Witness 544, at 1551; EVD-PT-D06-01303, Transcript of Interview of Witness 562, at 0133.

soldiers living in Busurungi were also killed.³³⁸ Witnesses 694, 5/BKA-4 and 632, as well as press articles, NGO and UN Reports also confirm that civilians were killed during the attack.³³⁹ In light of the extensive evidence submitted by the Prosecution, the Chamber is satisfied that there are substantial grounds to believe that individual civilians not taking direct part in the hostilities were intentionally killed during and in the aftermath of the attack in Busurungi and surrounding villages on or about 9-10 May 2009.

150. Witness 561 states that, after the attack, the troops gathered again at the assembly point and were congratulated by Sirius, who said the objective had been achieved.³⁴⁰

151. In light of the foregoing, the Chamber is satisfied that there are substantial grounds to believe that the attack on Busurungi and surrounding villages on or about 9-10 May 2009 was launched by the FDLR with the aim of targeting both military objectives (FARDC positions in the village and surroundings) and the civilian population or individual civilians not taking direct part in the hostilities. The Chamber is further satisfied that the FDLR soldiers who took part in the attack were aware of the civilian status of the victims and intended to attack the civilian population or individual civilians not taking direct part in the hostilities since they were considered enemies. The Chamber therefore finds substantial grounds to believe that the war crimes of attacking civilians under article 8(2)(e)(i) of the Statute and murder under article 8(2)(c)(i) of the Statute were committed by the FDLR troops in Busurungi and surrounding villages on or about 9-10 May 2009.

³³⁸ EVD-PT-D06-01292, Transcript of Interview of Witness 544, at 1566-9; EVD-PT-D06-01314, Transcript of Interview of Witness 528, at 1174.

³³⁹ EVD-PT-OTP-00743, summary Statement of Witness 694, at 1168-9; EVD-PT-D06-01286, Transcript of Interview of Witness 5/BKA-4, at 0064; EVD-PT-D06-01349, Transcript of Interview of Witness 632, at 0364-7; EVD-PT-OTP-00039, Press article, at 0322-3; EVD-PT-OTP-00075, *Final report of the Group of Experts on the Democratic Republic of the Congo*, at 0126; EVD-PT-OTP-00280, HRW Report, at 0234; EVD-PT-OTP-00282, HRW Report, at 0258 and 0309-10; EVD-PT-OTP-00309, UNHRO Report, at 1173; EVD-PT-OTP-00343, UNJHRO report, at 0039 and 0046; EVD-PT-OTP-00370, UNHCR, at 0034; EVD-PT-OTP-00344, UNJHRO Report, at 0053, 0057; EVD-PT-OTP-00038, AFP article, at 0319; EVD-PT-OTP-00033, *Report Massacre in the Congo organised in Germany*, at 0490; EVD-PT-OTP-00041, UN Special Rapporteur on extrajudicial executions, at 0638.

³⁴⁰ EVD-PT-OTP-00634, Transcript of Interview of Witness 561, at 1465-6.

(ii) *Whether the war crime of mutilation (Count 4) was committed*

152. Although in the charges the Prosecution does not provide any concrete indication as to the acts that, in his view, would amount to the war crime of mutilation, in its LoE the Prosecution identifies the following paragraphs of the DCC, and the supporting evidence thereof, as providing the facts that would amount to the constitutive elements of the war crime of mutilation:

- (i) [REDACTED].³⁴¹ [REDACTED].³⁴²
- (ii) Witness 694 saw [REDACTED] raped, beaten, eviscerated (including the foetus of her unborn child), and dismembered.³⁴³ They pierced her eyes and cut her throat with the bayonet of their guns, and cut open her pregnant stomach, causing her moving foetus to fall out,³⁴⁴ as she was six months pregnant.³⁴⁵ After killing her, the FDLR dismembered her body parts with machetes and threw them around,³⁴⁶ [REDACTED].³⁴⁷
- (iii) A demobilised FDLR insider told the Prosecution that FDLR Lieutenant MANDARINE, a notorious FDLR torturer who participated in the attack, boasted to the witness about having performed *gushahura*, a term used to describe genital mutilation, while at Busurungi.³⁴⁸

153. The only piece of evidence provided by the Prosecution in support of the allegation that [REDACTED] is the testimony of Witness 692, the account of whom the Prosecution has indicated may be unreliable.³⁴⁹ As indicated in paragraph 42 above, the Chamber will not use the statement of Witness 692 to support any of its findings. Since the Prosecution has not provided any further evidence in support of this allegation the Chamber will not analyse it.

³⁴¹ [REDACTED].

³⁴² [REDACTED].

³⁴³ DCC, para. 56.

³⁴⁴ DCC, paras 70 and 81.

³⁴⁵ DCC, para. 81.

³⁴⁶ DCC, para. 70.

³⁴⁷ DCC, para. 81.

³⁴⁸ DCC, para. 66.

³⁴⁹ ICC-01/04-01/10-456, para. 2.

154. In relation to the Prosecution's allegations based on the account of witness 694, the Chamber stresses, at the outset, that the acts allegedly inflicted on the body of Witness 694 [REDACTED] after she was killed cannot amount to the war crime of mutilation which presupposes an act committed against a person and not a dead body. This conduct will, therefore, not be analysed under the charge of mutilation.

155. Witness 694 describes how [REDACTED] during the attack of the 9-10 May in Busurungi and [REDACTED] found by five "Hutu soldiers" who "grabbed [REDACTED] by her arm [pulling] her away [REDACTED]." ³⁵⁰ The Witness further describes that after [REDACTED] was raped and beaten, she "was crying and they pierced her eyes with the bayonet of their guns. When they finished with that, they cut her throat with a bayonet. Then they cut her stomach with a machete. They cut it enough that it fell open [...] [REDACTED] was five or six months pregnant [...] when they cut her, blood came out, and something else came out of her that was moving." ³⁵¹

156. The allegation that pregnant women had their stomachs cut open and the foetuses removed from their bodies during the attack in Busurungi is also supported by a Human Rights Watch Report. ³⁵² Witness 683 further states having seen people with cuts on their breasts, heads or arms, or with their heads split open. ³⁵³

157. In relation to the Prosecution's allegation that during the 9-10 May 2009 attack in Busurungi men's genitals were also mutilated, Witness 561, who participated in the attack states that he heard from Lieutenant Mandarine of the FDLR at the assembly point after the attack, that he had removed male genital organs. ³⁵⁴ Witness 562 says that Mandarine was "behaving like an animal. He was [...] just killing and sometimes [...] he would just take a part of [a victim's] body organ." ³⁵⁵ The witness claims to have seen

³⁵⁰ EVD-PT-OTP-00743, summary Statement of Witness 694, at 1168.

³⁵¹ EVD-PT-OTP-00743, summary Statement of Witness 694, at 1169.

³⁵² EVD-PT-OTP-00282, HRW Report, at 0310.

³⁵³ EVD-PT-OTP-00699, Transcript of Interview of Witness 683, at 0805.

³⁵⁴ EVD-PT-OTP-00634, Transcript of Interview of Witness 561, at 1476-9.

³⁵⁵ EVD-PT-D06-01303, Transcript of Interview of Witness 562, at 0162.

Mandarine “holding the penises of the people whom he had killed.”³⁵⁶ Witness 561 also states that, when the troops gathered after the attack, he heard that some people from the *résistance civile*, who as found in paragraph 139 above were under the command of the FDLR, had cut off men’s genitals and spread them in the village.³⁵⁷

158. The Defence alleges elsewhere that the Prosecution could not prove that acts of mutilation were committed *before* or *after* the death of the victims.³⁵⁸ The Chamber however finds that the evidence provides substantial grounds to believe that at least some of the acts of mutilation were perpetrated when the victims were still alive. For example, Witness 694 describes how the acts of mutilation that eventually caused the death of [REDACTED] started while [REDACTED] was crying” and therefore still alive.³⁵⁹

159. In relation to the status of the victims, Witness 672, a former FDLR member who was not present during the attack, says that he heard that Mandarine had cut off the sexual organs of soldiers during the attack in Busurungi.³⁶⁰ It is unclear whether or not such soldiers were *hors de combat*, but it appears more likely that they were. Witness 562, who also participated in the attack, explains that he could not be sure whether Mandarine was mutilating civilians or soldiers, but assumed it was civilians because there were no FARDC soldiers anymore in the village when he saw Mandarine holding a penis.³⁶¹ Furthermore, Witness 694 [REDACTED] was indeed a civilian inhabitant of the village.³⁶² The Chamber is further satisfied that the FDLR soldiers who committed those acts of mutilation did so intentionally and were aware of the civilian status of the victims.

³⁵⁶ EVD-PT-D06-01303, Transcript of Interview of Witness 562, at 0162.

³⁵⁷ EVD-PT-OTP-00705, Transcript of Interview of Witness 561, at 1238.

³⁵⁸ ICC-01/04-01/10-T-8-Red2-ENG ET 20-09-2011, p. 38, lines 19-22.

³⁵⁹ EVD-PT-OTP-00743, summary Statement of Witness 694, at 1169.

³⁶⁰ EVD-PT-D06-01277, Transcript of Interview of Witness 672, at 0900-1.

³⁶¹ EVD-PT-D06-01304, Transcript of Interview of Witness 562, at 0175-6.

³⁶² EVD-PT-OTP-00743, summary Statement of Witness 694, at 1169.

160. In light of the above, the Chamber finds substantial grounds to believe that the war crime of mutilation under article 8(2)(c)(i)-2 of the Statute was committed by the FDLR troops in Busurungi and surrounding villages on or about 9-10 May 2009. The Prosecution charges the war crime of mutilation in the alternative under article 8(2)(c)(i)-2 or article 8(2)(e)(xi)-1. Since the Chamber has already found substantial grounds to believe that the elements of the crime under article 8(2)(c)(1)-2 of the Statute are fulfilled, it will not analyse the same offence under article 8(2)(e)(xi)-1 of the Statute.

(iii) Whether the war crime of rape (Count 8) was committed

161. Although most of the insider witnesses deny having seen any instance of rape during the attack on Busurungi on 9-10 May 2009 or being aware of any such acts,³⁶³ Witnesses 656 and 683 report being raped during and after the attack.³⁶⁴ Witness 694 further describes the brutal way in which [REDACTED] was raped.³⁶⁵ Insider Witnesses 562 and 4/BKA-3 also confirm that rape was committed by the FDLR during the attack on Busurungi on 9-10 May 2009.³⁶⁶ Moreover, Witness 650, who was present during the attack, refers to the case of a woman [REDACTED] by the FDLR during the attack and raped [REDACTED].³⁶⁷ A Human Rights Watch Report also provides information of rape and sexual violence committed during the attack.³⁶⁸

162. Witness 656 identifies her attackers as Rwandan soldiers speaking Kinyarwanda, who were called FDLR.³⁶⁹ She also “recognized one of the soldiers in the forest because

³⁶³ EVD-PT-OTP-00633, Transcript of Interview of Witness 561, at 1458-59; EVD-PT-OTP-00762, summary Statement of Witness 677, at 0061; EVD-PT-D06-01292, Transcript of Interview of Witness 544, at 1573-4 and 1579-80; EVD-PT-OTP-00860, summary of Statement of Witness 587, at 1428; EVD-D06-01314, Transcript of Interview of Witness 528, at 1183-4; EVD-PT-D06-01349, Transcript of Interview of Witness 632, at 0365-7.

³⁶⁴ EVD-PT-OTP-00594, Statement of Witness 656, at 0032; EVD-PT-OTP-00699, Statement of Witness 683, at 0805.

³⁶⁵ EVD-PT-OTP-00743, summary Statement of Witness 694, at 1168-9.

³⁶⁶ EVD-PT-D06-01302, Transcript of Interview of Witness 562, at 0121; EVD-PT-D06-01303, Transcript of Interview of Witness 562, at 0129; EVD-PT-D06-01285, Transcript of Interview of Witness 0004/BKA-003, at 0044.

³⁶⁷ EVD-PT-OTP-00597, Statement of Witness 650, at 0119.

³⁶⁸ See EVD-PT-OTP-00282, HRW Report, at 0258-9 and 0310.

³⁶⁹ EVD-PT-OTP-00594, Statement of Witness 656, at 0030, para. 23.

he would pass by [REDACTED] [...] every week on the way to the market.”³⁷⁰ She describes the way the soldier pushed her down, took her clothes off and threw them aside, laid down on her stomach and “put a part of his body inside mine. The lower part of his body [...] he put his penis into the lower part of my body,” and that she “did not have a choice; he did this to me by force.”³⁷¹

163. Witness 683 was assaulted in the forest on the day of the attack in Busurungi, which, according to her account, was “on a Saturday in May 2009.”³⁷² She was assaulted by two men while she could still “hear the noise from Busurungi and the shooting pretty well.”³⁷³ She states that one spoke Kinyarwanda and the other Swahili,³⁷⁴ and she further identifies them as *Interahamwe*.³⁷⁵ They grabbed her, took her underwear off and threw her down.³⁷⁶ She recalls that “one of them grabbed me by the throat and told me not to try to get away,” and then “the other one started having sex with me, raping me [...] he put a part of his body, his penis inside my vagina [...] then the second one raped me and the first one was helping his colleague and held my legs so I could not get up.”³⁷⁷

164. In light of the evidence discussed above, the Chamber is satisfied that there are substantial grounds to believe that the war crime of rape under article 8(2)(e)(vi) of the Statute was committed by the FDLR troops in Busurungi and surrounding villages on or about 9-10 May 2009.

(iv) Whether the war crimes of cruel treatment (Count 6) and torture (Count 10) were committed

³⁷⁰ EVD-PT-OTP-00594, Statement of Witness 656, at 0031, para. 25.

³⁷¹ EVD-PT-OTP-00594, Statement of Witness 656, at 0032, paras. 31 and 33.

³⁷² EVD-PT-OTP-00699, Statement of Witness 683, at 0803, para. 22.

³⁷³ EVD-PT-OTP-00699, Statement of Witness 683, at 807, para. 27.

³⁷⁴ EVD-PT-OTP-00699, Statement of Witness 683, at 0803, para. 27.

³⁷⁵ EVD-PT-OTP-00699, Statement of Witness 683, at 0804, para. 28.

³⁷⁶ EVD-PT-OTP-00699, Statement of Witness 683, at 0804, para. 27.

³⁷⁷ EVD-PT-OTP-00699, Statement of Witness 683, at 0804, para. 28.

165. In the charges, the Prosecution identifies among the acts underlying the war crimes of cruel treatment and torture as “assault”, “aggravated rape” or “inhumane treatment”, which do not provide indications as to the concrete facts underlying the counts of cruel treatment and torture. In its LoE the Prosecution identifies paragraphs 70, 81 and 56 of the DCC as providing the facts underlying the war crimes of cruel treatment and torture for the attack in Busurungi on 9-10 May 2009. The criminal conduct underlying the alleged charges includes: (i) the acts described by Witness 694, some of which have already been discussed in relation to the war crime of mutilation; and (ii) the allegations of Witness 692, who claims that [REDACTED] beaten and repeatedly raped by FDLR soldiers [REDACTED].

166. The Chamber notes that the only piece of evidence provided by the Prosecution in support of the allegations of Witness 692 is the testimony of Witness 692 herself, which the Prosecution considers to be unreliable.³⁷⁸ As indicated in paragraph 42 above, the Chamber will not use the statement of Witness 692 to support any of its findings. Since the Prosecution has not provided any further evidence in support of this allegation the Chamber will not analyse it.

167. Witness 694 describes how [REDACTED] FDLR soldiers³⁷⁹ found her [REDACTED] hiding [REDACTED] during the attack.³⁸⁰ The soldiers, noting that they were trying to flee, told them, “don’t try to flee, if you try to flee we will shoot you”.³⁸¹ They grabbed [REDACTED] and pulled her away [REDACTED].³⁸² Witness 694 tried to get closer [REDACTED] but was hit on her chest with the bottom of a gun by one of the soldiers.³⁸³ The soldiers then began raping [REDACTED], she was screaming, [REDACTED].³⁸⁴ Every time the witness tried to get closer [REDACTED], she was

³⁷⁸ ICC-01/04-01/10-456, para. 2.

³⁷⁹ The witness identifies them as the “Hutus” but clarifies that they were “also called [...] Rwandese, the interahamwe, and FDLR.” See EVD-PT-OTP-00743, summary Statement of Witness 694, at 1167, para. 2.

³⁸⁰ EVD-PT-OTP-00743, summary of Statement of Witness 694, at 1168, para. 15.

³⁸¹ EVD-PT-OTP-00743, summary Statement of Witness 694, at 1168, para. 15.

³⁸² EVD-PT-OTP-00743, summary Statement of Witness 694, at 1168, para. 16.

³⁸³ EVD-PT-OTP-00743, summary Statement of Witness 694, at 1168, para. 16.

³⁸⁴ EVD-PT-OTP-00743, summary Statement of Witness 694, at 1168, para. 17.

pushed back by the soldiers and forced to sit down.³⁸⁵ After the soldiers took turns raping [REDACTED], “[REDACTED]”.³⁸⁶ They beat her all over the body with pieces of wood [REDACTED].³⁸⁷ [REDACTED] was crying, and they pierced her eyes with the bayonet of their guns and cut her throat, then they cut her stomach with a machete. She was five or six months pregnant.³⁸⁸ Finally, they cut her body into pieces with machetes and threw the parts around.³⁸⁹

168. In view of the foregoing, the Chamber is satisfied that there are substantial grounds to believe that during the 9-10 May 2009 attack in Busurungi the FDLR soldiers inflicted severe physical and mental pain and suffering on civilians not taking direct part in the hostilities, such as Witness 694 [REDACTED]. The Chamber is further satisfied that the FDLR soldiers who inflicted severe physical and mental pain and suffering on civilians not taking direct part in the hostilities, did so intentionally and were aware of the civilian status of the victims. Accordingly, the Chamber finds substantial grounds to believe that the war crime of cruel treatment under article 8(2)(c)(i) of the Statute was committed by the FDLR troops in Busurungi on or about 9-10 May 2009.

169. While the criminal conduct analysed above could constitute both the war crime of cruel treatment and the war crime of torture, the Prosecution fails to provide any evidence in support of the allegation that this particular conduct was perpetrated with the purpose of obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind, as required by article 8(2)(c)(i)-4 of the Statute, element 2 of the Elements of Crimes. Accordingly, the Chamber does not find substantial grounds to believe that the war crime of torture under article 8(2)(c)(i) of the Statute was committed by FDLR soldiers in Busurungi and surrounding villages on or about 9-10 May 2009.

³⁸⁵ EVD-PT-OTP-00743, summary Statement of Witness 694, at 1168, para. 17.

³⁸⁶ EVD-PT-OTP-00743, summary Statement of Witness 694, at 1168, para. 18.

³⁸⁷ EVD-PT-OTP-00743, summary Statement of Witness 694, at 1168, para. 18.

³⁸⁸ EVD-PT-OTP-00743, summary Statement of Witness 694, at 1169, paras 19-20.

³⁸⁹ EVD-PT-OTP-00743, summary Statement of Witness 694, at 1169, para. 21.

(v) *Whether the war crime of destruction of property (Count 11) was committed*

170. As mentioned in paragraph 144 above, the orders the FDLR soldiers received before the attack were to “destroy everything, because everybody who was in there was considered [to be the] enemy.”³⁹⁰ The soldiers were ordered to destroy everything in the village,³⁹¹ to “annihilate the whole place as a [...] sign sent to [...] Congolese,”³⁹² and to set fire on the village and the houses³⁹³ in order to force the population to flee.³⁹⁴

171. In the view of the Chamber, the war crime of destruction of property may be carried out through acts such as setting fire to, pulling down, or otherwise damaging the adversaries’ property.³⁹⁵ As found by the Chamber in the *Katanga* case, the property in question may be moveable or immovable, private or public, but must belong to individuals or entities aligned with, or having an allegiance to, a party to the conflict, adverse or hostile to the perpetrator.³⁹⁶

172. In this respect, the Chamber recalls its previous findings that civilian property is also afforded protection under international humanitarian law.³⁹⁷ The crime of destruction of civilian property includes not only attacks specifically directed at a military objective, but also attacks that target and destroy only civilian property and

³⁹⁰ EVD-PT-OTP-00707, Transcript of Interview of Witness 562, at 1353.

³⁹¹ EVD-PT-OTP-00632, Transcript of Interview of Witness 561, at 1381-2.

³⁹² EVD-PT-OTP-00631, Transcript of Interview of Witness 561, at 1350.

³⁹³ EVD-PT-OTP-00632, Transcript of Interview of Witness 561, at 1382; EVD-PT-D06-01314, Transcript of Interview of Witness 528, at 1178-80; EVD-PT-OTP-00854, summary Statement of Witness 542, at 1240. Witness 562 contradicts himself; he first stated that the order to burn houses was not given prior to the attack but during it and was directed only at the houses occupied by the Mai Mai, EVD-PT-OTP-00704, Transcript of Interview of Witness 562, at 1212-4, but later he states that at the rally Kalume ordered them to set fire to the entire village, EVD-PT-OTP-00707, Transcript of Interview of Witness 562, at 1315-7.

³⁹⁴ EVD-PT-D06-01292, Transcript of Interview of Witness 544, at 1564. Some witnesses mention that burning the houses was a task assigned particularly to the Rwandan civilians taking part in the attack on the side of the FDLR (*résistance civile*), EVD-PT-OTP-00631, Transcript of Interview of Witness 561, at 1382; or to a specific group of soldiers, EVD-PT-D06-01314, Transcript of Interview of Witness 528, at 1178-1180.

³⁹⁵ K. Dörmann. *Elements of War Crimes under the Rome Statute of the International Criminal Court* (ICRC, Cambridge University Press, 2003), p. 252.

³⁹⁶ *Katanga* Decision, para. 310.

³⁹⁷ See *Katanga* Decision, paras 311-312. Although *Katanga and Ngudjolo Case* referred to international armed conflicts the same is applicable to the war crime of destruction of property in non-international conflict pursuant to article 8(2)(e)(xii), as the constituent elements of the offence are the same in both international and non-international conflict. See Dörmann, pp. 485-486.

attacks simultaneously aimed at both military and civilian objects.³⁹⁸ However, as underlined in the *Katanga* case, this crime does not encompass the incidental destruction of civilian property during an attack specifically directed at a military objective.³⁹⁹ The perpetrator will be exonerated if his/her conduct is justified by military necessity,⁴⁰⁰ notably when (i) the property destroyed constituted a military objective before falling into the hands of the attacking party and (ii) having fallen into the hands of the attacking party, its destruction was still necessary for military reasons.⁴⁰¹

173. As confirmed by several witnesses who were present during the attack, both former FDLR insiders and crime base witnesses at Busurungi, the orders to “destroy everything” were automatically complied with, and the town of Busurungi and its surroundings were destroyed and burnt down by the FDLR during and in the aftermath of the attack.⁴⁰² According to UN and Human Rights Watch Reports, “the area [was] completely deserted and [...] destroyed by flames”.⁴⁰³

174. Witness 562 explains that after destroying the military positions “other houses were burned, [...] set on fire [...] one after one”.⁴⁰⁴ Witness 5/BKA-4 recalls that all the houses were attacked, that they attacked “blind” and “could not tell whether they were

³⁹⁸ *Ibid.*, para. 311. The Chamber further recalls that article 52(3) of the AP I states that: “In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.” See also ICRC, “Customary International Humanitarian Law, Rule 10: Civilian Object’s Loss of Protection from Attack”, 2010, accessed at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule10.

³⁹⁹ *Katanga* Decision, para. 313.

⁴⁰⁰ *Ibid.*, para. 317.

⁴⁰¹ *Ibid.*, para. 318.

⁴⁰² EVD-PT-OTP-00633, Transcript of Interview of Witness 561, at 1437, 1442-3 and 1450; EVD-PT-D06-01291, Transcript of Interview of Witness 544, at 1551; EVD-PT-OTP-00597, Transcript of Interview of Witness 650, at 0116-8; EVD-PT-D06-01286, Transcript of Interview of Witness 5/BKA-4, at 0065; EVD-PT-D06-01268, Transcript of Interview of Witness 7/BKA-7, at 0895; EVD-PT-D06-01314, Transcript of Interview of Witness 528, at 1178-9; EVD-PT-OTP-00854, summary Statement of Witness 542, at 1239. Witness 564 heard from soldiers who participated in the attack that they had burned houses, EVD-PT-OTP-00669, Transcript of Interview of Witness 564, at 1224 and 1227.

⁴⁰³ EVD-PT-OTP-00039, Press article, at 0322; EVD-PT-OTP-00075, *Final report of the Group of Experts on the Democratic Republic of the Congo*, 23 November 2009, at 0126: “According to the statements of the survivors, FDLR cadres [...] systematically burned houses to the ground.” EVD-PT-OTP-00282, HRW Report, at 0309; EVD-PT-OTP-00343, UNJHRO Report, at 0039. EVD-PT-OTP-00370, Media Report at 0034; EVD-PT-OTP-00290, Media Report, at 0706.

⁴⁰⁴ EVD-PT-OTP-00704, Transcript of Interview of Witness 562, at 1164.

soldiers or civilians”, and that they did not “distinguish who was in the houses”.⁴⁰⁵ Witness 528 explains that they were ordered to burn the houses, and that there were soldiers specifically in charge of burning them.⁴⁰⁶ Witness 542 initially states that civilians were mixed with soldiers and that the houses were burnt with people inside, but also insists that only military houses were burnt; however, he also states that no houses remained in the village.⁴⁰⁷ Witness 562 states that there were about 200 houses in Busurungi,⁴⁰⁸ clarifying that only fifty of them were occupied by Mai Mai, while the rest were occupied by Congolese civilians.⁴⁰⁹

175. The Chamber is of the view that, although the destruction of the military positions may have been justified by military necessity, several pieces of evidence demonstrate, to the requisite threshold, that destruction of civilian property belonging to civilians whom the FDLR considered to be enemies because of their perceived allegiance with the FARDC,⁴¹⁰ was also carried out during and in the aftermath of the attack on Busurungi and surrounding villages. The Chamber is further satisfied that the perpetrators were aware that the houses they destroyed and burned down belonged to civilians and did so intentionally. Accordingly, the Chamber is satisfied that there are substantial grounds to believe that the war crime of destruction of property under article 8(2)(e)(xii) of the Statute, was committed by the FDLR troops in Busurungi and surrounding villages on or about 9-10 May 2009.

(vi) Whether the war crime of pillaging (Count 12) was committed

176. According to the Elements of Crimes, the crime of pillaging involves the act of appropriation for private or personal use of any property by a party to an armed

⁴⁰⁵ EVD-PT-D06-01286, Transcript of Interview of Witness 5/BKA-004, at 0065.

⁴⁰⁶ EVD-PT-D06-01314, Transcript of Interview of Witness 528, at 1178, 1180.

⁴⁰⁷ EVD-PT-D06-01332, Transcript of Interview of Witness 542, at 2159-2160.

⁴⁰⁸ EVD-PT-OTP-00703, Transcript of Interview of Witness 562, at 1126.

⁴⁰⁹ EVD-PT-OTP-00722, Transcript of Interview of Witness 562, at 1204-1205.

⁴¹⁰ See above, para. 144.

conflict, without the consent of the owner and with the intention of depriving the owner of the property and, which is not justified by military necessity.⁴¹¹

177. Several witnesses state that civilian property was pillaged during and in the aftermath of the attack on Busurungi. Witness 650 recalls that when the sun started to rise over Busurungi, he personally saw the attackers taking and eating goats, and that “they were taking goods from the houses and what they couldn’t carry, they burned”.⁴¹² Witness 561, who participated in the attack, also refers to the pillaging of goats, gallons of palm oil and clothes.⁴¹³ Witness 562, who also participated in the attack, states that he himself entered houses looking for things to loot and that other soldiers, and members of the *résistance civile*, did the same.⁴¹⁴ Witness 564 says he was told by soldiers who participated in the attack that they had pillaged goods in Busurungi.⁴¹⁵ Witness 552 heard [REDACTED] that everything in Busurungi had been confiscated.⁴¹⁶ A UN Report also states that houses were looted during the attack.⁴¹⁷

178. In view of the foregoing, the Chamber is satisfied that there are substantial grounds to believe that property was intentionally appropriated for personal use by FDLR soldiers without the consent of the civilian owners. Accordingly, the Chamber finds substantial grounds to believe that the war crime of pillaging under article 8(2)(e)(v) of the Statute was committed by FDLR soldiers in Busurungi and surrounding villages on or about 9-10 May 2009.

⁴¹¹ As referred in the *Katanga* case (footnote 430) the war crime of pillaging does not explicitly require that the pillaged property should belong to an “enemy” or “hostile” party to the conflict, although some doctrine affirms that war crimes can only be committed against an adverse party of a the conflict. *See* Dörmann, pp. 464-465.

⁴¹² EVD-PT-OTP-00597, Transcript of Interview of Witness 650, at 0118.

⁴¹³ EVD-PT-OTP-00634, Transcript of Interview of Witness 561, at 1467-8.

⁴¹⁴ EVD-PT-D06-01303, Transcript of Interview of Witness 562, at 0133-0134; EVD-PT-OTP-00705, Transcript of Interview of Witness 562, at 1229.

⁴¹⁵ EVD-PT-OTP-00669, Transcript of Interview of Witness 564, at 1227.

⁴¹⁶ EVD-PT-OTP-00646, Transcript of Interview of Witness 552, at 0316.

⁴¹⁷ EVD-PT-OTP-00343, UNJHRO Report, at 0046.

(b) Manje***i. The allegations of the Prosecution***

179. The Prosecution has charged the Suspect with the war crimes of attacking civilians (Count 1), murder (Count 3), cruel treatment (Count 6), rape (Count 8), torture (Count 10) and destruction of property (Count 11), all allegedly committed in Manje on or about 20-21 July 2009.

180. The Prosecution alleges that on:

[t]he 20 and 21 July 2009, the FDLR attacked the village of Manje (or “Mandje”), Masisi territory, North Kivu. When the FDLR troops reached Manje, they found that the FARDC had fled. Even though there were few or no FARDC soldiers left in Manje, the FDLR attacked anyway. It was a revenge attack, targeting the civilians.⁴¹⁸

181. In particular, the Prosecution contends that:

[d]uring the attack civilians were killed and houses were burnt to the ground. W-693 heard the FDLR shooting in Mandje, and was [REDACTED] beaten by FDLR soldiers. The FDLR pillaged,⁴¹⁹ attacked and killed civilians and burnt houses in the village. Women were taken to the forest, raped repeatedly and held captive for a week.⁴²⁰

[A]t least 16 civilians were killed by the FDLR during an attack on Manje. Amongst those killed were a woman and her two toddlers, a man who was stabbed in the neck and died on the spot and a five-year-old girl who was cut in the stomach. People were shot and their bodies thrown into the burning houses. Witness 693 was [REDACTED] beaten.⁴²¹

Shortly after the attack on Mandje, seven women were attacked and captured by three FDLR soldiers as they were returning from the fields outside Mandje. Three women were released, but the remaining four were badly beaten. In another attack in the fields outside Mandje, the FDLR killed a man by shooting him in the chest.⁴²²

⁴¹⁸ DCC, para. 58.

⁴¹⁹ Although included in the description of facts, the crime of pillaging was not charged by the Prosecution in relation to the attack in Manje on the 20-21 July 2009.

⁴²⁰ DCC, para. 58.

⁴²¹ DCC, para. 72.

⁴²² DCC, para. 73.

On or about 20-21 July 2009, the FDLR attacked the village of **Manje** and burnt over 180 houses. During this attack, [REDACTED] Witness 693 [REDACTED] saw houses being set on fire. As [REDACTED] the FDLR, the soldiers were taking away looted pots, money or clothes. [REDACTED] Witness 693 [REDACTED] found his wife had been robbed, his house pillaged and the entire village burnt down.⁴²³

ii. Events alleged but not charged by the Prosecution in the DCC

182. The Chamber notes that, while the Prosecution contends that Manje was attacked on the 20-21 July 2009, it further refers to other events in Manje the dates of which are unclear and which are not included in the charges brought. In particular, the Prosecution, without indicating the date of the alleged crimes, states in the DCC that “seven women were attacked as they were returning from the field outside Manje,”⁴²⁴ and that “in another attack in the fields outside Manje, the FDLR killed a man by shooting him in the chest.”⁴²⁵ By the same token, while alleging that the crime of pillaging was committed during the 20-21 July 2009 attack in Manje, the Prosecution has not included that location in the charge under Count 12.

183. For the reasons outlined in paragraph 113, the Chamber will not analyse the above-mentioned alleged events which have not been formally charged.

iii. The findings of the Chamber

Crimes allegedly committed in Manje on or about 20-21 July 2009

(i) Whether the war crimes of attacking civilians (Count 1) and murder (Count 3) were committed

184. The Chamber notes that several pieces of evidence refer to an attack in Manje in 2009.⁴²⁶ However, although the Prosecution asserts that the attack occurred on 20-21

⁴²³ DCC, para. 93.

⁴²⁴ DCC, para. 73.

⁴²⁵ *Ibid.*

⁴²⁶ EVD-PT-OTP-00742, summary Statement of Witness 693, at 1156; EVD-PT-OTP-00282, HRW Report, at 0311-2; EVD-PT-OTP-00670, Transcript of Interview of Witness 564, at 1277.

July 2009, the specific date of the attack, as also underlined by the Defence,⁴²⁷ differs from one piece of evidence to another. In particular, Witness 693 says that he is certain that an attack on Manje was launched on 20 June 2009.⁴²⁸ This date differs from the one cited by Human Rights Watch in its report (20 and 21 July 2009).⁴²⁹ Furthermore, Witness 561, a former FDLR member, asserts that such attack occurred between July and August 2009.⁴³⁰ However, the Chamber notes that, despite the inconsistency as to the exact date of the attack, as reported by Human Rights Watch⁴³¹ and Witness 693,⁴³² the description of the attack and its circumstances overlap in other respects, leading the Chamber to conclude that the two accounts refer to the same attack.

185. In light of the evidence submitted, the Chamber finds that, prior to the attack, the FARDC had been stationed in Manje,⁴³³ where they had only one military position,⁴³⁴ and that civilians lived behind that position.⁴³⁵ There is contradictory information in relation to the presence of FARDC soldiers in Manje at the time of the attack. According to Witness 693 and a Human Rights Watch Report, most of the FARDC soldiers had already left Manje at the time of the attack.⁴³⁶ Witness 693 states that only three FARDC soldiers were left behind.⁴³⁷ However, Witness 562, who participated in the attack, states that the FARDC was present and was directly attacked by the FDLR: “we fired at them and [...] we conquered the place [...] we defeated them [...] they ran away and we set fire on the place and we went back home.”⁴³⁸ He also states that they encountered the

⁴²⁷ ICC-01/04-01/10-T-8-Red2-ENG, p. 58, lines 12-25, p. 59, lines 1-12; Defence Written Submissions, ICC-01/04-01/10-450, para. 78.

⁴²⁸ EVD-PT-OTP-00742, summary Statement of Witness 693, at 1156, para. 10.

⁴²⁹ EVD-PT-OTP-00282, HRW Report, at 0311-2.

⁴³⁰ EVD-PT-OTP-00634, Transcript of Interview of Witness 561, at 1529-30.

⁴³¹ EVD-PT-OTP-00282, HRW Report, at 0312.

⁴³² EVD-PT-OTP-00742, summary Statement of Witness 693, at 1176, paras 11-12.

⁴³³ EVD-PT-OTP-00342, UN Report, at 0025; EVD-PT-OTP-00282, HRW Report, at 0311; EVD-PT-OTP-00708, Transcript of Interview of Witness 562, at 1382-1384; EVD-PT-OTP-00742, summary Statement of Witness 693, at 1156, paras 8-11.

⁴³⁴ EVD-PT-OTP-00708, Transcript of Interview of Witness 562, at 1382.

⁴³⁵ EVD-PT-OTP-00708, Transcript of Interview of Witness 562, at 1386.

⁴³⁶ EVD-PT-OTP-00282, HRW Report, at 0312; EVD-PT-OTP-00742, summary Statement of Witness 693, at 1176, paras 11-12.

⁴³⁷ EVD-PT-OTP-00742, summary Statement of Witness 693, at 1157, para. 12 and at 1162, para. 33.

⁴³⁸ EVD-PT-OTP-00708, Transcript of Interview of Witness 562, at 1388.

FARDC there and that they fired at each other,⁴³⁹ but, elsewhere asserts that nobody was in the area when they arrived.⁴⁴⁰

186. Reports⁴⁴¹ and witness statements attribute the attack launched in Manje to the FDLR.⁴⁴² In particular, Witness 693 says that [REDACTED] members of the attacking forces [REDACTED] were the FDLR.⁴⁴³ Witness 562, a former FDLR soldier, states that he was taken by some of Captain Barozi's soldiers (100 soldiers approximately), to Manje.⁴⁴⁴ Witness 562 further recalls that the FDLR immediately started the attack without any preparation or briefing and that Captain Barozi himself participated in the attack.⁴⁴⁵ This information is consistent with the statement of Witness 561, who states that it was Captain Barozi who attacked Manje.⁴⁴⁶

187. In light of the foregoing, the Chamber finds substantial grounds to believe that, on or about 20 July 2009, the FDLR launched an attack on the village of Manje.

188. Furthermore, the Chamber notes that Witness 562 states that Captain Barozi ordered his soldiers to set the FARDC position on fire and nothing more.⁴⁴⁷ He also states that commanders also told the soldiers how they should behave and in particular that they "have to behave properly [...] towards the civilians [...] wherever [they] are".⁴⁴⁸ However, the Witness further states that, notwithstanding such instructions "when you attack a position [...] we must destroy it [...] because the [...] civilians who are there in the zone of the enemy are enemies as well; so I have never heard of [...] an

⁴³⁹ EVD-PT-OTP-00708, Transcript of Interview of Witness 562, at 1392.

⁴⁴⁰ EVD-PT-OTP-00708, Transcript of Interview of Witness 562, at 1391.

⁴⁴¹ EVD-PT-OTP-00282, HRW Report, at 0311-0312; EVD-PT-OTP-00342 UN Report at 0025; EVD-PT-OTP-00380, UN OCHA Report, at 0246.

⁴⁴² EVD-PT-OTP-00742, summary Statement of Witness 693, at 1156; EVD-PT-OTP-00634, Transcript of Interview of Witness 561, at 1530.

⁴⁴³ EVD-PT-OTP-00742, summary Statement of Witness 693, at 1160-61, paras 27 and 29.

⁴⁴⁴ EVD-PT-OTP-00708, Transcript of Interview of Witness 562, at 1378-9.

⁴⁴⁵ EVD-PT-OTP-00708, Transcript of Interview of Witness 562, at 1380.

⁴⁴⁶ EVD-PT-OTP-00634, Transcript of Interview of Witness 561, at 1530.

⁴⁴⁷ EVD-PT-OTP-00708, Transcript of Interview of Witness 562, at 1389.

⁴⁴⁸ EVD-PT-OTP-00722, Transcript of Interview of Witness 562, at 1229.

order [...] distinguishing attacking a position and [...] where you have to separate between civilians and [...] soldiers.”⁴⁴⁹

189. The evidence shows that the attack on Manje was directed, not alone against the FARDC position and the FARDC soldiers present, but against civilians whom the FDLR also considered to be their enemies.⁴⁵⁰ Indeed, Witness 562 states that, when they arrived at the FARDC position, they did not see anybody; the FARDC had already gone and those who were left had run away.⁴⁵¹ He further adds that some of the FDLR soldiers, who ran after those FARDC soldiers who tried to escape, later mentioned that they had fired at “people who were watching the video”⁴⁵² in a nearby “area called URUSISIRO,”⁴⁵³ and whom they identified as civilians because “when they fired the other[s] didn’t return the fire [...] they didn’t fight back”.⁴⁵⁴

190. In addition, witnesses and reports provide evidence of the killing of civilians in the course of the attack on Manje.⁴⁵⁵ Although the specific number of civilian casualties is unknown, the Chamber is of the view that there are substantial grounds to believe that at least nineteen civilians were intentionally killed during the attack on Manje.⁴⁵⁶

191. The Chamber is accordingly satisfied that there are substantial grounds to believe that the attack on Manje, on or about 20 July 2009, was launched with the aim of targeting both a military objective, that is, the FARDC position in the village and the civilian population or individual civilians who resided in its vicinity and who were not taking direct part in the hostilities. The Chamber is further satisfied that the FDLR

⁴⁴⁹ EVD-PT-OTP-00722, Transcript of Interview of Witness 562, at 1230.

⁴⁵⁰ EVD-PT-OTP-00342, UN Report at 0025; EVD-PT-OTP-00742, summary Statement of Witness 693, at 1162, para. 33.

⁴⁵¹ EVD-PT-OTP-00708, Transcript of Interview of Witness 562, at 1391.

⁴⁵² EVD-PT-OTP-00708, Transcript of Interview of Witness 562, at 1389-90 and 1394-5.

⁴⁵³ *Ibid.*

⁴⁵⁴ EVD-PT-OTP-00708, Transcript of Interview of Witness 562, at 1395.

⁴⁵⁵ EVD-PT-OTP-00380, UN OCHA Report, at 0246; EVD-PT-OTP-00597, summary Statement of Witness 650, at 0120, para. 71; EVD-PT-OTP-00282, HRW Report, at 0311-0312; EVD-PT-OTP-00742, summary Statement of Witness 693, at 1161, para. 28 and at 1162, paras 31-32.

⁴⁵⁶ EVD-PT-OTP-00380, UN OCHA Report, at 0246; EVD-PT-OTP-00597, summary Statement of Witness 650, at 0120, para. 71; EVD-PT-OTP-00282, HRW Report, at 0311-2.

soldiers that participated in the attack were aware of the civilian status of the victims and intended the civilian population or individual civilians not taking direct part in the hostilities to be the target of the attack since they were considered enemies. In view of the foregoing, the Chamber is satisfied that there are substantial grounds to believe that the war crimes of attacking civilians under article 8(2)(e)(i) of the Statute and of murder under article 8(2)(c)(i) of the Statute were committed by the FDLR troops in Manje on or about 20 July 2009.

(ii) Whether the war crime of cruel treatment (Count 6) was committed

192. [REDACTED] civilian inhabitant of Manje,⁴⁵⁷ says that during the attack [REDACTED].⁴⁵⁸ [REDACTED].⁴⁵⁹ He also states that [REDACTED].⁴⁶⁰ [REDACTED].⁴⁶¹ The Chamber is further satisfied that the FDLR soldiers that inflicted cruel treatment on [REDACTED] Manje did so intentionally and were aware of his civilian status. Accordingly, the Chamber is satisfied that there are substantial grounds to believe that the war crime of cruel treatment under article 8(2)(c)(i) of the Statute was committed by the FDLR in Manje on or about 20 July 2009.

(iii) Whether the war crimes of rape (Count 8) and torture (Count 10) were committed

193. The Chamber notes that the Prosecution alleges in counts 8 and 10 that acts of rape and torture “through severe assaults, aggravated rape, mutilation and/or inhumane treatment involving the infliction of severe physical or mental pain or suffering upon the victims” were committed during the attack on Manje.⁴⁶²

194. The Chamber notes that the only piece of evidence that mentions the commission of rape in Manje is a Human Rights Watch Report, and that the relevant information

⁴⁵⁷ [REDACTED].

⁴⁵⁸ [REDACTED].

⁴⁵⁹ [REDACTED].

⁴⁶⁰ [REDACTED].

⁴⁶¹ [REDACTED].

⁴⁶² DCC, pp. 40-41.

contained therein is based on hearsay, the evidentiary weight of which is lower than other evidence.⁴⁶³ In the absence of corroboration, the information contained in the Human Rights Watch Reports cannot be regarded as sufficient evidence to establish substantial grounds to believe that rape under article 8(2)(e)(vi) of the Statute was committed during the attack in Manje. The Prosecution appears to attribute to the same conduct described as “rape” the legal characterisation of torture through “aggravated rape” which, in the view of the Chamber, has not been sufficiently substantiated. In this regard, the Chamber notes that the Prosecution has not advanced any other factual allegations to support its charge of torture. Therefore, the Chamber does not find substantial grounds to believe that the crime of torture under article 8(2)(c)(i) of the Statute was committed during the attack in Manje.

(iv) Whether the war crime of destruction of property (Count 11) was committed

195. Witness 562, a former FDLR soldier, further indicates that, after defeating the enemy in Manje, they set fire to the military position and “the houses which were near to the position [...] because the position was within the village.”⁴⁶⁴ Other witnesses state that they saw the attackers burning down the village of Manje,⁴⁶⁵ which is also corroborated by a Human Rights Watch Report.⁴⁶⁶

196. The Chamber is of the view that, although the destruction of the military position might have been justified by military necessity, several pieces of evidence demonstrate that houses belonging to civilians, whom the FDLR considered to be enemies because of their perceived allegiance with the FARDC,⁴⁶⁷ were intentionally burnt down and destroyed during and in the aftermath of the attack on Manje, without the justification of military necessity. The Chamber is further satisfied that the perpetrators were aware that the houses they destroyed and burned down belonged to

⁴⁶³ EVD-PT-OTP-00282, HRW Report, at 0312.

⁴⁶⁴ EVD-PT-OTP-00708, Transcript of Interview of Witness 562, at 1389.

⁴⁶⁵ EVD-PT-OTP-00597, summary Statement of Witness 650, at 0120, para. 71; EVD-PT-OTP-00742, summary Statement of Witness 693, at 1158, para. 17 and at 1161, para. 28.

⁴⁶⁶ EVD-PT-OTP-00282, HRW Report, at 0311.

⁴⁶⁷ See above para. 189.

civilians. Accordingly, the Chamber is satisfied that there are substantial grounds to believe that the war crime of destruction of property under article 8(2)(e)(xii) of the Statute was committed by the FDLR troops in Manje on or about 20 July 2009.

(c) Malembe

i. The allegations of the Prosecution

197. The Prosecution has charged the Suspect with the war crimes of attacking civilians (Count 1), rape (Count 8), torture (Count 10), destruction of property (Count 11) and pillaging (Count 12), allegedly committed in Malembe (i) on or about 11 to 16 August 2009 or August (Counts 1, 8, 10, 11 and 12); and (ii) on or about or on the 15 September 2009 (Counts 1, 8, 10 and 11).

198. The Prosecution alleges that:

[T]he FDLR perpetrated an attack on the village of Malembe in Waloa-Loanda groupment, Walikale, North Kivu at least once, and likely twice, in the period 11 to 16 August 2009, and again mid-September. Over 250 soldiers took part in the attack, which was carefully planned in advance. An insider indicated that support troops had been sent in prior to the attack. Soldiers participating in the attack were briefed by high-ranking FDLR commander, and given the order to destroy everything so that there would be nothing to come back to. When troops arrived, Malembe was deserted. The FDLR nevertheless pillaged and burnt down the village, comprising approximately 600 houses. During the September attack near Malembe, three FDLR cadres caught a 5-month pregnant woman and raped her in turn, causing her to lose her unborn child.⁴⁶⁸

199. The Prosecution further alleges that, in August, the FDLR perpetrated a further attack on the village of Malembe, pillaging and then burning down the village's approximately 600 houses.⁴⁶⁹

⁴⁶⁸ DCC, para. 59.

⁴⁶⁹ DCC, para. 94.

ii. The findings of the Chamber

a. Crimes allegedly committed in Malembe in August 2009 or on or about 11 to 16 August 2009

(i) Whether the war crime of attacking civilians (Count 1) was committed

200. In light of the evidence submitted, the Chamber finds substantial grounds to believe that, following an alleged FARDC/Mai Mai attack on the FDLR position in Bunyarwanda, which allegedly caused the death of eighteen civilians,⁴⁷⁰ General Rumuli, an FDLR commander, issued orders to attack Malembe.⁴⁷¹ Before the attack, the FDLR spent four days patrolling the village.⁴⁷² After that, General Rumuli told the troops that the Mai Mai had come to attack him and that they should go and “destroy everything belonging to them [...] so that they would never come back again to attack him.”⁴⁷³ He further stressed, “you go there and you give a lesson to those people.”⁴⁷⁴

201. The troops were gathered in the forest, in a location three and a half hours from Malembe.⁴⁷⁵ There were about 280 soldiers, who were divided into three groups.⁴⁷⁶ The orders the soldiers received were clear: “destroy everything so that they will never come back.”⁴⁷⁷ Witness 562 clarifies that there were no specific orders about what to do with the civilians, that they were just told to go and destroy. He further states, “we didn’t care about the civilians because the civilians were our enemies as well.”⁴⁷⁸

⁴⁷⁰ EVD-PT-OTP-00705, Transcript of Interview of Witness 562 at 1272; EVD-PT-OTP-00722, Transcript of Interview of Witness 562, at 1222-3.

⁴⁷¹ EVD-PT-D06-01334, Transcript of Interview of Witness 542, at 2208; EVD-PT-D06-01295, Transcript of Interview of Witness 544, at 1628; EVD-PT-OTP-00705, Transcript of Interview of Witness 562, at 1272.

⁴⁷² EVD-PT-OTP-00705, Transcript of Interview of Witness 562, at 1285.

⁴⁷³ EVD-PT-OTP-00706, Transcript of Interview of Witness 562, at 1286.

⁴⁷⁴ EVD-PT-OTP-00706, Transcript of Interview of Witness 562, at 1289.

⁴⁷⁵ *Ibid.*

⁴⁷⁶ EVD-PT-OTP-00706, Transcript of Interview of Witness 562, at 1287.

⁴⁷⁷ EVD-PT-OTP-00706, Transcript of Interview of Witness 562, at 1300.

⁴⁷⁸ EVD-PT-OTP-00706, Transcript of Interview of Witness 562, at 1301.

202. The attack started around 2h00 and lasted for approximately an hour to an hour and a half.⁴⁷⁹ Although eighty PARECO soldiers joined the FDLR forces, the orders were still given by the FDLR.⁴⁸⁰ Witness 544 states that, by the time his group attacked, most of the civilians had run away.⁴⁸¹ He further explains that they were given orders by General Rumuli to shoot the FARDC and the Mai Mai. The witness also states that, had there been civilians present, they would have been killed.⁴⁸² Those who ran away were shooting back, which led the Witness to conclude that they were Mai Mai.⁴⁸³ Witness 562 states that when they attacked, they found no one there as everybody had fled, but, affirms that, if the soldiers had seen anyone running away, they would have shot at them.⁴⁸⁴ Witness 544 states that General Rumuli told them: “now go and shoot at anything you see” but he “did not mention that they had to spare civilians.”⁴⁸⁵ Witness 544 states that their understanding of “shoot anyone” included civilians.⁴⁸⁶

203. In light of the abovementioned, the Chamber finds substantial grounds to believe that, on or about 11 to 16 August 2009, the FDLR launched an attack on the village of Malembe. The Chamber is further satisfied that there are substantial grounds to believe that the attack was launched with the aim of targeting both military objectives (FARDC/Mai Mai positions in the village) and the civilian population or individual civilians not taking direct part in the hostilities, who resided in the village. The Chamber is further satisfied that the FDLR soldiers who took part in the attack were aware of the civilian status of the victims and intended to attack the civilian population or individual civilians not taking direct part in the hostilities since they were considered enemies. In view of the foregoing, the Chamber is satisfied that there are substantial

⁴⁷⁹ EVD-PT-D06-01295, Transcript of Interview of Witness 544, at 1630; EVD-PT-D06-01298, Transcript of Interview of Witness 544, at 1685-6; EVD-PT-D06-01299, Transcript of Interview of Witness 544, at 1690.

⁴⁸⁰ EVD-PT-OTP-00704, Transcript of Interview of Witness 562, at 1190 and 1194.

⁴⁸¹ EVD-PT-D06-01298, Transcript of Interview of Witness 544, at 1686, 1689-90.

⁴⁸² EVD-PT-D06-01295, Transcript of Interview of Witness 544, at 1628; EVD-PT-D06-01298, Transcript of Interview of Witness 544, at 1691.

⁴⁸³ EVD-PT-D06-01295, Transcript of Interview of Witness 544, at 1629-30.

⁴⁸⁴ EVD-PT-OTP-00706, Transcript of Interview of Witness 562, at 1296-7, 1290 and 1303.

⁴⁸⁵ EVD-PT-OTP-00846, Transcript of Interview of Witness 544, at 0946.

⁴⁸⁶ EVD-PT-OTP-00846, Transcript of Interview of Witness 544, at 0946.

grounds to believe that the war crime of attacking civilians under article 8(2)(e)(i) of the Statute was committed by the FDLR in Malembe on or about 11 to 16 August 2009.

(ii) Whether the war crimes of rape (Count 8) and torture (Count 10) were committed

204. The Chamber notes that, while the Prosecution includes in Count 8 and Count 10 the crimes of rape and torture against civilian women and members of the civilian population, allegedly perpetrated by the FDLR in Malembe in August 2009, the Prosecution does not address such allegations in its factual description of the crimes charged.

205. In its analysis of the evidence, the Chamber nonetheless finds that only Witness 562 mentions that sexual violence *might* have been perpetrated in Malembe, without giving any further concrete information.⁴⁸⁷ Likewise, no evidence of torture being committed during the attack on Malembe was provided to the Chamber.

206. The Chamber, therefore, finds that the evidence submitted in support of these charges is not sufficient to establish substantial grounds to believe that the war crimes of rape under article 8(2)(e)(vi) of the Statute and torture under article 8(2)(c)(i) of the Statute against civilian women and members of the civilian population were perpetrated by the FDLR in Malembe in August 2009.

(iii) Whether the war crimes of destruction of property (Count 11) and pillaging (Count 12) were committed

207. The Chamber finds, in accordance with the evidence presented that, pursuant to General Rumuli's order to "go and shoot at anything you see and burn anything of theirs,"⁴⁸⁸ in the morning after the attack, all 200 houses⁴⁸⁹ in Malembe were burned down and destroyed "so no one could live there."⁴⁹⁰

⁴⁸⁷ EVD-PT-D06-01304, Transcript of Interview of Witness 562, at 0189-90.

⁴⁸⁸ EVD-PT-D06-01298, Transcript of Interview of Witness 544, at 1684.

208. It has further been demonstrated to the requisite threshold that the civilians were considered as having an allegiance to the FARDC and that pursuant to orders, the whole village of Malembe, including civilian property, was burned down during the August attack.⁴⁹¹ The Chamber is further satisfied that the perpetrators were aware that the houses they destroyed and burned down belonged to civilians and did so intentionally. Accordingly, the Chamber is satisfied that there are substantial grounds to believe that the war crime of destruction of property under article 8(2)(e)(xii) of the Statute was committed by the FDLR on or about 11 to 16 August 2009 in Malembe.

209. In relation to the allegations of pillaging, the Prosecution provides as evidence a UN Report to substantiate the charge, which only states that a Mai Mai General's house had been looted.⁴⁹² This evidence does not provide the Chamber with sufficient information to be satisfied, to the required threshold, that the war crime of pillaging under article 8(2)(e)(v) of the Statute was committed by the FDLR troops on or about 11 to 16 August 2009 in Malembe.

b. Crimes allegedly committed in Malembe on or about the 15 September 2009

Whether the war crimes of attacking civilians (Count 1), rape (Count 8), torture (Count 10) and destruction of property (Count 11) were committed

210. The Prosecution alleges that, on or about the 15 September 2009, the FDLR committed the war crimes of attacking the civilian population, rape, torture, and destruction of property in Malembe. However, the only allegation made by the Prosecution that specifically refers to the alleged attack in September 2009 is set out in

⁴⁸⁹ EVD-PT-OTP-00706, Transcript of Interview of Witness 562, at 1297-8; EVD-PT-D06-01295, Transcript of Interview of Witness 544, at 1628.

⁴⁹⁰ EVD-PT-D06-01298, Transcript of Interview of Witness 544, at 1692.

⁴⁹¹ EVD-PT-D06-01334, Transcript of Interview of Witness 542, at 2210; EVD-PT-OTP-00706, Transcript of Interview of Witness 562, at 1301.

⁴⁹² EVD-PT-OTP-00342, UNJHRO Report, at 0026, para. 21.

the following terms: “‘near’ Malembe, three FDLR cadres caught a 5-month pregnant woman and raped her in turn, causing her to lose her unborn child.”⁴⁹³

211. It is unclear as to whether some of the factual allegations set out in the DCC related to the attack in August or September. For example, paragraph 59 of the DCC starts by indicating that at least two, and likely three, attacks occurred in Malembe (“at least once, and likely twice, in the period 11 to 16 August 2009, and again mid-September”), but then it continues with the description of events referring to “in the attack” and “prior to the attack”, without clarifying which of the two or three attacks the Prosecution is referring to. Moreover, the only evidence relied upon by the Prosecution is a UN Report that describes an attack by the FDLR in Malembe on 15 September 2009.⁴⁹⁴ The Chamber finds that the evidence submitted in support of these charges is not sufficient to establish substantial grounds to believe that the war crimes of attack on civilians under article 8(2)(e)(i) of the Statute, rape under article 8(2)(e)(vi) of the Statute, torture under article 8(2)(c)(i) of the Statute and destruction of property under article 8(2)(e)(xii) of the Statute were committed by the FDLR in Malembe on 15 September 2009.

(d) Mianga

i. The allegations of the Prosecution

212. The Prosecution has charged the Suspect with the war crimes of attacking civilians (Count 1), murder (Count 3), rape (Count 8), torture (Count 10), destruction of property (Count 11) and pillaging (Count 12), allegedly committed in Mianga in late January 2009 (Count 1) and on or about 12 April 2009 (Counts 1, 3, 8, 10, 11 and 12).

213. The Prosecution alleges that:

⁴⁹³ DCC, para. 59.

⁴⁹⁴ EVD-PT-OTP-00342, UNJHRO Report, at 0026.

The FDLR carried out at least one attack on **Mianga**, Waloa-Loanda *groupement*, Walikale, North Kivu, where the FARDC had a small base. The largest scale incident took place on or about 12 April 2009, and was witnessed by Witness 687. The FDLR began the attack on Mianga in the early hours of the morning, finally neutralising the FARDC position in the village and leaving the population undefended. Many civilians fled their village to escape the shooting, but the FDLR killed others, [REDACTED]. The FDLR first pillaged and burnt the village. Others who fled into the the [sic] forest were hunted down and killed after the attack.⁴⁹⁵

In **Mianga**, on or about 12 April 2009, FDLR soldiers committed rape. Soldiers from the Reserve Brigade were further heard by Witness 562 bragging about having introduced spears into the vagina of women during the attack.⁴⁹⁶

In **Mianga**, on or about 12 April 2009, the FDLR pillaged and burnt down the entire village.⁴⁹⁷

In **Mianga**, Walikale, North Kivu, on or about 12 April 2009, FDLR murdered [REDACTED] in his home. Witness 687 states that he was targeted [REDACTED] had brought the FARDC. The entire village was then pillaged and burnt down because the population had allegedly become too close to the FARDC.⁴⁹⁸

ii. The findings of the Chamber

Crimes allegedly committed in Mianga on or about 12 April 2009

(i) Whether the war crimes of attacking civilians (Count 1) and murder (Count 3) were committed

214. The Chamber notes that several pieces of evidence refer to an attack which was launched by the FDLR in Mianga⁴⁹⁹ against the FARDC positions⁵⁰⁰ and civilians that

⁴⁹⁵ DCC, para. 51

⁴⁹⁶ DCC, para. 79.

⁴⁹⁷ DCC, para. 89.

⁴⁹⁸ DCC, para. 102.

⁴⁹⁹ EVD-PT-D06-01285, written Statement of Witness 4/BKA-3, at 0038; EVD-PT-D06-01268, written Statement of Witness 7/BKA-7, at 0897; EVD-PT-D06-01271, written Statement of Witness 8/BKA-8, at 0997; EVD-PT-OTP-00854, summary Statement of Witness 542, at 1235; EVD-PT-D06-01333, Transcript of Interview of Witness 542, at 2182; EVD-PT-D06-01296, Transcript of Interview of Witness 544, at 1634-1636; EVD-PT-OTP-00722, Transcript of Interview of Witness 562, at 1218; EVD-PT-OTP-00741, summary of Statement of Witness 687, at 1152.

⁵⁰⁰ EVD-PT-D06-01334, Transcript of Interview of Witness 542, at 2212; EVD-PT-D06-01296, Transcript of Interview of Witness 544, at 1639; EVD-PT-OTP-00634, Transcript of Interview of Witness 561, at 1511; EVD-PT-OTP-00670, Transcript of Interview of Witness 564, at 1274-1275.

were mixed with FARDC soldiers.⁵⁰¹ Although the Prosecution asserts that the attack occurred on or about 12 April 2009, the evidence is inconsistent on this point. Witness 562 affirms that the attack took place after the attack on Busurungi;⁵⁰² Witness 632 says it happened “a little bit earlier” than Busurungi;⁵⁰³ Witness 542 contradicts himself first saying that the attack was in May and then that it was in February;⁵⁰⁴ Witness 544 could not remember the month of the attack but says it happened during *Umoja Wetu*,⁵⁰⁵ which, as stated in paragraph 95 above, finished on 25 February 2009; Witness 559 says that it took place when the *Umoja Wetu* operation had already finished.⁵⁰⁶ None of these witnesses, however, gives direct evidence of the attack. Witness 687, who claims to have been present during the attack, states that it occurred on the Saturday and Sunday of Easter 2009,⁵⁰⁷ which date is corroborated by a UN Report.⁵⁰⁸ Witness 8/BKA-08, an FDLR insider, confirms that the attack took place in April 2009.⁵⁰⁹ The Chamber, however, notes that the description of the circumstances surrounding the attack provided in the aforementioned witness statements are similar enough to conclude that they relate to the same event. The Chamber, therefore, finds substantial grounds to believe that the attack on Mianga occurred on or about 12 April 2009.

215. The evidence also provides information that the FDLR headquarters was based in a small village across the river, two minutes away from the main village⁵¹⁰ of Mianga, where the FARDC was positioned, and that this represented a threat to the FDLR.⁵¹¹ Witness 559, who participated in the planning of the attack,⁵¹² says the order to attack Mianga came from General Sylvestre Mudacumura’s deputy Brigadier General

⁵⁰¹ EVD-PT-D06-01319, Transcript of Interview of Witness 559/BKA-1, at 1590-2.

⁵⁰² EVD-PT-D06-01304, Transcript of Interview of Witness 562, at 0186.

⁵⁰³ EVD-PT-D06-01352, Transcript of Interview of Witness 632, at 0470.

⁵⁰⁴ EVD-PT-OTP-00854, summary Statement of Witness 542, at 1235.

⁵⁰⁵ EVD-PT-D06-01296, Transcript of Interview of Witness 544, at 1636.

⁵⁰⁶ EVD-PT-D06-01325, Transcript of Interview of Witness 559/BKA-1, at 1810.

⁵⁰⁷ EVD-PT-OTP-00741, summary Statement of Witness 687, at 1151. Easter Sunday in 2009 fell on 12 April.

⁵⁰⁸ EVD-PT-OTP-00343, UNJHRO Special Report, 1 Jul 2009, at 0044.

⁵⁰⁹ EVD-PT-D06-01271, Transcript of Interview of Witness 0008, at 0997.

⁵¹⁰ EVD-PT-OTP-00741, summary Statement of Witness 687, at 1151.

⁵¹¹ EVD-PT-D06-01323, Transcript of Interview of Witness 559/BKA-1, at 1585-7.

⁵¹² EVD-PT-D06-01326, Transcript of Interview of Witness 559/BKA-1, at 1824.

Stanislas Nzeyimana, *alias* Bigaruka.⁵¹³ The order came from General Mudacumura,⁵¹⁴ in written form, but was communicated over the radio and stated that there was “a mission to chase the enemy that was based in Mianga.”⁵¹⁵ After that, a reconnaissance mission was carried out by the FDLR, during the course of which it became apparent that the FARDC and civilians were living together in the village.⁵¹⁶ Nevertheless, evidence provided by former FDLR soldiers shows that there were orders given by Brigadier General Izabayo Deo⁵¹⁷ and General Rumuli⁵¹⁸ to attack Mianga. As Witness 559 stresses, “the population here in the enemy’s position [was] considered as soldiers [...] in MIANGA the population [was] mixed with soldiers, then they were considered as enemies.”⁵¹⁹

216. In light of the evidence that has been submitted, the Chamber finds substantial grounds to believe that, on or about 12 April 2009,⁵²⁰ FDLR soldiers crossed the river and attacked Mianga.⁵²¹ Witness 559 says that the Congolese soldiers ran away together with the civilians who were able to do so, while the rest stayed behind in their houses.⁵²² This is confirmed by a Human Rights Watch Report and media articles which state that the population hid inside their houses, but were left without protection when the FARDC soldiers fled.⁵²³ Witness 687, who was present during the attack, says that the “FDLR were moving around and shouting” as they came closer to the centre of the village.⁵²⁴

⁵¹³ EVD-PT-D06-01326, Transcript of Interview of Witness 559/BKA-1, at 1825.

⁵¹⁴ EVD-PT-D06-01296, Transcript of Interview of Witness 544, at 1636.

⁵¹⁵ EVD-PT-D06-01326, Transcript of Interview of Witness 559/BKA-1, at 1825.

⁵¹⁶ EVD-PT-D06-01326, Transcript of Interview of Witness 559/BKA-1, at 1827.

⁵¹⁷ EVD-PT-D06-01271, Transcript of Interview of Witness 8/BKA-8, at 0998.

⁵¹⁸ EVD-PT-OTP-00854, summary Statement of Witness 542, at 1235.

⁵¹⁹ EVD-PT-D06-01318/BKA-001, Transcript of Interview of Witness 559/BKA-1, at 1591-2.

⁵²⁰ Witness 687 said the attack occurred at one o’clock, EVD-PT-OTP-00741, summary of Statement of Witness 687, at 1151; Witness 559/BKA-1 said it occurred at 5 in the morning, EVD-PT-D06-01326, Transcript of Interview of Witness 559/BKA-1BKA-001, at 1833; and the UN Report indicated it occurred at 4 o’clock, EVD-PT-OTP-00343, UNJHRO Special Report, 1 Jul 2009, at 0044.

⁵²¹ EVD-PT-D06-01326, Transcript of Interview of Witness 559/BKA-1, at 1832.

⁵²² EVD-PT-D06-01326, Transcript of Interview of Witness 559/BKA-1, at 1833.

⁵²³ EVD-PT-OTP-00282, HRW Report, at 0308; EVD-PT-OTP-00309, Media/Press Article, at 1174.

⁵²⁴ EVD-PT-OTP-00741, Transcript of Interview of Witness 687, at 1151, para. 34.

217. The Defence contests the commission of murders during the attack, highlighting the statement of Witness 587 who says that civilians were not killed.⁵²⁵ However, Witness 562 says soldiers who were at the attack talked and chanted of killing afterwards⁵²⁶ and Witness 564 confirms that civilians were indeed killed in Mianga.⁵²⁷ Furthermore, Witness 8/BKA-8, a former FDLR soldier, says that civilians were killed in Mianga as they were mixed with soldiers.⁵²⁸ Other pieces of evidence further demonstrate that [REDACTED] civilians were intentionally killed in the course of the attack, [REDACTED].⁵²⁹ According to the evidence, the FDLR intentionally [REDACTED];⁵³⁰ they [REDACTED].⁵³¹ During the same attack, a woman and her child were shot dead as they tried to run away from a camp.⁵³² The killing of civilians is also reported in other pieces of evidence, such as the *Final Report of the Group of Experts on the Democratic Republic of the Congo*, which estimates that at least six civilians were killed during the attack on Mianga.⁵³³ The Human Rights Watch Report put the number at forty-five, and added that some civilians had been hacked to death in their houses.⁵³⁴ In light of the foregoing, the Chamber is satisfied that there are substantial grounds to believe that civilians were intentionally killed by the FDLR troops in the course of the attack on Mianga on or about 12 April 2009.

218. The Chamber notes the Defence's challenge that, in light of the high number of casualties of combatants, the Prosecution should have proven the unlawful nature of

⁵²⁵ ICC-01/04-01/10-Red2-ENG ET, p.45, lines 8-18; EVD-PT-D06-01382, Transcript of Interview of Witness 587, at 1373.

⁵²⁶ EVD-PT-D06-01304, Transcript of Interview of Witness 562, at 0179.

⁵²⁷ EVD-PT-OTP-00578, Transcript of Interview of Witness 564, at 0181.

⁵²⁸ EVD-PT-D06-01271, Transcript of Interview of Witness 8/BKA-8, at 0996.

⁵²⁹ EVD-PT-OTP-00741, summary Statement of Witness 687, at 1146.

⁵³⁰ EVD-PT-OTP-00741, Transcript of Interview of Witness 687, at 1152, paras 37-40.

⁵³¹ EVD-PT-OTP-00741, Transcript of Interview of Witness 687, at 1152, paras 37-40; EVD-PT-D06-01326, Transcript of Interview of Witness 559/BKA-1, at 1824-1835; EVD-PT-OTP-00280, Media/Press Article, *DR Congo: Massive Increase in Attacks on Civilians*, 2 July 2009, at 0234; EVD-PT-OTP-00282, HRW Report, *You Will Be Punished: Attacks on Civilians in Eastern Congo*, 1 Dec 2009, at 0308.

⁵³² EVD-PT-D06-01326, Transcript of Interview of Witness 559/BKA-1, at 1152, para. 37.

⁵³³ EVD-PT-OTP-00075, Correspondence (letter), *Final report of the Group of Experts on the Democratic Republic of the Congo*, 23 Nov 2009, at 0126, para. 352.

⁵³⁴ EVD-PT-OTP-00280, Media/Press Article, *DR Congo: Massive Increase in Attacks on Civilians*, 2 Jul 2009, at 0233.

the attack on Mianga.⁵³⁵ The Defence contends that a media article⁵³⁶ shows that more soldiers were killed than civilians and that, accordingly, the attack did not target civilians.⁵³⁷ As indicated in paragraph 142 above, the Chamber is of the view that the war crime of attacking civilians pursuant to article 8(2)(e)(i) of the Statute does not presuppose that the civilian population is the sole and exclusive target of the attack, and that the crime may also be committed when the attack is launched simultaneously against a military objective and the civilian population or individual civilians not taking direct part in the hostilities. That scenario is to be distinguished from situations of violation of the principle of proportionality, which is not the crime charged in the present case.

219. In light of the abovementioned, the Chamber is satisfied that there are substantial grounds to believe that the FDLR attack on Mianga, on or about 12 April 2009, was launched with the aim of targeting both a military objective (FARDC position in the village) and the civilian population or individual civilians not taking direct part in the hostilities. The Chamber is further satisfied that the FDLR soldiers who took part in the attack were aware of the civilian status of the victims and intended to attack the civilian population or individual civilians not taking direct part in the hostilities since they were considered enemies. The Chamber is further satisfied that there is sufficient evidence to establish substantial grounds to believe that civilians not taking direct part in the hostilities were killed during the attack, and that the attackers were aware that they were attacking and killing civilians. In view of the foregoing, the Chamber is satisfied that there are substantial grounds to believe that the war crimes of attacking civilians under article 8(2)(e)(i) of the Statute and of murder under article 8(2)(c)(i) of the Statute were committed by the FDLR troops in Mianga on or about 12 April 2009.

(ii) Whether the war crime of rape (Count 8) was committed

⁵³⁵ Defence Written Submission, ICC-01/04-01/10-450 21-10-2011, p. 38.

⁵³⁶ EVD-PT-OTP-00361, Media/Press Article, at 0513.

⁵³⁷ ICC-01/04-01/10-T-8-Red2-ENG, p.47, lines 2-5.

220. The only allegation of rape included in the statement of facts in the DCC is that contained in the statement of Witness 562. Witness 562, says that he was not present during the Mianga attack,⁵³⁸ but, states that soldiers from the Reserve Brigade bragged in his presence about introducing spears into the vaginas of women during the attack.⁵³⁹

221. The Chamber notes the Defence's challenge as to whether the abovementioned acts were perpetrated on dead bodies based on the fact that Witness 562, when questioned by the investigator and a lawyer as to whether the women could possibly have been alive when this occurred, answered that he did not know.⁵⁴⁰ The Chamber notes that the only piece of evidence that mentions the commission of these acts of rape is the hearsay testimony of Witness 562 which does not provide sufficient information for the Chamber to establish to the required threshold that the war crime of rape under article 8(2)(e)(vi) of the Statute was committed by the FDLR during the attack in Mianga on or about 12 April 2009.

(iii) Whether the war crime of torture (Count 10) was committed

222. The Chamber notes that, while the Prosecution includes in Count 10 the crime of torture allegedly committed by the FDLR in Mianga on or about 12 April 2009, it neither addresses such allegations in its factual description of the crimes charged nor identifies the acts allegedly underlying the crime of torture. In addition, no evidence of torture being committed in Mianga has been provided to the Chamber.

223. In view of the foregoing, the Chamber is unable to find substantial grounds to believe that the crime of torture under article 8(2)(c)(i) of the Statute was perpetrated by the FDLR troops in Mianga on or about 12 April 2009.

(iv) Whether the war crimes of destruction of property (Count 11) and pillaging (Count 12) were committed

⁵³⁸ EVD-PT-D06-01304, Transcript of Interview of Witness 562, at 0177.

⁵³⁹ EVD-PT-D06-01304, Transcript of Interview of Witness 562, at 0179.

⁵⁴⁰ EVD-PT-D06-01304, Transcript of Interview of Witness 562, 0177-0179.

224. Several witnesses and UN and Human Rights Watch Reports mention the destruction of civilian homes in Mianga during the attack.⁵⁴¹ In particular, a former FDLR soldier, Witness 564, states that he saw burnt houses afterwards, but was not able to say whether the houses were deliberately burnt because he was not present when they were set on fire.⁵⁴² Witness 587, a former FDLR member, says that the entire village was burnt; he learned about the attack from FDLR soldiers that were there and from a report he saw which was sent by Kalume.⁵⁴³

225. The Chamber notes that, although the destruction of the military position located in the village of Mianga may have been justified by military necessity, several pieces of evidence demonstrate that civilian property was destroyed during and in the aftermath of the attack on Mianga. The Chamber also finds that the perpetrators were aware that the houses which they intentionally destroyed and burnt down belonged to civilians, whom they considered to be enemies, based on their perceived allegiance to the FARDC. Accordingly, the Chamber is satisfied that there are substantial grounds to believe that the war crime of destruction of property under article 8(2)(e)(xii) of the Statute was committed by FDLR troops in Mianga on or about 12 April 2009.

226. In relation to the Prosecution's allegations that the war crime of pillaging was also committed in Mianga, the Chamber notes that the Prosecution failed to provide evidence in support of these allegations. In this respect, the Chamber notes that two witnesses say that they saw soldiers returning from the attack with bullets and "armoury"⁵⁴⁴ or equipment.⁵⁴⁵ Furthermore, the Chamber takes note of vague references to "pillaged civilian property"⁵⁴⁶ or to soldiers and civilians "looking for food and

⁵⁴¹ EVD-PT-OTP-00670, Transcript of Interview of Witness 564, at 1277; EVD-PT-OTP-00860, Transcript of Interview of Witness 587, at 1425; EVD-PT-OTP-00597, written Statement of Witness 0650, at 0120; EVD-PT-OTP-00309, UNHRO Report, at 1174; EVD-PT-OTP-00282, HRW Report, at 0308.

⁵⁴² EVD-PT-OTP-00670, Transcript of Interview of Witness 564, at 1277.

⁵⁴³ EVD-PT-OTP-00860, Transcript of Interview of Witness 587, at 1425.

⁵⁴⁴ EVD-PT-D06-01296, Transcript of Interview of Witness 544, at 1639.

⁵⁴⁵ EVD-PT-D06-01326, Transcript of Interview of Witness 559/BKA-1, at 1824-35.

⁵⁴⁶ EVD-PT-D06-01326, Transcript of Interview of Witness 559/BKA-1, at 1824-35.

clothes".⁵⁴⁷ However, the Chamber is of the view that this evidence is not sufficient to substantiate, to the required threshold, that the war crime of pillaging under article 8(2)(e)(v) of the Statute was committed by FDLR troops on or about 12 April 2009 in Mianga.

(e) Kipopo

i. The allegations of the Prosecution

227. The Prosecution has charged the Suspect with the war crimes of attacking civilians (Count 1), murder (Count 3), and destruction of property (Count 11), all allegedly committed in Kipopo on or about 12-13 February 2009.

228. The Prosecution specifically alleges that:

[O]n or about 13 February 2009, the FDLR returned to the village of Kipopo. The FDLR burnt over 70 houses.⁵⁴⁸

ii. The findings of the Chamber

Crimes allegedly committed in Kipopo on or about 12-13 February 2009

Whether the war crimes of attacking civilians (Count 1), murder (Count 3) and destruction of property (Count 11) were committed

229. The Chamber notes that while the Prosecution includes in Count 1 and Count 3 the war crimes of attacking civilians and murder allegedly perpetrated by the FDLR troops in Kipopo on or about 12-13 February 2009, such allegations are not addressed in the factual description of the crimes charged.

⁵⁴⁷ EVD-PT-D06-01304, Transcript of Interview of Witness 562, at 0180.

⁵⁴⁸ DCC, para. 88.

230. In its analysis of the evidence, the Chamber found, nonetheless, that Witness 544 states that an order to attack the FARDC at Kipopo was issued by an FDLR commanding officer, in response to previous FARDC attacks against the FDLR in Kibua in January 2009.⁵⁴⁹ Witnesses 7/BKA-7 and 5/BKA-4 both confirm that the FDLR attacked Kipopo in retaliation for previous FARDC/Mai Mai attacks,⁵⁵⁰ more specifically the attack was understood to be a retaliatory attack for the Mai Mai attack on Masisi.⁵⁵¹ Human Rights Watch and media reports, however, state that the attack occurred on the night of 13 February 2009.⁵⁵²

231. Although some witnesses had heard of the attack,⁵⁵³ none of them participated therein or directly witnessed it. Witness 544, a former FDLR soldier, only saw FDLR troops leaving in the direction of Kipopo around 11h00, heard shooting at 15h00 and could see smoke.⁵⁵⁴ While he was not present during the attack, Witness 544 is the only one who states that he heard that there were civilians in Kipopo when the FDLR were ordered to attack⁵⁵⁵ and that he was told after the attack that civilians might have died.⁵⁵⁶

232. The Chamber further notes that the only pieces of evidence tendered by the Prosecution to support its allegations that war crimes were committed by the FDLR in Kipopo are reports from media sources and Human Rights Watch, according to which FDLR combatants attacked Kipopo at night, killing seventeen civilians, including eight

⁵⁴⁹ EVD-PT-D06-01299, Transcript of Interview of Witness 544, at 1707.

⁵⁵⁰ EVD-PT-D06-01268, Transcript of Interview of Witness 7/BKA-7, at 0896 (said Kipopo was in “retaliation for a previous Mai Mai attack on Masisi”); EVD-PT-D06-01286, Transcript of Interview of Witness 5/BKA-4, at 0069 (said the FDLR was always attacked first).

⁵⁵¹ EVD-PT-D06-01268, Transcript of Interview of Witness 7/BKA-7, at 0896.

⁵⁵² EVD-PT-OTP-00055, Media/Press Article, at 0427; EVD-PT-OTP-00282, HRW Report, at 0306.

⁵⁵³ EVD-PT-D06-01268, Transcript of Interview of Witness 7/BKA-7, at 0896; EVD-PT-D06-01286, Transcript of Interview of Witness 5/BKA-4, at 0069; EVD-PT-D06-01299, Transcript of Interview of Witness 544, at 1709; EVD-PT-OTP-00705, Transcript of Interview of Witness 562, at 1219; EVD-PT-OTP-00635, Transcript of Interview of Witness 561, at 1548.

⁵⁵⁴ EVD-PT-D06-01299, Transcript of Interview of Witness 544, at 1709.

⁵⁵⁵ EVD-PT-D06-01299, Transcript of Interview of Witness 544, at 1705.

⁵⁵⁶ EVD-PT-D06-01299, Transcript of Interview of Witness 544, at 1711.

children.⁵⁵⁷ The Chamber notes that the only testimony that refers to civilians being attacked in Kipopo is the hearsay testimony of Witness 544. Accordingly, the Chamber finds that the evidence submitted in support of this charge is insufficient to establish to the required threshold that the war crimes of attacking civilians under article 8(2)(e)(i) of the Statute and murder under article 8(2)(c)(i) of the Statute were committed by the FDLR in Kipopo on or about 12-13 February 2009.

233. Likewise, the lack of any evidence of destruction of property leads the Chamber to find that the war crime of destruction of property by the FDLR, under article 8(2)(e)(xii) of the Statute, in Kipopo on or about 12-13 February 2009 has not been established to the required threshold.

(f) Luofu and Kasiki

i. The allegations of the Prosecution

234. The Prosecution has charged the Suspect with the war crimes of attacking civilians (Count 1), murder (Count 3), and destruction of property (Count 11), all allegedly committed in Luofu and Kasiki on or about 18 April 2009.

235. The Prosecution specifically alleges that:

[O]n or about 18 April the FDLR attacked the villages of Luofu and Kasiki in Lubero territory, North Kivu, burning over 250 and 50 houses in these villages respectively.⁵⁵⁸

ii. The findings of the Chamber

Crimes allegedly committed in Luofu and Kasiki on or about 18 April 2009

⁵⁵⁷ EVD-PT-OTP-00282, HRW Report, at 0306. EVD-PT-OTP-00055, Media/Press Article at 0427; EVD-PT-OTP-00760, Media/Press Article at 0029; EVD-PT-OTP-00295, Media/Press Article at 0811.

⁵⁵⁸ DCC, para. 90

Whether the war crimes of attacking civilians (Count 1), murder (Count 3) and destruction of property (Count 11) were committed

236. The Chamber notes that, while the Prosecution includes in Count 1 and Count 3 the war crimes of attacking civilians and murder allegedly perpetrated by the FDLR in Luofu and Kasiki on or about 18 April 2009, such allegations are not addressed in the factual description of the crimes charged.

237. In its overall assessment of the evidence, the Chamber nonetheless finds that three witnesses said that they had heard of the attack on Luofu and Kasiki.⁵⁵⁹ The witnesses however did not implicate the FDLR in the attack. Witness 632, the only witness who was able to identify any perpetrator of the crimes, states that the attack in Kasiki was carried out by RUD-Urunana, a separate military organisation from the FDLR.⁵⁶⁰ The same witness states that RUD-Urunana also burnt Luofu.⁵⁶¹ The Chamber notes that Human Rights Watch also attributes the attack that occurred on the night of 17 April 2009 in Luofu and Kasiki to the RUD-Urunana forces.⁵⁶²

238. The only piece of evidence that refers to the killing of civilians is a Human Rights Watch Report, which, however, attributes the attack to the RUF-Urunana forces.⁵⁶³ The Chamber also notes that only one media report refers to civilian property being destroyed, stating that more than 300 houses were burnt to the ground.⁵⁶⁴

239. In view of the foregoing, the Chamber finds that the evidence submitted in support of these charges is not sufficient to establish to the required threshold that the war crimes of attacking civilians under article 8(2)(e)(i) of the Statute, murder under article 8(2)(c)(i) of the Statute and destruction of property under article 8(2)(e)(xii) of the

⁵⁵⁹ EVD-PT-D06-01350, Transcript of Interview of Witness 632, at 0428-0431; EVD-PT-D06-01268, Transcript of Interview of Witness 7, at 0897; EVD-PT-OTP-00669, Transcript of Interview of Witness 564, at 1265.

⁵⁶⁰ EVD-PT-D06-01350, Transcript of Interview of Witness 632, at 0428-0431.

⁵⁶¹ *Ibid.*

⁵⁶² EVD-PT-OTP-00282, HRW Report, at 0317.

⁵⁶³ *Ibid.*

⁵⁶⁴ EVD-PT-OTP-00042, Media/Press Article, at 0714.

Statute were committed by the FDLR troops in Luofu and Kasiki on or about 18 April 2009.

3. Existence of a nexus between the armed conflict and the alleged crimes

240. As already found in paragraph 107 above, the Chamber is satisfied that there are substantial grounds to believe that, from on or about 20 January 2009 until at least 31 December 2009, an armed conflict not of an international character took place in the North and South Kivus Provinces in the DRC, between FARDC forces supported at times by Rwandese or MONUC forces, on the one side, and at least one organised armed group, the FDLR, on the other.

241. On the basis of the evidence submitted for the purposes of the confirmation hearing, the Chamber is satisfied that there are substantial grounds to believe that the crimes set out above, which the Chamber found substantial grounds to believe were committed by FDLR troops, took place in the context of and were associated with the abovementioned armed conflict of a non international character in the North and South Kivus.

VI. CRIMES AGAINST HUMANITY

242. The Prosecution charges Mr Mbarushimana with the following crimes against humanity, which were allegedly committed in the course of at least eighteen separate incidents:⁵⁶⁵ (a) murder, pursuant to article 7(1)(a) of the Statute (Count 2); (b) inhumane

⁵⁶⁵ DCC, pages 37-43, where the Prosecution lists the following locations for the different crimes against humanity that charges: Remeka in late January and in late February 2009, Busheke in late January 2009, Kipopo on or about 12-13 February 2009, Mianga on or about 12 April 2009, Luofu and Kasiki on or about 18 April 2009, Busurungi and neighbouring villages on or about 28 April 2009, and on or about 9-10 May 2009, Manje on or about 20-21 July, the village of W-673 and W-674 in Masisi territory in the second half of 2009,

acts, pursuant to article 7(1)(k) of the Statute (Count 5); (c) rape, pursuant to article 7(1)(g) of the Statute (Count 7); (d) torture, pursuant to article 7(1)(f) of the Statute (Count 9); and (e) persecution, pursuant to article 7(1)(h) of the Statute (Count 13).

243. The DCC alleges that “during January 2009, the FDLR leadership decided to launch a campaign of attacks targeting the civilian population of the Kivu provinces”,⁵⁶⁶ the purpose of which “was to create a humanitarian catastrophe in order to extort concessions of political power for the FDLR from the Governments of DRC and Rwanda in exchange for ceasing to commit crimes against civilians.”⁵⁶⁷ By the same token, the Prosecution alleges that “FDLR troops also targeted the civilian population as a punishment for the population’s perceived support of the effort to dislodge the FDLR”,⁵⁶⁸ in an attempt to dissuade the population from cooperating with the coalition forces and to reduce public support for the Congolese Government’s military campaign against the FDLR.⁵⁶⁹

244. The Majority of the Chamber, the Presiding Judge dissenting, will first analyse whether there are substantial grounds to believe that the contextual elements of crimes against humanity are satisfied. Acts such as those charged by the Prosecution under article 7 of the Statute only qualify as crimes against humanity, pursuant to article 7(1) of the Statute, when “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”; and provided, in accordance with sub-paragraph 2(a) of the same provision, that they are part of a course of conduct involving the multiple commission of acts referred to in paragraph 1 “pursuant to or in furtherance of a State or organizational policy to commit such attack.” The Elements of Crimes further clarify that the “policy to commit such attack” requires that the state or organisation “actively promote or encourage such an attack against a civilian population.”

Ruvundi in October 2009, Mutakato on or about 2-3 December 2009, Kahole on or about 6 December 2009, Pinga on or about 12 February 2009 and on or about 14 February 2009, Miriki in February 2009 and Malembe on or about 11-16 August 2009 and 15 September 2009. Out of these locations and dates, only Remeka in late February 2009 and Pinga on or about 12 February 2009, were not included among the locations charged with war crimes.

⁵⁶⁶ DCC, para. 34.

⁵⁶⁷ DCC, para. 34.

⁵⁶⁸ DCC, para. 34.

⁵⁶⁹ DCC, para. 34.

245. The core of the Prosecution's submission is the existence of an order to create a "humanitarian catastrophe" by directing attacks on the civilian population, emanating from the leadership of the FDLR in early 2009.⁵⁷⁰ This "humanitarian catastrophe" was, as affirmed by the Prosecution, aimed to "make the cost in blood and human misery so high that public and international pressure would force the coalition forces to abandon their military campaign in favour of a negotiated political solution on terms favourable to the FDLR."⁵⁷¹

246. In the view of the Majority, if it is demonstrated to the required threshold that the so-called order to create a "humanitarian catastrophe" in the terms outlined by the Prosecution existed, it would allow the inference that the FDLR had a policy to attack the civilian population. Accordingly, the Majority will analyse the evidence tendered by the Prosecution in support of this allegation, in order to determine whether there are substantial grounds to believe that an order to create a "humanitarian catastrophe" aimed to create a high "cost in human misery" was indeed issued by the leadership of the FDLR.⁵⁷²

247. Witness 552,⁵⁷³ [REDACTED], recalls that, after the announcement on 20 January 2009 that Rwandese soldiers had crossed into the DRC and allied with FARDC, "FOCA sent a message informing everyone [...] to come back to fighting battle, calling everyone those who were into business, agriculture, into farming that they have to come back to fighting, that it's not time anymore for business."⁵⁷⁴ That message was sent [REDACTED] to all FDLR units and was signed by Mudacumura.⁵⁷⁵ The witness further describes that just days after *Umoja Wetu* started, Murwanashyaka himself sent a message stating that the "FDLR should carry on attacking FARDC to discourage and attack civilian Congolese to stop development work",⁵⁷⁶ such as constructing roads, electricity, business, houses.⁵⁷⁷ In the account of the witness, Murwanashyaka stressed that "the FDLR is going to do

⁵⁷⁰ DCC, para. 110.

⁵⁷¹ ICC-01/04-01/10-T-6-Red-ENG, p. 32, lines 10-15.

⁵⁷² DCC, para. 34.

⁵⁷³ EVD-PT-OTP-00649, Transcript of Interview of Witness 552, at 0403-404; EVD-PT-OTP-00650, at 0456.

⁵⁷⁴ EVD-PT-OTP-00644, Transcript of Interview of Witness 552, at 0285.

⁵⁷⁵ EVD-PT-OTP-00644, Transcript of Interview of Witness 552, at 0286.

⁵⁷⁶ EVD-PT-OTP-00649, Transcript of Interview of Witness 552, at 0403.

⁵⁷⁷ EVD-PT-OTP-00649, Transcript of Interview of Witness 552, at 0404.

everything [i]n their power to destroy the development work [...] so that civilians are going to shout [and] the Congolese government [will] stop the fighting [...the] FDLR was to attack in the population."⁵⁷⁸

248. Witness 632,⁵⁷⁹ a member of the FDLR at the relevant time, states that he "remembers" an order given by Mudacumura in March 2009 instructing the troops to "carry out attacks that will make the civilian population suffer."⁵⁸⁰ However, the recollection of the witness is prompted only when the investigator himself has spelt out the existence of such an order, its timing and specific content.⁵⁸¹ When trying to summarise the content of this order, he mentions the closure of those roads constituting the main axes of the region; the "humanitarian catastrophe", as seen by this witness, included making "people run into different camps, in many camps, [so] that the international community realise that they have done [sic] a mistake."⁵⁸² He states that "guerrilla units" were supposed to implement the order⁵⁸³ and he explicitly clarifies that, while instructing the troops to "throw out those people ... remove them from their place so that they go and create the humanitarian catastrophe,"⁵⁸⁴ the order made clear that "all the civilians ... shouldn't be killed or victimised."⁵⁸⁵ Witness 632 also denies that displacement of civilians, as advocated for by the abovementioned order, may have necessitated the use of force;⁵⁸⁶ he mentions a directive to "avoid blind terrorism" as part of the order given by Mudacumura.⁵⁸⁷ He further explains that the FDLR simply wanted to make the civilian population siding with the Congolese army leave, since it would appear that the FARDC – and, by implication, the Congolese Government – was too weak to protect them.⁵⁸⁸

⁵⁷⁸ EVD-PT-OTP-00649, Transcript of Interview of Witness 552, at 0407.

⁵⁷⁹ EVD-PT-D06-01349, Transcript of Interview of Witness 632.

⁵⁸⁰ EVD-PT-OTP-00669, Transcript of Interview of Witness 632, at 0373, The investigator actually says this quotation, and the interpreter responds: "Yes, how he said it I remember."

⁵⁸¹ EVD-PT-D06-01349, Transcript of Interview of Witness 632, at 0373.

⁵⁸² EVD-PT-D06-01349, Transcript of Interview of Witness 632, at 0374, lines 429-445.

⁵⁸³ EVD-PT-D06-01349, Transcript of Interview of Witness 632, at 0374-0375.

⁵⁸⁴ EVD-PT-D06-01349, Transcript of Interview of Witness 632, at 0375, line 470-72.

⁵⁸⁵ EVD-PT-D06-01349, Transcript of Interview of Witness 632, at 0375, line 476.

⁵⁸⁶ EVD-PT-D06-01349, Transcript of Interview of Witness 632, at 0377, lines 529-530.

⁵⁸⁷ EVD-PT-D06-01349, Transcript of Interview of Witness 632, at 0379, lines 597-598.

⁵⁸⁸ EVD-PT-D06-01349, Transcript of Interview of Witness 632, at 0379-0380, lines 630-3.

249. [REDACTED] former member of the FDLR, Witness 559, states that, in March 2009,⁵⁸⁹ the FDLR *commandement* ordered the troops over the radio to “chase out of the region” the population that collaborated with the enemy⁵⁹⁰ and to destroy their houses.⁵⁹¹ The operation, called *action punitive*,⁵⁹² was aimed at enabling the FDLR soldiers to regain positions that had been occupied by the enemy.⁵⁹³ It is worth noting that Witness 559 clearly recalls that Murwanashyaka, having been informed of alleged killings by the FDLR, blamed the soldiers and said that, should those allegations be proven true, he would no longer wish to be President of the FDLR.⁵⁹⁴ Witness 559 also states that during *Umoja Wetu*, the FDLR defended against attacks from the FARDC.⁵⁹⁵ The concerns of Murwanashyaka in relation to allegations of crimes purportedly committed by the FDLR are also mentioned by Witness 561, another former FDLR member. He recalls that, during one visit to the troops, the FDLR President “many times” said that behaviour such as that being attributed to the troops was wrong.⁵⁹⁶

250. According to Witness 587, towards the end of January 2009, Mudacumura issued a general order to his commanders “that they had to burn houses of civilians so that the civilians would flee and it would be difficult for the government of Congo to manage the war”.⁵⁹⁷ By the same token, the witness recalls Mudacumura clarifying that the troops were not supposed to kill the civilians, even though they were allowed “to burn their houses and take their things” whenever they would see Congolese soldiers coming from a particular area.⁵⁹⁸ However, Witness 587 also stated that there was an order or permanent

⁵⁸⁹ EVD-PT-D06-01325, Transcript of Interview of Witness 559, at 1800.

⁵⁹⁰ EVD-PT-D06-01325, Transcript of Interview of Witness 559, at 1785.

⁵⁹¹ EVD-PT-D06-01325, Transcript of Interview of Witness 559, at 1787.

⁵⁹² EVD-PT-D06-01325, Transcript of Interview of Witness 559, at 1786, line 142.

⁵⁹³ EVD-PT-D06-01325, Transcript of Interview of Witness 559, line 208-209.

⁵⁹⁴ EVD-PT-OTP-00848, Summary of interview of Witness 559, at 0976, para. 19. EVD-PT-D06-01318, Transcript of Interview of Witness 559, at 1533, lines 889-890. *See also*, EVD-PT-D06-01326, Transcript of Interview of Witness 559, at 1845, lines 970-973.

⁵⁹⁵ EVD-PT-OTP-00848, Summary of interview of Witness 559, at 0974, paragraph 6.

⁵⁹⁶ EVD-PT-OTP-00630, Transcript of Interview of Witness 561, at 1248, line 913.

⁵⁹⁷ Transcript of Interview of Witness 587, EVD-PT-D06-01382, at 1371, lines 314-317; at 1372.

⁵⁹⁸ Transcript of Interview of Witness 587, EVD-PT-D06-01382, at 1373, lines 375-387.

regulation to the effect that, when a population was mixed with the FARDC and refused to flee, they would be killed.⁵⁹⁹

251. Witness 564 recalls Mudacumura saying that the Governments of the DRC and Rwanda wanted to kill them, that they had to fight so that the population would flee the area⁶⁰⁰ and that they had to create a “chaotic situation” in the DRC to make the international community and the Congolese Government see that the population was being victimised.⁶⁰¹ Witness 564 states that the attack on Busurungi was to take revenge for Rwandan refugees that had been killed.⁶⁰² Only when the investigator insisted on the possibility of a second purpose for the attacks⁶⁰³ did the witness offer, in similar words to those used by the investigator, that the purpose was to show the international community that the local population was in danger so that the community would exert pressure on the Government of Rwanda to agree to negotiate with the FDLR.⁶⁰⁴ However, Witness 564 stresses that the general instruction given to the FDLR for the purposes of *Umoja Wetu* was to fight back when they were being attacked.⁶⁰⁵ He affirms that nothing bad or harmful could be done to Congolese civilians who were neutral⁶⁰⁶ and that the order allegedly imparted to the troops to consider civilians not siding with the FDLR “as enemies” was to avoid infiltration into the FDLR by *Umoja Wetu* soldiers wearing civilian clothes and to prevent FDLR information from being passed on to the Congolese army.⁶⁰⁷

252. Witness 677, another former member of the FDLR, affirms that the FDLR had “a general strategy of protecting civilians and getting them out of the fighting”.⁶⁰⁸ Upon being shown by the investigator a document containing the purported order to create a humanitarian catastrophe, as attached to the *Final Report of the Group of Experts on the*

⁵⁹⁹ Transcript of Interview of Witness 587, EVD-PT-D06-01384, at 1401, lines 28-30.

⁶⁰⁰ Transcript of Interview of Witness 564, EVD-PT-OTP-00669, at 1245-1246, lines 1153-1159.

⁶⁰¹ Transcript of Interview of Witness 564, EVD-PT-OTP-00669, at 1246-1247, 1253, 1259.

⁶⁰² Transcript of Interview of Witness 564, EVD-PT-OTP-00669, at 1243; BKA Statement of Witness 564, EVD-PT-OTP-00578, at 0180.

⁶⁰³ Transcript of Interview of Witness 564, EVD-PT-OTP-00669, at 1243.

⁶⁰⁴ Transcript of Interview of Witness 564, EVD-PT-OTP-00669, at 1244.

⁶⁰⁵ Transcript of Interview of Witness 564, EVD-PT-OTP-00668, at 1161, lines 137-8, and at 1162, lines 153-5.

⁶⁰⁶ Transcript of Interview of Witness 564, EVD-PT-OTP-00668, at 1166, lines 329-30.

⁶⁰⁷ Transcript of Interview of Witness 564, EVD-PT-OTP-00668, at 1199, line 518-25.

⁶⁰⁸ Summary of Statement of Witness 677, EVD-PT-OTP-00762, at 0056, para. 40.

Democratic Republic of the Congo, he states that there was “no way” that FOCA would give an order to create a humanitarian catastrophe.⁶⁰⁹

253. Witness 561, likewise formerly an FDLR soldier, recalls that at the start of *Umoja Wetu* FDLR troops were told that the enemy was very strong and that they “had to defend [them]selves and defend [their] civilian ... families”, as well as “to take on the enemy one by one and [...] get hold of [...] the[ir] weapons.”⁶¹⁰ He narrates that troops were ordered to attack Busurungi in retaliation for attacks against Rwandan refugees – hence the operation name “Eye for eye.”⁶¹¹ He was also told that “everything that has breath shouldn’t be there at all”, meaning that the place would have to be “annihilate[d]”.⁶¹²

254. The retaliatory nature of the attacks which the Chamber has found substantial grounds to believe were committed is confirmed by several witnesses, as discussed at paragraph 151 above for Busurungi and paragraph 203 for Malembe. Witness 562, for instance, stresses that “we started planning that attack [...] 1 hour [after] our people had been cut into pieces.”⁶¹³ He also recalls reference being made by commander Kalume to “all the harassment” which the FDLR had experienced from that village.⁶¹⁴ Witness 562 also mentions the objective of the attack being the FARDC,⁶¹⁵ who were to be removed “completely”⁶¹⁶ and indicates that the “enemies’ positions” were to be destroyed.⁶¹⁷ After prompting by the investigator, Witness 562 explains that they were to set fire to houses without regard for the civilians “because the civilians were our enemies as well”⁶¹⁸; he also states that they were ordered “to go in there and destroy everything.”⁶¹⁹

⁶⁰⁹ Summary of Statement of Witness 677, EVD-PT-OTP-00762, at 0058, para. 51.

⁶¹⁰ Transcript of Interview of Witness 561, EVD-PT-OTP-00631, at 1307-8, lines 692-6.

⁶¹¹ EVD-PT-OTP-00631, Transcript of Interview of Witness 561, at 1350.

⁶¹² Transcript of Interview of Witness 561, EVD-PT-OTP-00631, at 1350.

⁶¹³ Transcript of Interview of Witness 561, EVD-PT-OTP-00703, at 1085.

⁶¹⁴ Transcript of Interview of Witness 562, EVD-PT-OTP-00703, at 1136, lines 2283-4.

⁶¹⁵ Transcript of Interview of Witness 562, EVD-PT-OTP-00703, at 1136, line 2299.

⁶¹⁶ Transcript of Interview of Witness 562, EVD-PT-OTP-00703, at 1152, lines 170-1.

⁶¹⁷ Transcript of Interview of Witness 562, EVD-PT-OTP-00704, at 1163.

⁶¹⁸ Transcript of Interview of Witness 562, EVD-PT-OTP-00706, at 1301, lines 759-61; Transcript of Interview of Witness 562, EVD-PT-OTP-00707, at 1317, lines 293-5.

⁶¹⁹ Transcript of Interview of Witness 562, EVD-PT-D06-01303, at 0142.

255. The Majority observes that none of the FDLR insider witnesses directly and spontaneously confirm the existence of an order emanating from the FDLR leadership along the specific lines alleged by the Prosecution. On the contrary, there are several instances where the witnesses either affirm that civilians had to be protected from the consequences of the fighting,⁶²⁰ for example by way of warning,⁶²¹ or affirm not having heard of such an order.⁶²²

256. Further, the evidence submitted demonstrates the existence of documents wherein the fight against violence inflicted on civilians and the end of impunity for crimes against civilians are stated to be objectives of the organisation.⁶²³ There is also evidence of instances where the top leaders of the FDLR explicitly stated that the civilian population should be spared.⁶²⁴ In their discussions, the leaders of the FDLR showed concern about being blamed for committing crimes against civilians.⁶²⁵

257. Furthermore, as highlighted above, the few former FDLR combatants who do acknowledge the existence of an order to create a “humanitarian catastrophe” mostly do so after specific, explicit and insistent prompting by the investigator, and they attach to such order a meaning that is different to that which is alleged by the Prosecution.⁶²⁶

⁶²⁰ Transcript of Interview of Witness 672, EVD-PT-D06-01273, at 0800, line 215-20; *ibid.*, at 0806, 435-36.

⁶²¹ Transcript of Interview of Witness 544, EVD-PT-D06-01290, at 1536, line 128.

⁶²² Statement of Witness BKA-004, EVD-PT-D06-01286, at 0064.

⁶²³ EVD-PT-OTP-1025 (Conclusions, recommandations et décisions de la réunion du CD réuni en séance ordinaire du 16 au 19 janvier 2009), at 0754, paragraph 39; EVD-PT-OTP-01069 (Evaluation des recommandations et décisions de la dernière Rn CD), at 0957, paragraph 44.

⁶²⁴ EVD-PT-OTP-00678, at 0100, lines 90-93 (translation of the transcript of an intercept communication between Murwanashyaka and [REDACTED], where the FDLR President says “we don’t want the civilian population to be the victim of clashes between the ... the FDLR and [...] the FPR-FARDC”).

⁶²⁵ See SMS communication intercepted by the German Federal Authorities between Murwanashyaka and Iyamuremye on 16 May 2009 (EVD-PT-OTP-00265) (French translation at EVD-PT-OTP-00378): “Cherchez du temps au courant de l’après-midi par exemple 1630B afin que je vous fasse parvenir le dossier BUSURUNGI & MIANGA dont nous sommes accusés d’avoir tué des habitants, c’est à enregistrer, bon courage”.

⁶²⁶ EVD-PT-D06-01349, transcript of interview of Witness 632, at 0375 (“Interpreter: He was saying that we should also ... we should ... create a humanitarian catastrophe, throw out those people, we can remove them from their place so that they go and create the humanitarian catastrophe. OL: OK, but do you remember anything about what ... how you should consider the civilians who were on the side of the enemy? Interpreter: He said that all the civilians they shouldn't be killed or victimised”); EVD-PT-D06-01350, transcript of interview of Witness 632, at 0414 (Interpreter: In the order, I think I have told you that in the

258. It is also worth noting that most former FDLR soldiers indicate that the civilian population should be helped and not attacked⁶²⁷ or killed.⁶²⁸ For instance, one witness states that only people armed and shooting at the FDLR were to be regarded as enemies.⁶²⁹ He also states that, during the preparation for operation *Umoja Wetu* it was clarified that “none of the population was to be present where fighting was taking place, neither citizens nor refugees from Rwanda”.⁶³⁰ Further, several witnesses confirm that soldiers killing or raping civilians were punished⁶³¹ (although one witness, Witness 587, states that “since the war in 2009 [...] the attention of the FDLR was oriented towards fighting rather than discipline”)⁶³² and that the troops had been ordered to “be good to the Congolese people, because they had not done anything”⁶³³ to them.

259. Other pieces of evidence purportedly supporting the Prosecution’s assumption consist of a Human Rights Watch Report and a transcript taken down by the UN Group of Experts on the DRC.

260. The transcript contains orders allegedly “given by General Mudacumura and read out by an FDLR radio operator based in the field”,⁶³⁴ which refer to “military instructions issued in March 2009 by the FDLR high command to attack civilian populations and hospitals” and allegedly transcribed by a member of the Group of Experts as “read out”

order, there was the request to close the roads); EVD-PT-OTP-00762, summary statement of Witness 677, paras 42, 51 (“When asked about orders to create a humanitarian catastrophe, the witness answered that that would depend on the kind of operation. When the civilians were sided with the enemy, then there would be operations targeting the soldiers, but also the civilians. There was not an overall strategy... According to the witness, FOCA command did not give orders about creating a humanitarian catastrophe. At that time they were getting ready to get attacked; there was no way they would give such an order”).

⁶²⁷ Statement of Witness BKA-007, EVD-PT-D06-01268, at 0894; Statement of Witness BKA-009, EVD-PT-D06-01269, at 0936.

⁶²⁸ Statement of Witness BKA 008, EVD-PT-D06-01271, at 0992.

⁶²⁹ Statement of Witness BKA-005, EVD-PT-D06-01270, at 0952.

⁶³⁰ Statement of Witness BKA-005, EVD-PT-D06-01270, at 0950.

⁶³¹ Statement of Witness BKA-007, EVD-PT-D06-01268, at 0898; Statement of Witness BKA-009, DRC-OTP-2028-0924, at 0936; Statement of Witness BKA 008, EVD-PT-D06-01271, at 0992.

⁶³² Transcript of Interview of Witness 587, EVD-PT-D06-01384, at 1412, lines 411-2.

⁶³³ Statement of Witness BKA-004, EVD-PT-D06-01286, at 0062. See also Summary of Statement of Witness 528, EVD-PT-OTP-00859, at 1407, paragraph 71 and Transcript of Interview of Witness 528, EVD-PT-D06-01314, at 1174, line 268-69 and at 1175, line 288.

⁶³⁴ EVD-PT-OTP-00075, at 0168.

by the radio operator.⁶³⁵ The Majority finds that this piece of evidence qualifies at best as indirect evidence, and on its own is not enough to contradict or outweigh the information contained in direct evidence gathered from insider witnesses.

261. Regarding the Human Rights Watch Report,⁶³⁶ the Majority observes that, whilst detailing a number of incidents and attacks allegedly committed by FDLR troops against the civilian population of the Kivus, it does not go so far as to suggest that such attacks were carried out in furtherance of a general FDLR order or policy to attack the local civilian population, or to create a humanitarian catastrophe in the terms outlined by the Prosecution.

262. More specific statements as to the FDLR's alleged policy to pursue a strategy of deliberately attacking civilians are found in the UN "Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston", dated 1 June 2010 and based on its mission to the DRC. At best, this report stresses that the FDLR campaign was directed towards the intimidation of and exaction of revenge on those civilians accused of supporting the Government of the DRC or of cooperating with the FARDC.⁶³⁷

263. At this juncture, the Majority recalls that the "policy" element required by article 7 of the Statute need not be formalised. However, in light of the analysis of the evidence as a whole, and, in particular, several discrepancies between the Prosecution's allegations and the evidence submitted, the Majority is unable to be satisfied to the threshold of substantial grounds to believe that the FDLR pursued the policy of attacking the civilian population. The Majority further notes that the alleged policy to create a "humanitarian catastrophe" in the terms alleged by the Prosecution could not be inferred, to the requisite threshold, from the Chamber's findings in the War Crimes Section.

⁶³⁵ EVD-PT-OTP-00075, at 0068, paragraph 93.

⁶³⁶ EVD-PT-OTP-00282, HRW Report.

⁶³⁷ EVD-PT-OTP-00357, Alston report, at 0366-0367.

264. Indeed, although the Chamber has found substantial grounds to believe that acts amounting to war crimes were committed on 5⁶³⁸ out of the 25 occasions alleged by the Prosecution, the evidence submitted is, nevertheless, insufficient for the Majority to be convinced, to the threshold of substantial grounds to believe, that such acts were part of a course of conduct amounting to “an attack directed against the civilian population”, within the meaning of article 7 of the Statute.

265. Further, as found in the War Crimes Section, the 5 occasions on which war crimes were found to have been committed are scattered over a 6 month period. The Majority further notes that the 4 attacks against the civilian population that the Chamber found to have been committed (in Mianga on or about 12 April 2009, Busurungi on or about 9-10 May 2009, Manje on or about 20 July 2009 and Malembe on or about 11 to 16 August 2009) were mostly carried out in retaliation for attacks carried out by the FARDC/Mai Mai on the FDLR and/or Rwandese civilians,⁶³⁹ and were all launched with the aim of targeting both military objectives (FARDC positions in those villages and surroundings) and the civilian population or individual civilians not taking direct part in the hostilities, who were perceived as supporting the FARDC. Accordingly, such attacks cannot be considered to be part of any larger organised campaign specifically designed to be directed against the civilian population.

266. In view of the foregoing, absent the essential requirement that the crimes were committed pursuant to or in furtherance of an organisational policy to commit an attack directed against the civilian population, as set out in article 7(1) and (2)(a) of the Statute, the Majority of the Chamber, the Presiding Judge dissenting, deems it unnecessary to

⁶³⁸ Busurungi in March 2009, Mianga on or about 12 April 2009, Busurungi on or about 9-10 May 2009, Manje on or about 20 July 2009 and Malembe on or about 11 to 16 August 2009.

⁶³⁹ Summary of interview of Witness 559, EVD-PT-OTP-00848, at 0974, paragraph 6; Transcript of Interview of Witness 561, EVD-PT-OTP-00631 at 1307, 1340 (“Interpreter: [...] they told us that we were to attack the soldiers who were based in BUSURUNGI [...] just to retaliate”) and at 1350; EVD-PT-D06-01307, Transcript of Interview of Witness 526, at 0344, 0346. (Investigator: “OK. Were you trying to defend yourselves and get back to [REDACTED]? Interpreter: Yes”; Investigator: “was your task and was your duty there to defend that village from attack? Interpreter: Yes”); EVD-PT-OTP-00715, transcript of interview of Witness 527, at 0490 (“Interpreter: ... FDLR, the MURWANASHYAKA and the other ones, were saying that if we are attacked we will defend ourselves”).

analyse the remaining elements of the crimes against humanity charged by the Prosecution.

267. Accordingly, the Majority finds that there are not substantial grounds to believe that the crimes against humanity of murder under article 7(1)(a) of the Statute, inhumane acts under article 7(1)(k) of the Statute, rape under article 7(1)(g) of the Statute, torture under article 7(1)(f) of the Statute and persecution under article 7(1)(h) of the Statute were committed by the FDLR troops in: Remeka in late January and in late February 2009, Busheke in late January 2009, Kipopo on or about 12-13 February 2009, Mianga on or about 12 April 2009, Luofu and Kasiki on or about 18 April 2009, Busurungi and neighbouring villages on or about 28 April 2009, and on or about 9-10 May 2009, Manje on or about 20-21 July, the village of W-673 and W-674 in Masisi territory in the second half of 2009, Ruvundi in October 2009, Mutakato on or about 2-3 December 2009, Kahole on or about 6 December 2009, Pinga on or about 12 February 2009 and on or about 14 February 2009, Miriki in February 2009 or Malembe on or about 11-16 August 2009 and 15 September 2009.

VII. INDIVIDUAL CRIMINAL RESPONSIBILITY

1. The law

268. Article 25(3)(d) of the Rome Statute ("Statute") reads as follows:

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: [...]

(d) 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, where 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;

269. The Chamber has previously articulated that liability under article 25(3)(d) of the Statute (“25(3)(d) liability”) entails three objective and two subjective requirements.⁶⁴⁰ The law corresponding to these requirements will be discussed below.

(a) Objective Elements

i. a crime within the jurisdiction of the Court is attempted or committed

270. As found above in Section V, there are substantial grounds to believe that crimes within the jurisdiction of the Court were committed by the FDLR on five of the occasions identified by the Prosecution.

ii. the commission or attempted commission of such a crime was carried out by a group of persons acting with a common purpose

271. When discussing “a group of persons acting with a common purpose”, the Chamber sees no reason to depart from the past definition of an “agreement or common plan between two or more persons” adopted by this Chamber when discussing article 25(3)(a) of the Statute.⁶⁴¹ Though it appears in a discussion of co-perpetration liability, the *Lubanga* Confirmation Decision’s concept of a “common plan” is functionally identical to the statutory requirement of article 25(3)(d) of the Statute that there be a “group of persons acting with a common purpose.”⁶⁴² A common purpose must include an element of criminality, but does not need to be specifically directed at the

⁶⁴⁰ Decision on Warrant of Arrest, para. 39. The objective elements are: (i) a crime within the jurisdiction of the Court is attempted or committed; (ii) the commission or attempted commission of such a crime was carried out by a group of persons acting with a common purpose; (iii) the individual contributed to the crime in any way other than those set out in Article 25(3)(a) to (c) of the Statute. The subjective elements are: (i) the contribution shall be intentional; and (ii) shall either (a) be made with the aim of furthering the criminal activity or criminal purpose of the group; or (b) in the knowledge of the intention of the group to commit the crime.

⁶⁴¹ ICC-01/04-01/06-803-tEN, paras 343-5.

⁶⁴² ICC-01/04-01/06-803-tEN, paras 344-5.

commission of a crime.⁶⁴³ The agreement need not be explicit, and its existence can be inferred from the subsequent concerted action of the group of persons.⁶⁴⁴

272. At the hearing, the Defence argued that 25(3)(d) liability applies only to persons outside of the group acting with a common purpose.⁶⁴⁵ However, the Chamber notes that article 25(3)(d) of the Statute only refers to contributing to a crime committed by a group of persons without specifying that such contribution should be made by a member of that group or an outsider.⁶⁴⁶

273. The Defence cites the position of the late Professor Cassese that 25(3)(d) liability should apply only to non-group members,⁶⁴⁷ but the Chamber notes that, in the authority referred to by the Defence, Professor Cassese also argued for a broad understanding of the language “commits such a crime [...] jointly with another” contained in article 25(3)(a) of the Statute.⁶⁴⁸ In particular, he believed that this language also covered joint criminal enterprise (“JCE”) liability.⁶⁴⁹ Though Professor Cassese’s view as to the level of contribution required for JCE liability may not have been uniform, the source quoted by the Defence concludes that non-essential contributions to a JCE could give rise to responsibility.⁶⁵⁰ To adopt an essential contribution test for liability under article 25(3)(a) of the Statute, as this Chamber has done,⁶⁵¹ and accept the Defence argument that 25(3)(d) liability is limited only to non-group members would restrict

⁶⁴³ ICC-01/04-01/06-803-tEN, para. 344.

⁶⁴⁴ ICC-01/04-01/06-803-tEN, para. 345.

⁶⁴⁵ ICC-01/04-01/10-T-8-Red2-ENG, p. 15, lines 4-25, and p. 16, lines 1-17.

⁶⁴⁶ See article 25(3)(d) of the Statute.

⁶⁴⁷ ICC-01/04-01/10-450, para. 20; A. Cassese, *International Criminal Law* (Oxford University Press, 2nd ed., 2008), p. 213.

⁶⁴⁸ *Ibid.*, at p. 212.

⁶⁴⁹ *Ibid.*

⁶⁵⁰ Compare *Ibid.*, p. 196 (“substantial” contribution); Antonio Cassese, ‘The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise’, 5 *Journal of International Criminal Justice* 109 (2007), p. 128 (“substantial” contribution); with Antonio Cassese, “International Criminal Law”, New York, 2003, pp. 182-183 (each who take part must be “indispensable” to the final result).

⁶⁵¹ Decision on Warrant of Arrest, paras 35-36; *Katanga* Decision, para. 525; ICC-01/04-01/06-803-tEN, para. 347.

criminal responsibility for group members making non-essential contributions in ways not intended by the Defence's primary supporting authority.⁶⁵²

274. Furthermore, the Defence argument, if accepted, would create results at odds with common sense in circumstances where persons who lack the intent to commit any crimes themselves contribute to group crimes with knowledge of the group's intention to commit those crimes. The Chamber notes that, unlike the jurisprudence of the *ad hoc* tribunals,⁶⁵³ article 25(3)(c) of the Statute requires that the person act with the *purpose* to facilitate the crime; knowledge is not enough for responsibility under this article. Unless the requisite superior-subordinate relationship exists to charge responsibility under article 28 of the Statute, 25(3)(d) liability is the only other way a person can be held criminally responsible for acting merely with knowledge of the criminal intentions of others.⁶⁵⁴ Therefore, if command responsibility does not apply and 25(3)(d) liability were limited only to persons outside the group, all such persons who knowingly make non-essential contributions to crimes could be convicted if they are outside the group, but could not be convicted when making identical contributions from inside the group. Such an outcome would create results which run contrary to any literal, systematic or teleological interpretation of the principles established in the Statute for individual criminal responsibility.

275. For these reasons, the Chamber finds that the correct interpretation of 25(3)(d) liability is that it must apply irrespective of whether the person is or is not a member of the group acting with a common purpose.

⁶⁵² The Chamber also notes that another respected commentator analysed Professor Cassese's position on 25(3)(d) liability and concluded that the "outside contributor" interpretation is ultimately unconvincing. Jens David Ohlin, 'Joint Criminal Confusion', 2 *New Criminal Law Review* 406 (2009), pp 410-16.

⁶⁵³ ICTR, Appeals Chamber, *Prosecutor v. Seromba*, "Judgement", 12 March 2008, ICTR-2001-66-A, para. 56; ICTY, Appeals Chamber, *Prosecutor v. Blaškić*, "Judgement", 29 July 2004, IT-95-14-A, paras 45-46; ICTY, Appeals Chamber, *Prosecutor v. Vasiljević*, "Judgement", 25 February 2004, IT-98-32-A, para. 102 (the requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator). *See also* ICTY, Appeals Chamber, *Prosecutor v. Aleksovski*, "Judgement", 24 March 2000, IT-95-14/1-A, para. 162; ICTY, Trial Chamber, *Prosecutor v. Krnojelac*, "Judgement", 15 March 2002, IT-97-25-T, para. 90 (the aider and abettor need not share the *mens rea* of the perpetrator).

⁶⁵⁴ *See* articles 25 and 28 of the Statute.

iii. the individual contributed to the crime in any way other than those set out in Article 25(3)(a) to (c) of the Statute

Level of contribution

276. The Chamber considers it important to examine what level of contribution is required for 25(3)(d) liability and how to evaluate it. The Chamber first considers that it would be inappropriate for such liability to be incurred through *any* contribution to a group crime. The Chamber notes that, during the process of drafting the Statute, earlier language of what became article 17(1)(d) of the Statute, setting out, *inter alia*, the criteria of admissibility and requiring that the “crime” in question should be of sufficient gravity, gave way to the current formulation which requires the “case” to be of sufficient gravity.⁶⁵⁵ This change clarifies the drafter’s intention that not only crimes, but also *contributions* to crimes need to reach a certain threshold of significance in order to be within the Court’s ambit.

277. Indeed, such a threshold is necessary to exclude contributions which, because of their level or nature, were clearly not intended by the drafters of the Statute to give rise to individual criminal responsibility. For instance, many members of a community may provide contributions to a criminal organisation in the knowledge of the group’s criminality, especially where such criminality is public knowledge. Without some threshold level of assistance, every landlord, every grocer, every utility provider, every secretary, every janitor or even every taxpayer who does anything which contributes to a group committing international crimes could satisfy the elements of 25(3)(d) liability

⁶⁵⁵ Compare Report of the International Law Commission on the work of its forty-sixth session, “Draft Statute for an International Criminal Court with commentaries”, 1994, A/49/10, p. 52 (“a case before [the Court] is inadmissible that the crime in question [...] is not of sufficient gravity to justify further action by the Court”); with Preparatory Committee on the Establishment of an International Criminal Court, “Decisions Taken by the Preparatory Committee at its Session Held From 4 to 15 August 1997”, 14 August 1997, A/AC.249/1997/L.8/Rev.1, p. 11 (proposed revision referring to “the case” as not being of sufficient gravity); Statute, art. 17(1)(d) (final formulation: “a case is inadmissible where [...] the case is not of sufficient gravity to justify further action by the Court”).

for their infinitesimal contribution to the crimes committed.⁶⁵⁶ For these reasons, the Chamber considers that 25(3)(d) liability would become overextended if *any* contribution were sufficient.

278. The Chamber also recalls that article 25(3)(d) of the Statute provides for a residual form of accessorial liability, encapsulating contributions to crimes that cannot be characterised under article 25(3)(a)-(c) of the Statute.⁶⁵⁷ The Chamber is of the view that this fact has a bearing on the required level of contribution under article 25(3)(d) of the Statute. It is also to be noted that article 25(3)(d) of the Statute is aimed at combating group criminality, which usually involves the commission of comparably more serious crimes. This factor may also have a bearing on the required level of contribution.⁶⁵⁸

279. It has been argued that the modes of liability listed in article 25(3) of the Statute are arranged in accordance with “a value oriented hierarchy of participation in a crime under international law”,⁶⁵⁹ where the control over the crime decreases as one moves down the sub-paragraphs. Such an interpretation of the Statute would support the view that article 25(3)(d)’s contributions “[i]n any other way” must be *less* than that required for liability under article 25(3)(a)-(c). Indeed, this Chamber has already found that the level of contribution under article 25(3)(d) of the Statute cannot be as high as that

⁶⁵⁶ Jens David Ohlin makes a similar observation in relation to those who give commodities to criminal organisations: “Many members of the community may provide contributions to a criminal organization despite the fact that they disapprove of the group’s criminality. Merchants sell food, water and clothing to criminals; they sell cars and gasoline and repair their vehicles; they rent them office space, apartments and houses. These services are no doubt contributions to criminal organizations, since, without them, a conspiracy could not continue. Furthermore, these services may well be performed knowing of a gang’s criminal goals. However, these contributions are best viewed as commodities because they are readily available on the open market. (Of course, the sale of firearms or explosives is another story.) But if one merchant does not sell the gasoline, another merchant will. However, because this contribution is ‘intentional’ in the basic sense and is made ‘knowing of the group’s intention to commit the crime’, the merchant is criminally liable for the whole conspiracy under the Rome Statute.” Jens David Ohlin, ‘Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise’, 5 *Journal of International Criminal Justice* 69 (2007), p. 79.

⁶⁵⁷ *Lubanga* Decision, para. 337.

⁶⁵⁸ However, it must be borne in mind that article 25(3)(d) allows for the possibility of a person being criminally responsible for acting with a mere knowledge of the group’s intent to commit a crime. This is different from article 25(3)(c), which sets out a stricter standard of *mens rea*.

⁶⁵⁹ Gerhard Werle, ‘Individual Criminal Responsibility in Article 25 ICC Statute’, 5 *Journal of International Criminal Justice* 953 (2007), p. 957.

required under article 25(3)(a), since the latter requires an essential contribution.⁶⁶⁰ While there is little jurisprudence at this time interpreting articles 25(3)(b) or (c) of the Statute, the application of analogous modes of liability at the *ad hoc* tribunals suggests that a substantial contribution to the crime may be contemplated.⁶⁶¹

280. The *ad hoc* tribunal jurisprudence can be of assistance in defining contributions “in any other way”. In particular, the Chamber notes that the current formulation of JCE liability at the *ad hoc* tribunals only requires a significant contribution to give rise to liability; the contribution need not be substantial as a matter of law.⁶⁶²

281. The Chamber emphasises that the principles set out by the *ad hoc* tribunals with respect to the analogous modes of liability cannot be applied to the modes of liability set out in article 25(3) without modification, as there are a number of differences between those modes of liability and those set out in the Statute. For instance, as

⁶⁶⁰ Arrest Warrant Decision, paras 30-42. See also *Prosecutor v. Katanga and Ngudjolo*, “Decision on the confirmation of charges”, 1 October 2008, ICC-01/04-01/06-803-tEN (“*Katanga Decision*”), para. 525; *Lubanga Decision*, para. 347.

⁶⁶¹ For ordering, see ICTR, Appeals Chamber, *Prosecutor v. Kamuhanda*, “Judgement”, 19 September 2005, ICTR-99-54A-A, para. 76; ICTY, Trial Chamber, *Prosecutor v. Popović et al.*, “Judgement”, 10 June 2010, IT-05-88-T (“*Popović TJ*”), para. 1013; ICTY, Appeals Chamber, *Prosecutor v. Strugar*, “Judgement”, 17 July 2008, IT-01-42-A, para. 289; ICTY, Appeals Chamber, *Prosecutor v. Galić*, “Judgement”, 30 November 2006, IT-98-29-A, para. 152. For instigating (roughly analogous to soliciting or inducing in article 25(3)(b) of the Statute), see ICTY, Appeals Chamber, *Prosecutor v. Kordić and Čerkez*, “Judgement”, 17 December 2004, IT-95-14/2-A, para. 27; ICTR, Appeals Chamber, *Prosecutor v. Gacumbitsi*, “Judgement”, 7 July 2006, ICTR-2001-64-A, para. 129; ICTY, Trial Chamber, *Prosecutor v. Đorđević*, “Judgement”, 23 February 2011, IT-05-87/1-T, para. 1870 (“*Đorđević TJ*”); *Popović TJ*, para. 1009; ICTY, Trial Chamber, *Prosecutor v. Bošković and Tarčulovski*, “Judgement”, 10 July 2008, IT-04-82-T, para. 399 (instigating conduct “substantially contributes” to the commission of the crime). For aiding and abetting, see ICTY, Appeals Chamber, *Prosecutor v. Blaškić*, “Judgement”, 29 July 2004, IT-95-14-A, para. 48, ICTY, Appeals Chamber, *Prosecutor v. Vasiljević*, “Judgement”, 25 February 2004, IT-98-32-A, para. 102; ICTY, Trial Chamber, *Prosecutor v. Furundžija*, “Judgement”, 10 December 1998, IT-95-17/1, para. 249 (assistance must have a “substantial effect” on the commission of the crime).

⁶⁶² ICTY, Appeals Chamber, *Prosecutor v. Brđanin*, “Judgement”, 3 April 2007, IT-99-36-A (“*Brđanin AJ*”), para. 430; ICTY, Appeals Chamber, *Prosecutor v. Krajišnik*, “Judgement”, 17 March 2009, IT-00-39-A, para. 215 (“The contribution need not be necessary or substantial, but it should at least be a significant contribution to the crimes for which the accused is found responsible”); ICTR, Appeals Chamber, *Prosecutor v. Simba*, “Judgement”, 27 November 2007, ICTR-01-76-A, para. 303; *Đorđević TJ*, para. 1863; *Popović TJ*, para. 1027; ICTY, Trial Chamber, *Prosecutor v. Kvočka*, “Judgement”, 2 November 2001, IT-98-30/1-T (“*Kvočka TJ*”), para. 308. But see ICTY, Appeals Chamber, *Prosecutor v. Kvočka*, “Judgment”, 28 February 2005, IT-98-30/1-A, para. 104 (pre- *Brđanin AJ* judgment considering that “[j]oint criminal enterprise responsibility does not require any [...] proof of a substantial or significant contribution”); *Kvočka TJ*, para. 312 (does not always maintain a clear distinction between substantial and significant, defining the contribution required as “acts that substantially assisted or significantly effected the furtherance of the goals of the enterprise”).

mentioned earlier, the jurisprudence of the *ad hoc* tribunals does not require the aider and abettor to share the intent of the perpetrator to commit the crime, whereas under article 25(3)(c) of the Statute the aider and abettor must act with the purpose of facilitating the commission of that crime. There is also scholarly disagreement as to whether the *actus reus* required should likewise differ from the *ad hoc* tribunals' "substantial contribution" requirement.⁶⁶³

282. JCE and 25(3)(d) liability are also not identical, as similar as they may appear. Some relevant differences between JCE and 25(3)(d) liability include: (i) whether a defendant who is found guilty is convicted as a principal⁶⁶⁴ or accessory, (ii) whether a defendant must be in the group acting with the common purpose⁶⁶⁵ or not, (iii) whether the contribution is to the common purpose⁶⁶⁶ or to the crimes committed, and (iv) whether some form of intent⁶⁶⁷ or mere knowledge is sufficient for responsibility. However, both 25(3)(d) liability and JCE emphasise group criminality and actions performed in accordance with a common plan, which, when coupled with the fact that JCE requires a lower threshold of contribution than aiding and abetting at the *ad hoc* tribunals, makes the modern formulation of JCE's concept of a "significant contribution" relevant to the present discussion.

283. In view of the foregoing considerations, the Chamber finds that the contribution to the commission of a crime under article 25(3)(d) of the Statute cannot be just any

⁶⁶³ Compare William Schabas, *An Introduction to the International Criminal Court* (4th ed., 2011), p. 228 (suggesting that the absence of the word "substantial" in the Rome Statute may suggest that the Statute was drafted to reject the higher threshold of the ICTY and ICTR); Kai Ambos, "Article 25", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck et al., 2nd ed., 2008), p. 757 ("the word 'facilitating' confirms that a direct and substantial assistance is not necessary"); with Gerhard Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute', 5 *Journal of International Criminal Justice* 953 (2007), p. 969 ("The wording of Article 25(3)(c) does not require that the assistance has a substantial effect on the commission of the crime. However, within the ICC Statute's framework of modes of participation, it is reasonable to interpret the *actus reus* of assistance in this way."); ICC-01/04-01/10-T-8-Red2-ENG, p. 10, lines 10-16 (Professor Kai Ambos argues that "if you look at the case law - and in this case we can legitimately look at the case law of the *ad hoc* tribunals - a contribution in the sense of assistance, aiding and abetting, has been defined as a substantial contribution").

⁶⁶⁴ Tadić AJ, para. 188 (participating in a criminal common purpose is a method of "commission" of a crime).

⁶⁶⁵ Tadić AJ, para. 227.

⁶⁶⁶ Krajišnik AJ, para. 675; Đorđević TJ, para. 1863.

⁶⁶⁷ Tadić AJ, para. 228.

contribution and that there is a threshold of significance below which responsibility under this provision does not arise. On the other hand, given the “residual” nature of article 25(3)(d) and its focus on group criminality, the Chamber finds that a contribution to the commission of a crime by a group acting with a common purpose be at least significant.

284. As for which contributions are significant, the Chamber concludes that this requires a case-by-case assessment,⁶⁶⁸ as it is only by examining a person’s conduct in proper context that a determination can be made as to whether a given contribution has a larger or smaller effect on the crimes committed. Guided by leading scholars and past international cases as to why defendants have been convicted as principals, convicted as accessories or acquitted altogether, the Chamber considers that several factors are useful to help assess whether the suspect’s relevant conduct amounts to a significant contribution: (i) the sustained nature of the participation after acquiring knowledge of the criminality of the group’s common purpose,⁶⁶⁹ (ii) any efforts made to prevent criminal activity or to impede the efficient functioning of the group’s crimes,⁶⁷⁰ (iii) whether the person creates or merely executes the criminal plan,⁶⁷¹ (iv) the position of the suspect in the group or relative to the group⁶⁷² and (v) perhaps most importantly, the role the suspect played vis-à-vis the seriousness and scope of the crimes

⁶⁶⁸ *Kvočka* TJ, para. 309.

⁶⁶⁹ ICTY, Trial Chamber, *Prosecution v. Gotovina et al.*, 15 April 2011, IT-06-90-T (“*Gotovina* TJ”), paras 2509, 2548 (Ivan Čermak’s denial and concealment of crimes on a single occasion not sufficiently significant for JCE liability).

⁶⁷⁰ *Kvočka* TJ, para. 311.

⁶⁷¹ United States Military Tribunal, *United States of America v. Von Weizsaecker et al.*, Trials of War Criminals Before the Nuremberg Military Tribunals, 1949, Vol. XIV (“*Ministries Judgment*”), p. 478 (noting that defendants von Weizsaecker and Woermann only “aided, abetted, or implemented” the criminal plan because they had not “originated” it); United States Military Tribunal, *United States of America v. Oswald Pohl et al.*, Trials of War Criminals Before the Nuremberg Military Tribunals, 1947, Vol. V (“*Pohl Judgment*”), p. 1174 (Pohl did not need to “have a decisive part in formulating” the extermination program, but would be guilty if he “was an accessory to or abetted” it).

⁶⁷² The Nuremberg Military Tribunal jurisprudence considered the authority and discretion of an accused to be essential for attributing liability; Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011), p. 390. See *Ministries Judgment*, p. 676 (Schwerin von Krosigk acquitted because he lacked discretion with disposition of financial means, even though he furnished the means for which concentration camps were purchased, constructed and maintained); *Pohl Judgment*, p. 1042 (distinction between auditor Hohberg being convicted and auditor Vogt being acquitted was difference in authority).

committed.⁶⁷³ These factors are not a substitute for assessing the suspect's contribution to a crime, but they can assist in the assessment.

285. For the reasons above, the Chamber finds that, in order to be criminally responsible under article 25(3)(d) of the Statute, a person must make a significant contribution to the crimes committed or attempted. The extent of the person's contribution is determined by considering the person's relevant conduct and the context in which this conduct is performed.

Contributions after the fact

286. Because so much of the Suspect's alleged assistance is tied into covering up crimes already committed, it also becomes important to assess whether 25(3)(d) liability allows for contributions to crimes after they have occurred. The Chamber notes that some of the pre-Rome Conference drafting history of the Statute, made in the context of discussing what ultimately became article 25(3)(c) of the Statute, shows that the drafters were cautious about including *ex post facto* aiding and abetting in the ICC legal scheme and believed that a specific provision would be necessary to criminalise such conduct ("Preparatory Commission Comment").⁶⁷⁴ No such explicit provision was incorporated

⁶⁷³ *Kvočka* TJ, para. 311 ("even a lowly guard who pulls the switch to release poisonous gas into the gas chamber holding hundreds of victims would be more culpable than a supervising guard stationed at the perimeter of the camp who shoots a prisoner attempting to escape"). The Nuremberg era cases held that many different roles in the crime incur responsibility if a defendant knows of a criminal enterprise that had led to the commission of a crime. *See* *Ministries Judgment*, 472 (such persons responsible for the enterprise's crimes regardless of whether they "originated or executed them, or merely implemented them, justified them to the world, or gave aid and comfort to their perpetrators"); General Military Government Court of the United States Zone, *Trial of Martin Gottfried Weiss and Thirty-Nine Others*, United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, 1945. Vol. XI ("Dachau Concentration Case"), p. 13 (describing contributions in two ways: "(a) if his duties were such as to constitute in themselves an execution or administration of the system that would suffice to make him guilty of participation in the common design, or, (b) if his duties were not in themselves illegal or interwoven with illegality he would be guilty if he performed these duties in an illegal manner"); British Military Court, *Trial of Max Wielen and 17 Others*, United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, 1947. Vol. XI ("Stalag Luft III Judgment"), p. 46 ("the persons concerned must have been part of the machine doing some duty, carrying out some performance which went on directly to achieve the killing, that it had some real bearing on the killing, would not have been so effective or been done so expeditiously if that person had not contributed his willing aid").

⁶⁷⁴ Preparatory Committee on the Establishment of an International Criminal Court, "Decisions Taken by the Preparatory Committee at its Session Held From 11 to 21 February 1997", 12 March 1997, A/AC.249/1997/L.5,

into the final Statute and scholars disagree as to what the silence ultimately means on this point.⁶⁷⁵ The Chamber, however, notes that these considerations are not necessarily relevant to the mode of liability set out in article 25(3)(d) of the Statute. The Preparatory Commission Comment only relates to what became article 25(3)(c) of the Statute and it pre-dates the inclusion of the language which ultimately became article 25(3)(d) of the Statute. Further, article 25(3)(d) of the Statute includes contributions to crimes “in any other way” not defined in article 25(3)(a)-(c) of the Statute, meaning that, even if it were to be accepted that *ex post facto* assistance was deliberately excluded from the ambit of article 25(3)(c) of the Statute, such an assumption would not preclude such assistance from constituting a contribution under article 25(3)(d) of the Statute. The Chamber also notes that the potential for finding people criminally responsible for *ex post facto* contributions to international crimes, at least when such contribution was given pursuant to a prior agreement between the principal and accomplice, has been recognised by the International Law Commission⁶⁷⁶ and case law from the Nuremberg era⁶⁷⁷ and the *ad hoc* tribunals.⁶⁷⁸

p. 21 n. 9 (“It was pointed out that the commentary to the ILC draft Code of Crimes [...] implicitly also includes aiding, abetting or assisting *ex post facto*. This presumption was questioned in the context of the ICC. If aiding, etc., *ex post facto* were deemed necessary to be criminalized, an explicit provision would be needed”). See also Preparatory Committee on the Establishment of an International Criminal Court, “Preparatory Committee on the Establishment of an International Criminal Court”, 1996, A/51/22, Vol. II, p. 83.

⁶⁷⁵ Compare William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), p. 435 (“the *travaux préparatoires* provide support for the view that silence of the provision on complicity after the fact indicates it was intentionally excluded”) with Albin Eser, “Individual Criminal Responsibility”, in A. Cassese (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, p. 807 (“[a]s the silence of law-makers is always ambiguous and does not necessarily point in one or the other direction, the better reasons espouse including even contributions after the fact if they have both a causal connection with the final accomplishment of the crime and have been made with intent to this effect”); Kai Ambos, “Article 25”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Beck et al., 2nd ed., 2008), p. 767.

⁶⁷⁶ International Law Commission, “Draft Code of Crimes against the Peace and Security of Mankind”, in Yearbook of the International Law Commission, Vol. II, A/CN.4/SER.A/1996/Add.1 (Part 2), p. 21.

⁶⁷⁷ British Military Court, *Trial of Franz Schonfeld and Nine Others*, United Nations War Crimes Commission, Law Reports of Trials of War Criminals, 1946, Vol. XI, p. 70 (“if he watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, he was, in contemplation of law, present, aiding and abetting”).

⁶⁷⁸ ICTY, Trial Chamber, *Prosecutor v. Blagojević and Jokić*, “Judgement”, 17 January 2005, IT-02-60-T, para. 731; ICTY, Trial Chamber, *Prosecutor v. Limaj et al.*, 30 November 2005, IT-03-66-T, para. 662; ICTY, Trial Chamber, *Prosecutor v. Furundžija*, “Judgement”, 10 December 1998, IT-95-17/1, para. 230; ICTY, Trial

287. For these reasons, the Chamber finds that 25(3)(d) liability can include contributing to a crime's commission after it has occurred, so long as this contribution had been agreed upon by the relevant group acting with a common purpose and the suspect prior to the perpetration of the crime.

(b) Subjective Elements

i. the contribution shall be intentional

288. The definition of "intent" is given in article 30 of the Statute, and the Chamber deems it appropriate to use this definition when determining what is an "intentional contribution" for 25(3)(d) liability.⁶⁷⁹ Intentional conduct is defined in article 30(2)(a) of the Statute such that a person must "mean[] to engage in the conduct."⁶⁸⁰ The Chamber, however, notes that the application of this requirement alone may lead to the imposition of criminal liability on persons whose intentional actions have an unintended, significant effect on a group that is acting with a common purpose.⁶⁸¹ The Chamber is thus of the view that the "intentionality" of the contribution must include an additional element, linking the contribution with the crimes alleged. Such an element should not, however, overlap with either of the two prongs set out in article 25(3)(d)(i) and (ii), as this would make one or both of them redundant. The Chamber therefore finds that, in order for a person to incur 25(3)(d) liability, the person must both: (i) mean to engage in the relevant conduct that allegedly contributes to the crime and (ii) be at

Chamber, *Prosecutor v. Aleksovski*, "Judgement", 25 June 1999, IT-95-14/1-T, para. 62. Other ad hoc tribunal judgments recognize the possibility of incurring criminal responsibility through assistance given before, during or after the commission of the crime. ICTY, Appeals Chamber, *Prosecutor v. Mrkšić*, "Judgement", 5 May 2009, IT-95-13/1-A; para.81; ICTR, Appeals Chamber, *Prosecutor v. Nahimana et al.*, "Judgement", 28 November 2007; ICTR-99-54A-A, para. 482; ICTY, Appeals Chamber, *Prosecutor v. Blaškić*, "Judgement", 29 July 2004, IT-95-14-A, para. 48.

⁶⁷⁹ Article 30(2) of the Statute reads, in relevant part: "[...] a person has intent where: (a) in relation to conduct, that person means to engage in that conduct; (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events".

⁶⁸⁰ See article 30(2)(a) of the Statute.

⁶⁸¹ For example, a well intentioned arms dealer may decide to sell arms to State C instead of warring States A and B, since the arms dealer knows that both States A and B are committing war crimes. However, if State C is merely funneling all of the arms to State A unbeknownst to the arms dealer, then the arms dealer may meet all of the elements for 25(3)(d) liability for uncontroversial non-criminal conduct in the absence of some requirement that he at least be aware that his contribution is going to, in this example, State A.

least aware that his or her conduct contributes to the activities of the group of persons for whose crimes he or she is alleged to bear responsibility.

ii. shall either (a) be made with the aim of furthering the criminal activity or criminal purpose of the group; or (b) in the knowledge of the intention of the group to commit the crime

289. The Chamber points out that this element is disjunctive. Differently from aiding and abetting under article 25(3)(c) of the Statute, for which intent is always required, knowledge is sufficient to incur liability for contributing to a group of persons acting with a common purpose, under article 25(3)(d) of the Statute.⁶⁸² Since knowledge of the group's criminal intentions is sufficient for criminal responsibility, it is therefore not required for the contributor to have the intent to commit any specific crime and not necessary for him or her to satisfy the mental element of the crimes charged. This stands in sharp contrast with liability under article 25(3)(a) of the Statute, where the suspect must meet the subjective elements of the crimes charged.⁶⁸³

2. Prosecution's submissions

290. The Prosecution charges Mr Mbarushimana under article 25(3)(d) of the Statute, for contributing to the commission of crimes by a group of persons, including Murwanashyaka and Mudacumura, acting with a common purpose.⁶⁸⁴

3. Majority's findings

291. At the outset, the Majority of the Chamber, the Presiding Judge dissenting, recalls the finding made in the context of the analysis of the contextual elements of crimes against humanity, namely that in light of the analysis of the evidence as a whole,

⁶⁸² Andrea Reggio, 'Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen for Trading with the Enemy of Mankind', 5 *International Criminal Law Review* 623 (2005), 647 (reaching the same conclusion from an analysis of article 25 of the Statute).

⁶⁸³ *Lubanga* decision, para. 349; *Bemba* decision, para. 351.

⁶⁸⁴ DCC, para. 108.

the Majority is unable to be satisfied to the threshold of substantial grounds to believe that the FDLR pursued the policy of attacking the civilian population.⁶⁸⁵ This finding leads the Majority to take the view that, based on the analysis of the evidence as a whole, there are likewise not substantial grounds to believe that the FDLR leadership constituted “a group of persons acting with a common purpose” within the meaning of article 25(3)(d) of the Statute, in particular in light of the requirement that the common purpose pursued by the group must have at least an element of criminality.⁶⁸⁶

292. The absence of one critical constitutive element of the form of responsibility enshrined under article 25(3)(d) of the Statute would *per se* exempt the Majority from the need to analyse whether the Suspect provided a significant contribution to the commission of the crimes by the FDLR and, in the affirmative, whether such contribution satisfies the requirements of article 25(3)(d) of the Statute. The Majority nonetheless analysed the evidence relating to the role of the Suspect within the FDLR, with a view to determining whether his actions may amount to the requisite level of contribution under article 25(3)(d) of the Statute with respect to the war crimes which the Chamber found substantial grounds to believe were committed by the FDLR troops in the field. The Majority analysed each of the Suspect’s alleged contributions in view of his functions within the organisation as apparent both from the FDLR statutory instruments and his actual actions, as well as in view of the perception of FDLR members or former members of the role of the Suspect. As hereinafter explained, the Majority of the Chamber, with the Presiding Judge dissenting, finds that the Suspect did not provide any contribution to the commission of such crimes, even less a “significant” one.

(a) The Suspect’s role as a leader of the FDLR and his alleged contribution to a common plan

⁶⁸⁵ See above, para. 255.

⁶⁸⁶ See ICC-01/04-01/06-803, para. 344.

293. The Prosecution alleges that the Suspect contributed to the common plan “by agreeing with Murwanashyaka and Mudacumura to conduct an international media campaign as part of the [c]ommon [p]lan”.⁶⁸⁷ It also alleges that the Suspect’s contribution to the common plan was based on his position of “authority and independence as one of the five civilian leaders in the FDLR” and that “his official duties as Executive Secretary and Steering Committee member required him to engage with the [c]ommon [p]lan”.⁶⁸⁸

294. Since none of the crimes which the Chamber found substantial grounds to believe were committed took place after the arrests of Ignace Murwanashyaka, the President of the FDLR, and Straton Musoni, the First Vice-President of the FDLR (which occurred on 17 November 2009), the Majority believes that any evidence suggesting that the Suspect’s responsibilities within the FDLR were increased or otherwise amended as a result of those arrests is of no relevance to the present decision and thus will not be further considered.

295. As regards the responsibilities vested in the Suspect, the Chamber finds that there are substantial grounds to believe that, throughout 2009 and at all times relevant to the charges, Mr Mbarushimana was the FDLR’s Executive Secretary⁶⁸⁹ and, as such, a member of the FDLR Executive Committee (*Comité Exécutif des FDLR*) and Steering Committee (*Comité Directeur*).⁶⁹⁰ According to the FDLR Internal Regulations, the

⁶⁸⁷ DCC, para. 115.

⁶⁸⁸ DCC, para. 117.

⁶⁸⁹ EVD-PT-D06-01284, Statement of Witness 3, at 0022-3; EVD-PT-D06-01270, Statement of Witness 6, at 0949; EVD-PT-D06-01271, Statement of Witness 8, at 0986; EVD-PT-D06-01269, Transcript of Interview of Witness 9, at 0930, 0933; EVD-PT-OTP-00644, Transcript of Interview of Witness 552, at 0277-8, and EVD-PT-OTP-00648, Transcript of Interview of Witness 552, at 0387, 0391; EVD-PT-D06-01322, Transcript of Interview of Witness 559, at 1671-88; EVD-PT-OTP-00630, Transcript of Interview of Witness 561, at 1262; EVD-PT-OTP-00860, summary of Statement of Witness 587, at 1419, 1422; EVD-PT-D06-01382, Transcript of Interview of Witness 587, at 1364; EVD-PT-D06-01354, Transcript of Interview of Witness 632, at 0545-7; EVD-PT-D06-01346, Transcript of Interview of Witness 632 at 0243-5; EVD-PT-OTP-00834, transcript of interview if Witness 632, at 0448, 0451; EVD-PT-OTP-00762, summary of Statement of Witness 677, at 0069-70. *See also* EVD-PT-OTP-00805, Callixte Mbarushimana’s interview with [REDACTED], 22 September 2009, at 2317-9; EVD-PT-OTP-01235, Callixte Mbarushimana’s interview for BBC Radio dated 17 October 2009, audio (Part 2).

⁶⁹⁰ EVD-PT-OTP-01080, “Manifeste-Programme et Statuts des FDLR, 31 Janvier 2006”, at 1524-5.

Executive Secretary of the FDLR is preceded in the hierarchy by the President of the FDLR, the First and Second Vice-President and followed by the Deputy Executive Secretary.⁶⁹¹

296. There are likewise substantial grounds to believe that, in his capacity as Executive Secretary of the FDLR, Mr Mbarushimana issued and signed press releases on behalf of the FDLR⁶⁹² and often spoke to journalists on issues relating to the situation in the DRC and, more specifically, the position of the FDLR.⁶⁹³

297. The Majority stresses the lack of any suggestion that Mr Mbarushimana was bestowed with the power to exercise any form of authority over FDLR commanders and soldiers on the ground. Both his residence in Paris and the very nature of his tasks – limited as they were to issues concerning the relationship of the FDLR with the media and the external world – make it apparent that there was no link between him and the FDLR soldiers and troops on the ground.

298. Although the FDLR statutory instruments entrust the Executive Secretary with the function of coordinating the activities of the Executive Secretariat and making propositions to the Steering Committee with regard to the appointment of the directors

⁶⁹¹ EVD-PT-OTP-01079, “Règlement d’Ordre Intérieur des FDLR, 31 Janvier 2006”, at 1495-7.

⁶⁹² The name of Callixte Mbarushimana and the title “Executive Secretary of the FDLR” appears on most press releases available to the Chamber. *See, among others*, EVD-PT-OTP-00386, FDLR Press Release of 26 January 2009; EVD-PT-OTP-00016, FDLR Press Release of February 2009; EVD-PT-OTP-00366, FDLR Press Release of 23 March 2009; EVD-PT-OTP-00382, FDLR Press Release of 12 March 2009; EVD-PT-OTP-00383, FDLR Press Release of 17 April 2009; EVD-PT-OTP-00385, FDLR Press Release of 11 February 2009; EVD-PT-OTP-00384, FDLR Press Release of 25 May 2009.

⁶⁹³ EVD-PT-OTP-00814, Translated Intercepted Communication Transcript of 19 June 2009, at 0065; EVD-PT-OTP-00745, Translated Intercepted Communication Transcript of 21 January 2009, at 2151-2; EVD-PT-OTP-00790, Translated Intercepted Communication Transcript of 3 September 2009, at 2258; EVD-PT-OTP-00869, Email from BBC to Mbarushimana, at 1648; EVD-PT-OTP-00868, Email between BBC and Mbarushimana, at 1646; EVD-PT-OTP-00916, Email from AFP to Mbarushimana, at 0132; EVD-PT-OTP-00957, Email from RNW to Mbarushimana, at 1859; EVD-PT-OTP-00959, Email from Le Monde to Mbarushimana, at 1868; EVD-PT-OTP-01240, Questions from Der Spiegel, at 0001; EVD-PT-OTP-01260, [REDACTED] and EVD-PT-OTP-00805, Callixte Mbarushimana’s interview [REDACTED]; EVD-PT-OTP-01236, Interview with BBC-TV-Radio (Part 1), 17 October 2009; EVD-PT-OTP-01235 Interview with BBC-TV-Radio (Part 2), 17 October 2009; EVD-PT-OTP-00860, Transcript of Interview of Witness 587, at 1370; EVD-PT-OTP-00669, Transcript of Interview of Witness 564, at 1230.

of the FDLR,⁶⁹⁴ Witnesses 3/BKA-2 and 8/BKA-8 state that, in his role as Executive Secretary, Mr Mbarushimana did not execute the coordination task attributed to him by the FDLR Statute because he lived abroad.⁶⁹⁵ Witness 8/BKA-8 explains also that, in practice, it was another person who took over the leadership of the commissioners within the Executive Secretariat and reported to Mr Mbarushimana.⁶⁹⁶ Witness 3/BKA-2 further adds that “Mbarushimana does not do anything special, he writes the communiqués and talks to journalists”.⁶⁹⁷

299. The Majority observes that, by far, the most significant responsibility vested in the Suspect was the issuance of press releases on behalf of the organisation. By the same token, the Majority notes that (contrary to that which is alleged by the Prosecution⁶⁹⁸ and without prejudice to its former finding that there are not substantial grounds to believe that the FDLR pursued a policy to attack civilians⁶⁹⁹), the evidence does not provide substantial grounds to believe that the Suspect contributed to the FDLR’s alleged plan of attacking civilians by agreeing to conduct an international media campaign in support of it.

300. The Prosecution submits an e-mail from the FDLR Secretariat and addressed to Murwanashyaka and others in which the Suspect proposes to regularly issue situation reports (“*Points de presse*”) with the aim of presenting the situation on the ground to the press and to the public, which journalists could consult before asking questions of the

⁶⁹⁴ EVD-PT-OTP-01080, “Manifeste-Programme et Statuts des FDLR, 31 Janvier 2006”, at 1524-5, article 34 « Le Secrétaire Executif est chargé de la coordination des activités du secrétariat Exécutif. Il est le Rapporteur de l’Organisation. Il organise et convoque les réunions du Secrétariat Exécutif. Il fait des propositions au Comité Directeur pour la nomination où la revocation des cadres permanents de l’Organisation ». EVD-PT-OTP-01079, “Règlement d’Ordre Intérieur des FDLR, 31 Janvier 2006”, at 1495-7, article 28.

⁶⁹⁵ EVD-PT-D06-01284, Statement of Witness 3/BKA-2, at 0022-3; EVD-PT-D06-01271, Statement of Witness 8,/BKA-8 at 0987.

⁶⁹⁶ EVD-PT-D06-01271, Statement of Witness 8/BKA-8, at 0987.

⁶⁹⁷ EVD-PT-D06-01284, Statement of Witness 3/BKA-2, at 0022-3.

⁶⁹⁸ DCC, para. 115.

⁶⁹⁹ See above, para.255.

FDLR.⁷⁰⁰ The Suspect presents this suggestion as part of the *war of communication/information against the enemy that attacked them*.⁷⁰¹

301. The Prosecution's written submissions also refer to two documents⁷⁰² containing Murwanashyaka's and the Suspect's names which spell out the conclusions of a meeting of the FDLR Steering Committee allegedly held in January 2009. In that meeting, the FDLR leadership allegedly "decided on the international media campaign to be conducted in parallel with the attacks on civilians and the intended central role and content of the media campaign as part of the FDLR's overall strategy".⁷⁰³

302. However, the Majority notes that none of these documents mention any strategy of attacking civilians. Although one of the documents indeed refers to a media campaign of permanently *demonising* the enemy, it, at the same time, sets out a diplomatic strategy of insisting on the necessity of a pacific solution, arguing that the war imposed on the population in the region is useless, and states that the FDLR military strategy should be directed at defending itself from the attacks of the Rwandan-Congolese coalition.⁷⁰⁴ The same document explicitly stresses that no chance should be given to those who want to involve the FDLR in the pillaging of the resources of the DRC and crimes against humanity (recruitment of minors, rape as a weapon of war, etc).⁷⁰⁵ The other document also recommends that the FDLR "combat with energy all form of exactions against the civilian populations".⁷⁰⁶

303. In view of the foregoing, the Majority of the Chamber, the Presiding Judge dissenting, finds that the evidence submitted by the Prosecution is insufficient to

⁷⁰⁰ EVD-PT-OTP-00782, Email from Mbarushimana to Murwanashyaka and others, 25 January 2009, at 2154.

⁷⁰¹ EVD-PT-OTP-00782, Email from Mbarushimana to Murwanashyaka and others, 25 January 2009, at 2154 «Dans le cadre de la guerre de communication/information contre l'ennemi qui nous a attaqué».

⁷⁰² EVD-PT-OTP-01025, "Conclusions, recommandations et décisions de la réunion du CD réuni en séance ordinaire du 16 au 19 janvier 2009"; EVD-PT-OTP-01230, "Compte-rendu de la réunion du 16 au 18 Janvier 2009".

⁷⁰³ ICC-01/04-01/10-448-Conf, Prosecution's written submissions, para. 70.

⁷⁰⁴ EVD-PT-OTP-01230, "Compte-rendu de la réunion du 16 au 18 Janvier 2009", at 0936.

⁷⁰⁵ EVD-PT-OTP-01230, "Compte-rendu de la réunion du 16 au 18 Janvier 2009", at 0936.

⁷⁰⁶ EVD-PT-OTP-01025 "Conclusions, recommandations et décisions de la réunion du CD réuni en séance ordinaire du 16 au 19 janvier 2009", at 0754.

substantiate the finding, to the threshold of substantial grounds to believe, that the Suspect's role as a leader of the FDLR qualifies as a significant contribution to the commission of crimes by the FDLR in accordance with article 25(3)(d) of the Statute.

(b) Alleged articulation and dissemination of an international media campaign seeking to conceal the crimes committed by the FDLR on the ground and to extort political concessions

304. The Prosecution alleges⁷⁰⁷ that the Suspect contributed to the commission of crimes by the FDLR through direct involvement - "in coordination with Murwanashyaka and other senior FDLR leaders" - in the articulation and dissemination of an international media campaign seeking to "conceal the FDLR's responsibility for the attacks by either denying them or casting the blame onto the FARDC/RDF coalition or other armed groups" and to "extort concessions of political power for the FDLR in Rwanda in exchange for stopping the crimes against civilians" by "persuading the governments of the DRC and Rwanda and the international community that the FDLR could not be defeated militarily and that the cost to the civilian population of the military campaign against the FDLR would be intolerable". This media campaign was allegedly implemented by the Suspect through the FDLR's press releases issued in 2009 as well as through interviews and "other interaction with the media".

305. In 2009 alone, the Suspect issued approximately 65 press releases. The overwhelming majority of these press releases are directed at responding to accusations levelled against the FDLR by the UN, NGOs and/or the media and typically include denials of allegations that the FDLR had committed any crimes,⁷⁰⁸ denials of allegations that the FDLR had suffered military losses⁷⁰⁹ and condemnations of crimes allegedly

⁷⁰⁷ DCC, paras 110, 116.

⁷⁰⁸ EVD-PT-OTP-00489, FDLR Press Release of 2 February 2009; EVD-PT-OTP-01112, FDLR Press Release of 14 February 2009.

⁷⁰⁹ EVD-PT-OTP-00061, FDLR Press Release of 26 January 2009; EVD-PT-OTP-00891, FDLR Press Release of 11 November 2009.

committed by the Rwandan or Congolese Governments/military forces.⁷¹⁰ Calls for international investigations to determine the identity of those responsible for crimes committed,⁷¹¹ for peaceful solutions⁷¹² and for dialogue to reach a negotiated settlement to the conflict⁷¹³ were also often included.

306. The Majority notes that, although the Suspect had some authority over the content of the press releases he issued and signed, other members of the FDLR leadership contributed to the drafting process. More specifically, the press releases were usually the result of and mirrored discussions between Mudacumura and Murwanashyaka.⁷¹⁴ The Majority deems it significant that the press release issued in the aftermath of the attacks on Busurungi was signed by Murwanashyaka.⁷¹⁵

307. Furthermore, there is limited evidence that the Suspect made “extortionate demands” in his press releases that could be interpreted as blackmail of the international community to stop the war. Just before the commencement of *Umoja Wetu*, the Suspect affirmed that “any solution based on the desire to destroy militarily the FDLR is not only counterproductive but also extremely dangerous because it could plunge the entire region into a fratricidal, dreadful and long war, and whose consequences are immeasurable.”⁷¹⁶ At the war’s outset, the Suspect also said that those “who conceived and implemented the plan to exterminate the peoples of the African

⁷¹⁰ EVD-PT-OTP-01153, FDLR Press Release of 12 March 2009; EVD-PT-OTP-01029, FDLR Press Release of 20 May 2009; EVD-PT-OTP-01095, FDLR Press Release of 2 June 2009; EVD-PT-OTP-01100, FDLR Press Release of 9 February 2009; EVD-PT-OTP-01024, FDLR Press Release of 20 February 2009, at 0734; EVD-PT-OTP-00023, FDLR Press Release of 14 July 2009; EVD-PT-OTP-00935, FDLR Press Release of 17 April 2009; EVD-PT-OTP-01143, FDLR Press Release of 20 April 2009; EVD-PT-OTP-01035, FDLR Press Release of 25 May 2009.

⁷¹¹ EVD-PT-OTP-01110, FDLR Press Release of 13 May 2009; EVD-PT-OTP-00522, FDLR Press Release of 12 August 2009; EVD-PT-OTP-00886, FDLR Press Release of 30 October 2009, at 1800.

⁷¹² EVD-PT-OTP-00065, FDLR Press Release of 14 January 2009, at 0590; EVD-PT-OTP-00963, FDLR Press Release of 27 November 2009, at 1924; EVD-PT-OTP-00520, FDLR Press Release of 30 July 2009, at 2498.

⁷¹³ EVD-PT-OTP-01110, FDLR Press Release of 13 May 2009; EVD-PT-OTP-01160, FDLR Press Release of 27 May 2009; EVD-PT-OTP-01105, FDLR Press Release of 7 September 2009.

⁷¹⁴ EVD-PT-OTP-00035, S/2008/773, at 0576; EVD-PT-D06-01382, Transcript of Interview of Witness 587, at 1364-5.

⁷¹⁵ EVD-PT-D06-01381, Transcript of Interview of Witness 587, at 1356; EVD-PT-D06-01384, Transcript of Interview of Witness 587, at 1406.

⁷¹⁶ EVD-PT-OTP-00064, FDLR Press Release of 8 December 2008.

Great Lakes Region, whoever they may be, must understand that their acts will not go unpunished and that they will sooner or later have to answer before the law for all the serious consequences that will result from that war".⁷¹⁷ The Suspect also often alleges in press releases that the war is unnecessary and counterproductive, saying that the only way to disarm the FDLR is through dialogue between the FDLR and Rwandan authorities.⁷¹⁸

308. Finally, a press article dated 24 January 2008 about Rwandan Hutu fighters allegedly jeopardising the peace pact in the DRC states that "a Hutu representative told the BBC the group would not leave DR Congo until Rwanda agreed to negotiate"⁷¹⁹ and reports that the Suspect asked the Congolese people to be patient. The Suspect also allegedly stated to the BBC that "should the government of Rwanda sit down with us at the negotiation table we are going to stop everything".⁷²⁰

309. The Majority finds that there is also evidence that the call for negotiations and a peaceful solution was part of the agenda of the organisation rather than part of a strategy of extortion of political concessions. Two documents, signed by the Suspect, after the January 2009 Steering Committee meeting refer to the necessity of insisting on a peaceful solution as part of the strategy of the organisation⁷²¹ and contain recommendations to continue the Rome process,⁷²² to intensify diplomatic contacts and to address "the problem of coordination of the political actions and militaries on the ground."⁷²³

⁷¹⁷ EVD-PT-OTP-01101, FDLR Press Release of 21 January 2009.

⁷¹⁸ EVD-PT-OTP-01102, FDLR Press Release of 22 June 2009; EVD-PT-OTP-00519, FDLR Press Release of 23 July 2009, at 2496; EVD-PT-OTP-01090, FDLR Press Release of 20 October 2009; EVD-PT-OTP-00891, FDLR Press Release of 11 November 2009.

⁷¹⁹ EVD-PT-OTP-00356, *Rebels "threaten DR Congo deal"*, Press article, at 0090.

⁷²⁰ EVD-PT-OTP-00356, *Rebels "threaten DR Congo deal"*, Press article, at 0091.

⁷²¹ EVD-PT-OTP-01230, "Compte-rendu de la réunion du 16 au 18 Janvier 2009", at 0936.

⁷²² EVD-PT-OTP-01025, "Conclusions, recommandations et décisions de la réunion du CD réuni en séance ordinaire du 16 au 19 janvier 2009", at 0755.

⁷²³ EVD-PT-OTP-01025, "Conclusions, recommandations et décisions de la réunion du CD réuni en séance ordinaire du 16 au 19 janvier 2009", at 0756.

310. In an intercepted communication between unknown speakers, in which one of the speakers identifies himself as a member of the FDLR and the other as a civilian in Uganda, the FDLR member presents the organisation to the civilian and says that “we are convinced that as long as our people, the peoples of the Great Lakes [...] are not able to choose their own leaders, the fight will continue [...] we have taken weapons because we knew that it was not possible to have a say in the country without having some force to protect at least our people. Not use forces to overtake the government, but first to protect our people and also have a persuasive mean[s] to tell those people that we have the possibility of using the force if necessary. But we privilege peaceful means and we continue to advocate for that, although we still have an army and weapons because we do believe that as long as they continue killing our people, we have to protect our people”.⁷²⁴

311. In view of the above mentioned contradictions in the evidence, the Majority finds that the evidence presented is insufficient to show that the Suspect was using his press releases to “extort political concessions” from the FDLR. There is very little of an extortionate nature to be found in the press releases, and the comments the Suspect makes in relation to the “consequences” of war with the FDLR or the need for dialogue are insufficient evidence to show a pattern of extortion. In addition, the Prosecution’s allegation is contradicted by its allegation that the Suspect was in fact concealing criminal activity. If the purpose of the press releases was to extort political concessions by means of demonstrating the military power of the FDLR, as the Prosecution alleges, the concealment of crimes in the very same press releases would clearly defeat such a purpose.

312. The Majority takes the view that even those press releases explicitly denying accusations of crimes levelled against the FDLR remain *per se* neutral, unless it is demonstrated (i) that the Suspect knew that he was denying the truth; and (ii) that this denial of the truth was done in furtherance of an FDLR policy.

⁷²⁴ EVD-PT-OTP-00813, Translated Intercepted Communication Transcript, at 0061.

313. The Majority notes that the evidence is contradictory as to whether Mr Mbarushimana, or even the FDLR political leadership, was aware of the crimes committed on the ground. While there is evidence that information about events on the ground was reported to Mudacumura and forwarded to Murwanashyaka,⁷²⁵ there is also evidence that not everything was reported to the leadership, especially when it came to crimes against civilians, which commanders may not have reported.⁷²⁶ However, Witness 559 contradicts himself a few times, saying both that Mudacumura was informed of everything that happened on the ground, including crimes, and reported this to Murwanashyaka;⁷²⁷ and that not everything was reported by the commanders on the ground to the leadership.⁷²⁸ In addition to these contradictions, these witnesses do not clarify whether Murwanashyaka would have reported everything on to Mr Mbarushimana.

314. Furthermore, in the view of the Majority, the evidence is not sufficient to demonstrate that the Suspect denied crimes in furtherance of a policy of the organisation. The evidence provided by the Prosecution to support the allegations that Mr Mbarushimana agreed on a media campaign to conceal crimes as part of a common plan in reality refers only to the denial of “lies”, in reaction to supposed lies that were being told about the FDLR.⁷²⁹ Finally, the Majority notes that the arguments raised by the Prosecution to support its allegations that the Suspect was aware of the commission of crimes and that denial of these crimes was a policy of the organisation are based on assumptions about Mr Mbarushimana’s knowledge of the alleged crimes at the time when he distributed his radio communications and press releases.⁷³⁰ This does not

⁷²⁵ EVD-PT-D06-01382, Transcript of Interview of Witness 587, at 1364-1366, EVD-PT-OTP-00860, Summary Statement of Witness 587, at 1421; EVD-PT-OTP-00722, Transcript of Interview of Witness 564, at 1181.

⁷²⁶ EVD-PT-D06-01350, Transcript of Interview of Witness 632, at 0426; EVD-PT-D06-01315.

⁷²⁷ EVD-PT-D06-01321, Transcript of Interview of Witness 559, at 1658; EVD-PT-D06-01323, Transcript of Interview of Witness 559, at 1723-4; EVD-PT-OTP-00577, Statement of Witness 559, at 0160.

⁷²⁸ EVD-PT-D06-01318, Transcript of Interview of Witness 559, at 1533; EVD-PT-D06-01321, Transcript of Interview of Witness 559, at 1659; EVD-PT-D06-01322, Transcript of Interview of Witness 559, at 1708.

⁷²⁹ EVD-PT-OTP-01230 “Compte-rendu de la réunion du 16 au 18 Janvier 2009”, at 0936, EVD-PT-OTP-00601, Translated Intercepted Communication Transcript of 17 February 2009, at 0146, EVD-PT-OTP-00602, Translated Intercepted Communication Transcript of 23 March 2009, at 0151; EVD-PT-OTP-00603, Translated Intercepted Communication Transcript of 15 May 2009, at 0165-6.

⁷³⁰ DCC, paras.129-136; See also Prosecution’s written submissions, paras 74-9.

create substantial grounds to believe that Mr Mbarushimana had knowledge of the crimes committed.

315. In view of the foregoing, the Majority of the Chamber, the Presiding Judge dissenting, finds that the evidence submitted by the Prosecution is not sufficient to establish substantial grounds to believe that the Suspect denied crimes committed by the FDLR with knowledge of them and in furtherance of a policy of the organisation and, therefore, he could have not provided, through his radio communications and press releases, a significant contribution to the commission of crimes by the FDLR within the meaning of article 25(3)(d) of the Statute.

(c) Alleged leadership and authority with respect to FDLR contacts with external parties for the purpose of peace negotiations

316. The Prosecution submits that the Suspect contributed to the commission of the crimes by voluntarily engaging in contacts with various external actors, including peace mediators,⁷³¹ to whom he communicated the FDLR's conditions for laying down their arms, while disseminating the FDLR's extortive message at the same time.⁷³² According to the Prosecution, Mr Mbarushimana and Mr Murwanashyaka shared and jointly exercised the power to authorise FDLR contact with external parties for the purposes of peace negotiations and FDLR demobilisation.⁷³³ In its final written submissions, the Prosecution submits that, by virtue of the fact that he was an authorised FDLR representative in discussions about the group's conditions for demobilisation and agreed to the use of humanitarian corridors on behalf of the FDLR, Mr Mbarushimana contributed to the commission of the alleged crimes, and that his contribution had a direct effect on the exposure of civilians to the conflict, and on the combatants' ability to continue to commit crimes.⁷³⁴

⁷³¹ DCC, para. 125.

⁷³² ICC-01/04-01/10-T-6-Red-ENG, p. 35, lines 10-5.

⁷³³ DCC, para. 119.

⁷³⁴ Prosecution Final Submissions, para. 67(a)

317. The evidence provided by the Prosecution shows that Mr Mbarushimana, along with Mr Murwanashyaka, was a point of contact for external parties who were involved in initiatives and/or organised meetings devoted to exploring ways to bring the conflict in the Great Lakes Region to an end, and, as such, was entitled to speak on behalf of the FDLR and act as the FDLR spokesperson.⁷³⁵

318. Furthermore, the Chamber notes that there is evidence of Mr Mbarushimana's participation in two state-level meetings held in Rome in 2005 between the Government of the DRC and the FDLR for the purposes of peace negotiations.⁷³⁶ There is also evidence that Mr Mbarushimana, as the FDLR's spokesperson, was in regular contact with [REDACTED].⁷³⁷ [REDACTED],⁷³⁸ [REDACTED], in the context of those peace negotiations, the Suspect conceded to/accepted the use of "humanitarian corridors",

⁷³⁵ EVD-PT-OTP-00681, Translated Intercepted communication between Mudacumura and Murwanashyaka, 30 April 2009, at 0154 (lines 18-19) and 0155 (lines 40-43); EVD-PT-OTP-00217, Intercepted Communication between Mudacumura and Murwanashyaka, 10 March 2009; EVD-PT-OTP-00462, Translated Intercepted communication between Mudacumura and Murwanashyaka, 10 March 2009, at 0295. In relation to the same person, *see also* Mbarushimana's handwritten notes, dated 5 April 2009, Translation EVD-PT-OTP-00802 [Reference to "contacts qui seraient en cours" et qui "demandent 1 zone pour se rencontrer et pour discuter" and [REDACTED] (tel. number, email address)]. *See also* EVD-PT-OTP-00468, Translated Intercepted Communication between Mudacumura and Murwanashyaka, 28 April 2009, at 0315; EVD-PT-OTP-00680, Intercepted Communication between Mudacumura and Myrwanashyaka, 30 April 2009, at 0150 (lines 31-35); EVD-PT-OTP-00602, Translated Intercepted Communication between Mudacumura and Murwanashyaka, 23 March 2009, at 0150. *See also* EVD-PT-OTP-00468, Translated Intercepted Communication between Mudacumura and Murwanashyaka, 28 April 2009, at 0315; EVD-PT-OTP-00768, Copy of e-mail of 20 April 2009 (Translation), at 0222-3, read in conjunction with EVD-PT-OTP-01222, at 0001; EVD-PT-OTP-01027, Email between [REDACTED] and Mbarushimana, at 0810-11 which reveals that further communication between Callixte Mbarushimana and [REDACTED] has taken place in relation to the peace process in the Great Lakes Region. *See also* EVD-PT-D06-01270, Statement of Witness 6, at 0949; EVD-PT-D06-01322, Transcript of Interview of Witness 559, at 1671-88; EVD-PT-OTP-00834, Transcript of Interview of Witness 632, at 0445. *See also* EVD-PT-OTP-00739, DDR/RR Section Monthly Report / MONUC DR Congo, 1 May 2009, at 2267, [Document from Mbarushimana's seized material (According to Prosecution: Message to members of Steering Committee on contacts with external parties collated in siezed notes and transmitted by email/sms)—E-mail from Murwanashyaka to Mbarushimana, 3 July 2009 which includes text messages addressed to all the members of the CD]. As Mudacumura reports to Murwanashyaka by email on 5 July, Mudacumura forwarded the text messages which the email includes to all the members of the CD [Attitude à prendre pour les commandants d'Unité et tous les membres du CD: n. 2 : Si ces gens de la diaspora européenne vous contactent renvoyez les toujours directement aux membres de la direction des FDLR se trouvant en Europe, lesquels membres disposent d'informations détaillées sur les activités de ces gens et sur tous les contacts en cours des FDLR avec la CI.

⁷³⁶ [REDACTED]. ([REDACTED])

⁷³⁷ [REDACTED].

⁷³⁸ [REDACTED].

which would allow the civilians to abandon the zones/areas under FDLR control as necessary to reduce the population's suffering.⁷³⁹

319. In light of the foregoing, the Chamber finds that there are substantial grounds to believe that the Suspect, in his capacity as Executive Secretary of the FDLR and having the responsibility to act as the FDLR's spokesperson, was actively involved in the Saint Egidio peace process and had the authority to represent the FDLR and speak on its behalf in its contact with external actors. However, the Prosecution has failed to demonstrate the impact Mr Mbarushimana's involvement in the Saint Egidio peace process had on the crimes committed by the FDLR in 2009 or on the FDLR troops' ability to continue to commit crimes. The Chamber further observes that, in so far as humanitarian corridors could only serve to prevent the exposure of civilians to the risks of the conflict, the Suspect's role in the creation of such corridors runs counter to the Prosecution's allegation that Mr Mbarushimana contributed to the commission of the alleged crimes.

320. In view of the foregoing, the Chamber, in this aspect the Presiding Judge concurring, finds that the evidence submitted by the Prosecution is not sufficient to establish substantial grounds to believe that, in the performance of the Suspect's functions as a point of contact for external actors and his active involvement in the Saint Egidio peace negotiations, the Suspect contributed to the commission of the crimes allegedly committed by the FDLR in 2009 within the meaning of article 25(3)(d) of the Statute.

(d) Alleged encouragement of troops on the ground through press releases and speeches

321. Finally, the Prosecution alleges that the Suspect contributed to the commission of crimes by the FDLR by encouraging the troops on the ground through his press releases and speeches.

⁷³⁹ [REDACTED].

322. The Majority notes that most of these press releases and speeches only contain words of encouragement and praise for the troops;⁷⁴⁰ homage and tributes to the FDLR leaders and combatants;⁷⁴¹ or, more broadly, optimistic commentary as to the prospective fate of the FDLR's struggle.⁷⁴² However, when former FDLR soldiers were asked, many said they had never heard of Mr Mbarushimana or they did not know of his media campaign of radio messages or press releases.⁷⁴³

323. Furthermore, at least seven former FDLR soldiers had not heard of Mr Mbarushimana or his role in the FDLR.⁷⁴⁴ Four more witnesses know nothing more than Mr Mbarushimana's position in the FDLR.⁷⁴⁵

324. While eight witnesses have more detailed knowledge regarding Mr Mbarushimana and his role in the FDLR,⁷⁴⁶ they speak only of his responsibilities,⁷⁴⁷ or

⁷⁴⁰ EVD-PT-OTP-00325, Press Release of 21 January 2009; EVD-PT-OTP-00061, Press Release of 26 January 2009; EVD-PT-OTP-00536, Press Release of 11 November 2009; EVD-PT-OTP-00019, Press Release of 20 February 2009; EVD-PT-OTP-00023, Press Release of 14 July 2009 ; EVD-PT-OTP-00504, Press Release of 10 April 2009; EVD-PT-OTP-00519, Press Release of 23 July 2009; EVD-PT-OTP-00527, Press Release of 27 August 2009.

⁷⁴¹ EVD-PT-OTP-00066, Press Release of 23 February 2009; EVD-PT-OTP-00326, Press Release of 27 May 2009 at 3490,

⁷⁴² EVD-PT-OTP-00655, Transcript of Interview of Witness 552, at 0624-0625, line 819.

⁷⁴³ EVD-PT-D06-01268, Translation of Interview of Witness 0007, at 0899; EVD-PT-D06-01286, Translation of Interview of Witness 0005, at 0060; EVD-PT-D06-01292, Transcript of Interview of Witness 544, at 1577; EVD-PT-D06-01307, Transcript of Interview of Witness 526, at 0370; EVD-PT-D06-01310, Transcript of Interview of Witness 527, at 0576; EVD-PT-D06-01314, Transcript of Interview of Witness 528, at 1210; EVD-PT-D06-01329, Transcript of Interview of Witness 542, at 2087; EVD-PT-OTP-00578, Transcript of Interview of Witness 564, at 0177; EVD-PT-D06-01269, Translation of Interview of Witness 0009, at 0933; EVD-PT-D06-01270, Translation of Interview of Witness 0006, at 0949; EVD-PT-D06-01285, Translation of Interview of Witness 0004, at 0042.

⁷⁴⁴ EVD-PT-D06-01268, Translation of Interview of Witness 0007, at 0899; EVD-PT-D06-01286, Translation of Interview of Witness 0005, at 0060; EVD-PT-D06-01292, Transcript of Interview of Witness 544, at 1577; EVD-PT-D06-01307, Transcript of Interview of Witness 526, at 0370; EVD-PT-D06-01310, Transcript of Interview of Witness 527, at 0576; EVD-PT-D06-01314, Transcript of Interview of Witness 528, at 1210; EVD-PT-D06-01329, Transcript of Interview of Witness 542, at 2087.

⁷⁴⁵ EVD-PT-OTP-00578, Transcript of Interview of Witness 564, at 0177; EVD-PT-D06-01269, Translation of Interview of Witness 0009, at 0933; EVD-PT-D06-01270, Translation of Interview of Witness 0006, at 0949; EVD-PT-D06-01285, Translation of Interview of Witness 0004, at 0042.

⁷⁴⁶ EVD-PT-D06-01270, Translation of Interview of Witness 6. at 0949; EVD-PT-OTP-00630, Transcript of Interview of Witness 1, at 1263; EVD-PT-OTP-00648; EVD-PT-OTP-00655, Transcript of Interview of Witness 552, at 0625, 0627; EVD-PT-D06-01322, Transcript of Interview of Witness 559, at 1676, 1685; EVD-PT-D06-01346, Transcript of Interview of Witness 632, at 1250-51; EVD-PT-D06-01382, Transcript of Interview of Witness 587, at 1371; EVD-PT-OTP-0762, Summary Statement of Witness 677, at 0068. EVD-PT-D06-01373, Transcript of Interview of Witness 530, at 1069.

of the fact that he was mentioned⁷⁴⁸ or spoke on the radio many times.⁷⁴⁹ In particular, Witness 552 states that, speaking on the radio, Mr Mbarushimana “remind[ed] soldiers and politicians in the FDRL [*sic*] that now is the time for Rwandan independence⁷⁵⁰ and “the price of a country is...is blood not water” conveying to the soldiers that “the objective is to win”.⁷⁵¹ These statements are strong indications of attempts at least on the part of the Suspect to encourage troops through his words, but only one witness can even recall these statements.⁷⁵²

325. Furthermore, Witness 559 notes that press releases were communicated to the troops or not, depending on the effect that they would have on the morale of the soldiers.⁷⁵³ Witness 632 explained that the Suspect’s role was to explain to the international community that the allegations against Murwanashyaka and Musoni are unfounded.⁷⁵⁴ The witness also states that the duties of the Executive Secretary of the FDLR were to deny the allegations against the FDLR.⁷⁵⁵ The Majority takes this into consideration.

326. Witness 587 remembers that Mr Mbarushimana talked on BBC radio about the attack on Busurungi of 9-10 May 2009 and stated in a press release that the FARDC were mixed with civilians but did not know if any civilians were killed, even though the message [REDACTED] sent from Kalume admitted that civilians had been killed.⁷⁵⁶ There appears to be reason to believe that Mr Mbarushimana was aware of this message.⁷⁵⁷ However, Witness 587 continues by stating he never heard the Suspect

⁷⁴⁷ EVD-PT-D06-01270, Translation of Interview of Witness 6. at 0949.

⁷⁴⁸ EVD-PT-OTP-00630, Transcript of Interview of Witness 1, at 1263; EVD-PT-OTP-00648, Transcript of Interview of Witness 552, at 0393.

⁷⁴⁹ EVD-PT-D06-01322, Transcript of Interview of Witness 559, at 1676.

⁷⁵⁰ EVD-PT-OTP-00655, Transcript of Interview of Witness 552, at 0625.

⁷⁵¹ EVD-PT-OTP-00655, Transcript of Interview of Witness 552, at 0627.

⁷⁵² *Ibid.*

⁷⁵³ EVD-PT-D06-01322, Transcript of Interview of Witness 559, at 1685.

⁷⁵⁴ EVD-PT-D06-01346, Transcript of Interview of Witness 632, at 1250-51.

⁷⁵⁵ EVD-PT-OTP-00842, Transcript of Interview of Witness 632, at 0776.

⁷⁵⁶ [REDACTED].

⁷⁵⁷ EVD-PT-OTP-00860, summary statement of Witness 587, at 1423, paras 68-70.

speaking on the radio and that the troops were not encouraged to listen to the radio.⁷⁵⁸ Clearly, there is some contradiction in his statements which will be taken into account by the Majority. Witness 587 most importantly states “Mbarushimana doesn’t have every horizontal collaboration with Mudacumura, because Mudacumura reports to Murwanashyaka”.⁷⁵⁹ This statement leads the Majority to conclude that Mr Mbarushimana did not make a significant contribution to encouraging the troops.

327. According to Witness 677, “Mbarushimana had no influence on the soldiers in the field; Mbarushimana was a politician and the soldiers on the ground got their orders from their commanders. The one who was in charge of the soldiers was FOCA commander Mudacumura.”⁷⁶⁰ Again, an insider witness clarifies that Mr Mbarushimana’s power in the FDLR was very limited.

328. The Majority is persuaded that the press releases prepared and issued by the Suspect were intended to address the international community, rather than the troops in the field, and that, accordingly, they did not have an impact on the troops on the ground. The evidence (in particular, the statements of Witness 559⁷⁶¹ and Witness 632⁷⁶²) shows that General Mudacumura received all the press releases and decided whether they should be passed on to the troops depending on their content and on their likely effect on the soldiers’ morale.

329. The Majority takes the view that the information provided by Witness 559 is instructive in demonstrating that there was no strategy underlying the press releases to encourage the soldiers and, even less, to encourage them to commit crimes against the civilian population in the Kivus.⁷⁶³

⁷⁵⁸ EVD-PT-D06-01383, Transcript of Interview of Witness 587, at 1394.

⁷⁵⁹ EVD-PT-OTP-00860, summary statement of Witness 587, at 1422, para. 64.

⁷⁶⁰ EVD-PT-OTP-0762, Summary Statement of Witness 677, at 0068.

⁷⁶¹ EVD-PT-D06-01322, Transcript of Interview of Witness 559, at 1685, lines 493-5.

⁷⁶² EVD-PT-D06-01350, Transcript of Interview of Witness 632, at 0394, line 277.

⁷⁶³ EVD-PT-D06-01322, Transcript of interview of Witness 559, at 1685, lines 493-5.

330. The Majority also takes note of two witnesses stating that Mr Mbarushimana's words had a positive impact on their morale. Referring to Mr Mbarushimana's speech of Christmas 2009, Witness 552 states that "for those who have a good understanding of FDLR, everything ...anything that is spoken in those speeches, they do believe in it" and that "if you are in FDLR those are really very powerful words".⁷⁶⁴ Witness 530 states that he believed Mr Mbarushimana's words in the message which he heard on the BBC radio in November 2009.⁷⁶⁵ The Majority notes, however, that both these witnesses link the purported galvanising effect of Mr Mbarushimana's words to messages issued after the arrest of the FDLR's President and Vice-President and near the last weeks covering the charge period. As such, they are irrelevant for the purposes of this decision.

331. Another witness, Witness 564, states that, when they heard the FDLR spokesperson speaking, FDLR soldiers were encouraged and motivated. However, the Majority notes that Witness 564 clarifies that such encouraging and motivating effect was linked to their belief that the spokesperson's words stemmed directly from "the supreme leader Murwanashyaka".⁷⁶⁶

332. There is evidence which could detract from the weight which should be attached to the evidence showing that soldiers may have been encouraged by Mr Mbarushimana's words contained in press releases, speeches and other messages communicated to FDLR soldiers on the ground. Witness 3, for example, who knows that the Suspect is the FDLR Executive Secretary, states that "in reality Mbarushimana does not do anything special. He writes the communiqués and talks to journalists."⁷⁶⁷ In addition, Witnesses 4, 526 and 544 appear to know very little about Mr Mbarushimana. In particular, Witness 4, a demobilised former member of the FDLR, who identifies another person ([REDACTED]) as the Executive Secretary, states that Mr Mbarushimana, whose name he has heard, lives in Germany and is "a kind of Executive

⁷⁶⁴ EVD-PT-OTP-00655, Transcript of Interview of Witness 552, at 0629 .

⁷⁶⁵ EVD-PT-D06-01373, Transcript of Interview of Witness 530, at 1069-70.

⁷⁶⁶ EVD-PT-OTP-00668, Transcript of Interview of Witness 564, at 1188-9, lines 1165-7.

⁷⁶⁷ EVD-PT-D06-01284, Transcript of Interview of Witness 3, at 0023.

Secretary of Murwanashyaka in Germany, his deputy".⁷⁶⁸ Witness 526, a former FDLR soldier, never heard of Mr Mbarushimana.⁷⁶⁹ Witness 544, a former FDLR soldier, states that he has only heard of Callixte Mbarushimana [REDACTED] were talking about him. But it seems that he doesn't know anything about his position or his role.⁷⁷⁰ In the same vein, Witness 542, another former FDLR soldier, who believes that he knows Callixte Mbarushimana is obviously referring to a different person that he claims was in the Congo.⁷⁷¹ Accordingly, the Majority deems that even this Witness does not support the view that the encouraging effect might be linked to the activity of the Suspect as such.

333. In the view of the Majority, the little evidence which might support the allegation that the press releases and radio appearances had some impact on the FDLR's military efforts is either too limited or too inconsistent for it to take the view that the allegation is proven to the requisite standard. Further, Witness 632, whilst affirming that "[i]f that spokesperson said these allegations are not founded or did not happen, and those soldiers who have committed these actions and acts ... hear these words, they feel like they are supported"⁷⁷², also says that the Suspect's task was "to deny ... things that did not take place".⁷⁷³

334. Witness 3, besides broadly stating that Murwanashyaka and Musoni did contribute to the crimes in the DRC by way of "their activities, publications and conversations with journalists",⁷⁷⁴ also states that the Executive Secretary, albeit tasked to "coordinate the everyday life of the FDLR", did not live in the DRC and, in any event, was not involved in military decisions.⁷⁷⁵

335. The Majority is mindful of the statement of Witness 552 that "when they heard that the leadership [was] denying what they did, they were happy that the leaders

⁷⁶⁸ EVD-PT-D06-01285 at 0042.

⁷⁶⁹ EVD-PT-D06-01307 at 0367, 0369

⁷⁷⁰ EVD-PT-D06-01292 at 1577, 1578.

⁷⁷¹ EVD-PT-OTP-00854, Summary Statement of Witness 542, at 1231.

⁷⁷² EVD-PT-D06-01353, Transcript of Interview of Witness 632, at 0524.

⁷⁷³ EVD-PT-OTP-00834, Transcript of Interview of Witness 632, at 0449, line 1332.

⁷⁷⁴ EVD-PT-D06-1284, Statement of BKA Witness 3, at 0028.

⁷⁷⁵ EVD-PT-D06-1284, Statement of BKA Witness 3, at 0022.

[were] doing their job, so they were happy about it”,⁷⁷⁶ and that the FDLR were denying crimes because they “wanted to show that they are innocent”.⁷⁷⁷ However, the Majority observes that this witness does not straightforwardly confirm the investigator’s suggestion that the words spoken by the Suspect might have any encouraging or galvanising effects on the troops.⁷⁷⁸ The Majority notes that this one statement supporting the Prosecution’s allegation, isolated as it is and considered against the bulk of the rest of the evidence, is insufficient to support a finding that Mr Mbarushimana’s alleged contribution has proven to the required standard.

336. Regarding the perception of the Suspect among the FDLR troops, the Majority observes that, although some Witnesses describe Callixte Mbarushimana as the FDLR’s “third in line”,⁷⁷⁹ one of the FDLR leaders,⁷⁸⁰ and “high” in the FDLR hierarchy,⁷⁸¹ most of the FDLR soldiers on the ground seem to have been unaware of the Suspect’s role within the organisation. Most witnesses either do not know,⁷⁸² or have never heard of,⁷⁸³ Mr Mbarushimana, or, even when they had heard about him, seem not to have paid any particular attention to his role within the organisation.⁷⁸⁴ Some only link the name to “somebody who was a minister in Rwanda”,⁷⁸⁵ or who is “in prison in Arusha”;⁷⁸⁶ others seem to confuse him with FDLR Vice-President Musoni.⁷⁸⁷ Those, such as

⁷⁷⁶ EVD-PT-OTP-00660, Transcript of Interview of Witness 552, at 0768-9.

⁷⁷⁷ EVD-PT-OTP-00660, Transcript of Interview of Witness 552, at 768, line 224.

⁷⁷⁸ EVD-PT-OTP-00655, Transcript of Interview of Witness 552, at 0628-9.

⁷⁷⁹ EVD-PT-D06-01271, Statement of Witness 8, at 0986.

⁷⁸⁰ EVD-PT-D06-01269, Statement of Witness 9, at 0930, 0933; EVD-PT-D06-01322, Transcript of Interview of Witness 559, at 1671.

⁷⁸¹ EVD-PT-OTP-00834, Transcript of Interview of Witness 632, at 0448-9; EVD-PT-D06-01354, Transcript of Interview of Witness 632, at 0546-7.

⁷⁸² EVD-PT-D06-01268, Statement of Witness BKA-007, at 0899 (who knows he is a politician but ignores whether he belongs to the FDLR).

⁷⁸³ EVD-PT-D06-01307, Transcript of Interview of Witness 526, at 0369-70, line 1172; EVD-PT-OTP-00854, Summary of Statement of Witness 542, at 1225.

⁷⁸⁴ EVD-PT-D06-01292, Transcript of Interview of Witness 544, at 1577, lines 618-619; EVD-PT-D06-01269, Statement of Witness BKA 009, at 0933. EVD-PT-D06-01284, Statement of Witness BKA-002, at 0023. EVD-PT-OTP-00859, Summary of Statement of Witness 528, at 1395, para. 20; EVD-PT-D06-01314, Transcript of Interview of Witness 528, at 1210, lines 1466-75.

⁷⁸⁵ EVD-PT-D06-01329, Transcript of Interview of Witness 542, at 2086-87.

⁷⁸⁶ EVD-PT-D06-01286, Statement of Witness BKA-004, at 0059-60; EVD-PT-D06-01310, Transcript of Interview of Witness 527, at 0576-7; EVD-PT-D06-01329, Transcript of Interview of Witness 542, at 2091, line 899.

⁷⁸⁷ EVD-PT-D06-01368, Transcript of Interview of Witness 529, at 0875-6.

Witness 559, who do remember who Mr Mbarushimana was, portray his role as strictly confined to being the spokesperson of the FDLR, as such responsible for “making” the organisation “known” to the media and using radio and newspapers for this purpose.⁷⁸⁸

Witness 561, while correctly attributing to Mr Mbarushimana the role of FDLR secretary, also states that he had been imprisoned and denies having ever heard him on the radio.⁷⁸⁹

337. Witness 552 says that Mr Mbarushimana did become the one in charge of ‘taking decisions’, but only after Murwanashyaka was put in jail, i.e. 17 November 2009.⁷⁹⁰

Witness 530 recalls just one speech made by the Suspect following the arrest of the FDLR President, telling people not to be discouraged.⁷⁹¹

338. An entirely different view is expressed by Witness 559, according to whom the President’s responsibilities following his arrest were taken over by FDLR second Vice-President Rumuli.⁷⁹² Witness 552 also says that the attacks were planned by the army, who did not have to ask permission from the politicians.⁷⁹³

339. Accordingly, the Majority of the Chamber, the Presiding Judge dissenting, finds that the evidence submitted by the Prosecution is not sufficient to establish substantial grounds to believe that the Suspect encouraged the troops’ morale through his press releases and radio messages, and, therefore, he could have not provided through his radio communications and press releases a significant contribution to the commission of crimes by the FDLR within the meaning of article 25(3)(d) of the Statute.

340. In view of the foregoing, the Majority finds that there are not substantial grounds to believe that the Suspect is individually responsible under article 25(3)(d) of the Statute for the crimes committed by the FDLR.

⁷⁸⁸ EVD-PT-D06-01322, Transcript of Interview of Witness 559, at 1671-6.

⁷⁸⁹ EVD-PT-OTP-00630, Transcript of Interview of Witness 561, at 1262-3.

⁷⁹⁰ EVD-PT-OTP-00648, Transcript of Interview of Witness 552, at 0387, lines 648-9; at 0388, lines 664-5.

⁷⁹¹ EVD-PT-D06-01373, Transcript of Interview of Witness 530, at 1070, lines 1254-73.

⁷⁹² EVD-PT-D06-01321, Transcript of Interview of Witness 559, at 1657.

⁷⁹³ EVD-PT-OTP-00660, Transcript of Interview of Witness 552, at 0775.

FOR THESE REASONS, the Chamber, by majority, the Presiding Judge, Sanji M. Monageng, dissenting, hereby

DECLINES to confirm the charges against Mr Callixte Mbarushimana;

DECLARES that the Warrant of Arrest against Mr Callixte Mbarushimana ceases to have effect in its entirety;

DECIDES that Mr Callixte Mbarushimana shall be released from the custody of the Court immediately upon the completion of the necessary modalities;

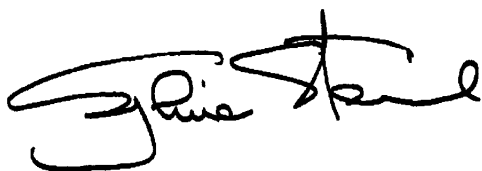
ORDERS the Registrar to make necessary arrangements for the release of Mr Callixte Mbarushimana pursuant to rule 185 of the Rules;

ORDERS the Registrar to arrange for an expedited translation of the present Decision into French; and

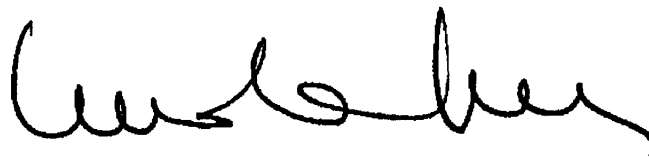
DECIDES that the five-day period to present an application for leave to appeal set out in rule 155(1) of the Rules shall start running for the Defence as of the date of notification of the French translation of this decision.

The Presiding Judge, Sanji M. Monageng, appends a dissenting opinion.

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



Judge Sylvia Steiner



Judge Cuno Tarfusser

Dated this Friday, 16 December 2011

At The Hague, The Netherlands

Dissenting opinion of Judge Sanji Mmasenono Monageng

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1. I respectfully dissent from some conclusions made by the Majority. This disagreement does not concern any of the main legal principles which the Chamber enunciated in the present decision (“Decision”). Nonetheless, due to the centrality of the findings of the Majority with which I take issue, the implications of my disagreement are substantial. As a result, I disagree with the Majority’s decision to decline to confirm the charges against Callixte Mbarushimana. The reasons for my disagreement are set out in this Opinion.

1. Crimes against humanity

(a) Contextual elements of crimes against humanity

i. Organisational policy to commit an attack

2. The Majority found that the evidence does not establish substantial grounds to believe that the FDLR pursued the policy of attacking the civilian population. It also found that the existence of the policy to create a “humanitarian catastrophe”, as described by the Prosecution, could not be inferred from the findings the Chamber made with respect to the war crimes charged in this case.¹ This finding is to a large extent based on the Majority’s difficulty in accepting the evidence of an order to create a humanitarian catastrophe allegedly issued by the FDLR leadership. For reasons set out in my Opinion, I am of the view that there is sufficient evidence to establish to the required threshold the fact that such an order was issued. The Majority’s finding is, in my view, based on an incorrect application of the standard of “substantial grounds to believe”.

3. First, the Majority attached too much weight to inconsistencies between the evidence as to the existence and scope of the order to create a humanitarian catastrophe and the Prosecution’s allegations.² I agree that there are differences, in some cases significant, between the allegations of the Prosecution and the evidence presented to

¹ Decision, para. 263.

² Decision, para. 263.

support them. While the witnesses confirm the existence of an order to attack civilians, their evidence differs as to the scope of such an order. In my view, however, the evidence, examined in its totality, confirms the Prosecution's ultimate allegations.

4. Most of the relevant witness statements quite consistently refer to an order³ issued in or around February 2009⁴ by Sylvestre Mudacumura.⁵ Consistent with the transcript of a message appended to the report of the UN Group of Experts and purported to be the order itself,⁶ Witness 632 stated that the purpose of the order was to create a humanitarian catastrophe.⁷ The Report of Human Rights Watch, relying on interviews with "local authority", a "UN DDRRR official" and health workers, refers to "a humanitarian disaster with a high human cost", very much in line with the evidence of Witness 632.⁸ Differently, but consistent with this evidence, Witness 564 stated that the purpose of the operation was to create a "chaotic situation".⁹

5. I also find the evidence to be quite consistent on the issue of the target of the order to create a humanitarian catastrophe. Witnesses 632, 552, 559 and 587, as well as the UN Group of Experts' report, the Human Rights Watch report and the report of Philip Alston, UN special rapporteur on extrajudicial, summary or arbitrary executions, refer to the civilian population as the object of the order.¹⁰

6. There is also a lot of indirect evidence which does not discuss the order itself, but confirms its existence in one way or another. The evidence regarding orders issued in relation to military operations of the FDLR is of assistance. Witness 561 stated that the

³ P649, transcript of interview of Witness 552, at 0402-0407; D1325, transcript of interview of Witness 559, at 1784-1798; D1382, transcript of interview of Witness 587, at 1371-1372.

⁴ P1349, transcript of interview of Witness 632, at 0383: "at the end of the operation Umoja, like in the 3rd week"; P649, transcript of interview of Witness 552, at 0402-0407; D1325, transcript of interview of Witness 559, at 1800; D1382, transcript of interview of Witness 587, at 1371-1372.

⁵ P1349, transcript of interview of Witness 632, at 0373-0375; D1382, transcript of interview of Witness 587, at 1371-1373; P669, transcript of interview of Witness 564, at 1246-1247, 1253, 1259.

⁶ P75, Report of UN Group of Experts, at 0168.

⁷ P1349, transcript of interview of Witness 632, at 0374-0375.

⁸ P282, Human Rights Watch report "You Will Be Punished", at 0298-0299.

⁹ P669, transcript of interview of Witness 564, at 1246-1247, 1253, 1259.

¹⁰ P1349, transcript of interview of Witness 632, at 0374-0375; P649, transcript of interview of Witness 552, at 0402-0407; D1325, transcript of interview of Witness 559, at 1784-1798; D1382, transcript of interview of Witness 587, at 1371-1372; P75, Report of UN Group of Experts, at 0168; P282, Human Rights Watch report "You Will Be Punished", at 0299; P357, Alston report, at 0366-0367.

order to attack Busurungi was that: “everything that has breath shouldn’t be there at all”.¹¹ Witness 562 said that the order was, *inter alia*, to set fire to houses,¹² finish off Busurungi,¹³ destroy everything,¹⁴ destroy and kill “everything that moves or breathes”.¹⁵ The order with regard to one attack on Malembe was to “give a lesson to those people”¹⁶ and, with regard to another, to “shoot at anything you see”.¹⁷ The findings of the Chamber with respect to the attacks on Busurungi, as well as Manje, Malembe and Mianga are also of relevance.

7. Further, there is evidence of the FDLR’s political objectives, which, in my view, supports the view that there was an order to target civilians. The Majority referred to some of this evidence, but did not thoroughly explore the issue of its consistency with the order to target civilians. Witness 564 stated that the FDLR sought negotiations with a view to ensuring positions for them in the Rwandan government.¹⁸ According to Witness 632, Murwanashyaka expressed the view that if the FDLR could go to Rwanda, it would do it using political dialogue or in the military way. His idea was to use the war to show that the FDLR still had some military strength so that Rwanda could agree to the demands of the FDLR.¹⁹ One of these demands was that the FDLR would be able to return to Rwanda with dignity²⁰ and to be considered equal (of “the same weight”) to the Rwandan Government in terms of force.²¹ Similarly, Witness 559 stated that Mudacumura’s view was that the FDLR’s return to Rwanda would depend on whether the FDLR would become part of the government of Rwanda.²²

8. There is also evidence showing the FDLR’s chosen means to pressure the Rwandan Government to sit down at the negotiating table with the FDLR and discuss their political

¹¹ P631, transcript of interview of Witness 561, at 1350.

¹² P706, transcript of interview of Witness 562, at 1301; P707, transcript of interview of Witness 562, at 1317.

¹³ P707, transcript of interview of Witness 562, at 1317.

¹⁴ P707, transcript of interview of Witness 562, at 1353.

¹⁵ D1303, transcript of interview of Witness 562, at 0142.

¹⁶ P706, transcript of interview of Witness 562, at 1289.

¹⁷ P846, Summary of the statement of Witness 544, at 0946.

¹⁸ P669, transcript of interview of Witness 564, at 1244.

¹⁹ D1354, transcript of interview of Witness 632, at 0540-0541.

²⁰ D1354, transcript of interview of Witness 632, at 0565.

²¹ D1354, transcript of interview of Witness 632, at 0539-0540.

²² D1321, transcript of interview of Witness 559, at 1653.

demands. Witness 632 stated that the purpose of creating a humanitarian catastrophe was to make the international community realise that they had made a mistake, as well as to overwhelm the Government of the DRC with the number of displaced civilians.²³ According to Witness 564, the purpose was to show to the international community that the local population was in danger so that this community would exert pressure on the Government of Rwanda to agree to negotiate with the FDLR.²⁴ The above-mentioned document appended to the report of the UN Group of Experts provides that a humanitarian catastrophe was supposed to be created in order to force the international community to react by pressuring the Kigali Government to engage in negotiations with the FDLR.²⁵

9. The evidence of political goals of the FDLR and the chosen means for their realisation supports the view that an order to create a humanitarian catastrophe was issued, as mentioned by witnesses and international reports. An order of this kind would be consistent with the strategy of demonstrating military strength and preparedness to harm civilians in order to draw the attention of the international community to the demands of the FDLR and, ultimately, force the Government of Rwanda to sit down at the negotiating table.

10. I also take note of other indirect evidence, which, in my view, shows that an order to create a humanitarian catastrophe was issued and, in addition, that the crimes committed by the FDLR troops, complied with that order. Witness 587 stated that, pursuant to that order, houses were burnt in Busurungi and Mianga.²⁶ Further, I take note of the evidence regarding the conversations between Mr Mbarushimana, Sylvestre Mudacumura and Ignace Murwanashyaka after the attack on Busurungi. As will be discussed later,²⁷ this evidence suggests that the killing of civilians in Busurungi did not come as a surprise to the FDLR leaders. Furthermore, in a conversation with Murwanashyaka, Mudacumura spoke of things which were continuing the way they had

²³ P1349, transcript of interview of Witness 632, at 0374-0375.

²⁴ P669, transcript of interview of Witness 564, at 1244.

²⁵ P75, Report of UN Group of Experts, at 0168.

²⁶ D1382, transcript of interview of Witness 587, at 1374.

²⁷ See *infra* para. 73.

been planned and made reference to Busurungi, where in his words “the harvest was good”.²⁸

11. I also take note of the manner in which the FDLR conducted its operations. As discussed in the Decision, the evidence shows that the FDLR’s acts of violence included killing, setting fire to houses, inhumane treatment, mutilation, pillaging and rape. Despite such acts being described in press articles and reports of international organisations, there is no evidence of internal enquiries into these allegations, which lends further support to the view that those acts of violence were not incidental to the implementation of the order to create a humanitarian catastrophe.

12. Further, I note that the Majority seems to have taken no account of possible reasons for what it identified as inconsistencies between the evidence regarding the order to create a humanitarian catastrophe and the Prosecution’s allegations. Most of the evidence regarding the existence of an order to create a humanitarian catastrophe comes from insiders. It is thus not unlikely that the fear of prosecution for the crimes attributed to their organisation affected their statements. They may have tried to disavow the suspicion of their involvement in the commission of crimes. Those who were conscious of impermissibility of attacking civilians may have tried to protect themselves by saying that the attackers only targeted combatants. There may also be differences between the statements of high-rank officers and rank-and-file soldiers. While the former may deny the existence of any order to target civilians issued at their level of the chain of command, the latter may prefer to emphasise that such an order was in fact issued and that they were in no position to refuse to carry it out. Of course I cannot be certain that these considerations affected one or more statements of witnesses in the present case because none of these witnesses gave evidence in court. It is only in court that such aspects of reliability can be properly explored. Nonetheless, I am of the view that for the foregoing reasons and because of the lack of opportunity to properly address such matters in the courtroom, the Majority should have attached less significance to the inconsistencies between the

²⁸ P603, English translation of transcript of intercepted telephone communication, at 0157; for evidence linking the participants in this conversation to Murwanashyaka and Mudacumura, *see infra* note 153.

witnesses' statements and the Prosecution's allegations regarding the order to create a humanitarian catastrophe.

13. The Majority expressed reservations with respect to evidence which was given by witnesses in response to what the Majority refers to as "prompting by the investigator".²⁹ I agree that the evidence obtained this way is less reliable. However, I note that, for instance, Witness 632, after he was told by the investigator about the order to create a humanitarian catastrophe, spontaneously talked about aspects of the order not discussed by the investigator, which, in my view, strengthens the reliability of his evidence on this issue. I also note that even if it were to be accepted that these witnesses' evidence regarding the order to create a humanitarian catastrophe was nothing more than a repetition of what the investigator told them, that would be no reason to reject it altogether. In my view, the very confirmation that the content of the document shown to or described for the witnesses by the investigator was familiar to them constitutes evidence that the order was issued. If they testified in court, questions could be asked to test their knowledge of the order and to determine whether that knowledge is based entirely on what was suggested by the investigator. I have no problems accepting this evidence at this stage, all the more so in light of corroborating evidence of other witnesses.

14. I also disagree with the Majority's reliance on evidence regarding the FDLR's alleged respect for the principle of protecting civilians.³⁰ There is evidence suggesting that the FDLR had its internal rules and instructions clearly prohibiting attacks and violence against civilians.³¹ It appears to be the position of the Majority that the alleged order to create a humanitarian catastrophe would be impossible to reconcile with the above-mentioned internal FDLR instructions. However, the evidence adduced by the Prosecution, some of which is referenced in the Majority's analysis, shows that the FDLR troops did not always follow these instructions and that the respect for the rules of international humanitarian law may have decreased during the conflict in 2009. Witness 632 stated that after the order to create a humanitarian catastrophe was issued, the FDLR

²⁹ Decision, para. 257.

³⁰ Decision, para. 256.

³¹ P1025, FDLR Steering Committee minutes of 19 January 2009, paras 39, 41; P1349, transcript of interview of Witness 632, at 0379; P669, transcript of interview of Witness 564, at 1240.

troops changed “the way they work” and they went after the FARDC. Operations took place at various locations and introduced “total insecurity”.³² According to Witness 587, since the war in 2009 the attention of the FDLR was oriented towards fighting rather than discipline.³³ Witness 559 stated that the commanders were aware of the principles of international humanitarian law, but “the kind of wars ... that happened in Congo didn’t follow international humanitarian law”.³⁴

15. I also take note of the peculiar understanding of the notion of civilians shown by FDLR insider witnesses. According to Witness 559, civilians who were on the side of the enemy were not considered to be civilians, but soldiers.³⁵ Witness 564 said that Murwanashyaka ordered that anyone who was not on the side of the FDLR should be considered as an enemy, especially Congolese civilians who supported the Umoja Wetu operation.³⁶ Witness 677 stated that there was a strategy whereby, in addition to soldiers, the civilians who sided with the enemy would be targeted.³⁷

16. The evidence of the FDLR troops’ vacillating respect for international humanitarian law shows that the principle of protecting civilians would not be an obstacle to issuing an order to target civilians, since the persons believed to collaborate with the DRC Government were not considered to be civilians. I am therefore of the view that the existence of the FDLR’s internal regulations regarding civilians does not negate the allegation that an order to target the civilian population was issued by the leaders of the organisation.

17. Finally, I disagree with the Majority’s conclusion that the evidence suggesting that the attacks were launched in retaliation proves that they were not carried out in furtherance of a policy to target civilians.³⁸ While the evidence discussed by the Majority does show that retaliation was a motive to attack, this evidence does not contradict the

³² D1350, transcript of interview of Witness 632, at 0415.

³³ D1384, transcript of interview of Witness 587, at 1412.

³⁴ D1324, transcript of interview of Witness 559, at 1769.

³⁵ D1324, transcript of interview of Witness 559, at 1771.

³⁶ P668, transcript of interview of Witness 564, at 1166-1182, 1198; P669, transcript of interview of Witness 564, at 1248-1250.

³⁷ P762, Summary of the statement of Witness 677, at 0056. *See* also P706, transcript of interview of Witness 562, at 1301.

³⁸ Decision, para. 254.

view that the order was to attack civilians. The evidence speaks of revenge³⁹ or punitive action.⁴⁰ However, the object of such revenge or punishment, according to this evidence, was the civilian population. Furthermore, some evidence refers to both the order to create a humanitarian catastrophe and punitive action at the same time,⁴¹ which in my view lends further support to the view that one object does not negate the other.

18. In view of the foregoing considerations, I am of the view that there is sufficient evidence to establish substantial grounds to believe that an order to create a humanitarian catastrophe was issued by Sylvestre Mudacumura at the time operation Umoja Wetu was about to commence or had just commenced. The humanitarian catastrophe envisaged in the order included attacks against the civilian population primarily aimed at displacement of the population. While the actual text of the order may have envisaged no acts of violence of the kind alleged by the Prosecution, there are substantial grounds to believe that such acts were part of the policy of the FDLR. The evidence establishes substantial grounds to believe that the FDLR sought to punish the civilian population for its perceived collaboration with the FARDC and support to the Umoja Wetu operation, as well as to regain military positions lost to the FARDC. The order was also aimed at exerting pressure on the Government of the DRC, the Government of Rwanda and the international community, who were all expected to react to the acts of violence against the civilian population.

19. As indicated earlier, based on the above-mentioned considerations, with which I take issue, the Majority found that the existence of an organisational policy was not established to the required threshold.⁴² I recall that article 7(2)(a) of the Statute imposes the requirement that the attack against a civilian population be committed ‘pursuant to or in furtherance of a State or organizational policy.’ In *Katanga and Ngudjolo Chui*, Pre-Trial

³⁹ P357, Alston report, at 0366-0367; P669, transcript of interview of Witness 564, at 1242-1243.

⁴⁰ D1325, transcript of interview of Witness 559, at 1784-1798; P282, Human Rights Watch report “You Will Be Punished”, at 0298-0299.

⁴¹ For example, Witness 564 spoke about an order to create a “chaotic situation” (P669, transcript of interview of Witness 564, at 1246-1247, 1253, 1259), as well as of revenge on the local population (P669, transcript of interview of Witness 564, at 1242-1243). See also P282, Human Rights Watch report “You Will Be Punished”, at 0298-0299, and P357, Alston report, at 0366-0367, referring to both objectives.

⁴² Decision, para. 263.

Chamber I stated, *inter alia*, that such a policy may be made ‘either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be explicitly defined by the organisational group.’⁴³

20. For the reasons set out above and in the light of my conclusion regarding the order to create a humanitarian catastrophe, I am of the view that the evidence is sufficient to establish, to the required threshold, that the above-mentioned order to create a humanitarian catastrophe reflects the FDLR’s policy to target civilians. The conclusions of the Chamber regarding the commission of war crimes by this organisation demonstrate the FDLR’s capability to commit a widespread or a systematic attack against a civilian population. I would therefore conclude that there are substantial grounds to believe that the FDLR acted pursuant to its “organisational policy”, when committing the attack, to which I will turn in the following part of my Opinion.

ii. Attack against a civilian population

21. Article 7(1) of the Statute requires that acts constituting crimes against humanity are committed as part of a widespread or systematic attack directed against any civilian population. In addition to the policy requirement, which I discussed earlier, such an attack is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7(1) of the Statute against any civilian population.⁴⁴ It is not necessary to prove that the entire civilian population of the area in question was targeted.⁴⁵

⁴³ Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Decision on the confirmation of charges”, 30 September 2008, ICC-01/04-01/07-717, (“Katanga Decision”), para. 396.

⁴⁴ Statute, art. 7(2)(a).

⁴⁵ *Situation in the Republic of Côte D’Ivoire*, Pre-Trial Chamber III, “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire”, 3 October 2011, ICC-02/11-14 (“Côte D’Ivoire Decision”), para. 33; Pre-Trial Chamber II, *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 15 June 2009, ICC-01/05-01/08-424 (“Bemba Decision”), para. 77.

However, the civilian population must have been the primary object of the attack and not just incidental victims.⁴⁶

22. I disagree with the Majority's conclusion that there are not substantial grounds to believe that the crimes established in this case were part of an attack against the civilian population.⁴⁷ I accept that crimes were established only with respect to 5 occasions.⁴⁸ However, there is also other evidence presented by the Prosecution, not discussed in the Chamber's Decision, which shows that the FDLR's military operations forcibly displaced hundreds of thousands of civilians during the course of 2009.⁴⁹ I am also not persuaded by the Majority's reliance on the facts that the attacks established to the required threshold were conducted in a period of six months and that they were carried out in retaliation.⁵⁰ I find these facts to be of little relevance. Further, I wish to recall that the Chamber found that there are substantial grounds to believe that dozens of civilians were murdered in Manje, Mianga and Busurungi. The evidence discussed regarding Busurungi further establishes that civilians were raped and subjected to mutilation and cruel treatment. I consider these acts to be within the ambit of article 7(1) of the Statute. The Chamber also found that the civilian population was attacked by the FDLR, within the meaning of article 8(2)(e)(i) of the Statute, at Manje, Malembe, Mianga and Busurungi.⁵¹ In order to make these findings, the Chamber necessarily found that civilians were targeted and that they were the primary object of these attacks as opposed to incidental victims of them.⁵² I would therefore find that there are substantial grounds to believe that there existed a course of conduct involving the multiple commission of acts referred to in article 7(1) of the Statute, against a civilian population and, consequently, that an attack directed against a civilian population occurred.

⁴⁶ Côte D'Ivoire Decision, para. 33; Bemba Decision, paras 76-77.

⁴⁷ Decision, para. 264.

⁴⁸ Decision, para. 265.

⁴⁹ P282, HRW Report, *You Will Be Punished: Attacks on Civilians in Eastern Congo*, 1 Dec 2009, at 0256, 0322; P75, Final report of the UN Group of Experts on the Democratic Republic of the Congo, at 0125; P371, UNHCR Article of 21 April 2009; P370, UNHCR Article of 22 May 2009; P283, International Crisis Group Report entitled "Congo: A Comprehensive Strategy to Disarm the FDLR", at 0447.

⁵⁰ Decision, para. 265.

⁵¹ For analysis of the evidence concerning these attacks, see paras 137-151, 184-191, 200-203, 214-219 of the Decision.

⁵² See Elements of crimes, art. 8(2)(e)(i), para. 2.

iii. Whether the attack was widespread or systematic

23. Having concluded that there is not sufficient evidence to establish substantial grounds to believe that the crimes were part of an attack against the civilian population and that these crimes were committed pursuant to an organizational policy, the Majority did not analyse the other contextual elements of crimes against humanity. In view of my conclusions made above, I shall analyse those other elements. An act under article 7(1) of the Statute constitutes a crime against humanity when committed as part of a widespread *or* systematic attack directed against a civilian population. The term is disjunctive, and it is therefore only necessary for an attack to be *either* widespread *or* systematic in order for this particular contextual element to be satisfied.⁵³

24. I will start with the requirement that the attack be systematic. This requirement refers to the “organised nature of the acts of violence and the improbability of their random occurrence”.⁵⁴ The systematic nature of an attack can “often be expressed through patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis.”⁵⁵ Other factors that may be of relevance to the assessment of whether an attack was systematic are the involvement of substantial public or private resources⁵⁶ and the implication of high-level political and/or military authorities.⁵⁷

25. Some of the findings of the Chamber are indicative of the existence of a ‘systematic’ attack on a civilian population. The Chamber has found that the civilian population was

⁵³ Bemba Decision, para. 82. See also, ICTR, Trial Chamber, *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Judgement, 6 December 1999, Case No. ICTR-96-3-T, paras 67- 69.

⁵⁴ Côte D’Ivoire Decision, para. 54, citing to, *inter alia*, Pre-Trial Chamber II, Public Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19 (“Kenya Decision”), para. 96; ICTY, Trial Chamber, *Prosecutor v. Duško Tadić*, Judgement, 7 May 1997, Case No. IT-94-1-T, para. 648.

⁵⁵ Côte D’Ivoire Decision, para. 54, citing to, *inter alia*, Kenya Decision, para. 96; ICTY, Appeals Chamber, *Prosecutor v. Dario Kordić and Mario Čerkez*, Appeal Judgement, 17 December 2004, Case No. IT-95-14/2-A, para. 94.

⁵⁶ Kenya Decision, para. 96, citing to ICTR, Trial Chamber, *Prosecutor v. Jean-Paul Akayesu*, Judgement, 2 September 1998, Case No. ICTR-96-4-T, para. 580.

⁵⁷ ICTY, Trial Chamber, *Prosecutor v. Tihomir Blaškić*, Judgement, 3 March 2000, Case No. IT-95-14-T, para. 203.

attacked by the FDLR, within the meaning of article 8(2)(e)(i) of the Statute, at Manje, Malembe, Mianga and Busurungi. I believe that these acts evince a discernible pattern of crimes and were of an organised and systematic nature by virtue of their regular and organised occurrence, the deployment of significant military resources and the involvement of senior FDLR military figures in carrying out attacks.⁵⁸ Moreover, I consider these incidents to be a non-accidental repetition of similar criminal conduct on a regular basis. As discussed earlier, I consider there to be substantial grounds to believe that there was an organisational policy to commit an attack against the civilian population. The presence of such a policy further corroborates my view that the subsequent attacks by the FDLR were systematic in nature. Taking the above into account, I therefore consider there to be substantial grounds to believe that there was a 'systematic' attack on the civilian population in the aforementioned locations within the meaning of article 7(1) of the Statute. As 'widespread or systematic' appears in the disjunctive, it is unnecessary to determine if the attack was widespread.

iv. Conclusion

26. Based on the foregoing, I respectfully dissent with the Majority by concluding that the contextual elements of crimes against humanity have been established to the required threshold. In particular, I believe that the evidence establishes substantial grounds to believe that there was an attack on the civilian population pursuant to an organisational policy and that this attack was systematic in nature.

(b) Crimes against humanity charged by the Prosecutor

27. I accept the Majority's evidentiary conclusions regarding the underlying criminal acts committed by the FDLR, but my disagreement as to the existence of the contextual elements of crimes against humanity leads me to conclude that the Chamber's previous findings establish some of the crimes against humanity charged.

⁵⁸ See paras 137-151, 184-191, 200-203, 214-219 of the Decision for analysis of these attacks.

i. Murder and rape

28. I note that: (i) the Prosecutor alleges the same underlying acts to prove the crime against humanity of murder and the war crime of murder⁵⁹ and (ii) the Chamber has found some of these acts to be proven to the required threshold.⁶⁰ The Prosecutor proceeded in the same fashion with respect to rape,⁶¹ and some of the rapes alleged are also found above to be proven as war crimes to the required threshold.⁶² I note that the only differences between murder as a war crime (Count 3) and murder as a crime against humanity (Count 2) in the Elements of Crimes are the contextual elements and the narrower definition of a victim at article 8(1)(c); the acts constituting murder are the same for each.⁶³ The underlying acts constituting rape are also identical across articles 7(1)(g) and 8(2)(e)(vi) of the Elements of Crimes except for differences in the contextual elements.⁶⁴ Therefore, in view of my conclusion that the contextual elements of crimes against humanity have been established to the required threshold, I would find that the factual findings of the Chamber regarding murder and rape as war crimes (Counts 3 and 8) also establish murder and rape as crimes against humanity (Counts 2 and 7).

ii. Torture and other inhumane acts

29. The underlying torture allegations analysed by the Chamber above are the same for both the war crime of torture and the crime against humanity of torture.⁶⁵ I note that the

⁵⁹ For murder at Mianga on 12 April 2009, Busurungi in March 2009, Busurungi on 9-10 May 2009 and Manje on 20-21 July 2009, *see* DCC, pp. 37-38 (all listed as crimes against humanity in Count 2 and war crimes in Count 3). Whenever the list of evidence refers to a given fact supporting murder, both the war crime and crime against humanity counts are always listed together as corresponding to this fact.

⁶⁰ Decision, paras 133, 151, 191, 219.

⁶¹ For rape at Busurungi on 9-10 May 2009, *see* DCC, p. 40 (listed as crime against humanity in Count 7 and as a war crime in Count 8). Whenever the list of evidence refers to a given fact supporting rape, both the war crime and crime against humanity counts are always listed together as corresponding to this fact.

⁶² Decision, para. 164.

⁶³ *Compare* Elements of Crimes, art. 8(2)(c)(i)-1 *with* *ibid.*, art. 7(1)(a).

⁶⁴ *Compare* Elements of Crimes, art. 8(2)(e)(vi)-1 *with* *ibid.*, art. 7(1)(g).

⁶⁵ *See* DCC, p. 41 (identical crime bases listed as crimes against humanity in Count 9 and war crimes in Count 10). Whenever the list of evidence refers to a given fact supporting torture, both the war crime and crime against humanity counts are always listed together as corresponding to this fact with a single exception related to an incident not analysed by the Chamber above because it was not properly plead. *See* LoE, p. 141 (related to incident involving witnesses 673 and 674 where only torture as a crime against humanity is listed); Decision, para. 85 (declining to analyse this incident).

elements of torture as a crime against humanity and torture as a war crime are significantly different in the Elements of Crimes. In particular, torture as a war crime requires that a specific purpose be proven (“specific purpose requirement”), whereas torture as a crime against humanity does not contain this requirement.⁶⁶ However, torture as a crime against humanity includes a requirement that “[s]uch person or persons were in the custody or under the control of the perpetrator”, something that is not required for torture as a war crime.⁶⁷

30. This difference necessitates revisiting the torture conclusions made by the Chamber. The April 2009 Busurungi, September 2009 Malembe, and April 2009 Mianga torture charges, however, did not consist of sufficient evidence to justify analysing the elements of the crime.⁶⁸ I agree with these conclusions. The Chamber also found that there are not substantial grounds to believe that torture as a war crime was committed at Busurungi in May 2009, but for this crime base the Chamber found that, while Witness 694’s account [REDACTED] substantiated a finding that cruelty was inflicted, the Prosecutor had not proven, to the required threshold, that this particular conduct was perpetrated with the purpose of obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.⁶⁹ As has just been indicated, there is no specific purpose requirement under article 7(1)(f) of the Statute. However, both the Prosecutor’s allegations and the evidence presented indicate that Witness 694 [REDACTED] was in the course of fleeing Busurungi when [REDACTED] confronted and attacked by FDLR soldiers.⁷⁰ I do not consider the evidence to show that Witness 694 [REDACTED] was in the “custody or under the control of” the FDLR as required by article 7(1)(f) of the Statute. I would therefore conclude that the evidence does not establish, to the required threshold, that torture as a crime against humanity was committed under article 7(1)(f) of the Statute (Count 9).

⁶⁶ Compare Elements of Crimes, 8(2)(c)(i)-4, para. 2 with *ibid.*, art. 7(1)(f) n. 14.

⁶⁷ Compare Elements of Crimes, art. 7(1)(f), para. 2 with *ibid.*, art. 8(2)(c)(i)-4.

⁶⁸ Decision, paras 136, 206, 223.

⁶⁹ Decision, para. 169.

⁷⁰ DCC, paras 70 and 81; P743, Summary statement of Witness 694, at 1168, para. 15.

31. However, the acts observed by Witness 694 are also charged as the crime against humanity of “other inhumane acts” under article 7(1)(k) of the Statute. The acts found above to have been suffered by [REDACTED]⁷¹ are likewise charged under this provision. This crime addresses the infliction of great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act of a character similar to any other act referred to in article 7(1) of the Statute.⁷² There is no requirement that the inhumanely treated person be in the control or custody of the perpetrator for this provision.

32. The account of events at Busurungi and Manje given by Witnesses 694 and [REDACTED], found above to support findings that the war crime of cruel treatment occurred, also support a finding that the crime against humanity of other inhumane acts is proven to the required threshold. I consider that the acts committed against [REDACTED] and Witness 694 [REDACTED] are of a character similar to other acts referred to in article 7(1) of the Statute and, as the Chamber already found above, that these acts inflicted severe suffering.⁷³ Given my analysis of the contextual elements above, I would find that there are substantial grounds to believe that the crime against humanity of other inhumane acts occurred at Busurungi and Manje (Count 5).

iii. Persecution

33. I will now turn to the issue of whether persecution under article 7(1)(h) of the Statute has been established to the required degree.

34. The Elements of Crimes define the crime of persecution as severely depriving, contrary to international law, one or more persons of fundamental rights.⁷⁴ The perpetrator must have targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.⁷⁵ Such targeting must have been based on political, racial, national, ethnic, cultural, religious, gender (as defined in article 7, paragraph 3, of the Statute) or other grounds that are universally recognized as

⁷¹ Decision, para. 192.

⁷² Elements of Crimes, art. 7(1)(k), paras 1-2.

⁷³ See Elements of Crimes, art. 8(2)(c)(i)-3, para. 1.

⁷⁴ Elements of Crimes, Article 7(1)(h), para. 1.

⁷⁵ *Ibid.*, para. 2.

impermissible under international law.⁷⁶ Furthermore, the impugned conduct must have been committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.⁷⁷

35. The Prosecution asserts that “[i]n perpetrating the crimes described above, FDLR troops specifically targeted members of the civilian population of the Kivu provinces perceived as having called for, collaborated with or supported the FARDC’s and/or the RDF’s efforts to defeat the FDLR. These civilians were – whether individually or collectively as residents of a given locality – considered as enemies by the FDLR”.⁷⁸

36. It is evident that the Prosecution defines the targeted group as being *political* in nature. Upon analysing the evidence and reflecting upon the particular context and nature of the conflict in the Kivu region in 2009, it is my opinion that the alleged targeted group in the instant case lacks the required specificity, ideological coherence and necessary identifiable characteristics in order to fall within one of the protected groups as listed under article 7, be it political or otherwise.

37. The FARDC was deployed within its own sovereign territory and was engaged in military operations designed to ‘neutralize’ and militarily defeat the FDLR, at times in cooperation with MONUC and the Rwandan Defence Forces (RDF).⁷⁹ Part of the FDLR’s tactics involved attacking FARDC positions and Congolese civilians whom they perceived to be directly or indirectly assisting the FARDC in its operations. While the FDLR’s attacks on civilians were intended to serve some political purposes, the main political goal of the group was to force the Governments of the DRC and Rwanda to negotiate and the civilians attacked were not targeted because of their ideological opposition to this goal.⁸⁰ In this context, and noting the purpose of article 7(1)(h) of the Statute, it is my considered view that the civilian population of the Kivu provinces cannot reasonably be conceived as being an identifiable ‘political’ group with a coherent set of ideological beliefs. Nor is there

⁷⁶ *Ibid*, para. 3.

⁷⁷ *Ibid*, para. 4.

⁷⁸ DCC, para, 96. *See also* ICC-01/04-01/10-T-7-Red-ENG, p. 7, lines 7-13.

⁷⁹ Decision, para. 95.

⁸⁰ *See supra*, paras 7-18.

evidence to support the view that the FDLR targeted this population because of the civilians' ideological beliefs. Consequently, it is my considered view that there are not substantial grounds to believe that the crime of persecution has occurred within the meaning of article 7(1)(h) of the Statute.

iv. Conclusion

38. For the reasons outlined above, I would confirm the crimes of murder (Count 2), rape (Count 7) and other inhumane acts (Count 5) as crimes against humanity. However, I would not confirm the crimes of torture (Count 9) and persecution (Count 13) as crimes against humanity.

2. Individual criminal responsibility of Callixte Mbarushimana

39. Relying on its conclusions with regard to the FDLR's organisational policy to attack civilians, the Majority found that there are not substantial grounds to believe that the FDLR constituted a "group of persons acting with a common purpose", in particular in light of the requirement that the common purpose pursued by the group must have at least an element of criminality.⁸¹ In view of the reliance of the Majority on the finding regarding the lack of organisational policy and my disagreement with that finding, I do not agree with the very foundation of the Majority's conclusion with respect to the "group acting with a common purpose".

(a) Common purpose

40. As discussed earlier in my Opinion, I am of the view that the evidence establishes, to the required threshold, that Sylvestre Mudacumura issued an order to create a humanitarian catastrophe.⁸² In the Prosecution's submission, the order was only part of the

⁸¹ Decision, para. 291.

⁸² See *supra* para. 18.

alleged common purpose. According to the Prosecution, the common plan consisted of two elements:

- i. To direct attacks against the civilian population of the eastern DRC in order to create a “humanitarian catastrophe”.⁸³ The objective of this policy was to make the cost in blood and human misery so high that public and international pressure would force the coalition forces to abandon their military campaign in favour of a negotiated political solution on terms favourable to the FDLR.⁸⁴ This part of the plan was implemented by the FDLR military wing under the command of General Mudacumura.⁸⁵
- ii. To simultaneously conduct an international media campaign.⁸⁶

41. The Prosecution alleges that the aim of the media campaign was twofold:

- i. Firstly, to conceal the FDLR’s responsibility for the attacks by either denying them or casting the blame onto the FARDC/RDF coalition or other armed groups; and
- ii. Secondly, to persuade the governments of the DRC and Rwanda and the international community that the FDLR could not be defeated militarily and that the cost to the civilian population of the military campaign against the FDLR would be intolerable.⁸⁷

42. The goal of the Common Purpose Group, the Prosecution submits, was to create the humanitarian catastrophe while at the same time distancing themselves from it. Mr. Mbarushimana used his press releases to pursue this goal by denying responsibility for

⁸³ DCC, para. 110.

⁸⁴ ICC-01/04-01/10-T-6-Red2-ENG, p. 32, lines 10-15.

⁸⁵ ICC-01/04-01/10-T-6-Red2-ENG, p. 32, lines 15-17 and p. 58, lines 10-13.

⁸⁶ DCC, para. 110.

⁸⁷ DCC, para. 110. *See also* ICC-01/04-01/10-T-6-Red2-ENG, p. 33, lines 17-22.

the crimes and at the same time by portraying the FDLR as a necessary part of the solution to the misery in Eastern Congo.⁸⁸

43. As discussed earlier, I am of the view that the evidence establishes, to the required threshold, substantial grounds to believe that an order to create a humanitarian catastrophe was issued by Sylvestre Mudacumura and envisaged attacks against the civilian population primarily aimed at displacement of the population. I also concluded that the evidence is sufficient to establish, to the required threshold, that the organisational policy of the FDLR included the commission of acts of violence, such as murder, cruel treatment, mutilation, rape, destruction of property and pillaging. I am of the view that these acts were part of the common purpose. For this reason, I respectfully disagree with the Majority that the common purpose had no element of criminality.⁸⁹

44. I also disagree with the Majority's reliance on the absence of reference to attacking civilians in the documents containing conclusions of a meeting of the FDLR Steering Committee held from 16 to 19 January 2009. The Majority seems to consider the lack of such reference as indicative of the lack of the FDLR's strategy to attack civilians.⁹⁰ I am not at all persuaded that the absence of such reference is of any significance. On the contrary, I find it quite natural that an organisation which, like the FDLR, seeks to present itself as law-abiding, would not mention in a public document setting out its objectives that one of its goals is to attack civilians, kill them and burn their houses.

45. As regards the alleged media campaign, evidence has been adduced to demonstrate that denials of involvement in crimes were part of the strategy of the FDLR. Among the conclusions of the above-mentioned meeting of the FDLR Steering Committee, recommendations, signed by Murwanashyaka and the Suspect, were made to improve the image of the organisation through the use of the media and to make immediate reactions to allegations against the Organisation in order to protect that image.⁹¹ There is also

⁸⁸ ICC-01/04-01/10-T-7-Red-ENG, p. 35, lines 11-15.

⁸⁹ Decision, para. 291.

⁹⁰ Decision, para. 302.

⁹¹ P1025, FDLR Steering Committee minutes of 19 January 2009, paras 1, 9.

evidence of a discussion of the FDLR leaders based in Europe,⁹² following which recommendations were made for the “media front” of the FDLR to, *inter alia*, “demonise the enemy ..., to accuse him of everything; [and to] react quickly if not immediately to all that is said about our organisation”, as well as to insist on the necessity of a peaceful solution.⁹³ As has been discussed in the Decision and will be discussed in more detail later in this Opinion,⁹⁴ there is evidence that a campaign of press releases consistent with these recommendations was carried out, which further confirms the existence of a plan. Further, Witness 559 refers in his evidence to the need to “advocate” for what the FDLR was fighting for and to convince the international community that negotiations with the FDLR were necessary.⁹⁵

46. In view of the evidence discussed above, I am of the view that there are substantial grounds to believe that the FDLR launched a media campaign aimed at disavowing suspicions of the FDLR’s involvement in crimes and exerting pressure on the international community and the Governments of the DRC and Rwanda so that negotiations with the FDLR could be initiated. The evidence also establishes substantial grounds to believe that said media campaign served, *inter alia*, the purpose of presenting the FDLR as a law-abiding organisation committed to peace and the principles of humanitarian law. The creation and promotion of such an image of the organisation was a means to persuade the international community that the FDLR was a legitimate partner for negotiations at a high official level. As discussed earlier in this Opinion, the FDLR sought to negotiate the conditions of its return to Rwanda and participation in the Rwandan Government.

47. On the basis of the evidence and in view of the foregoing considerations, I would conclude that there are substantial grounds to believe that a group of persons acted with a common purpose of attacking civilians, in order to create a humanitarian catastrophe and

⁹² I note that the only source of information as to the origins of this document is the Prosecution’s assertion made at the hearing, ICC-01/04-01/10-T-7-Red-ENG, p. 46, lines 15-16. All the evidence establishes is that this document was found in Mr Mbarushimana’s house when he was arrested and its date can be approximated to the time of the Steering Committee Meeting discussions that occurred before Umoja Wetu. See P598 (intercepted communication discussing headings of this document).

⁹³ P1069, « Evaluation des recommandations et décisions de la dernière Rn CD (Par domaine) », at 0962.

⁹⁴ Decision, paras 305-306. See *infra*, paras 68-69.

⁹⁵ D1321, transcript of interview of Witness 559, at 1651, 1666; D1322, transcript of interview of Witness 559, at 1674.

to exert pressure on the Government of the DRC, the Government of Rwanda and the international community, so that they would agree to engage in negotiations with respect to the political demands of the FDLR. There are also substantial grounds to believe that the common plan included a media campaign, which was a means to persuade the international community that the FDLR was a legitimate partner for negotiations at a high official level and to present the FDLR's pleas for negotiations. The evidence establishes substantial grounds to believe that there was an element of criminality to this common purpose.

(b) Group of persons

48. I will now turn to the analysis of the Prosecution's allegations with respect to the composition of the group of persons acting with a common purpose.

49. In the DCC, the Prosecution alleges that Ignace Murwanashyaka, Sylvestre Mudacumura and Callixte Mbarushimana, together with other members of the FDLR membership (the "Common Purpose Group") constituted a group of persons acting with a common purpose, within the meaning of article 25(3)(d) of the Statute.⁹⁶ At the Oral hearing, the Prosecution further named FDLR First Vice-President Straton Musoni, Second Vice-President Gaston Iyamuremye⁹⁷ and the External Relations Commissioner, Djuma Ngilishuti⁹⁸ as also being part of the Common Purpose Group. The Prosecution alleges that "this inner core of leaders formed the Common Purpose Group that adopted and executed a common plan involving the commission of crimes for which the suspect, Mr. Mbarushimana, now stands accused."⁹⁹

50. I note that the Prosecution identifies each of the alleged members of the "group of persons acting with a common purpose" by their names and respective positions in the hierarchy of the FDLR organisation.

⁹⁶ DCC, para. 108.

⁹⁷ ICC-01/04-01/10-T-6-Red2-ENG, p. 32, lines 1-8.

⁹⁸ ICC-01/04-01/10-T-7-Red-ENG, p. 45, lines 17-24.

⁹⁹ ICC-01/04-01/10-T-6-Red2-ENG, p. 32, lines 1-8.

51. On the basis of the evidence provided by the Prosecution, I find that there are substantial grounds to believe that until November 2009 (i) Ignace Murwanashyaka was the President of the FDLR;¹⁰⁰ (ii) Straton Musoni was the First Vice-President of the FDLR;¹⁰¹ (iii) Gaston Iyamuremye, alias General Rumuli or Victor Byiringiro, was the Second Vice-President of the FDLR, based in the DRC;¹⁰² (iv) Callixte Mbarushimana was the Executive Secretary of the FDLR;¹⁰³ and (v) General Sylvestre Mudacumura, alias Bernard Mupenzi, was the leader of the FDLR military, the FOCA commander, based in the DRC.¹⁰⁴ There is also evidence suggesting that Djuma Ngilishuti was the External Relations Commissioner of the FDLR.¹⁰⁵

¹⁰⁰ P1025, FDLR Steering Committee minutes of 19 January 2009; P058, Document seized from Mbarushimana's residence, entitled "FDLR Memorandum addressed to the President of the Security Council of the United Nations on the war waged by the RPA/FARDC coalition in the Democratic Republic of the Congo (DRC)", dated 18 February 2009 and signed off by "Dr Ignace Murwanashyaka, President of the FDLR"; D1270, statement of Witness 6, at 0943, 0945; D1271, statement of Witness 8, at 0986, 0993; P721, transcript of interview of Witness 542, at 2001-2002; P643, transcript of interview of Witness 552, at 0224-0225, and P644, transcript of interview of Witness 552, at 0276; D1318, transcript of interview of Witness 559, at 1511, and P577, transcript of interview of Witness 559, at 0155; P702, transcript of interview of Witness 562, at 1061; P664, transcript of interview of Witness 564, at 0928; P860, summary of the statement of Witness 587, at 1419; D1346, transcript of interview of Witness 632, at 0243; P834, transcript of interview of Witness 632, at 0417; P36, Report of the UN Group of Experts S/2009/53 (18 May 2009), at 0697; P368, List of individuals and entities subject to the measures imposed by the United Nations Security Council found in Mbarushimana's possession, at 0611.

¹⁰¹ D1270, statement of Witness 6, at 0949; P1271, statement of Witness 8, at 0986, 0993; P644, transcript of interview of Witness 552, at 0277; P860, summary of the statement of Witness 587, at 1419; D1346, transcript of interview of Witness 632, at 0243, 0245; P834, transcript of interview of Witness 632, at 0417; D1389, transcript of interview of Witness 672, at 1718; P368, List of individuals and entities subject to the measures imposed by the United Nations Security Council found in Mbarushimana's possession, at 0611.

¹⁰² D1284, statement of Witness 3, at 0007, 0022; D1285, statement of Witness 4, at 0042; D1270, statement of Witness 6, at 0949; P1271, statement of Witness 8, at 0986, 0993; P850, transcript of interview of Witness 527, at 1122; P577, transcript of interview of Witness 559, at 0157, and D1318, transcript of interview of Witness 559, at 1511; P630, transcript of interview of Witness 561, at 1235-1236, P634, transcript of interview of Witness 561, at 1510, P635, transcript of interview of Witness 561, at 1543; P702, transcript of interview of Witness 562, at 1039, 1041-1042, 1067; P666, transcript of interview of Witness 564, at 1094-1095; P860, summary of the statement of Witness 587, at 1419, D1383, transcript of interview of Witness 587, at 1389; P834, transcript of interview of Witness 632, at 0417, D1346, transcript of interview of Witness 632, at 0243-0244, 0269-0270; D1389, transcript of interview of Witness 672, at 1717; P762, summary of the statement of Witness 677, at 0068-0069.

¹⁰³ Decision, para. 295.

¹⁰⁴ D1270, statement of Witness 6, at 0943, 0945; P1271, statement of Witness 8, at 0993; P1269, statement of Witness 9, at 0929; P721, transcript of interview of Witness 542, at 2001-2002; D1328, transcript of interview of Witness 542, at 2048; P643, transcript of interview of Witness 552, at 0260, and P644, transcript of interview of Witness 552, at 0276-0277, and P650, transcript of interview of Witness 552, at 0432; D1318, transcript of interview of Witness 559, at 1535, and P577, transcript of interview of Witness 559 at 0155, and D1317, transcript of interview of Witness 559, at 1504; P702, transcript of interview of Witness 562, at 1061; P860, summary of the statement of Witness 587, at 1415, 1420; D1389, transcript of interview of Witness 672, at

52. As indicated earlier, at the FDLR Steering Committee meeting held from 16 to 19 January 2009, decisions were made with respect to the media campaign.¹⁰⁶ I note that the document containing conclusions of the meeting was signed by Ignace Murwanashyaka and Callixte Mbarushimana.¹⁰⁷ In addition, there is evidence of an *Haut Commandement* meeting held from 12 to 15 January 2009, attended by, *inter alia*, Gaston Iyamuremye and Sylvestre Mudacumura,¹⁰⁸ and at which the FDLR's response to the DRC's planned joint operations was discussed.¹⁰⁹

53. Further, I take note of evidence that shows that, between 2 and 18 January 2009, Ignace Murwanashyaka, Gaston Iyamuremye, Sylvestre Mudacumura, Callixte Mbarushimana and Djuma Ngilishuti were in contact discussing or/and making suggestions to the agenda of the Steering Committee meeting held from 16 to 19 January 2009,¹¹⁰ which later became the Steering Committee meeting outcome document.¹¹¹ I thus

1727; P762, summary of the statement of Witness 677, at 0051; P666, transcript of interview of Witness 564, at 1069; P140, Intercepted Communication of 15 December 2008, at 0236; P368, List of individuals and entities subject to the measures imposed by the United Nations Security Council found in Mbarushimana's possession, at 0609; *See also* P444, Translated Intercepted Communication of 14 January 2009, at 0197.

¹⁰⁵ P7, UN Group of Experts Report S/2008/34 (13 February 2008), at 0256; P997 in combination with P998 (Mbarushimana's handwritten notes seized from his residence, 27 July 2009, wherein it appears that "SE+ComRe", standing for Secrétaire Exécutif and Commissaire Relations Extérieures respectively, corresponds to "CMB" (that is, Callixte Mbarushimana) and "DJ" (that is, Djuma -Ngilishuti-); *See also* P29, Rakiya Omaar Report "The Leadership of Rwandan Armed Groups Abroad with a Focus on the FDLR and RUD/URUNANA", at 1081, wherein the Commissioner of Foreign Affairs appears to be a person called "Ngirinshuti Ntambara".

¹⁰⁶ *See supra* para. 45.

¹⁰⁷ P1025, FDLR Steering Committee minutes of 19 January 2009.

¹⁰⁸ P441, Translated Intercepted Communication between Mudacumura and Murwanashyaka, 12 January 2009, at 0179; P444, Translated Intercepted Communication between Mudacumura and Murwanashyaka, 15 January 2009, at 0197; D1380, transcript of interview of Witness 587, at 1330-1331; *See also* D1318, transcript of interview of Witness 559, at 1542.

¹⁰⁹ D1380, transcript of interview of Witness 587, at 1331.

¹¹⁰ P438, Translated Intercepted Communication between Mudacumura and Murwanashyaka, 2 January 2009, at 0173; P439 and P440, Translated Intercepted Communications between Mudacumura and Myrwanashyaka, 3 January 2011, at 0175 and 0177 respectively – *see also* P812, Document seized from Callixte Mbarushimana's residence which contains the three text messages which Mudacumura sent to Murwanashyaka under the heading "MUPENZI", as well seven text messages under the heading "BYIRINGIRO", that is, Iyamuremye; P786 at 2230 and P787 at 2232, Translated Copies of emails, dated 7 and 11 January 2009 respectively, seized from Callixte Mbarushimana's residence sent from Murwanashyaka to, *among others*, Mbarushimana and Ngilishuti (read in combination with P910, P795 at 2276 and P894, copies of emails seized from Mbarushimana's residence, wherein the name Djuma Ngilishuti appears [REDACTED]), at 2230; P675, Translated Intercepted Communication between Mudacumura and Murwanashyaka, 16 January 2009 (mention to Iyamuremye is also made); P624 and P675, Translated Intercepted Communication between Mudacumura and Murwanashyaka, 16 January 2009, at 0799-0800 and

find substantial grounds to believe that Ignace Murwanashyaka, Gaston Iyamuremye, Sylvestre Mudacumura, Callixte Mbarushimana and Djuma Ngilishuti were cooperating closely prior to and during the Steering Committee meeting, and that the conclusions reached and the objectives set in that meeting were mutually agreed upon.

54. In light of the foregoing and in view of evidence of the structure and activities of the FDLR/FOCA throughout 2009, as well as the evidence of a common purpose, discussed earlier,¹¹² I am satisfied that there are substantial grounds to believe that Ignace Murwanashyaka, Callixte Mbarushimana,¹¹³ Gaston Iyamuremye, Sylvestre Mudacumura and Djuma Ngilishuti, all members of the Executive and Steering Committee of the FDLR,¹¹⁴ formed the “group of persons” within the meaning of article 25(3)(d) of the Statute and that these persons are sufficiently identified.

55. At this juncture, I observe that it is not alleged in the present case that the criminal conduct underlying the alleged crimes was physically carried out by any of the individuals identified as belonging to the group of persons acting with a common purpose. As manifested in the Prosecution’s submissions,¹¹⁵ the physical perpetrators of the alleged crimes are the FDLR rank-and-file soldiers who belong to the FDLR military forces, and who have not been identified as members of the “group of persons acting with

0067 respectively; P598, Translated Intercepted Communication between Iyamuremye and Murwanashyaka, 16 January 2009, at 0130-0131; P769, Translated Intercepted Communication between Mudacumura and Murwanashyaka, at 0225; P165, P166, P167, P168, P169, P170, P170, P171, P172, P173 and P174, Intercepted Communications between Iyamuremye and Murwanashyaka, 17 January 2009. *See also* P1231, Electronic Document, found in Mbarushimana’s possession, entitled “EST RDC PAT 2-SMS.doc” and dated 17 January 2007”, which contains the text messages which Iyamuremye sent to Murwanashyaka, and P1232, Electronic Document found in Mbarushimana’s possession, entitled “Point de vue des membres EST RDC.doc” and dated 17 January 2007, into which Iyamuremye’s text messages are incorporated; P1229, Electronic Document found in Mbarushimana’s possession, entitled “Commentaires OUEST sur texte ESTRDCSMS.doc” and dated 17 January 2009, which contains 5 text messages; P1226, Electronic Document found in Mbarushimana’s possession, entitled “Avis et commentaires EST RDC sur texte from EXT Texte RDC.doc” and dated 17 January 2009; P1230, Electronic Document entitled “Commentaires OUEST.doc and dated 18 January 2010”; P677, Translated Intercepted Communication between Mudacumura, Murwanashyaka and two unidentified speakers, 21 January 2009.

¹¹¹ P1025, FDLR Steering Committee minutes of 19 January 2009.

¹¹² *See supra* para. 47.

¹¹³ This finding with respect to Mr Mbarushimana is further supported by the evidence of his contribution to the crimes, which will be discussed later in this Opinion.

¹¹⁴ *See supra* para. 3 read in combination with P1080, “Manifeste-Programme et Statuts des FDLR, 31 Janvier 2006”, Article 33, 36 and 39, at 1524-1525.

¹¹⁵ In the DCC the Prosecution refers to the alleged perpetrators of the alleged crimes as “the FDLR”, “FDLR troops” or “FDLR soldiers” interchangeably. *See also* DCC, paras 109 and 111.

a common purpose". I will thus examine whether the crimes allegedly committed by FDLR troops can be imputed to the "group of persons acting with a common purpose".¹¹⁶

56. I recall the Chamber's finding that the FDLR is an organisation with a defined leadership and organised hierarchical structure, composed of a political branch, the FDLR, and a military wing, the FOCA ("*Forces Combattantes Abacunguzi*"). The organisational elements of the structure of the FOCA include military ranks, the chain of command and a system of reporting.¹¹⁷ I also note the evidence of coordination and interactions between the FDLR and FOCA.¹¹⁸

57. On the basis of the evidence provided by the Prosecution, I consider that Ignace Murwanashyaka, in his capacity as President of the FDLR, was the supreme leader of the FDLR military force, that is, the *de jure* Commander-in-Chief, while General Sylvestre Mudacumura was the FOCA Commander who had the authority to give orders to those directly below him, in the chain of command, who would in turn transmit them down the chain to lower-ranked military personnel expected to execute them.¹¹⁹ The evidence also

¹¹⁶ Katanga Decision, paras 492-493. See also ICTY, Appeals Chamber, *Prosecutor v. Radoslav Brđanin*, Judgement, 3 April 2007, Case No. IT-99-36-A, paras 410, 413, 430; ICTY, Appeals Chamber, *Prosecutor v. Milan Martić*, Judgement, 8 October 2008, Case No. IT-95-11-A, paras 168, 169; ICTY, Appeals Chamber, *Prosecutor v. Momčilo Krajišnik*, Judgement, 17 March 2009, Case No. IT-00-39-A, paras 225-226.

¹¹⁷ Decision, paras 104-105.

¹¹⁸ See, for example, P1080, "Manifeste-Programme et Statuts des FDLR, 31 Janvier 2006", Articles 5, 37, 39, 45, at 1515, 1525 and 1527 respectively; P1079, "Règlement d'Ordre Intérieur des FDLR, 31 Janvier 2006", Article 31, at 1498; D1271, statement of Witness 8, at 0991-0992; P1269, statement of Witness 9, at 0931; P721, transcript of interview of Witness 542, at 2001-2002; D1293, transcript of interview of Witness 544, at 1599; P577, transcript of interview of Witness 559, at 0155; D1346, transcript of interview of Witness 632, at 0240-0241; D1272, transcript of interview of Witness 672, at 0792; P635, transcript of interview of Witness 561, at 1540-1542.

¹¹⁹ P1079, Article 24 of the "Règlement d'Ordre Intérieur des FDLR, 31 Janvier 2006", at 1496; D1284, statement of Witness 3, at 0018-0020; D1285, statement of Witness 4, at 0036-0038; D1270, statement of Witness 6, at 0943, 0945; P1268, statement of Witness 7, at 0892; D1271, statement of Witness 8, at 0991-0992; P1269, statement of Witness 9, at 0931-0932; D1307, transcript of interview of Witness 526, at 0367-0368; D1314, transcript of interview of Witness 528, at 1204-1206; D1361, transcript of interview of Witness 529, at 0735-0737, D1366, transcript of interview of Witness 529, at 0838-0840; D1373, transcript of interview of Witness 530, at 1043-1045, 1074 ; D1328, transcript of interview of Witness 542, at 2048 and 2062, D1338, transcript of interview of Witness 542, at 2306-2307, P721, transcript of interview of Witness 542, at 2001-2002; D1293, transcript of interview of Witness 544, at 1592; P644, transcript of interview of Witness 552, at 0276-0277; D1318, transcript of interview of Witness 559, at 1511, 1533, 1536; P668, transcript of interview of Witness 564, at 1188, P669, transcript of interview of Witness 564, at 1252; P860, summary of the statement of Witness 587, at 1421-1422; D1346, transcript of interview of Witness 632, at 0240-0241; D1272, transcript of interview of Witness 672, at 0792. See also P677, Translated Intercepted Communication Transcript of 21 January 2009, at 0077-0078.

suggests that Sylvestre Mudacumura had the duty to report to Murwanashyaka on FDLR's activities in the field.¹²⁰

58. In view of the foregoing, I am satisfied that there are substantial grounds to believe that the group of persons, identified above, had the authority to exercise control over the FDLR military forces which was at the organisation's disposal and expect that the orders originating from group members Murwanashyaka and Mudacumura would be complied with by FDLR commanders and soldiers under their command.

59. I also take note of evidence related to the group of persons' *mens rea*. I note in this regard that Sylvestre Mudacumura's position as the FOCA Commander, along with the fact that he was based in the DRC throughout 2009, strongly indicates that he had knowledge of the situation in North and South Kivus and FDLR's activities in the field.

60. There is also evidence showing that Ignace Murwanashyaka was receiving information in relation to military activities and developments on the ground through his direct contact and communication with members of the FDLR military leadership in Eastern DRC, including Sylvestre Mudacumura and Gaston Iyamuremye, and other sources.¹²¹ The evidence also shows that Ignace Murwanashyaka was aware of reports of crimes committed against civilians in the Kivu Provinces.¹²² I also refer to my analysis of

¹²⁰ D1382, transcript of interview of Witness 587, at 1364-1365; P1269, statement of Witness 9, at 0932; P577, transcript of interview of Witness 559, at 0160.

¹²¹ P728, Translated copy of email seized from Mbarushimana's residence sent by Murwanashyaka, 15 May 2009, at 1584 (providing information in relation to the Busurungi attack, FDLR's role, casualties); P783, Translated Intercepted Communication between Mbarushimana and Murwanashyaka, 2 February 2009, at 2157 (which contains information provided to Mbarushimana by Levite); P378, Translated Intercepted Communication between Iyamuremye and Murwanashyaka, 16 May 2009, at 0203; P605, Translated Intercepted Communication between Iyamuremye and Murwanashyaka, 17 May 2007, at 0165; P603, Translated Intercepted Communication between Mudacumura and Murwanashyaka, 15 May 2009, at 0157 (information about displacement of people fleeing the battlefield, "we have to continue to give them a rough time", Murwanashyaka's communication with "Commander of Sonoki"); P377, Translated Intercepted Communication, 13 April 2009, at 0201; D1356, transcript of interview of Witness 632, at 0594 (Levite is the liaison or link passing information to Murwanashyaka); P622, Translated Summary prepared by German authorities of Intercepted Communication attributed by the German authorities to Mudacumura and Murwanashyaka on the basis of their voices; D1382, transcript of interview of Witness 587, at 1364 (Mudacumura communicates with Ignace Murwanashyaka and he sends information to Callixte Mbarushimana for press releases); P678, Translated Intercepted Communication between Murwanashyaka and Rugiririza, 25 January 2009, at 0098-0100 (Murwanashyaka has information about the incident in Rutshuru). See also *infra* paras 70-73; P668, transcript of interview of Witness 564, at 1181.

¹²² P927, Copy of email correspondence seized from Mbarushimana's residence, 2 February 2009, which contains a MISNA article and was sent to, among others, Ignace Murwanashyaka; P957, Copy of email

the evidence showing that, at least until his arrest, Ignace Murwanashyaka shared responsibility with the Suspect for the drafting of the FDLR press releases wherein allegations of the FDLR's responsibility for crimes having been committed in the Kivu Provinces were systematically refuted.¹²³

61. At this juncture, I recall the Chamber's finding that from at least 20 January 2009 until at least 31 December 2009, an armed conflict not of an international character took place in the North and South Kivus between the joint DRC and Rwanda government forces and the FDLR.¹²⁴ In addition, I reiterate my previous finding that there was an attack on the civilian population pursuant to an organisational policy and that this attack was systematic in nature.

62. On the basis of the foregoing analysis, I consider that there are substantial grounds to believe that in the relevant period the above-mentioned group of persons was aware of the factual circumstances that established the existence of an armed conflict of a non international character in North and South Kivus; and of the existence of a nexus between their acts related to the commission of the crimes charged and the armed conflict taking place in North and South Kivus. Furthermore, I find that there are substantial grounds to believe that the group of persons was aware that the crimes committed by FDLR troops against the civilian population in Malembe, Mianga and Busurungi were part of a systematic attack against the civilian population, which was conducted pursuant to the organisational policy described above.

63. In light of the foregoing and in view of the evidence of the agreement which the Steering Committee members reached in January 2009,¹²⁵ the existence and content of the common purpose,¹²⁶ and, most importantly, the coordinated and concerted manner in which Murwanashyaka and Mudacumura performed their functions and pursued the

seized from Mbarushimana's residence, 20 January 2009, which contains a REUTERS article; P601, Translated Intercepted Communication between Mudacumura and Murwanashyaka, 17 February 2009, at 0146-0147; P901 and P794 (Translation), Copy of email seized from Mbarushimana's residence, 9 April 2009, which contains a Human Rights Watch article.

¹²³ See *infra* paras 70-73.

¹²⁴ Decision, para. 107.

¹²⁵ See *supra*, para. 45.

¹²⁶ *Supra*, paras 2-20, 45-47.

implementation of the different aspects of the common plan and, in particular, the order to create a humanitarian catastrophe,¹²⁷ I consider that there are substantial grounds to believe that the group of persons intended to implement the common purpose through the FDLR troops and that they were aware and accepted that the implementation of the common purpose would result in the realisation of the objective elements of the crimes committed by the FDLR soldiers.

64. I thus find that there are substantial grounds to believe that the group of persons intended to commit, through the FDLR soldiers under their command, as part of the common purpose, the crimes of attack against a civilian population, murder, rape, destruction of property, pillaging and other inhuman acts. I am thus satisfied that the group of persons committed, within the meaning of article 25(3)(d) of the Statute, through FDLR troops, the crimes detailed above with the requisite intent.

3. Mbarushimana's contribution to the common purpose

65. I consider that the Majority did not present a complete analysis of the Prosecution's allegations and that the analysis the Majority does undertake does not accurately reflect the evidentiary record. Rather, I believe that the Majority's conclusions are largely predicated on marginal considerations and are sometimes made without discussing critical pieces of evidence presented by the Prosecution. I will now discuss the evidence of the Suspect's contribution to the crimes alleged and my disagreement as to how the Majority analyses this element of 25(3)(d) liability.

(a) Press releases aimed at concealment of crimes

i. General characteristics of the press releases

¹²⁷ *Supra*, 2-20, 45-47, 52-53; *infra*, 72-73.

66. The Prosecution contends that the international media campaign was designed in part to conceal the FDLR's responsibility for criminal attacks by either denying them or casting the blame onto other groups.¹²⁸ The Prosecution argues that the "plausible deniability" the Suspect provided through his denials contributed to the commission of further crimes by the FDLR because it made it possible for the persecutory campaign against civilians to continue unabated.¹²⁹ According to the Prosecution, these denials "were necessary to maintain the FDLR's credibility as a political organisation".¹³⁰ At the oral hearings, the Prosecution also, and for the first time, refers to the Suspect as "the linchpin, the man who could transform crimes committed in the Kivus into political leverage for the FDLR in Rwanda."¹³¹

67. The Defence responds to these allegations by arguing that "the Prosecution has no evidence whatsoever to show that the Suspect contributed, in any direct, concrete or intentional way, to the outright criminal common purpose of attacking a civilian population".¹³² The Defence singles out the acquittal of Hans Fritzsche from the Nuremberg International Military Tribunal Judgment ("IMT Judgment") and seems to suggest that it stands for the proposition that a propagandist merely denying crimes cannot be held criminally responsible under international law.¹³³ The Defence also contends that, by alleging that the Suspect contributed to FDLR crimes through press

¹²⁸ DCC, para. 110.

¹²⁹ ICC-01/04-01/10-T-7-Red-ENG, p. 38, lines 3-6.

¹³⁰ DCC, para. 126.

¹³¹ ICC-01/04-01/10-T-6-Red2-ENG, p. 36, lines 8-10.

¹³² ICC-01/04-01/10-450, para. 24.

¹³³ ICC-01/04-01/10-T-8-Red2-ENG, pp. 18-19; ICC-01/04-01/10-450, para. 22. The Defence specifically quotes this passage from the IMT Judgment:

[...] the Tribunal is not prepared to hold that they [i.e. the propagandistic statements] were intended to incite the German people to commit atrocities on conquered peoples, and he cannot be held to have been a participant in the crimes charged. His aim was rather to arouse popular sentiment in support of Hitler and the German war effort

releases, the Prosecution's case is doing nothing more than criminalising free speech protected under international human rights law.¹³⁴

68. I note that the Majority discusses the general content of the Suspect's 2009 press releases.¹³⁵ The timeframe between the media allegations and FDLR response thereto was generally less than a week and was often only one or two days.¹³⁶ On one occasion, the Suspect denied the allegations of a Human Rights Watch report even while admitting that he had yet to read the allegations.¹³⁷

69. Despite calling repeatedly for independent, international investigations into crimes, the Suspect vigorously denied the findings of any United Nations body whenever it accused the FDLR of criminal activity.¹³⁸ There is evidence that the Suspect did both

¹³⁴ ICC-01/04-01/10-450, para. 30; ICC-01/04-01/10-T-8-Red2-ENG, p. 67, lines 15-17. *See also* ICC-01/04-01/10-T-9-ENG, pp. 24, 26.

¹³⁵ Decision, para. 305.

¹³⁶ *See* P281, Human Rights Watch article entitled "DR Congo: Rwandan Rebels Slaughter Over 100 Civilians", P1112, FDLR Press Release of 14 February 2009 (response to Human Rights Watch allegations of 13 February); P912, Media article entitled "Sanctions Committee Concerning Democratic Republic of Congo Adds Four Individuals to Assets Freeze, Travel Ban List", P1041, FDLR Press Release of 5 March 2009 (response to UN imposed sanctions against the FDLR on 3 March); P293, Radio Okapi article entitled "Lubero: les FDLR encore à la charge, 17 villageois tués dont 4 enfants", P1143, FDLR Press Release of 20 April 2009 (denial of FDLR involvement of Luofu and Kasiki attacks reported on 18 April); P23, FDLR Press Release of 14 July 2009 (refuting MONUC allegations of 13 July of FDLR attack on a MONUC base in South Kivu); P945, FDLR Press Release of 5 October 2009 (denial of statements made by commander of Kimia II to international press on 3 and 4 October); P1091, FDLR Press Release of 18 November 2009 (denying allegations and condemning Murwanashyaka/Musoni arrests of 17 November 2009). *But see* P303, Twenty-ninth report of the Secretary-General on the Republic of the Congo, P1090, FDLR Press Release of 20 October 2009 (nearly one month delay in responding to 18 September UN Secretary General Report); P283, International Crisis Group Report entitled "Congo: A Comprehensive Strategy to Disarm the FDLR", P519, FDLR Press Release of 23 July 2009 (nearly two week delay in responding to 9 July 2009 International Crisis Group Report).

¹³⁷ P1247, Radio Interview with Mr Callixte Mbarushimana of 13 February 2009, at 0:27-0:35 ("I have not received this actual report, but whatever they are saying is not true [...]"). The Suspect formally responded to the Human Rights Watch allegations by way of a press release. P1112, FDLR Press Release of 14 February 2009.

¹³⁸ P1041, FDLR Press Release of 5 March 2009 (condemned findings of the UN Sanctions Committee that led to sanctions against the FDLR); P1043, FDLR Press Release of 20 March 2009 (denied allegations made by the UN Office for the Coordination of Humanitarian Affairs against the FDLR); P1048, FDLR Press Release of 23 March 2009 (denied the conclusion of the UN High Commissioner for Human Rights that the FDLR had displaced over 160,000 civilians in the early part of the war); P531, FDLR Press Release of 15 September 2009 (condemned a UN Panel of Experts Report that accused the FDLR of, *inter alia*, committing various abuses against civilians); P1090, FDLR Press Release of 20 October 2009 (described a MONUC report's allegations against the FDLR in a 20 October 2009 Press Release as "defamatory"); P963, FDLR Press Release of 27 November 2009 (denied the findings made against the FDLR in a UN Group of Experts Report).

publicly and privately welcome international investigations when such investigations were initially announced, particularly when it came to the investigation for crimes committed against Hutu refugees at Shario.¹³⁹ However, the Suspect's unequivocal denials to the final conclusions of investigations conducted by UN bodies are no different from his reactions to allegations made by media outlets or non-governmental organisations.

ii. Intercepted communications and evidence of the press release drafting process

70. It appears that the Suspect had authority over the content of the press releases he issued and signed, but other members of the FDLR leadership also drafted press releases and otherwise contributed to the drafting process. Murwanashyaka and the Suspect wrote press releases together denying allegations, and when a message was sent to the troops it would be coordinated between the two.¹⁴⁰ When something serious happened, such as when soldiers killed civilians, it was necessary for Mudacumura to inform Murwanashyaka, but not the Suspect.¹⁴¹ However, the evidence does show that the Suspect regularly spoke to other FDLR members and was not receiving information from Murwanashyaka only.¹⁴² Every press release in evidence before the Chamber is either issued in the *Suspect's* name or, on rare occasions, has no signature at all.

71. The Chamber has also been presented with an abundance of intercepted communications of Murwanashyaka; these messages discuss information that occasionally appears in subsequent press releases.¹⁴³ Some of the intercepted communications show

¹³⁹ P1114, FDLR Press Release of 18 May 2009; P522, FDLR Press Release of 12 August 2009; P820, Translated Intercepted Communication Transcript of 16 June 2009; P821, Translated Intercepted Communication of 16 June 2009 (tells Murwanashyaka that the FDLR should not interfere with investigation). *But see* P780, Translated Intercepted Communication of 16 June 2009 (urges caution with cooperating with investigation because it was headed by a member of the UN Group of Experts).

¹⁴⁰ P35, S/2008/773, Report, 12 Dec 2008 at 0576; D1346, transcript of interview of Witness 632, at 0265; D1381, transcript of interview of Witness 587, at 1356 (referring to Suspect's role in preparing Busurungi press release); D1382, transcript of interview of Witness 587, at 1364 ("Mbarushimana was in charge of the communiqué de presse"); D1384, transcript of interview of Witness 587, at 1406; D1284, transcript of interview of Witness 3, at 0023.

¹⁴¹ D1382, transcript of interview of Witness 587, at 1365. *See also ibid.*, at 1364 (Suspect did not have "horizontal collaboration with Mudacumura, because Mudacumura report[ed] to Murwanashyaka").

¹⁴² *See infra*, paras 118-120.

¹⁴³ *Egs* P377, Translated Intercepted Communication of 13 April 2009, P935, FDLR Press Release of 17 April 2009 (discussion of 63 Hutus killed in Mianga); P678, Translated Intercepted Communication Transcript of 25 January 2009, at 0098, P61, FDLR Press Release of 26 January 2009 (denial that 9 FDLR soldiers were killed

that the FDLR leadership are aware that they are being investigated for crimes committed in the Kivus.¹⁴⁴

72. I note that the titles of Murwanashyaka's intercepted communications in evidence correspond to particular lines in the intercept log prepared by the German authorities ("German intercept log").¹⁴⁵ In order to verify the identity of the people speaking with Murwanashyaka, the following have been considered: (i) the evidence associating specific phone numbers with specific FDLR members,¹⁴⁶ (ii) the German intercept log, (iii) the title of the Kinyarwanda versions of the Prosecution's exhibits in evidence showing the cross references to the German intercept log, (iv) whether the evidence is a phone call or an SMS and (v) if a call, the length of that call. Through this process, the identities of many persons speaking with Murwanashyaka can be verified, despite the fact that the Prosecution often erroneously refers the Chamber to the contact on the German intercept log that immediately precedes the contact which is actually in evidence.¹⁴⁷ The evidence shows that

in late January 2009 in Cyamakala); P601, Translated Intercepted Communication Transcript of 17 February 2009, at 0146, P19, FDLR Press Release of 20 February 2009, at 0053 (criticism of non-neutral reporting of Radio Okapi relating to an attack in "Tinga" three days before FDLR press release denying an attack in "Pinga" and criticizing the reporting of, *inter alia*, Radio Okapi); P605, Translated Intercepted Communication Transcript of 17 May 2009, at 0169, P947, FDLR Press Release of 9 July 2009 (discussion of weapons seized at Bururungi prior to press release describing same).

¹⁴⁴ P256, Intercepted Communication of 2 May 2009; P780, Translated Intercepted Communication of 16 June 2009 (Suspect informs Murwanashyaka to be cautious with woman in charge of UN investigation into Shario because she is a member of the UN Group of Experts).

¹⁴⁵ P311, German Intercepted Communications Log.

¹⁴⁶ Mbarushimana's known phone numbers are identified in P617, Communication Rogatoire/Procès-Verbal de Synthèse; P618, Procès-Verbal d'Investigations/(Liste du groupe d'experts de l'ONU - Remise par la DCRI), at 0494-0502. The Suspect's most commonly used email address appears on the bottom of most of the press releases in evidence. Eg P927, Email Exchange of 2 February 2009; P489, FDLR Press Release of 2 February 2009 (Suspect personally responded to a question sent to the email address listed in contemporaneous press release). Murwanashyaka's known phone numbers can be identified through P599, Intercepted Communication of 28 January 2009; FDLR Memorandum P58, FDLR Memorandum Addressed to the President of the Security Council. Mudacumura's known phone numbers are identified in P576, handwritten notes of Witness 632, at 0072. Iyamuremye's known phone numbers are identified in P576, handwritten notes of Witness 632, at 0072.

¹⁴⁷ As an example, the metadata for the phone call in evidence as P264 indicates that this call corresponds to item 4461 in the German intercept log. P264, Intercepted Communication of 15 May 2009; P576, handwritten notes of Witness 632, at 0072. The German intercept log indicates that this contact is a 41 second call between Mudacumura and Murwanashyaka at 09:21 on 15 May 2009. P311, German Intercepted Communications Log, at line 4461. However, the actual voice call in evidence is 5 minutes and 50 seconds long. P264, Intercepted Communication of 15 May 2009; P311, German Intercepted Communications Log, at line 4462. Line 4462 in the log is a 5 minute, 51 second call between Mudacumura and Murwanashyaka at 09:58 on 15 May 2009; no other intercepted communication in the log for 15 May 2009 is 5 minutes and 51 seconds long,

the Suspect often conversed with other high ranking FDLR members, including Murwanashyaka, Iyamuremye and Mudacumura.¹⁴⁸ Many of these field communications occur close in time to when press releases were issued, but, in the majority of cases, the contents of these conversations are unavailable and the evidence only allows for a determination of the identity of the other person the Suspect is conversing with and the contact's date, time and duration.

73. Using these intercepted communications, it is possible to piece together some of the FDLR's press release drafting process. By far the clearest picture of how this process works is the evidence regarding the discussions amongst the FDLR leadership that culminates in the press releases in May 2009 regarding Busurungi and Mianga. Following the attack on Busurungi in the early morning of 10 May 2009, the evidence shows:

- a. 14 May 2009 at 14:33: A MONUC press article condemns the FDLR attack on Busurungi and claims that several dozen civilians were killed.¹⁴⁹
- b. 14 May 2009 at 21:10: the Suspect calls Murwanashyaka.¹⁵⁰
- c. 15 May 2009 at 09:52: Murwanashyaka sends the Suspect an email, explaining that the attack on Busurungi was carried out by the FDLR on 10 May 2009.¹⁵¹ Murwanashyaka writes that "on the enemy side, 37 people died as well as some of their women, because they spent the night together".¹⁵²
- d. 15 May 2009 at 09:58: Mudacumura calls Murwanashyaka and discusses Busurungi. Murwanashyaka says that "[i]t's inevitable that we'll be subject to slander but we have to continue

or even within 20 seconds of this length. It is thus apparent that line 4462 is the entry that actually corresponds to the evidence presented.

¹⁴⁸ P70, French Intercepted Communications Log; P391, French Intercepted Communications Log; P311, German Intercepted Communications Log.

¹⁴⁹ P1252, Article entitled "RDC: La MONUC condamne une attaque meurtrière contre des civils à Busurungi" (in Suspect's possession when arrested).

¹⁵⁰ P311, German Intercepted Communications Log, at line 4453.

¹⁵¹ P728, Translated Email from Murwanashyaka to, *inter alia*, Mbarushimana, at 1584 (in Suspect's possession when arrested).

¹⁵² *Ibid.*

to ... to give them a rough time, to ... to show them we're still here".¹⁵³ Mudacumura says that "the harvest was good, but we lost ... a major there."¹⁵⁴

- e. 16 May 2009: Someone alleged by the Prosecution to be Iyamuremye sends a SMS message to Murwanashyaka, requesting that the latter make time to review the Mianga and Busurungi file "for which the FDLR are accused of having killed inhabitants".¹⁵⁵
- f. 17 May 2009 at 07:08 and 16:36: Iyamuremye contacts Murwanashyaka twice. The first is an SMS requesting that Murwanashyaka set up a time to talk so Iyamuremye can pass on relevant "denial and divine msgs".¹⁵⁶ The second is a phone call where Iyamuremye tells Murwanashyaka that he will send a text with ideas on how to "refute those things" at Mianga and Busurungi.¹⁵⁷
- g. 17 May 2009 at 16:39: Iyamuremye calls Murwanashyaka and reads a prepared statement that says, *inter alia* "[s]ome if not all of the [FARDC] soldiers and Mai-Mai refuse to live without their whores or their entire families. [...] The FDLR/FOCA consequently accepts no responsibility should these civilians be killed in the fighting. As a rule, our operations take place at night and it is difficult to differentiate".¹⁵⁸
- h. 18 May 2009: Mudacumura and Murwanashyaka have a phone conversation. Mudacumura says that the brigade commander will give Murwanashyaka "whatever [he] need[s]" in order to draft the press release.¹⁵⁹ Mudacumura, in what appears to be a reference to Busurungi, emphasises that "seeing as the climate here is very delicate, it wouldn't make a good impression if people heard us

¹⁵³ P603, Translated Intercepted Communication Transcript of 15 May 2009, at 0157; P311, German Intercepted Communications Log, at line 4462. *See also* P622, Translated Intercepted Communication of 15 May 2009 prepared by German authorities, at 0267 (indicates that German authorities were able to judge the voices of the people speaking in order to determine that Mudacumura was speaking with Murwanashyaka). The Chamber notes that the two translations in evidence of this conversation are different; in P622 at 0267, Murwanashyaka's quote is "we have to make sure they keep suffering a defeat until they realize that the problem has not been solved" and Mudacumura's quote is "[w]e got good results in Busurungi. But we did lose a major".

¹⁵⁴ P603, Translated Intercepted Communication Transcript of 15 May 2009, at 0157.

¹⁵⁵ P378, Translated Intercepted Communication of 16 May 2009, at 0203; P311, German Intercepted Communications Log, at line 4477.

¹⁵⁶ P379, Translated Intercepted Communication of 17 May 2009, at 0305; P311, German Intercepted Communications Log, at line 4529.

¹⁵⁷ P604, Translated Intercepted Communication Transcript of 17 May 2009, at 0162; P311, German Intercepted Communications Log, at line 4545.

¹⁵⁸ P605, Translated Intercepted Communication Transcript of 17 May 2009, at 0166; P311, German Intercepted Communications Log, at line 4547.

¹⁵⁹ P606, Translated Intercepted Communication Transcript of 18 May 2009, at 0174; P311, German Intercepted Communications Log, at line 4560.

bragging about that.”¹⁶⁰ Murwanashyaka agrees that “we should also find the ... right words for saying it.”¹⁶¹

- i. 21 May 2009 at 16:12pm: Murwanashyaka emails the Suspect a draft press release regarding Mianga and Busurungi. The draft asserts that the FDLR declines all responsibility for any civilians killed in these operations because these civilians were living amongst FARDC/RPA/Mai Mai coalition soldiers.¹⁶²
- j. 21 May 2009 at 20:58pm: the Suspect calls Murwanashyaka to discuss the draft.¹⁶³ The following conversation transpires:

Mbarushimana: [...] [T]here are some things that we shouldn't say [...] there mustn't be erm ... anything anywhere that could give the impression that we ourselves are admitting and saying that we might have killed some ... some ... some civilians.

Murwanashyaka: These are very complicated things, actually, for the simple reason that ... as you know, there are women and children [...] [a]nd so, with MONUC going out into the field and seeing what the real truth is, when you publish a press release more or less differ... you say, of course, “We didn't know about it” [...]

[...]

Mbarushimana: We mustn't forget that the law which governs ... in international law, in international humanitarian ... hum ... erm ... law ...

Murwanashyaka: Yes...

¹⁶⁰ P606, Translated Intercepted Communication Transcript of 18 May 2009, at 0174.

¹⁶¹ *Ibid.*

¹⁶² P818, Translated Email from Murwanashyaka to, *inter alia*, Mbarushimana, at 0104, 0108.

¹⁶³ The transcript indicates that Murwanashyaka is talking to an “Unidentified Speaker”, but the Prosecution alleged at the hearing that Murwanashyaka is speaking with Mbarushimana. ICC-01/04-01/10-T-7-Red-ENG, 14. The metadata for P592 indicates that this call is item 4656 in the German intercept log, which is a text message and not a voice call. P311, German Intercepted Communications Log, at line 4656. However, the next contact in line 4657 of the log is a 7 minute, 30 second call at 20:58 pm and the actual voice call in evidence is 7 minutes and 30 seconds long. P311, German Intercepted Communications Log, at line 4657; P381, Intercepted Communication of 21 May 2009. The surrounding entries on the log show that line 4657 is the only 7 minute, 30 second long contact that Murwanashyaka had on 21 May 2009. It is thus possible to establish that P592 corresponds to line 4657 of the intercept log, and the phone number of the caller in line 4657 of the intercept log matches a known phone number of the Suspect. P311, German Intercepted Communications Log, at line 4657 (seventh column shows number of caller); P618, Procès-Verbal d'Investigations/(Liste du groupe d'experts de l'ONU - Remise par la DCRI), at 0502 (matches the same number to the Suspect).

Mbarushimana: ... in theory, when you plan to ... to attack a given location, you must first ensure that there aren't any civilians at the location. When ... erm ... saying that there are erm ... that you found out afterwards that they were there with the others, in this instance, won't clear you of the responsibility for what happened. That's the thing. That's precisely what you have to be careful about.¹⁶⁴

Later in the conversation, the Suspect says that he will "take care of" the edits to the draft press release.¹⁶⁵

- k. 25 May 2009: The Suspect issues a press release strongly condemning war crimes and crimes against humanity against Rwandan Hutu refugees in, *inter alia*, the territory of Walikale (where Busurungi is located).¹⁶⁶ The Suspect says that "[a]ll these heinous crimes were committed by [coalition forces] which were deployed in the areas of Busurungi and Mianga specially between early April 2009 and early May 2009."¹⁶⁷ No reference is made to the FDLR killing any civilians.
- l. 27 May 2009: The Suspect issues a second press release clarifying what happened at Busurungi. Rather than claiming that the FDLR had attacked, the Suspect claims the opposite and says that "aware that the FDLR never attacked civilian populations, the elements of the FDLR coalition attack and when they returned fire, the *attackers* fled to civilians used as human shields."¹⁶⁸ The final press release also removes all references to night time operations and the difficulties involved with respecting the principle of distinction, arguing instead that "[t]he FDLR can not be held liable for the victims caused by the coalition attacks against civilians used as human shields."¹⁶⁹

74. Either Murwanashyaka or the Suspect also appears to have given an interview to the BBC around this same timeframe, heard by multiple witnesses, denying knowledge that the FDLR had killed any civilians in Busurungi.¹⁷⁰ Witness 564 said that this speech

¹⁶⁴ P592, Translated Intercepted Communication Transcript of 21 May 2009, at 2677-2678; P311, German Intercepted Communications Log, at line 4657.

¹⁶⁵ P592, Translated Intercepted Communication Transcript of 21 May 2009, at 2679.

¹⁶⁶ P1035, FDLR Press Release of 25 May 2009.

¹⁶⁷ *Ibid.*

¹⁶⁸ P1160, FDLR Press Release of 27 May 2009 (emphasis added).

¹⁶⁹ P1160, FDLR Press Release of 27 May 2009.

¹⁷⁰ D1372, transcript of interview with Witness 530, at 1027; P669, transcript of interview with Witness 564 (unsure if the interview was done by Murwanashyaka or the FDLR "spokesman"), at 1230; D1382, transcript of interview with Witness 587, at 1370; D1383, transcript of interview with Witness 587, at 1393-94 (says Mbarushimana spoke, then later says he never heard Mbarushimana speak on the radio).

denied killing the population because “they know it was [...] a mistake to kill the population.”¹⁷¹

75. After 27 May 2009, the Suspect made at least eight separate blanket statements in the media vigorously denying that the FDLR had committed *any* crimes in the Kivus during the war.¹⁷²

iii. Analysis

76. There is evidence to support the notion that the Suspect was using press releases to conceal crimes, and I consider that the Majority does not give appropriate weight to this allegation of the Prosecution. The Majority makes a test to decide when denying crimes is not “neutral”, referring to: (i) whether the Suspect knew that he was not stating the truth and (ii) that this failure to state the truth was done in furtherance of a FDLR policy.¹⁷³ Without taking a position on the validity of the Majority’s test, I note that the test is nevertheless met in the present case because the evidence shows that the Suspect does know of the falsity of his statements and that these statements are made pursuant to an organizational policy.¹⁷⁴

¹⁷¹ P669, transcript of interview with Witness 564, at 1231.

¹⁷² P280, Human Rights Watch article entitled “DR Congo: Massive Increase in Attacks on Civilians”, P1037, FDLR Press Release of 7 July 2009 (refutes Human Rights Watch allegation that FDLR massacred civilians in, *inter alia*, Busurungi by saying “[t]he FDLR troops are in no way involved in acts of rape, murder of civilians or any other acts of violation of humanitarian law against civilians in the DRC”); P519, FDLR Press Release of 23 July 2009 (“The FDLR are not responsible for various serious human rights violations committed in DRC”); P531, FDLR Press Release of 15 September 2009 (“[t]he FDLR also reject allegations that they would commit reprisals against civilians in eastern DRC and rape”); P1090, FDLR Press Release of 20 October 2009 (“The FDLR again refute the false accusations made against them that they would have committed attacks against civilians and that these attacks would have resulted in population displacements”); P886, FDLR Press Release of 30 October 2009 (“[t]he FDLR remind the media and the peoples of the African Great Lakes Region that they have never attacked politicians and will never attack civilian populations”); P1091, FDLR Press Release of 18 November 2009 (“the FDLR are in no way involved in the atrocities committed against civilians in eastern DRC”); P963, FDLR Press Release of 27 November 2009, at 1924 (“The FDLR consider unfair the recommendations calling for the prosecution of their leaders on the basis of unsubstantiated allegations”); P1236, Part 1 of BBC Interview with Mr Callixte Mbarushimana, at 09:40 (“why should I accept that [the FDLR] have committed any crime if there is no crime they have committed?”).

¹⁷³ Decision, para. 312.

¹⁷⁴ See *infra*, section 3(e), *supra*, para. 45.

77. The Majority speaks of how all that could be proven was that the Suspect only agreed to deny “lies”,¹⁷⁵ but this assessment is inconsistent with the totality of the evidence, which shows that: (i) the Suspect agreed in January 2009 to react to all that was said about the FDLR, not just lies,¹⁷⁶ (ii) the Suspect denied true statements about the FDLR killing civilians and (iii) the Suspect repeated these untrue denials on many separate occasions throughout 2009. The Suspect’s 27 May 2009 press release suggests that the coalition forces attacked the FDLR at Busurungi, claiming that “the attackers fled to civilians used as human shields” and that “the FDLR cannot be held liable for the victims caused by the coalition attacks against civilians used as human shields”.¹⁷⁷ The Suspect was told by Murwanashyaka a completely different story than what appeared in the press release, and the evidence thus suggests that the “human shield narrative” was an invention by Mr Mbarushimana and was done with the aim of furthering the crimes committed.

78. The Majority also ignores the evidence, cited above, which supports the conclusion that the Suspect denied crimes with an aim to blunt the international community’s response to what the FDLR was doing in the field. As the care put into crafting the Mianga/Busurungi press release illustrates, the FDLR leadership relied on the Suspect to perform this role. Contrary to the evidence relied upon by the Majority, four different copies of this 27 May 2009 press release are in evidence and all of them are clearly signed by “Callixte Mbarushimana, Executive Secretary of the FDLR”.¹⁷⁸ After the Mianga/Busurungi press release was issued on 27 May 2009, the Suspect extended his attempts to cover-up what had happened by stating on at least eight occasions over the remainder of 2009 that the FDLR had not committed *any* crimes in Busurungi or anywhere else. The Prosecution even provided evidence of a telephone conversation, where the Suspect explained to Murwanashyaka how to manipulate the language of the draft press release of Mianga/Busurungi so that the FDLR could avoid accusations of violating

¹⁷⁵ Decision, para. 314.

¹⁷⁶ *Supra*, para. 45.

¹⁷⁷ P1160, FDLR Press Release of 27 May 2009.

¹⁷⁸ Compare Decision, para. 306, with P1160, FDLR Press Release of 27 May 2009; P1202, FDLR Press Release of 27 May 2009; P1203, FDLR Press Release of 27 May 2009; P326, FDLR Press Release of 27 May 2009, at 3490.

international humanitarian law.¹⁷⁹ This critical piece of evidence that supports the Prosecution's concealment allegations is not referenced even once in the Majority's decision. I consider it to be a strong inference that the FDLR leadership believed the Suspect's words to the international community were needed to facilitate their crimes; rather than refuting this inference, the Majority instead concedes that the Suspect's press releases *were* directed at the international community.¹⁸⁰

79. I consider that the Suspect was categorically denying all allegations made against the FDLR, even those that came from independent international investigations and those that were confirmed by other members of the FDLR leadership. I would find that there are substantial grounds to believe that the Suspect was using the international media campaign to conceal the criminal activities of the FDLR.

(b) Press releases and/or speeches on the radio to encourage the FDLR troops to continue fighting

80. I note that, on the basis of a range of considerations, which I will thoroughly discuss and analyse below, the Majority found that that "the evidence submitted by the Prosecution is not sufficient to establish substantial grounds to believe that the Suspect encouraged the troops' morale through his press releases and radio messages, and therefore he could have not provided through his radio communications and press releases a significant contribution to the commission of crimes by the FDLR in accordance with article 25(3)(d) of the Statute"¹⁸¹. The Majority then concluded "that there are not substantial grounds to believe that the Suspect is individually responsible under article 25(3)(d) of the Statute for the crimes committed by the FDLR".¹⁸² I respectfully disagree with the Majority's finding and conclusion.

¹⁷⁹ P592, Translated Intercepted Communication Transcript of 21 May 2009, at 2678.

¹⁸⁰ Decision, para. 328.

¹⁸¹ Decision, para. 339.

¹⁸² Decision, para. 340.

81. I note that the Majority, on the basis of evidence of FDLR press releases and the statement of Witness 552, acknowledges that “most of these press releases and speeches only contain words of encouragement and praise for the troops; homage and tributes to the FDLR leaders and combatants; or, more broadly, optimistic commentary as to the prospective fate of the FDLR’s struggle”.¹⁸³ Nevertheless, the Majority seems to minimise the importance of such a finding by holding, in the same breath, that “however, when former FDLR soldiers were asked, many said that they had never heard of Mr Mbarushimana or they did not know of his media campaign of radio messages or press releases”.¹⁸⁴ The Majority continues by referring to witnesses and former FDLR soldiers who “had not heard of Mr Mbarushimana or his role in the FDLR” or who “know nothing more than Mr Mbarushimana’s position in the FDLR”.¹⁸⁵ The Majority goes on to refer to witnesses who “have more detailed knowledge regarding Mr Mbarushimana and his role in the FDLR” but “they speak only of his responsibilities, or of the fact that he was mentioned or spoke on the radio many times”.¹⁸⁶

82. I consider that the Majority does not evaluate the evidence of encouragement tendered in its context. The Majority ignores evidence showing that the FDLR troops’ morale and determination to fight were of significance within the context of the FDLR defence strategy, especially when considering the attempts by third parties to persuade FDLR soldiers (“Abacunguzi”) to desert the FDLR and participate in the demobilisation process, as reflected in the outcome document of the Steering Committee’s meeting in January 2009.¹⁸⁷ For the purposes of the discussion below of the specific arguments made by the Majority, I will follow the order in which the Majority’s considerations and arguments unravel in the Decision.

¹⁸³ Decision, para. 322 (citations omitted).

¹⁸⁴ *Ibid.*

¹⁸⁵ Decision, para. 323.

¹⁸⁶ Decision, para. 324.

¹⁸⁷ P1025, FDLR Steering Committee minutes of 19 January 2009, para 43 at 0754. (“Les causes qui peuvent faire baisser la détermination et le moral des Abacunguzi doivent être détectées à temps et des solutions appropriées trouvées”). See also P1069, « Evaluation des recommandations et décisions de la dernière Rn CD (Par domaine) », at 0957, 0958, 0962.

i. Suspect's lack of authority over troops

83. The Majority relies on the statement of Witness 587, on the basis of which the Majority finds that “Mr Mbarushimana did not make a significant contribution to encouraging the troops”.¹⁸⁸ The Majority underscores that “Witness 587 most importantly states that ‘Mbarushimana doesn’t have every horizontal collaboration with Mudacumura, because Mudacumura reports to Murwanashyaka’”.¹⁸⁹ Furthermore, the Majority relies on the statement of Witness 677 and finds that “Mr Mbarushimana’s power in the FDLR was very limited”.¹⁹⁰ The relevant passage of the statement of Witness 677 reads as follows: “Mbarushimana had no influence on the soldiers in the field; Mbarushimana was a politician and the soldiers on the ground got their orders from their commanders. The one who was in charge of the soldiers was FOCA commander Mudacumura”.¹⁹¹ The Majority also invokes the statement of Witness 3 that the “Executive Secretary is not involved in military decisions”¹⁹² and the statement of Witness 552 who says “that the attacks were planned by the army, who did not have to ask permission from the politicians”.¹⁹³

84. In my opinion, the fact that these witnesses state that Callixte Mbarushimana did not have power, control or authority over FDLR commanders and soldiers does not, in and of itself, preclude a finding that the Suspect made a significant contribution to the commission of crimes by FDLR soldiers. Most importantly, such power or authority is not required under article 25(3)(d) of the Statute. I also note that the Prosecution does not allege that the Suspect had such power or authority. Rather than emphasising that Callixte Mbarushimana had no role within the FDLR’s military wing, I consider that the Majority should instead have focused on what was actually alleged by the Prosecution, namely that the Suspect contributed to the crimes committed by the FDLR’s military wing through his role in the political wing of the FDLR organisation.

¹⁸⁸ Decision, para. 326.

¹⁸⁹ Decision, para. 326, citing to P1383, transcript of interview of Witness 587, at 1394.

¹⁹⁰ Decision, para. 327.

¹⁹¹ Decision, para. 327, citing to P762, summary of the statement of Witness 677, at 0068.

¹⁹² Decision, para. 334, citing to D1284, statement of Witness 3, at 0022.

¹⁹³ Decision, para. 338, citing to P660, statement of Witness 552, at 0775.

ii. Target audience of press releases

85. The Majority also finds that the press releases prepared and issued by Callixte Mbarushimana did not have an impact on FDLR troops on the ground on the basis that they “were intended to address the international community, rather than the troops in the field”.¹⁹⁴ While the Majority acknowledges that the FDLR press releases were available to FDLR commanders and soldiers in the field,¹⁹⁵ the Majority’s finding that the press releases did not have any impact on FDLR soldiers in the field is, in my opinion, erroneously premised on the assumption that FDLR soldiers could not be a potential audience solely because the FDLR press releases were also intended to address the international community. Such a consideration ignores the fact that the FDLR press releases also served as a tool for denying and concealing the FDLR’s criminal activity, as I have demonstrated above.¹⁹⁶ Having said that, I believe that the Majority fails to give proper weight to the evidence that shows that FDLR press releases were available to the commanders and soldiers in the field.

iii. Mudacumura’s use of press releases

86. The Majority further concludes that “the press releases issued by Callixte Mbarushimana did not have an impact on FDLR troops on the ground”, notwithstanding its finding that “General Mudacumura received all the press releases and decided whether they should be passed on to the troops depending on their content and on their likely effect on the soldiers’ morale”.¹⁹⁷ I believe that the Majority does not attach proper weight to the evidence on which this finding is based and which shows that Sylvestre Mudacumura, the FOCA Commander, believed that FDLR press releases could motivate FDLR soldiers and affect their morale and their determination to fight. In this respect, I also note that the Majority disregards evidence of a text message sent to Ignace Murwanashyaka in early 2009, wherein Sylvestre Mudacumura acknowledges the

¹⁹⁴ Decision, para. 328.

¹⁹⁵ *Ibid.*, citing to D1322, transcript of interview of Witness 559, at 1685, and D1350, transcript of interview of Witness 632, at 0394.

¹⁹⁶ *Supra*, section 3(a).

¹⁹⁷ Decision, para. 328.

significance of Callixte Mbarushimana's contribution: "Message for [REDACTED]: Tell executive secretary Callixte what this programme can mean for us. If we stop issuing statements, although the war is still going on, they'll be shooting at us every day!? Get hold of him and talk about it".¹⁹⁸

87. Moreover, citing to the statement of Witness 559, the Majority finds that "there was no strategy underlying the press releases to encourage the soldiers and, even less, to encourage them to commit crimes against the civilian population in the Kivus".¹⁹⁹

88. I do not agree with the Majority's interpretation of the statement of Witness 559. On the basis of the statements of Witness 559²⁰⁰ and Witness 632²⁰¹, I consider that, contrary to the Majority's finding, the assessment and selection of press releases conducted by Sylvestre Mudacumura, for the purposes of making them available to lower level FDLR commanders and soldiers, does in fact reveal the existence of "a strategy underlying the press releases". Most importantly, this evidence suggests that Sylvestre Mudacumura was aware of *all* the FDLR press releases, which, is only implicitly acknowledged by the Majority and, in my view, not given proper weight. In this regard, I also note that the Majority disregards the evidence of an intercepted telephone conversation of 16 January 2009, wherein the FOCA Commander, Sylvestre Mudacumura, reassures Murwanashyaka that he is reading "all the press releases".²⁰² I further find that lower level FDLR commanders and soldiers were also an audience which the FDLR press releases intended to reach. Critically, the fact that the press releases had a broad target audience does not necessarily mean, as the Majority suggests, that Callixte Mbarushimana did not contribute to the crimes committed by the FDLR by encouraging their commission.

¹⁹⁸ P376, Translated Intercepted Communication of 22 March 2009, at 0199 (translated from French by the Chamber).

¹⁹⁹ Decision, para. 329, citing to D1322, transcript of interview of Witness 559, at 1685.

²⁰⁰ D1322, transcript of interview of Witness 559, at 1685.

²⁰¹ D1350, transcript of interview of Witness 632, at 0391-0395.

²⁰² P624, Translated Intercepted Communication between Sylvestre Mudacumura and Ignace Murwanashyaka, 16 January 2009, at 0800.

iv. Speeches and/or messages issued towards the end of the charge period

89. Moreover, I note that the Majority refers to the statements of Witnesses 552 and 530. Witness 552 states that “for those who have a good understanding of FDLR, everything ...anything that is spoken in those speeches, they do believe in it” and that “if you are in FDLR those are really very powerful words”.²⁰³ Witness 530 states that he believed Mbarushimana’s words in the message he heard on BBC radio in November 2009.²⁰⁴ For the reasons discussed below, I don’t agree with the Majority’s decision to dismiss these portions of the statements of Witnesses 552 and 530 as “irrelevant for the purposes of this decision”, because, as the Majority reasoned, these messages were “issued [...] near the last weeks covering the charge period”.²⁰⁵

90. First, I do not agree with the Majority’s interpretation of the statement of Witness 552. In my opinion, the Majority erroneously “links” the Witness’ quoted words solely to a message issued towards the end of the charged period, which is the Suspect’s Christmas speech of 2009, and turns this speech into the single point of reference for its interpretation of the quoted passage. Interestingly, I observe that the Witness does not refer to the Christmas speech only. In this respect, I note that, in order to provide examples of Callixte Mbarushimana’s speeches and/or messages, as the Investigator asks him to do,²⁰⁶ the Witness talks about Callixte Mbarushimana’s message of July 2009 and speech of Christmas 2009.²⁰⁷ The Witness also mentioned Murwanashyaka’s speech on 1 May 2009.²⁰⁸

91. Furthermore, a reading of the passage quoted by the Majority, in conjunction with the Investigator’s questions which directly precede the quoted passage, leads me to a

²⁰³ Decision, para. 330, citing to P655, transcript of interview of Witness 552, at 0629.

²⁰⁴ Decision, para. 330, citing to D1373, transcript of interview of Witness 530, at 1069-1070.

²⁰⁵ Decision, para. 330.

²⁰⁶ P655, transcript of interview of Witness 552, at 0627 (the Investigator asks the Witness: “And what about ... uhm ... later on like... uh ..does any other speeches from ... Callixte ... stand out in your head? Like for example Christmas time?” and the Witness replies and talks about to the Christmas 2009 speech), *see* also at 0624-0625 (the Investigator asks the Witness: “Can you ...give me an example of ...uhm ...these messages ...uh ...when ... when ... what periods of time ... when ... when this would have been, like in 2008 and 2009?”, the Witness answers: “Uh ... the example message Callixte ... Mbarushimana” and talks about a message that Callixte Mbarushimana sent on the occasion of the Rwandan Independence in July 2009).

²⁰⁷ *Ibid.*, at 0624-0625 and 0627-0628.

²⁰⁸ *Ibid.*, at 0626.

conclusion different from the one which the Majority reaches. In this respect, I am convinced that the language of the quoted passage itself²⁰⁹ and the wording of the Investigator's relevant questions²¹⁰ suggest that the Witness replies to the Investigator's questions in a general way and is referring to different speeches of this kind, i.e. delivered by the FDLR leadership, which, the Majority agrees, includes Callixte Mbarushimana. I thus find that the Witness' words quoted in the Decision are not focused on the specific speech of Christmas 2009. Having said that, I do not agree with the Majority that the statement of Witness 552 is "irrelevant" to this decision and, in particular, to the considerations pertinent to the discussion on the impact of Callixte Mbarushimana's relevant way of contributing to the crimes committed by FDLR soldiers. In my opinion, the statement of Witness 552 is evidence of the impact that Callixte Mbarushimana's words had on FDLR soldiers in the field.

92. With respect to Witness 530, it is uncontested that the Witness is referring to Callixte Mbarushimana's encouraging words in the Suspect's message which he heard on BBC radio in November 2009. However, I believe that, rather than being "irrelevant for the purposes of this decision", the Witness' statement that "he believed Mbarushimana's words" is indicative of the impact of Callixte Mbarushimana's encouraging messages.

v. Why soldiers said they were encouraged

93. Furthermore, I observe that the Majority takes note of the statement of Witness 564, who states that "when they heard the FDLR spokesperson speaking, FDLR soldiers were encouraged and motivated".²¹¹ However, the Majority decides not to consider this evidence on the basis that the encouraging and motivating effect attributed by the Witness

²⁰⁹ *Ibid.*, at 0629, where the Witness states "[f]or those who have a good understanding of ... FDLR, everything ... anything that is spoken in *those* speeches, [FDLR soldiers] do believe in it" (emphasis added).

²¹⁰ *Ibid.*, at 0629, where the Investigator asks: "I meant more ... *in general* the... the fact that there were *these* ... messages and speeches ... do you think it had ... a positive ... effect on ... on ... the FDLR?" (emphasis added), and at 0628, where the Investigator had previously asked where the Investigator asks: "[b]ut ... you think ... without *such* ... messages or speeches *from* ... *Ignace or also Callixte*, would it have made a difference or would it also have been OK without these speeches?" (emphasis added); Interestingly, the Majority overlooks that, in his attempt to respond the latter question, the Witness is only referring to "religious special occasion" but also to the occasion of the Rwandan Independence Day, that is, July 2009.

²¹¹ Decision, para. 331, citing to P668, transcript of interview of Witness 564, at 1188-1189.

to the Suspect's words "was linked to their belief that the spokesperson's words stemmed directly from 'the supreme leader Murwanashyaka'".²¹²

94. I consider that the Majority fails to distinguish the issue of *whether* Callixte Mbarushimana's words had an encouraging effect on the soldiers on the ground with the issue of *why* FDLR soldiers felt motivated or encouraged by Callixte Mbarushimana's words as a matter of perception. That being said, I believe that to the extent that a witness says that he/she and/or other soldiers felt encouraged by the Suspect's words, it is irrelevant to the present discussion why the FDLR soldiers subjectively felt motivated. I thus consider that the Majority places undue weight on a secondary consideration and does not properly evaluate the evidence which it analyses.

vi. Witnesses who do not know the Suspect

95. In support of the finding that Callixte Mbarushimana did not contribute to the commission of the crimes, the Majority considers in detail evidence that shows that some of the former FDLR soldier witnesses do not know Callixte Mbarushimana, his position, the details of his role and responsibilities within the FDLR or accurate information about the Suspect's current situation.²¹³ I do not agree with the Majority's suggestion that this evidence could conflict with the evidence of Callixte Mbarushimana's encouraging statements or "could detract from the weight which should be attached to the evidence showing that soldiers may have been encouraged by Mr Mbarushimana's words contained in press releases, speeches and other messages communicated to FDLR soldiers on the ground".²¹⁴

96. I believe that the effect that Callixte Mbarushimana's press releases, messages and speeches had on FDLR soldiers' morale and military efforts on the ground is not materially undermined by the fact that some FDLR soldiers did not know Callixte Mbarushimana's identity or his role within the FDLR, especially given that his contribution to the crimes need only be significant under article 25(3)(d) of the Statute. In

²¹² Decision, para. 331.

²¹³ Decision, para. 332. *See also* Decision, paras 322-324.

²¹⁴ Decision, para. 332.

this regard, I also find that, as transpires from the analysis of the evidence, the lower-ranking FDLR commanders and soldiers would be encouraged by statements of support and encouragement which were perceived to originate from the FDLR leadership, irrespective of the identity of their author or drafter.

97. Having said that, considerations relating to whether the entire infantry was aware of who Callixte Mbarushimana was or whether all rank-and-file soldiers had knowledge of Callixte Mbarushimana's role and responsibilities, or even the foot soldiers' opinion on the significance or the extent of Callixte Mbarushimana's tasks, are, in my view, not decisive for a finding as to whether the Suspect significantly contributed to the crimes committed by the group of persons under article 25(3)(d) of the Statute. I thus consider that, contrary to the Majority's view, this evidence could not and should not detract from the weight that should be given to the evidence of FDLR soldiers who do say that they were encouraged.

vii. Evidence of Witnesses 552 and 632

98. The Majority then relies on the statements of Witnesses 632 and 552.²¹⁵ I note that Witness 632 says "[i]f that spokesperson said these allegations are not founded or did not happen, and those soldiers who have committed these actions and acts ... hear these words, they feel like they are supported."²¹⁶ While the Majority refers to the statement of Witness 632, it appears that it does not eventually consider this evidence further. In my opinion, the statement of Witness 632, as evidence in favour of the allegation that the denials of crimes had a positive impact on FDLR soldiers and FDLR's military efforts, is important to the determination of the issue at hand.

99. The Majority also refers to the statement of Witness 552 several times in its analysis of the issue under consideration.²¹⁷ I note, in particular, that the Majority quotes passages from the statement of Witness 552, who states (i) that Callixte Mbarushimana, in a message to the soldiers, said, *inter alia*, that both soldiers and politicians should be

²¹⁵ Decision, paras 333 and 335, respectively.

²¹⁶ Decision, para. 333, citing to D1353, transcript of interview of Witness 632, at 0524.

²¹⁷ Decision, paras 324, 330, 335, 337, 338.

patient, that sooner or later they will achieve victory,²¹⁸ “remind[ed] soldiers and politicians in the FDRL [sic] that now is the time for Rwandan independence and “that the price of a country is blood not water”;²¹⁹ and (ii) that “when they heard that the leadership [was] denying what they did, they were happy that the leaders [were] doing their job”.²²⁰ I further note that, while the Majority relies on the statement of Witness 552 and concludes that “these statements are strong indications of attempts at least on the part of the Suspect to encourage troops through his words”, it then seeks to minimise the importance of this evidence by adding: “but only one witness can even recall these statements”.²²¹ The Majority also refers to the statement of Witness 552 as “isolated”.²²²

100. I do not agree with the Majority’s finding that the statement of Witness 552 is “isolated” and thus, when “considered against the bulk of the rest of the evidence, is insufficient to support a finding that Mr Mbarushimana’s alleged contribution has proven to the required standard”.²²³ I also disagree with the Majority that “the little evidence which might support the allegation that the press releases and radio appearances had some impact on the FDLR’s military efforts is either too limited or too inconsistent for it to take the view that the allegation is proven to the requisite standard”.²²⁴ In view of the foregoing, I believe that the statements of Witnesses 552, 559, 564, 632 and 530 show that the press releases issued by Callixte Mbarushimana encouraged many of the FDLR soldiers on the ground and had an impact on the FDLR’s military, and therefore criminal, efforts.

²¹⁸ P655, transcript of interview of Witness 552, at 0624-0625, 0627-0628; According to the Witness, “[f]or soldiers who are in ... in a battle ... the objective is to win ... to have victory, so that proverb we saw as relevant to our situation, and ... during the battle people die”, *ibid.*, at 0628; See also P648, transcript of interview of Witness 552, at 0393 where Witness 552 states that, after Murwanashyaka’s arrest, Callixte Mbarushimana was the one who was sending messages on special occasions.

²¹⁹ Decision, para. 324, citing to P655, transcript of interview of Witness 552, at 0625 and 0627.

²²⁰ Decision, para. 335, citing to P660, transcript of interview of Witness 552, at 0768-0769. See also *ibid.* where the Majority notes that, according to Witness 552, “the FDLR were denying crimes because they ‘wanted to show that they are innocent’”. In this respect, I also note P655, transcript of interview 552, at 0620-0625, where Witness 552 says that Murwanashyaka and the Suspect were denying crimes because they did not want people to think that they had done the bad things that they had done.

²²¹ Decision, para. 324.

²²² Decision, para. 335.

²²³ *Ibid.*

²²⁴ Decision, para. 333.

viii. Conclusion

101. For these reasons, I am satisfied that there are substantial grounds to believe that Callixte Mbarushimana contributed to the commission of the crimes committed in 2009 by FDLR soldiers by encouraging them to stay in their ranks, continue the military efforts and remain faithful to the FDLR's goal, that is, the liberation of the Rwandan people.

(c) Analysis of Significant Contribution

102. The totality of the evidence presented by the Prosecution does not support a finding that the Suspect was a "linchpin". What is more, this allegation of the Prosecution amounts to suggesting that the Suspect's contribution to the crimes was essential, a proposition which is inconsistent with the mode of liability alleged in the DCC and with the Chamber's finding made in relation to the Prosecution's request for a warrant of arrest.²²⁵

103. However, the Majority's finding that the Suspect did not make *any* contribution to the crimes committed is made by emphasising secondary issues at the expense of the evidence discussed in the sections above. The Majority quotes at length an intercepted communication where an FDLR member says that peaceful means are privileged and arms are only used to protect their people,²²⁶ but this evidence is contradicted by the Majority's own findings that the FDLR committed war crimes in four distinct locations in the Eastern DRC.²²⁷ The Majority gives detailed consideration to whether the FDLR infantry in the field knew of the Suspect and his words, ignoring important evidence as to how the FDLR leadership depended on the Suspect and how the FDLR's top military commander in the DRC, Sylvestre Mudacumura, wanted the Suspect to be told that the FDLR would be getting shot at every day if statements stopped being issued.²²⁸ This comment from Mudacumura shows that the Suspect *was* having an impact on the FDLR's military efforts

²²⁵ Pre-Trial Chamber I, *Prosecutor v Callixte Mbarushimana*, , Decision on the Prosecutor's Application for the Warrant of Arrest against Callixte Mbarushimana, 28 September 2010, ICC-01/04-01/10-1, para. 36.

²²⁶ Decision, para. 310.

²²⁷ See also *supra*, paras 15-16.

²²⁸ P376, Translated Intercepted Communication of 22 March 2009, at 0199 (translated from French by the Chamber).

in the field, irrespective of the evidence that some members of the infantry were not familiar with who the Suspect was. Noticeably, the intercepted communication containing this comment from Mudacumura is not referenced even once in the Majority decision.

104. I believe that a consideration of the evidence in line with the relevant standard of proof shows, contrary to the arguments of the Defence and the Majority, that there is sufficient evidence that the Suspect's efforts to conceal past crimes and encourage future crimes were facilitating the commission of the FDLR's crimes both before and after they were committed. By virtue of his control over the media campaign, it was the Suspect's role, assigned to him before the commencement of *Umoja Wetu*, to demonise the enemy and to react as soon as possible to all that was said against the FDLR.²²⁹ The FDLR's crimes in 2009 were committed against the backdrop where, if the FDLR were accused of crimes, then the Suspect would deny them. It follows that when the FDLR leadership, of which the Suspect was a part, issued or consented to the issuance of criminal orders, they must have taken the Suspect's pre-planned assistance into account. Mbarushimana's role also validated the FDLR's actions to their own soldiers, which limited the risk of dissension in their ranks and encouraged the commission of future crimes.

105. The Suspect's actions did facilitate the commission of crimes to such an extent that they can be classified as a significant contribution. Denials of crimes and encouragement given through press statements which, though they could have been non-criminal if made in another context, take on a criminal character on the facts before the Chamber. The contextual factors referenced in the Decision²³⁰ can be of assistance for making this determination.

106. First, as found by the Majority, the Suspect is one of the highest ranking members of the FDLR and was the most visible member of the FDLR during the timeframe relevant to the crimes alleged in the DCC.²³¹ I consider that the Suspect's persistent denials of

²²⁹ See *supra*, para. 45.

²³⁰ Decision, para. 284.

²³¹ Decision, para. 295.

crimes he knew had been committed²³² are more meaningful and effective in encouraging FDLR crimes than if those same denials were made by someone outside the organisation, a lower level member of the FDLR or, to borrow an example from the Defence, a Defence counsel defending Mr Mbarushimana in the context of a criminal trial.²³³

107. Second, the evidence of the Suspect's sustained contribution, made with knowledge of the FDLR's criminal activities, shows an intention on his part to further those activities.²³⁴ The Suspect was not operating as a part time member of the FDLR; the evidence shows his steadfast commitment to maintaining the legitimacy of his organisation and, when crimes were committed, he endeavoured to deny them beyond detection by the international community. In the numerous press statements in evidence before the Chamber, the Suspect does not, even in a single sentence, acknowledge that the FDLR had ever committed crimes. Even after the events of Busurungi that are conceded by the Defence to be criminal actions by the FDLR, albeit ones they argue were ordered by a rogue commander, the Suspect denied the existence of FDLR involvement in *any* crime at least eight times during the rest of 2009.

108. Third, I consider that almost all of the Suspect's calls for investigation and peaceful solutions were insincere. The Suspect's calls for an international investigation into crimes committed, when viewed under the totality of the circumstances, are meaningless; many such international investigations were made and the Suspect denied all their findings that accused the FDLR of criminal activities. Given the evidence of the Suspect's knowledge that crimes had been committed by the FDLR,²³⁵ it thus appears that the Suspect was creating an illusion of engagement with the international community. The strongest evidence that the Suspect wanted an international investigation in the Congo was with respect to Shario, which is a crime base, uncharged by the Prosecution in the present case, where the *FARDC*, not the FDLR, was alleged to have committed serious crimes.

²³² See *infra*, section 3(e).

²³³ ICC-01/04-01/10-T-9-ENG, p. 24, lines 21-23.

²³⁴ See *infra*, section 3(e).

²³⁵ *Infra*, section 3(e).

109. Fourth, the Suspect played a meaningful role vis-à-vis the crimes as the spokesman articulating the political motivations behind the military effort. He was the FDLR's head of the international media campaign and referred to himself as conducting a "war of information".²³⁶ As discussed earlier, the FDLR sought to demonstrate its strength so that they could negotiate on terms more favourable to them. While I do not consider the press releases to be extortive in nature, the evidence does establish that the Suspect did articulate the FDLR's demands and specified what needed to happen for the war, and by extension the crimes, to stop. Without the Suspect and his press statements, there would be less of a reason for the FDLR to commit crimes because they would no longer be linked to any political message.²³⁷

110. Turning to the remaining Defence arguments, I am of the view that the Defence's reliance on the Hans Fritzsche is misplaced in so far as the Defence suggests that Fritzsche's acquittal stands for the proposition that, under international criminal law, no one should be held responsible for denying crimes via propaganda. First, Fritzsche's acquittal was controversial at the time. The Soviet Judge dissented and argued for a conviction²³⁸ and after the acquittal Fritzsche was subsequently tried again and convicted by a German Court for what one scholar described as "anti-Semitic propaganda per se, without additional calls for acts of violence."²³⁹ Second, and more importantly, the IMT Judgment's holding was premised on finding that there was insufficient evidence that Fritzsche could control the content of his statements²⁴⁰ or that he knew what he was saying was false.²⁴¹ When the facts of Fritzsche's acquittal are fully laid out, it is not at all clear that the IMT concluded that international criminal law precludes responsibility for when

²³⁶ P782, Translated Email from Mbarushimana to, *inter alia* Murwanashyaka, at 2154.

²³⁷ See, for example, the evidence of Witness 559, who said that the FDLR needed someone to advocate for what they were fighting for (D1321, transcript of interview of Witness 559, at 1651).

²³⁸ Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Vol. 22 (1946), p. 589.

²³⁹ See Wibke Kristen Timmerman, "Incitement in International Criminal Law", 88 *International Review of the Red Cross* 823, pp. 829-31 (2006).

²⁴⁰ Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Vol. 22 (1946), p. 583 ("Fritzsche had no control over the formulation of these propaganda policies. He was merely a conduit to the press [...]").

²⁴¹ *Ibid.*, at p. 584 ("Fritzsche sometimes spread false news, but it was not proved that he knew it to be false"). The IMT also found that the evidence against Fritzsche was also insufficient to support a finding that he knew of the extermination of Jewish persons during the war. See *Ibid.*

propagandists deny crimes. The present case is also distinguishable from Fritzsche's circumstances in that the evidence in the present case shows that the Suspect had authority over shaping the FDLR's media campaign, discretion as to what was said and, as will be explored further below, knowledge of the criminal activity of his organisation.

111. I also do not find persuasive the Defence argument that the Suspect is being criminalised for exercising his right to free speech. The Suspect's denials are not merely the expression of an opinion on historical facts; they are statements contributing to the commission of international crimes. To follow the Defence's logic, it seems unclear how anyone could ever be convicted of criminal orders, instigation, solicitation etc. without violating their human rights. Article 19(3) of the International Covenant of Civil and Political Rights acknowledges that freedom of expression may be restricted when such restriction is provided by law and is necessary "for the protection of national security or public order [...]";²⁴² the European Convention on Human Rights also explicitly makes an exception to the right of freedom of expression if restricting this right is necessary "for the prevention of disorder or crime."²⁴³ It is self-evident that prohibiting speech which serves to contribute to the commission of international crimes would be a permissible restriction under international human rights law.

112. The Suspect's actions in context do show that the Suspect was using the international media campaign to conceal past crimes and encourage future ones. Given his well-defined role in the organisation to enable the FDLR's efforts on every score, the Suspect contributed to the crimes committed to a degree warranting criminal responsibility. I would find that there are substantial grounds to believe that the Suspect's contribution is sufficiently significant to the crimes committed to deem that the Prosecution has satisfied its burden on this element.

²⁴² International Covenant on Civil and Political Rights, 16 December 1966, 999 United Nations Treaty Series 14668, art. 19(3).

²⁴³ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, as amended by Protocol 14, 213 United Nations Treaty Series 2889, art. 10(2).

(d) Intentional contribution

113. Though the Majority ostensibly finished its analysis with the objective requirements for 25(3)(d) liability, I consider it important to complete the analysis by discussing 25(3)(d) liability's subjective elements as well.

114. The evidence summarised above clearly establishes that the Suspect's conduct, which I would find constitutes a significant contribution to the crimes committed, is composed of acts the Suspect meant to engage in: press release writing, making statements to the media and the troops, speaking with other members of the FDLR leadership, etc. The evidence discussed later also shows that the Suspect acted with the awareness that he was contributing to the FDLR and the work of its leadership. I am satisfied that there are substantial grounds to believe that the acts found to be contributions to crimes were committed intentionally.

(e) Aim to further criminal activity/purpose and knowledge of intention of group to commit crimes

i. Evidence

115. There is a variety of evidence supporting the allegation that the Suspect had knowledge of the crimes committed by the FDLR.

116. First, during 2009 many criminal allegations were levied against the FDLR from an array of organizations and news agencies, including the United Nations,²⁴⁴ Human Rights Watch,²⁴⁵ The International Crisis Group,²⁴⁶ the British Broadcasting Company ("BBC"),²⁴⁷ The New York Times²⁴⁸ and many others. The Suspect was clearly aware of all of these reports, as his press releases articulate the allegations made against his organisation before denying their substance.

²⁴⁴ P1024, FDLR Press Release of 20 February 2009.

²⁴⁵ P1112, FDLR Press Release of 14 February 2009.

²⁴⁶ P519, FDLR Press Release of 23 July 2009.

²⁴⁷ P1105, FDLR Press Release of 7 September 2009.

²⁴⁸ P337, FDLR Press Release of 27 August 2009.

117. In particular, the Suspect was clearly aware of allegations made throughout 2009 that the FDLR had specifically been committing the kinds of crimes found by the Chamber above to have occurred in Busurungi, Manje, Malembe and Mianga.²⁴⁹ On 2 February 2009, the Suspect was sent an email containing a 30 January 2009 MISNA article alleging that the FDLR had killed 36 civilians in Masisi and Walikale.²⁵⁰ On 13 February 2009, Human Rights Watch alleged that the FDLR had “brutally slaughtered at least 100 Congolese civilians in the Kivu provinces [...] between January 20 and February 8, 2009”.²⁵¹ The Suspect clearly read this Human Rights Watch article, as on 14 February 2009 he issued a press release denying all of Human Rights Watch’s allegations.²⁵² On 30 March 2009, the Suspect denied allegations made by the “UNHCR” and others that the FDLR was displacing and taking revenge on the civilian population.²⁵³ On 9 April 2009, the Suspect received an email from Murwanashyaka containing a Human Rights Watch article which reported that the FDLR had “attacked and burned dozens of villages” and were “committing deliberate killings, rapes, and acts of looting”.²⁵⁴ On 5 May 2009, the Suspect denied allegations made by the UN Special Representative of the UN Secretary General in the DRC that the FDLR “has a history of bloody reprisal [sic] against civilians.”²⁵⁵ On 2 July 2009, Human Rights Watch published an article accusing the FDLR of attacking and murdering civilians in Busurungi and Mianga;²⁵⁶ the Suspect denied this article’s allegations on 7 July 2009.²⁵⁷ On 9 July 2009, the International Crisis Group accused the FDLR of many crimes of violence and destruction of property, singling out Busurungi as “the most murderous attack”.²⁵⁸ The Suspect responded to this report and denied all its

²⁴⁹ See Decision, Section V.

²⁵⁰ P927, Email exchange involving Mr Callixte Mbarushimana. See also P489, FDLR Press Release of 2 February 2009 (press release denying this allegation).

²⁵¹ P281, Human Rights Watch article entitled “DR Congo: Rwandan Rebels Slaughter Over 100 Civilians”.

²⁵² P1112, FDLR Press Release of 14 February 2009.

²⁵³ P1048, FDLR Press Release of 23 March 2009.

²⁵⁴ P901, Translated Email from Murwanashyaka to, *inter alia*, Mbarushimana.

²⁵⁵ P1028, FDLR Press Release of 5 May 2009.

²⁵⁶ P280, Human Rights Watch article entitled “DR Congo: Massive Increase in Attacks on Civilians”, at 0234.

²⁵⁷ P1037, FDLR Press Release of 7 July 2009.

²⁵⁸ P283, International Crisis Group report entitled “Congo: A Comprehensive Strategy to Disarm the FDLR”, at 0447. The ICG credited a 19 May 2009 report of the United Nations Office for the Coordination of Humanitarian Affairs for the information on which they base their claims.

allegations on 23 July 2009.²⁵⁹ On 15 September 2009, the Suspect denied allegations made in May 2009 by the Panel of United Nations Experts on the Democratic Republic of Congo that had accused the FDLR of, *inter alia*, committing rapes and reprisal attacks against civilians in eastern DRC.²⁶⁰

118. Second, the evidence shows that the Suspect was also in regular contact with FDLR members in the field during the war, as the Suspect himself acknowledged in a BBC interview in October 2009.²⁶¹

119. Some examples in the record as to how the Suspect was informed are instructive. A FDLR cabinet member named Levite²⁶² emailed the Suspect on 29 December 2009 informing him about, *inter alia*, “a mission from Kigali to infiltrate the FDLR, a search by the FARDC and the departure of FARDC from a particular zone.”²⁶³ Levite asks for Mbarushimana’s feedback, which is described as “indispensable.”²⁶⁴ Witness 632 states that Levite was a “liaison or link passing information to Murwanashyaka”²⁶⁵ and he is the source of a number of intercepted communications which describe the deployment of FARDC troops at various locations.²⁶⁶ The Prosecution has also provided evidence of email correspondence from a certain [REDACTED] sent on 29 January 2009, containing information from the battlefield, describing fighting in Kibua and the loss of Col.

²⁵⁹ P519, FDLR Press Release of 23 July 2009.

²⁶⁰ P531, FDLR Press Release of 15 September 2009.

²⁶¹ P1235, Part 2 of BBC Interview with Mr Callixte Mbarushimana, at 0:37 (“you didn’t ask me my role as Executive Secretary. On a regular basis we talk”).

²⁶² D1270, Transcript of interview with Witness 6, at 0946. The witness describes Levite as a member of the FDLR Cabinet. *See also* D1284, Transcript of interview with Witness 3, where the witness describes Levite as a civilian and member of *Comite Directeur*, at 0023.

²⁶³ P799, electronic correspondence between Mbarushimana and Levite, 15 December 2009. The email is sent to “Brian White”, which is one of the Suspect’s pseudonyms. *See* P910, email of 16 April 2009 (email sent from Djuma Ngilishuti to “Brian White” found in the Suspect’s apartment when he is arrested).

²⁶⁴ *Ibid.* *See also* P961, email correspondence between Mbarushimana and [REDACTED], 8 December 2009 where Levite sends an email to “Brian White”, found in the Suspect’s apartment when he is arrested, informing him about the killing of a priest and a nun in Murhesa.

²⁶⁵ D1356, Transcript of Interview with Witness 632, at 0594.

²⁶⁶ *See* P186, Intercepted Communication of 26 January 2009 (SMS begins: ‘De Levite’); P188, Intercepted communication of 27 January 2009 (SMS begins: ‘De Levite’); P81, Intercepted communication of 15 June 2009 (SMS signed ‘Levite’) and P397, Translated Intercepted Communication of 4 July 2009 (SMS signed ‘Levite’).

Mwarimu and “many people on their side”.²⁶⁷ Witness 587 describes the transfer of information from the Congo to the Suspect: “Mudacumura communicates with IM [Ignace Murwanashyaka] and he sends the information to CM [Callixte Mbarushimana] for press releases.”²⁶⁸

120. Handwritten notes found in the possession of the Suspect also show his knowledge of operations in the Congo, containing details such as troop movements,²⁶⁹ displacement of the local population,²⁷⁰ attacks on FDLR troops,²⁷¹ intimidation by the RDF/FARDC coalition and the occurrence of attacks against the civilian population by the latter, including pillaging and rape.²⁷² One example of these notes refers to a massacre, an ambush in Kayanja between Kashebere and Nyabiondo in Masisi, the death of a colonel from the FARDC and 3 civilians and soldiers being attacked and injured in Kirama near Kibirizi.²⁷³

121. Third, as regards Busurungi, the Suspect was informed directly by an email from Murwanashyaka on the morning of 15 May 2009 that the FDLR had killed civilians during the attack that the FDLR initiated.²⁷⁴ The Suspect may also have learned about some of the material facts related to Busurungi on 14 May 2009, as the Suspect called Murwanashyaka seven hours after MONUC issued a press release condemning the FDLR’s actions in Busurungi.²⁷⁵ Only the fact of the 14 May 2009 contact itself is in evidence, and not the contents of the call. However, there is evidence of the contents of a 21 May 2009 phone call where the Suspect and Murwanashyaka discuss the incident further in the context of

²⁶⁷ P798, Email correspondence from [REDACTED].

²⁶⁸ D1382, Transcript of interview with Witness 587, at 1364.

²⁶⁹ P803, Typed version of handwritten notes of 18 March 2009.

²⁷⁰ P800, Typed version of handwritten notes of 3 February 2009.

²⁷¹ P803, Typed version of handwritten notes of 18 March 2009.

²⁷² P824, Typed version of handwritten notes of 19 February 2009.

²⁷³ P803, Typed version of handwritten notes of 18 March 2009.

²⁷⁴ P728, Translated Email from Murwanashyaka to, *inter alia*, Mbarushimana, at 1584 (in Suspect’s possession when arrested).

²⁷⁵ P1252, Article entitled “RDC: La MONUC condamne une attaque meurtrière contre des civils à Busurungi” (in Suspect’s possession when arrested); P311, German Intercepted Communications Log, at line 4453.

drafting the necessary edits to the draft Busurungi/Mianga press release.²⁷⁶ In addition to the discussion quoted above about international humanitarian law,²⁷⁷ Murwanashyaka also tells the Suspect during this conversation that “it’d be a problem if we were to say, ‘Only soldiers are involved’ because, since MONUC has already gone out there ... and was in a position to actually see that women were victims, people would then say: ‘You’re lying’”.²⁷⁸

122. Fourth, the Suspect was by all accounts one of the highest ranked officials in the FDLR,²⁷⁹ creating a presumption that he had knowledge of the FDLR’s activities, criminal and otherwise. Witness 632 states that the Suspect was “among the bureau of the FDLR, the people who were the strongest people and who [knew] what was exactly happening”.²⁸⁰ Witness 6 discusses how the Suspect’s role is that of spokesman and that “he is responsible for communication and information within the FDLR”.²⁸¹ A 29 January 2009 intercepted communication reveals that when Levite, a FDLR member in the field, was struggling to send field news to Murwanashyaka due to technical problems, the news was sent to the Suspect instead.²⁸² A 10 March 2009 intercepted communication encouraged Murwanashyaka to put someone named “[REDACTED]” in contact with the Suspect in order to prevent the FDLR from saying contradictory things.²⁸³ On 23 March 2009, Murwanashyaka and Mudacumura have a conversation where both specifically mention that it is not possible to speak on behalf of the FDLR without speaking to either Murwanashyaka or the Suspect.²⁸⁴ Murwanashyaka and Mudacumura agreed during a 30 April 2009 phone conversation that “everything relating to the FDLR was under [Murwanashyaka’s] responsibility and Callixte’s”.²⁸⁵ On 19 June 2009, a Congolese

²⁷⁶ P592, Translated Intercepted Communication Transcript of 21 May 2009, at 2677-2678; P311, German Intercepted Communications Log, at line 4657.

²⁷⁷ See *supra*, para. 73, part j.

²⁷⁸ P592, Translated Intercepted Communication Transcript of 21 May 2009, at 2679.

²⁷⁹ See Decision, para. 295.

²⁸⁰ D1354, transcript of interview of Witness 632, at 0549. Witness 632 further stated that Mbarushimana could speak with Mudacumura and the 1st commander of the 1st division. *Ibid.*, at 0547, 0549.

²⁸¹ D1270, statement of Witness 6, at 0949.

²⁸² P599, Translated Intercepted Communication Transcript of 28 January 2009, at 0134.

²⁸³ P462, Translated Intercepted Communication Transcript of 10 March 2009, at 0295.

²⁸⁴ P602, Translated Intercepted Communication Transcript of 23 March 2009, at 0150.

²⁸⁵ P681, Translated Intercepted Communication Transcript of 30 April 2009, at 0154.

journalist called Murwanashyaka to interview him about the FDLR and Murwanashyaka referred him to the Suspect instead.²⁸⁶

ii. Analysis

123. Turning to my analysis of this evidence, I first recall the findings from Section V of the Decision that only a small percentage of the criminal allegations charged by the Prosecution as having been committed by the FDLR have been supported by sufficient evidence which meets the required standard. For this reason, I consider that the evidence of the Suspect's knowledge of the media reports and accusations in this case would not be sufficient, on its own, to conclude that the Suspect knew that crimes had been committed by the FDLR.

124. However, in my view, the partially verified media allegations, when combined with all the other evidence presented, establish that the Suspect aimed to further the criminal activity or criminal purpose of the group and acted with the knowledge of the intention of the FDLR to commit crimes. The Suspect's role in the organization required him to be aware of all activities undertaken by the organization so that he could speak on their behalf. The evidence above indicates the presence of a *de facto* functional and operating reporting mechanism between FDLR members in the field and the Suspect in Europe. Moreover, there is also evidence which indicates that a *de jure* structure of reporting was legislated for within the FDLR.²⁸⁷

125. The field contacts in evidence, as well as the Suspect's admissions that he was in regular contact with the field, are meaningful circumstantial evidence that the Suspect was provided with sufficient information to put him on notice of the FDLR's crimes. The information found in the Suspect's possession regarding troop movements and casualty reports supports the finding that the Suspect was also informed about specific locations in

²⁸⁶ P814, Intercepted Communication Transcript of 19 June 2009, at 0065.

²⁸⁷ P1069, FDLR document, Evaluation recommendations et décisions de la dernière RN CD (par domain) at 0957 (with respect to violations of which the FDLR is accused, the relevant unit commanders should make enquiries and report to Commander FOCA, who will then report to the Comité Directeur, of which the Suspect was a member).

the DRC where fighting was occurring and, therefore, where it was particularly likely that crimes committed by the organization would occur.

126. When some of the crimes alleged by the media did in fact occur, the evidence demonstrates that the Suspect continued to perform his role of “all purposes denier” without hesitation. Murwanashyaka, someone the Suspect must have trusted, actually told him on 15 May 2009 that the FDLR had killed women in Busurungi in the context of a retaliatory attack initiated by the FDLR. Rather than providing any indication that this information took him by surprise, the Suspect explained to Murwanashyaka on 21 May 2009 how to disguise the facts of the incident in order to avoid accusations of violating international humanitarian law.²⁸⁸

127. Simply put, this is not how the Suspect would react if he were genuinely surprised by Murwanashyaka’s information about Busurungi. The defendant’s willingness to cover up this incident and to make repeated, blanket denials that no FDLR crimes had ever occurred goes towards establishing that the Suspect acted with the aim to further the FDLR’s criminal activity. This evidence also establishes that the Suspect knew when he was making his contribution that the FDLR would commit crimes in the ordinary course of events, especially when considered along with: (i) the field contacts, (ii) the FARDC troop movements which the Suspect was receiving from FDLR people on the ground and (iii) the Suspect’s own admissions as to the information he was receiving. To the extent that they are verified, the criminal allegations in the media which the Suspect was reading and denying further corroborate this finding.

128. Even if the evidence was insufficient to find that the Suspect knew that specific crimes would occur before they were committed, there would still be substantial grounds to believe that the Suspect was criminally responsible. Given that the Suspect was contributing to crimes both before and after they occurred, whether the Suspect knew that crimes would occur in the ordinary course of events or only knew of specific crimes after they had already been committed is immaterial. Consistent with the international treaty

²⁸⁸ P592, Translated Intercepted Communication Transcript of 21 May 2009, at 2677-2678.

language that forms the basis for article 25(3)(d) of the Statute, all that is required to be held responsible under the Statute is that the contribution to the crime be made with the aim to further the general criminal activity or purpose of the group.²⁸⁹ In the present case, the Suspect agreed to systematically deny all criminal allegations levied against the FDLR before any of the crimes the Prosecution has established by substantial grounds occurred and, when these crimes were ultimately committed, he deliberately aimed to conceal this criminal activity in order to preserve the public image of the FDLR and its integrity. It does not matter if the Suspect learned of the precise nature of the crimes committed in Busurungi until after they were committed; so long as the Suspect aimed to further the criminal activity orchestrated by the FDLR leadership at the point and time when he made his contribution, he can be held responsible under article 25(3)(d) of the Statute.

129. I note the Majority's discussion of the evidence that some witnesses suggest that Murwanashyaka, and the Suspect by extension, may not have been given complete information about the events on the ground.²⁹⁰ The evidence which the Majority finds to be contradictory, and thus insufficient to establish to the required threshold, that the Suspect knew of the crimes committed are statements of two insider Witnesses: 632 and 559.²⁹¹

130. Witness 632 confirms the existence of an order to commit a humanitarian catastrophe,²⁹² says that the denial of crimes made the people "who committed those actions and acts" feel supported²⁹³ and emphasises that the Suspect was fully informed of what was going on;²⁹⁴ all these statements strongly support the notion that the Suspect was knowingly denying crimes and I believe that, rather than placing so much literal meaning

²⁸⁹ See International Convention for the Suppression of Terrorist Bombings, UN Doc. A/RES/52/164 (1998), annex, art. 2(3)(c) ("such contribution shall be intentional and either be made with the aim of furthering the *general criminal activity or purpose of the group* or be made in the knowledge of the intention of the group to commit the offence or offences concerned.") (emphasis added); Convention Relating to Extradition between the Member States of the European Union, OJ C 313 of 23 June 1996, art. 3(4) ("such contribution shall be intentional and made having knowledge either of the purpose and *the general criminal activity of the group* or of the intention of the group to commit the offence or offences concerned") (emphasis added).

²⁹⁰ Decision, para. 313.

²⁹¹ Decision, para. 313.

²⁹² *Supra*, para. 4.

²⁹³ Decision, para. 333.

²⁹⁴ *Supra*, para. 122.

into the statement that the Suspect was denying “things that did not take place”,²⁹⁵ a Trial Chamber should be entitled to hear Witness 632 testify and evaluate the probative value of the testimony given.

131. Witness 559 mentions that some of the criminal elements of military operations may have been withheld from Mudacumura and Murwanashyaka and that, therefore, the FDLR leadership may not have always had accurate information on the crimes committed by their own troops.²⁹⁶ However, later in his interview, Witness 559 completely contradicts this earlier statement and says that Mudacumura was aware of everything that happened on the ground, either in advance or after the fact, and that he then reported everything to Murwanashyaka.²⁹⁷ This inconsistency is much more difficult to reconcile than Witness 632’s allegedly conflicting statements, so much so that I consider Witness 559’s account of the reporting system between Murwanashyaka and the field to be unreliable. It is unclear why the Majority puts weight on Witness 559’s testimony, despite correctly acknowledging that this witness “contradicts himself a few times”.²⁹⁸

132. More importantly than the assessment of these two witnesses, the Majority ignores or does not consider critical evidence of the Suspect’s knowledge of the crimes committed, including: (i) the intercepted communications of the Suspect’s communication with the field, (ii) the Suspect’s admissions that he was regularly informed of field developments, (iii) other witnesses, such as Witness 6, who states that Murwanashyaka was not informed of military decisions, but that he was considered competent where “human rights issues were concerned,” suggesting that Murwanashyaka was likely to be informed of crimes committed by the FDLR,²⁹⁹ (iv) the clear evidence that the Suspect had been told by

²⁹⁵ Decision, para. 333.

²⁹⁶ D1318, transcript of interview of Witness 559, at 1533. This witness goes so far as to say that he thought that Murwanashyaka had no idea of what was happening on the ground, describing one occasion when Murwanashyaka had been to Congo and, when some people told him that Congolese were being killed during FDLR military operations, the witness reported that Murwanashyaka was angry and said that if it was the case he would not be president of FDLR anymore. *Ibid.*

²⁹⁷ D1322, transcript of interview of Witness 559, at 1701-08; D1323, transcript of interview of Witness 559, at 1710-29.

²⁹⁸ Decision, para. 313.

²⁹⁹ D1270, transcript of interview of Witness 6, at 0948. When describing what Murwanashyaka was competent to be informed of, the witness gave three examples: plundering, rapes and killings. *Ibid.*

Murwanashyaka what happened in Busurungi, (v) the Suspect's position and role in the organization and (vi) the voluminous allegations that the FDLR had committed crimes of which the Suspect was clearly aware, as he was responding directly to them in his press releases.

133. For these reasons, I would find that there are substantial grounds to believe that the Suspect acted with the aim of furthering the criminal activity and criminal purpose of the FDLR leadership. Further, there are substantial grounds to believe that the Suspect acted in the knowledge of the intention of the FDLR leadership to commit the crimes within the scope of the common purpose.

(f) Conclusion

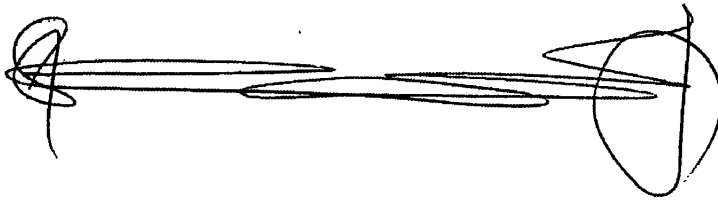
134. The Majority concludes that there are not substantial grounds to believe that the Suspect contributed to the crimes committed by agreeing to conduct an international media campaign in support of them.³⁰⁰ However, when viewing the totality of the evidence, I see a clear line of reasoning in the Prosecution's case. I see the Suspect's January 2009 agreement to deny all allegations made against the FDLR, I see the order to commit a humanitarian catastrophe agreed upon by members of the FDLR leadership, I see the crimes that were committed consistent with that order, I see the Suspect denying these crimes consistent with the January 2009 agreement, I see how these denials conceal past crimes and encourage future ones and I see the evidence that the Suspect is making these denials with knowledge of the crimes committed and an aim to further them to preserve a veneer of legitimacy over his organisation. The case against Mr Callixte Mbarushimana is not a conventional one, but what the Majority sees as "insufficient evidence" I see as "triable issues" deserving of the more rigorous fact finding that only a Trial Chamber can provide.

135. I would find there are substantial grounds to believe that the Suspect is responsible for the crimes found to be committed by the FDLR under article 25(3)(d) of the Statute and

³⁰⁰ Decision, para. 299.

would therefore confirm the following: attacks against the civilian population constituting a war crime (Count 1), murder constituting a crime against humanity (Count 2), murder constituting a war crime (Count 3), mutilation constituting a war crime (Count 4), inhumane acts constituting a crime against humanity (Count 5), cruel treatment constituting a war crime (Count 6), rape constituting a crime against humanity (Count 7), rape constituting a war crime (Count 8), destruction of property constituting a war crime (Count 11) and pillaging constituting a war crime (Count 12).

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

A handwritten signature in black ink, consisting of a series of loops and horizontal strokes, positioned above the judge's name.

Judge Sanji Mmasenono Monageng

Presiding Judge

Dated this Friday, 16 December 2011

At The Hague, The Netherlands