

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: **ICC-01/04**
Date: **15 May 2012**

PRE-TRIAL CHAMBER II

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

PUBLIC

**Corrigendum to “Public redacted version of
Prosecution’s Application under Article 58”**

With Explanatory Annex A

Source: Office of the Prosecutor

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

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SUMMARY OF THE CASE

1. Pursuant to Article 58(1), the Prosecution applies for a warrant for the arrest of Sylvestre MUDACUMURA, who bears criminal responsibility for crimes against humanity and war crimes committed by the *Forces Démocratiques pour la Libération du Rwanda – Forces Combattantes Abacunguzi* (FDLR-FOCA, hereafter “FDLR”) between 20 January 2009 and 31 August 2010, in North and South Kivu Provinces (“the Kivus”), Democratic Republic of the Congo (“DRC”).
2. In January 2009, Ignace MURWANASHYAKA, Sylvestre MUDACUMURA, Callixte MBARUSHIMANA and Gaston IYAMUREMYE, together with other senior FDLR military and political leaders, agreed to conduct a widespread and systematic attack against the civilian population of the Kivus and a simultaneous international media campaign together designed to extort political concessions for the FDLR in Rwanda (“Common Plan”).
3. Based on the evidence collected, the Prosecution alleges that there are reasonable grounds to believe that MUDACUMURA is responsible pursuant to Article 25(3)(a), alternatively Article 25(3)(b) or Article 28(a), of the Statute for the crimes committed in implementation of the Common Plan.
4. At all relevant times, MUDACUMURA was a member of the FDLR’s Steering Committee and head of the FDLR military wing. In early 2009 he transmitted an order to FDLR troops to create a humanitarian catastrophe in the Kivus by attacking civilians and ensured its implementation during 2009 and 2010, in furtherance of the Common Plan. MUDACUMURA also collaborated with MURWANASHYAKA, MBARUSHIMANA and other FDLR leaders in implementation of the international media campaign authorised by the Steering Committee in January 2009 as part of the group’s multi-dimensional response to the joint military operation.

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

The historical background to the crimes committed by the FDLR

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

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

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

¹ [REDACTED].

² [REDACTED]

³ [REDACTED].

⁴ [REDACTED]..

⁵ [REDACTED].

⁶ [REDACTED].

⁷ [REDACTED].

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

9. It was in this context of the growing political isolation of former *génocidaires* after the Congo Wars that the FDLR was created in early 2000 from a splinter group of ALIR II leaders. One of the main objectives of the founders of the FDLR was to attempt to distance themselves from its roots in the Rwandan 1994 genocide. They needed to disguise their connection to it so as to avoid isolation and gain international legitimacy, clearing the way for their participation in political negotiations aimed ultimately at regaining political power in Rwanda.¹⁰ To this end, the FDLR adopted a bifurcated structure:

a. On the one hand a political leadership was established in Europe, which was ostensibly unconnected either with either the genocide or the new crimes in the Kivus. The movement sought to sanitise its image in order to participate in political negotiations aimed at regaining power in Rwanda.

b. However, the FDLR maintained a military force of thousands of soldiers in the Kivus, under the command of Sylvestre **MUDACUMURA**, who were tasked in 2009 with the creation of a humanitarian catastrophe in order to extort political concessions.

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ [REDACTED]..

10. Having inherited the leadership¹¹ and the goals of its predecessors, the FDLR continued to seek to return to Rwanda and overthrow that country's government.¹² Its criminal activities over the years were publicly and officially exposed. Between 2002 and 2010, the UN Security Council repeatedly expressed serious concerns about the military activities of the FDLR in Eastern DRC. It has characterized the group as a threat to the peace and security of the Great Lakes region, a cause of insecurity and instability and a threat to the local civilian population. It issued repeated resolutions since at least 2004¹³ condemning the FDLR for breaches of human rights and IHL and calling on them to cease their attacks against the civilian population including during 2009-2010, the time when the crimes dealt with in this application were committed.¹⁴ The UN Security Council ("UNSC") and the Council of the European Union ("EU") have also imposed travel bans and asset freezes on several of the FDLR's leaders, including MUDACUMURA, as a result of the group's activities.¹⁵ Furthermore, numerous respected and independent international organisations and NGOs repeatedly reported on the catalogue of abuses committed by FDLR combatants against the civilian population of the Eastern DRC.¹⁶

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

12. The DRC and Rwanda Governments announced in December 2008 their agreement to launch a joint military operation against the FDLR on DRC territory, in line with the Pretoria Accord. Following this announcement, the Congolese armed forces ("FARDC") and their partners¹⁷ launched three successive military operations

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ The Rwandan Defence Forces ("RDF") and MONUC/MONUSCO.

– *Umoja Wetu*, *Kimia II* and *Amani Leo* – to dislodge the FDLR from its strongholds in Eastern DRC. The events relevant to this application took place between January 2009 and 31 August 2010, within the context of a non-international armed conflict in the Kivu Provinces.¹⁸

13. At all relevant times, the parties to this armed conflict included the FARDC, fighting alone or in coalition with Rwandan forces or supported by MONUC/MONUSCO forces; and the FDLR fighting alone or, in July and August 2010 in particular, in coalition with other armed groups.¹⁹

The 2009/10 Common Plan

14. In early 2009 the FDLR leadership decided to launch a widespread and systematic attack against the civilian population of the Kivus and a simultaneous international media campaign together designed to extort political concessions for the FDLR in Rwanda.²⁰

15. The Prosecution alleges that the policy to attack civilians could not have occurred without the concept of operations being approved by the Steering Committee, the highest functioning decision making body of the FDLR, which integrated top military and political leaders such as MURWANASHYAKA, MUDACUMURA, MBARUSHIMANA and others and was responsible *inter alia* for developing the group's defence and security policies,²¹ even though this decision was not explicitly documented in its resolutions.²²

16. The FDLR leaders knew this strategy had worked for other militias in the Great Lakes region.²³ Acting alone or in coalition with others,²⁴ the FDLR pursued a

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED]..

²³ [REDACTED].

²⁴ [REDACTED].

military terror campaign, directing numerous attacks against civilians in pursuit of the FDLR's goals.

17. MUDACUMURA issued the order to attack civilians shortly after the launch of *Umoja Wetu*.²⁵ It was transmitted to all FDLR commanders and read out to the troops in the field. It identified the primary target as the civilian population. MUDACUMURA's order directed FDLR combatants to treat civilians as enemies and traitors and to make them "suffer". It directed the troops to pillage civilian property and burn down entire villages to ensure that the FDLR's enemies and civilians supportive of the FARDC's offensive would have nowhere to return to.²⁶ MUDACUMURA also issued orders to pillage. He ordered FDLR units to carry out so-called resupply or "*ravitaillement*" operations a euphemism for pillaging operations during which FDLR troops forcefully robbed the local population of their personal property and committed other crimes.

18. However, the attacks were not aimed solely at punishing those Congolese civilians considered as enemies by the FDLR, but also at a wider audience. Thus, in parallel with the campaign of crimes on the ground, MURWANASHYAKA, MUDACUMURA and MBARUSHIMANA, as members of the Steering Committee, approved a "war of information" on public awareness, media and diplomatic fronts,²⁷ designed to exploit the military terror campaign in order to persuade the government forces to abandon their military operation in favour of a negotiated settlement on terms favourable to the FDLR.²⁸ It was also designed to deny the FDLR's responsibility for crimes in order to maintain its credibility as a legitimate party for negotiation.

²⁵ [REDACTED].

²⁶ [REDACTED]..

²⁷ [REDACTED].

²⁸ [REDACTED].

19. The common plan was systematically implemented. From early on in the FDLR campaign, MBARUSHIMANA “warn[ed] MONUC against a danger resulting of [sic] its alignment with the Rwandan-Congolese troops”,²⁹ that “[a]ny solution based on the desire to destroy militarily the FDLR is not only counterproductive but also extremely dangerous”, and that any attempt to forcibly disarm the group would plunge the region into a long and dreadful war, “the consequences of which are immeasurable”.³⁰

20. In conjunction with these warnings, the FDLR launched its campaign of attacks on civilians.³¹ Implementing MUDACUMURA’s orders, FDLR units perpetrated crimes against the civilian population – murder, rape, torture, inhumane acts, cruel treatment, persecution, mutilation, outrage upon personal dignity, pillaging and extensive destruction of civilian property – during attacks on [REDACTED] and numerous other villages as detailed in section D.4 below.

21. In some attacks, the FDLR assaults initially focussed on FARDC positions located in or near villages, but then razed the villages and attacked civilians after the military opposition, if any, had been neutralised. In others, the FDLR deliberately perpetrated attacks on completely undefended places. In some instances where the FDLR was itself attacked by coalition forces, it prevented civilians from fleeing resulting in many casualties and also killed civilians during and after the attack as retribution. In its aim to create a humanitarian catastrophe, FDLR units perpetrated rapes and other sexual atrocities, burnt down houses on a massive scale, and fueled substantial civilian displacement in both Kivu Provinces.³²

22. UN agencies and NGOs confirm that FDLR attacks were widespread: up to 750 killings, more than 600 rapes and over 7,000 houses or other structures destroyed at numerous different locations over the relevant period.³³ The rapes perpetrated by

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

FDLR soldiers included gang rapes and other brutal sexual attacks, sometimes involving mutilation and disfigurement.³⁴ [REDACTED]

23. The FDLR leadership supervised the execution of the order to attack civilians. FDLR units regularly reported to MUDACUMURA on operations during which crimes were committed. In certain instances, notorious perpetrators of these crimes were promoted, not punished.³⁵ MUDACUMURA also personally received a share of the profits of the *ravitaillement* campaign.³⁶

24. MUDACUMURA made various essential³⁷ contributions to the Common Plan. As a top FDLR leader and member of the Steering Committee, he contributed to its adoption. The Prosecution submits that it is inconceivable that such a plan could have been conceived and adopted without his involvement as Steering Committee member and top military commander of the FDLR. Through his command of FDLR forces, MUDACUMURA personally ordered and supervised the attack on civilians. He kept MURWANASHYAKA and MBARUSHIMANA apprised of its development, ensuring coordination between the military and the political dimensions of the Common Plan. As the Supreme Commander of the FDLR military wing, MUDACUMURA had the authority to issue orders and enforce their execution. But for his order to attack civilians and his enforcement thereof, the Common Plan would have been frustrated. MUDACUMURA is therefore responsible pursuant to Article 25(3)(a) as an indirect co-perpetrator, or alternatively as an indirect individual perpetrator under 25(3)(a) or accessory under 25(3)(b) for ordering the commission of crimes, or further alternatively pursuant to Article 28(a) as a military commander.

³⁴ [REDACTED].

³⁵ [REDACTED]..

³⁶ [REDACTED].

³⁷ The Prosecution does not necessarily agree that an “essential” contribution is required to incur liability as a co-perpetrator, (see Judge Fulford’s dissenting opinion to the *Lubanga* trial judgment, ICC-01/04-01/06-2842, para. 15, Separate Opinion) but in this case it alleges that the contribution was indeed essential so it is unnecessary to decide this issue.

25. The Prosecution submits that it is unnecessary for the Chamber, at this stage at least, to choose between these modes of liability. It is sufficient to determine that there are reasonable grounds to believe that MUDACUMURA has committed the crimes alleged under one or more of the modes alleged.³⁸

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

26. Sylvestre MUDACUMURA³⁹ was born in 1954 in *cellule* Ferege, Gatumba sector, Kibilira commune, Gisenyi prefecture, Rwanda.⁴⁰ He is otherwise known as Pierre Bernard MUPENZI⁴¹ or Mpezi,⁴² Commandant Pharaon⁴³ or Pharaoh,⁴⁴ Mudac,⁴⁵ Mukanda⁴⁶ or Radja.⁴⁷ He is married and has one son. His wife and son are believed to live in France or Belgium.⁴⁸

27. MUDACUMURA was a member of the Rwandan Presidential Guard and was responsible for President Juvénal HABYARIMANA's security. He became the S3 officer, responsible for operations, in the Presidential Guard Battalion.⁴⁹ During the 1994 Rwandan genocide, MUDACUMURA commanded the 31st (Rutare) Battalion, and was part of operational sector Byumba,⁵⁰ until he fled to the DRC.⁵¹

³⁸ The Prosecution notes in this regard Judge Fulford's dissenting opinion of that these modes of liability are not intended to be mutually exclusive (ICC-01/04-01/06-2842, para.7), or arranged in any hierarchy of seriousness (*ibid.* para.9)

³⁹ See photos of MUDACUMURA in Anx.1.

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED]..

⁴³ [REDACTED].

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

28. MUDACUMURA is among the longest-serving high-level commanders of the various Rwandan rebel groups that sought to overthrow the Rwandan Government. MUDACUMURA was a founder of the RDR in 1995,⁵² which recruited over 50,000 men and launched attacks on Rwandan territory in pursuit of the goal of returning to power there.⁵³ He subsequently led the Western faction of the ALIR, the FDLR's immediate predecessor.⁵⁴ MUDACUMURA has been a member of the FDLR since its foundation.

29. MUDACUMURA became acting Commander of the FDLR in November 2003.⁵⁵ He was confirmed in that position in January 2004 and re-elected three times, including in 2009.⁵⁶ As Supreme Commander of the Army and President of its High Command, MUDACUMURA is the highest-ranking military commander in the FDLR.⁵⁷

30. MUDACUMURA is staunchly opposed to FDLR disarmament unless its conditions are met.⁵⁸ He is on the United Nations' Security Council's and the European Union's sanctions lists.⁵⁹

⁵¹ [REDACTED]..

⁵² [REDACTED].

⁵³ [REDACTED].

⁵⁴ [REDACTED].

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

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

31. Between 20 January 2009 and 31 August 2010 MUDACUMURA committed the crimes listed in this section as an indirect co-perpetrator or alternatively, by ordering or as a military commander. These crimes were perpetrated by FDLR troops in North and South Kivu, DRC, at locations including but not limited to those identified in section D.4 below.

32. Under Article 25(3)(a), 25(3)(b) or 28(a) of the Rome Statute, MUDACUMURA is responsible for the following offences:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Categories of evidence relied on primarily

33. [REDACTED]

34. [REDACTED]

35. [REDACTED]

36. [REDACTED]

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

37. [REDACTED]

38. [REDACTED]

39. [REDACTED]

40. [REDACTED]

41. [REDACTED]

42. [REDACTED]

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

43. [REDACTED]

44. [REDACTED]

45. [REDACTED]

46. [REDACTED]

47. [REDACTED]

48. [REDACTED]

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

49. [REDACTED]

50. [REDACTED]

51. [REDACTED]

52. [REDACTED]

53. [REDACTED]

54. [REDACTED]

55. [REDACTED]

56. [REDACTED]

57. [REDACTED]

58. [REDACTED]

59. [REDACTED]

60. [REDACTED]

61. [REDACTED]

62. [REDACTED]

63. [REDACTED]

64. [REDACTED]

65. [REDACTED]

66. [REDACTED]

67. [REDACTED]

68. [REDACTED]

69. [REDACTED]

70. [REDACTED]

5. Mode of liability

71. MUDACUMURA bears responsibility pursuant to Article 25(3)(a) as an indirect co-perpetrator of the crimes referred to in section D.4 above. In the alternative, he bears responsibility pursuant to Article 25(3)(b) or Article 28(a).

Article 25(3)(a)

72. [REDACTED]

73. [REDACTED]

74. [REDACTED]

75. [REDACTED]

76. [REDACTED]

77. [REDACTED]

Article 28(a)

78. [REDACTED].

79. [REDACTED]

80. [REDACTED]

81. [REDACTED]

82. [REDACTED]

83. [REDACTED]

E. BACKGROUND TO INVESTIGATION / LEGAL FRAMEWORK

1. Jurisdiction and admissibility

84. [REDACTED]

85. [REDACTED]

86. [REDACTED]

2. Issues of victim and witness protection

87. [REDACTED].

88. [REDACTED].

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

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

90. First, there are reasonable grounds to believe that MUDACUMURA will not appear for trial unless compelled to do so by arrest. He faces many serious charges and, if convicted, a lengthy term of imprisonment.⁶⁰ MUDACUMURA lives in remote, deep forest areas of Masisi territory, North Kivu, beyond the reach of the Court. MUDACUMURA has been able to evade capture and operate with impunity in the Kivus for over 15 years. In that time, successive campaigns by government forces have failed to dismantle the troops under his command. Even if he would move out of the DRC, he has the means to evade arrest [REDACTED].⁶¹

91. Second, as the top FDLR operational commander, MUDACUMURA has the means and opportunity to obstruct and endanger the investigations and court proceedings, [REDACTED].

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

⁶¹ Based on similar facts, this Chamber already made findings to this effect in the *Mbarushimana* case. See ICC-01/04-01/10-1, para.47; ICC-01/04-01/10-163, paras.46, 59; ICC-01/04-01/10-428, para.40.

G. [REDACTED]

93. [REDACTED]

94. [REDACTED]

95. [REDACTED]

96. [REDACTED]

H. OTHER REQUESTS

1. Confidentiality of filing

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

2. Transmission of request for arrest and surrender

98. [REDACTED]

99. [REDACTED]

I. RELIEF SOUGHT

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

1. Find that there are reasonable grounds to believe that Sylvestre MUDACUMURA is criminally responsible for war crimes and crimes against humanity within the jurisdiction of the Court committed by the FDLR in North and South Kivu Provinces of the DRC between 20 January 2009 and 31 August 2010, pursuant to Article 25(3)(a) or, in the alternative, Article 25(3)(b) or Article 28(a) of the Statute;
2. Find that the arrest of Sylvestre MUDACUMURA is necessary;
3. Issue a warrant of arrest for Sylvestre MUDACUMURA;

4. [REDACTED];

5. [REDACTED].



Luis Moreno-Ocampo, Prosecutor

Dated this 15th day of May 2012

At The Hague, The Netherlands