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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 Document

Defence Written Submissions Pursuant to the Oral Order of Pre-Trial Chamber I of 16 September 2011

Source: **Defence for Mr. Callixte Mbarushimana**

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I INTRODUCTION

1. The Defence for Callixte Mbarushimana ("the Suspect") hereby presents its written submissions supplementing the oral arguments presented at the confirmation of charges hearing held between 16 and 21 September 2011 ("the Hearing").

2. Firstly, the Defence will reinforce its central submission that the Prosecution has erroneously interpreted so-called "common purpose liability" under Article 25(3)(d) of the Rome Statute ("Article 25(3)(d)"). In so doing, the Defence will show that the evidence adduced by the Prosecution and deemed specific to the Suspect fails to establish his liability under Article 25(3)(d). Thereafter, the Defence will present a critique of the Prosecution's approach to the standard of proof and its purposeful avoidance of conducting a discrete analysis of the evidence adduced to support its contention that the FDLR committed the crimes identified in the document containing the charges ("the DCC"). Finally, the Defence will address certain legal submissions raised by the Prosecution in its written submissions.

3. At the very outset, however, the Defence wishes to shed some light on the FDLR organisation. Evidently, it is not the FDLR which is on trial but the Suspect. Accordingly, the Prosecution's persistent attempt to depict the FDLR as a criminal organisation[1] is purposefully designed to imbue the Suspect with a streak of criminality. The Rome Statute, however, does not recognise guilt by association nor does it criminalise membership *per se* of a proscribed organisation. The information seized from the Suspect's house proves nothing more than his sympathy for the vision and ideals of the FDLR – an organisation which was created with the objective of protecting Rwandan refugees in the

[1] See for instance, Transcript 19 September 2011, ICC-01/04-01/10-T-7-RED-ENG at 21, lines 9-10; Transcript 21 September 2011, ICC-01/04-01/10-T-9 -ENG at 25, lines 22-23.

Democratic Republic of the Congo ("the DRC"). Indeed, as the FDLR statute itself asserts:[2]

> "*Les FDLR constituent donc une organisation de libération qui vise à redonner l'espoir d'une nouvelle ère de paix et de reprise en mains, par le peuple rwandais, de son avenir et de ses destinées.*"

While these ideals may not be shared by all, the Suspect's right to promulgate them - even in provocative language – is not a criminal offence and is protected under international human rights law.

4. The Prosecution has erroneously attempted to portray the FDLR as a criminal gang of Hutu *génocidaires* which, after fleeing Rwanda, decided to wreak havoc on the Eastern DRC. While this might support the mistaken theory that the FDLR hierarchy purposefully decided to attack the civilian population of the Kivus, it is, in truth, a gross distortion of the reality and of the Prosecution's very own evidence. The Prosecution, it will be remembered, has relied heavily on the testimonies of ex-FDLR soldiers. Most of these very same soldiers, however, far from implicating the FDLR in a criminal campaign are positive about the relationship between the FDLR and the Congolese civilian population. Defence witness W-0005 (BKA-004), for example, states that in the forests, the FDLR and the Congolese people lived well together.[3] The same witness adds that it was understood that the FDLR should treat the indigenous

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[2] EVD-PT-OTP-01080, DRC-REG-0008-1507 at 1507-1509. See also on the FDLR pursuit of peace in OTP evidence: UN Secretary General Report, 27 May 2009, EVD-PT-OTP-00301; DRC-OTP-2014-0865 at para.12: "*the start of the joint operation prompted the issuance, on 5 February, of a statement by the President of FDLR, Ignace Murwanashyaka, calling for direct political negotiations with Rwanda and a peaceful resolution to the conflict.*"; and from evidence communicated to the Defence by the Prosecution; see W-0006 (BKA-005) who participated in the Rome peace negotiations in 2005EVD-PT-D06-01270; DRC-OTP-2028-0940 at 0943 where he states Ignace Murwanashyaka assigned him to meet DRC military representative in order to find a peaceful resolution that would spare innocent lives; at 0946 the witness states that: "*Ignace Murwanashyaka was of the opinion that fighting was no solution: it would only have terrible consequences for our people in the forests*".

[3] EVD-PT-D06-01286, DRC-OTP-2031-0050-RO1 at 0054.

Congolese well "*because they had not done anything to us*.[4] One civilian member of the FDLR testifies that there were "*no problems of coexistence*" and speaks of intermarriage between the FDLR soldiers and Congolese civilians[5] - something corroborated by other former FDLR soldiers.[6] W-0003 (BKA-002) states: "*There are many other groups there; The FDLR has a bad image in the world but in the DRC it is the best of a bad bunch for the civilians, by contrast with the groups, like Mai Mai, for instance*"[7]

5. In addition to the foregoing, the FDLR had a functioning system of justice which was designed to prevent its troops from committing crimes.[8] The need to enforce FDLR code of conduct outlawing all forms of aggression mentioned in the DCC,[9] was even reinforced by the FDLR Steering Committee and FOCA High Command in January 2009.[10] FDLR rank and file were taught

[4] EVD-PT-D06-01286, DRC-OTP-2031-0050-RO1 at 0062.
[5] EVD-PT-D06-01269, DRC-OTP-2028-0924 at 0929.
[6] W0008 (BKA008) EVD-PT-D06-01271, DRC-OTP-2028-0982-RO1 at 0993; OTP W0526: EVD-PT-D06-03107; DRC-OTP-2033-0334 at 0375 and 0376; OTP W0527: EVD-PT-D06-01310; DRC-OTP-2033-0551 at 0582 and 0583; OTP W0552: EVD-PT-OTP-00644; DRC-OTP-2030-0264 at 0282 and 0283.
[7] W0003 (BKA 002), EVD-PT-D06-01284; DRC-OTP-2031-0003-R01 at 0024.
[8] OTP W 0559: "A: …*Ignace was usually gives orders as to how the army and the civilians should behave in the war. Q: and how should the army behave in the war then? A: Not kill civilians for examples: avoid wrongdoings of war like killing and rape. Murwanashyaka forbade such things. Punishments were ordered for them. That was the case from the start. He often reminded us of it.." at* EVD-PT-D06-01271, DRC-OTP-2028-0982-RO1 at 0992;.
[9] Article 9 of the FDLR Statute, DRC-REG-0008-1507 requires its members to abide by its provisions (at 1516); Article 11 provides that a member is disqualified after a breach or grave disciplinary violation (at 1518); Article 6 of the Code of conduct of the FDLR specifies that it is prohibited to, *inter alia*, attack people, to beat people, to abuse or humiliate them; to appropriate the property of others, to kill innocent people or to commit rape; to use by force or by threat the property of others, see EVD-PT-D06-01409, DRC-REG-0100-0463-0001 at 0003. See also W0003 (BKA 002), EVD-PT-D06-01284; DRC-OTP-2031-0003-R01 at 0012: "Q: *"What were the worst crimes one could commit in the FDLR? A: the worst crime is treason. Q: What was the worst crime that be committed against civilians? A: The worst crimes here were murder, rape, "association des malfaiteurs" and armed robbery*"; OTP W0552, EVD-PT-OTP-00646; DRC-OTP-2030-0307 at 0329 where he states: "*the most severely punished crimes were stealing from people, raping women, deserting the war".*
[10] EVD-PT-D06-02170, DRC-OTP-2028-0940 at 0950, where the witness states that "[n]one of the population was to be present where fighting was taking place, neither citizens nor refugees from Rwanda".

the code of conduct[11] and witnesses testify that soldiers were sanctioned for offending behaviour.[12]

II THE MODE OF LIABILITY

Introductory Remarks, General Understanding of Article 25(3)

6. To date, the jurisprudence of the International Criminal Court has not occupied itself with a detailed analysis of Article 25(3)(d).[13] The Defence, thus, believes it important to make some initial comments concerning the genesis of this provision and how it ought to be distinguished from the other forms of liability contained in Article 25(3) of the Rome Statute.

7. Article 25(3)(d) constitutes an almost literal copy of a provision of a 1998 anti-terrorism convention[14] and, from a normative perspective, is unique in international criminal law as well as in customary international law[15]. It represents, on the one hand, a compromise between the strong opposition of State delegations to any form of anticipated or organisational/collective liability and, on the other hand, the need to provide for a form of *individual* participation in collective criminal enterprises in keeping with the principles of legality and culpability.[16]

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[11] See for instance Prosecution witness W-527: the Code of Conduct was taught to soldiers as if they were in school at EVD-PT-OTP-1310; DRC-OTP-2033-0551 at 0587; see also for the same witness: *QK, and where you referred to the military rules that you were supposed to follow, is there a rule book that you follow or is this just what you have been taught in your military education? A: we learned, we were told and everyone in the army knew what he is supposed to do."* EVD-PT-D06-01310; DRC-OTP-2033-0551 at 0585.

[12] Prosecution witness W-559, EVD-PT-D06-01271, DRC-OTP-2028-0982-RO1 at 0992

[13] So far it has only been the object of Arrest warrant decisions which merely repeated the elements of subparagraph (d) without further analysis, see *Decision on the Prosecutor's Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, 8 March 2011, ICC-01/09-01/11, para 53; Warrant of Arrest for Ahmad Harun, 27 April 2007, ICC-02/05-01/07, para. 16 and Warrant of Arrest for Ali Kushayb, 27 April 2007, ICC-02/05-01/07, para. 17.

[14] A. Eser in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, New York: Oxford University Press 2002, at 802; see also K. Ambos in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, München: Beck 2nd ed. 2008, art. 25 margin no. 24.

[15] G. Werle, *Principles of International Criminal Law*, The Hague: Asser Press 2nd ed. 2009, at 498.

[16] K. Ambos, *supra* note 14 art. 25 margin no. 24.

8. Taking into account the history and wording of the provision, Article 25(3)(d) encompasses neither *conspiracy* nor *membership* liability. Indeed, perusal of its antecedent provisions in the 1991 and 1996 ILC draft codes clearly shows that Article 25(3)(d) requires, at the very least, *direct participation* in the attempted commission of a crime falling within the ICC's jurisdiction[17]. A literal analysis thus makes it clear that Article 25(3)(d) excludes anticipated liability (such as the classical form of conspiracy) where the mere agreement to commit a crime (*i.e.,* the 'meeting of minds'), independent of its eventual execution, is punishable.[18]

9. Moreover, the language of Article 25(3)(d), with its specific requirement for a "contribution" to the (attempted) execution of a crime, clearly demonstrates that *membership per se* of a criminal or proscribed terrorist organisation will not engender criminal responsibility under the Rome Statute.[19]

10. The Defence submits that the drafters of the Rome Statute purposefully opted for a model of *individual* responsibility, *i.e.*, where the individual *contribution* to a criminal result is an *indispensable prerequisite* for fixing any kind of criminal liability. Noting that Article 10 of the IMT-Statute,[20] which criminalized membership *per se* of the SS and other Nazi entities, was neither founded in (historic) customary law nor a source for the later development of a

[17] This, as many affirmations in this submission, clearly follows from the *travaux préparatoires* and is not just, as argued by the Prosecution, anecdotic evidence which should be ignored (in this sense view the rebuttal of the Senior Trial Lawyer in ICC-01/04-01/10-T-8-CONF-ENG ET 20-09-2011 at 88). See P. Saland, "International Criminal Law Principles", in: R.S. Lee, *The ICC, The Making of the Rome Statute, Issues, Negotiations, Results*, The Hague: Kluwer International Law 1999, at 199 *et seq*. Saland was chairman of the working group 3 on General Principles during the Rome Conference; Kai Ambos was member of this working group as part of the German delegation.

[18] See A. Eser, *supra* note 14, at 802 and K. Ambos, *supra* note 14, art. 25 margin no. 24.

[19] Cf. K. Ambos, *Der Allgemeine Teil des Völkerstrafrechts*, Berlin: Duncker & Humblot 2002, at 642.

[20] The provision reads: 'In cases where a group or *organization* is declared *criminal* by the Tribunal, the competent national authority of any Signatory shall have the right to *bring individuals to trial for membership* therein before national, military or occupation courts. In any such case the *criminal nature* of the group or organization is *considered proved* and shall not be questioned.' (emphasis added). The IMTFE-Statute did not contain such a provision.

customary norm,[21] the drafters of the Rome Statute consciously avoided adopting *membership* as a basis for criminal responsibility. While national law,[22] frequently provides for this type of membership liability, modern international criminal law, as enshrined in the Rome Statute, does not do so out of respect for the principle of culpability.

11. It should be stressed that Joint Criminal Enterprise ("JCE") is not an analogous form of liability. Indeed, the subjective requirements JCE, especially those of the extended form (JCE III), are also different from Article 25(3)(d).[23]

Distinguishing Article 25(3)(d) from Articles 25(3)(a) and 25(3)(c)

12. The key element distinguishing the form of *accomplice or accessory liability* formulated in Article 25(3)(d) from *co-perpetration* as defined in Article 25(3)(a) is the relevant objective threshold. Article 25(3)(a) requires a co-perpetrator to exercise (joint) control over a crime, such that its commission may be frustrated by the omission of his contribution. Article 25(3)(d), however, does not set such a high objective standard. Where a co-perpetrator's influence is thus regarded as being insufficient to frustrate the commission of a crime, Article 25(3)(d) will fix him with a residual mode of *accomplice* liability.[24] In issuing its warrant for the arrest of the Suspect, the learned Pre-Trial Chamber

[21] Cf. K. Ambos, *Der Allgemeine Teil*, *supra* note 19 at 103; A. Cassese, *International Criminal Law*, New York: Oxford University Press 2nd ed. 2008, at 34.

[22] See, as mentioned by Professor Ambos during the Hearing and by way of example, Art. 68 (a) Botswana Penal Code ("Any person who is a member of an unlawful society is guilty of an offence and is liable to imprisonment for a term not exceeding seven years."), Art 416 Italian *Codice Penale* ('Quando tre o più persone si associano allo scopo di commettere più delitti, coloro che promuovono o costituiscono od organizzano l'associazione sono puniti, per ciò solo, con la reclusione da tre a sette anni. Per il solo fatto di partecipare all'associazione, la pena è della reclusione da uno a cinque anni.'), Art 288 Brasilian Penal Code ('Associarem-se mais de três pessoas, em quadrilha ou bando, para o fim de cometer crimes: Pena - reclusão, de um a três anos'; see for the dominant interpretation insofar Luis Regis Prado, *Curso de Direito Penal Brasileiro*, volume 3, Parte Especial, Arts. 250 a 359-H, São Paulo: Revista dos Tribunais 6th ed. 2010, p. 189-190: 'Não é necessário que a quadrilha ou bando tenha cometido algum delito para que o delito se concretize; pune-se o simples fato de se figurar como integrante da associação.'). See also Art 278 Austrian Penal Code and sect. 129, 129a German Penal Code (*Strafgesetzbuch*).

[23] K. Ambos, 'Joint criminal enterprise and command responsibility', *JICJ* 5 (2007), 159, at 173.

[24] Lubanga Decision on the Confirmation of Charges, 29 Jan. 2007, ICC-01/04-01/06-803, para. 337; see also more recently PTC II, Deci*sion on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, 8 March 2011, ICC-01/09-01/11, para. 44 (with respect to Joshua Arap Sang).

specifically excluded the applicability of Article 25(3)(a), concluding that reasonable grounds did not exist to believe that the Suspect could have frustrated the crime by omitting his contributions.[25] With this finding, so it is submitted, the Pre-Trial Chamber acknowledged that the Suspect lacked a substantial degree of influence over the alleged crimes.[26]

13. Article 25(3)(c), as distinct from Article 25(3)(d), requires a *substantial* contribution on the objective level.[27] This may be concluded from an analysis of the ILC drafts and of the consolidated jurisprudence of the *ad hoc* tribunals regarding aiding and abetting. Taking a cue from the ICTY Trial Chamber in *Tadić*, a contribution will only be considered "*substantial*" if the ensuing criminal act "*most probably would not have occurred in the same way had not someone acted in the role that the suspect in fact assumed*".[28] On the subjective level, Article 25(3)(c) requires that the contribution be made for the "*purpose of facilitating*" the commission of a crime. However, as will be shown hereinafter, this is a more stringent requirement than that stipulated in Article 25(3)(d).[29]

The existence of the alleged common purpose

14. As mentioned above, the Defence strenuously disputes the Prosecution's allegation that a group of FDLR officials, collectively agreed to attack a civilian population and that the Suspect made a contribution thereto.

[25] ICC-01/04-01/10-1-tFRA at para. 36 (French version).
[26] *Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana*, 11 Oct. 2010, ICC-01/04-01/10-1 at para. 36: "In the case at hand, while there are reasonable grounds to believe that Callixte Mbarushimana contributed to the common plan in the way described above, at this stage the Chamber finds no sufficient evidence to establish reasonable grounds to believe that he had the power, by not performing his tasks, to frustrate the commission of the crimes. Therefore, the Chamber does not find at this stage sufficient evidence to establish reasonable grounds to believe that Callixte Mbarushimana's contribution was essential, and that his participation in the commission of the crimes alleged by the Prosecutor is that of a co-perpetrator or an indirect co-perpetrator, within the meaning of article 25(3)(a) of the Statute."
[27] See W. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, New York: Oxford University Press 2010, at 434 *et seq*.; see also Ambos, *supra* note14, art. 25 margin no. 17 *et seq*.
[28] *Tadić* Opinion and Judgment, 7 May 1997, IT-94-1-T, para. 688.
[29] See H. Vest, 'Business Leaders and the Modes of Individual Criminal Responsibility under International Law', *Journal of International Criminal Justice* 3 (2005), at 851, who refers to subparagraph (d) as a „rescue clause" with respect to subparagraph (c). See also the *Lubanga* Decision on the Confirmation of Charges, 29 Jan. 2007, ICC-01/04-01/06-803 at para. 337 and K. Ambos, *supra* note 14, art. 25 margin no. 26 and 45.

15. First and foremost, the objective requirement of "a group of persons acting with a common purpose",[30] *in casu,* depends on (a) the definition of the group[31] and (b) the actual composition of the FDLR leadership. Despite the requirements of Regulation 58(2) of the Re*gulations of the Office of the Prosecutor*, the Prosecution has failed clearly to define the mode of liability which it imputes to the Suspect.

16. Such an unfair lack of clarity is evidenced by the remarkable inconsistency with which the Prosecution has defined the members of the so-called "common purpose group". In the DCC, this group originally comprised Ignace Murwanashyaka ("Murwanashyaka"), Sylvestre Mudacamura ("Mudacamura"), the Suspect and "other members" of the FDLR.[32] Yet, by the time the Prosecution opened its case at the Hearing and, subsequently, in its written submissions, the common purpose group had unfairly mutated to comprise not just Murwanashyaka, Mudacamura and the Suspect but also Straton Musoni and Gaston Iyamuremye. [33]

17. The Prosecution also failed to demonstrate that the members of the aforementioned "common purpose group" possessed a shared criminal design. Referring to the meetings of the Steering Committee and FOCA High Command held between 16 and 19 January 2009, the Prosecution alleged that the operation of the international media campaign for the mobilization was placed at the top of the list of priorities.[34] Nevertheless, despite the ample documentation and oral testimony recording what transpired during these

[30] *Ibid.*, para. 124 *et seq*.
[31] C.f. prelimary oral submission presented by Counsel for the Suspect regarding the lack of specificity in defining the minimum essential members of the common purpose group, ICC-01/04-01/10-T-6-Red2-ENG at page 13 line 18 to page 16 line 14
[32] DCC at paragraph 108
[33] Transcript of 16 September 2011, ICC-01/04-01/10-T-6-RED2-ENG at page 32, lines 1-9 and ICC-01/04-01/10-448 at paragraph 38.
[34] See Prosecution oral submissions on January 2009 meetings at ICC-01/04-01/10-T-7-CONF-ENG, pages 46 line 14 to page 50 line 6

meetings, no evidence was adduced to show that the members of the Steering Committee and/or FOCA High Command ever agreed to a *criminal* media campaign of *extortion*.[35]

18. Nor can the so-called common purpose be inferred from the press releases allegedly issued by the Suspect or from the circumstances; namely his alleged association with other members of the so-called common purpose group. The Defence takes note of the Prosecution's persistent reference to communications between the Suspect and members of the FDLR in the field. Nevertheless, even if the Prosecution were able to satisfy the Pre-Trial Chamber of the admissibility of these communications and of the identity of the Suspect's alleged interlocutors,[36] there is no evidence to suggest that these communications were criminal in content.

19. At the Hearing, the Defence dissected the various common purposes that the Prosecution imputed to the FDLR hierarchy:[37]

a. The primary and ultimate purpose which allegedly entailed extorting political power in Rwanda **(**called hereinafter **"Common Purpose A")**[38],

b. Two secondary common purposes: to direct attacks against the civilian population in order to create a humanitarian catastrophe

[35] Despite virtually complete interception of Murwanashyaka's communications **throughout** the period relevant to the charges, no evidence exists to prove that he communicated or agreed any criminal plan – whether it be extortion through the media or the creation of a "humanitarian catastrophe".
[36] See Defence request for a ruling on the admissibility of two categories of evidence, ICC-01/04-01/10-329. The Defence challenged the legality of the seizing of evidence at the Suspect's home in the absence of a judicial order or warrant as well as the authority of those executing the seizure; The Defence further objected to the illegal break of seals by the Court Registry in the absence of a representative of the Defence; Finally, the Defence challenged the introduction of faulty or corrupt hard drives handled by the French Gendarmerie.
[37] *c.f;*.Defence visual aid, ICC-01/04-01/10-445-Anx 3
[38] DCC. para. 126 second last sentence.

("Common Purpose B") and to initiate an international media campaign **("Common Purpose C").** [39]

20. According to the Prosecution, the Suspect was not just a leading member of the FDLR [40] but the 'linchpin'.[41] If characterisation is to be taken at face value, the Suspect, so it is submitted, would have to be considered, perforce, a party to the ultimate Common Purpose A *and* to the secondary Common Purposes B and C. Yet, by occupying an alleged role of centrality within the FDLR, the Suspect would have fallen without the purview of Article 25(3)(d). As stated above, Article 25(3)(d) is a form of accomplice or accessory liability and, in contrast to the forms of perpetrator liability delineated in Article 25(3)(a), it is, first and foremost, intended to cover those *persons* who are not "linchpins" and do not belong to the inner circle of the criminal common purpose but make contributions from without. Indeed, Professor Cassese, takes the view that this is the *only* possible interpretation of Article 25(3)(d).[42]

21. Even if one were not to follow the above mentioned restrictive *ratione personae* interpretation of Article 25(3)(d) and were to extend the provision to encompass insiders as defined by the Prosecution, the Suspect would still fall without its ambit. Apart from its group common purpose element, Article 25(3)(d) requires a '*contribution*' to a crime. This contribution, furthermore, has to be '*intentional*'.[43] Accordingly, a two-fold objective-subjective nexus must connect the alleged contribution to the alleged criminal results. According to the DCC, the Suspect's contribution was aimed *exclusively* at implementing Common Purpose C; *i.e.* the international media campaign. However,

[39] *Ibid.* para. 126.
[40] As set out on 16 September 2011 by Deputy Prosecutor F. Bensouda in ICC-01/04-01/10-T-6-Red2-ENG and confirmed on 19 September 2011 by Assistant Trial Lawyer J. Solano in ICC-01/04-01/10-T-7-CONF-ENG.
[41] See Transcript ICC-01/04-01/10-T-6-Red2-ENG at page 36 line 9.
[42] A. Cassese, *International Criminal Law*, *supra* note 21 at 213.
[43] For the 'intentional' requirement see *infra* para. 34 to para. 37.

"conducting an international media campaign", does not, even with the most generous interpretation, constitute a crime within the material jurisdiction of the Court. Nor do any of the concrete alleged activities of the Suspect identified in the DCC constituted such a crime. The true essence of the activity imputed to the Suspect is the generation of propaganda and this will only be deemed criminal under international criminal law if it amounts to an incitement to genocide (Article 25 (3)(e)) – something which is irrelevant to the case at hand.

22. In this context, the learned Pre-Trial Chamber is referred to the case of *Hans Fritzsche* – the former director of the news division of the Nazis' propaganda ministry headed by Josef Göbbels. Although deemed the most prominent representative of the Nazi-propaganda machine, Fritzsche was later acquitted by the International Military Tribunal of war crimes and crimes against humanity ("IMT") with the following reasoning:[44]

> *"[…] 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."*

23. The above-cited passage is of extreme relevance to the present case given that the Suspect, according to the Prosecution case theory, performed the role of a *quasi* propaganda minister within the FDLR.

24. The Prosecution's exposé of the various common purposes imputed to the FDLR leadership is highly convoluted. Purposefully refraining from

[44] IMT Judgment of 1 Oct. 1946, para. 526; available at http://avalon.law.yale.edu/imt/judfritz.asp. With respect to Crimes against Peace, the Court stated: '[…] Nor is there any showing that he was informed of the decisions taken at these conferences (*i.e. those conferences where the aggressive war was planned*). His activities cannot be said to be those which fall within the definition of the common plan to wage aggressive war […].' (ibid).

focusing on one common criminal purpose, the Prosecution, as demonstrated at the Hearing, constructed the aforementioned complex system of "common purposes" of which two (Common Purposes A and C) are not criminal. The reason for this strategy speaks to the lacunae in the Prosecution case: 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.

25. Concerning the definition of a *'contribution'* for the purpose of Article 25(3)(d), however, three issues must be tackled; the **legality** of the contribution (*i.e.*, whether or not it was a lawful contribution), the **nature** of the contribution and the **impact** of the contribution on the charged crimes.

26. Firstly, with respect to the "legality" of the contribution, the Prosecution is, apparently, of the view that any contribution – even a *per se* lawful one[45] – suffices for the purpose of Article 25(3)(d). This theory, however, should not be accepted without a careful and profound analysis of the differing doctrinal discussion in many civil law jurisdictions.[46]

27. Secondly, with respect to the "nature" of the "contribution", the Defence submits that such contribution must be relevant, in some meaningful way, to

[45] By way of example, supplying food to a concentration camp would constitute such a *per se* lawful economic activity.

[46] C. Roxin, *Strafrecht. Allgemeiner Teil*, vol. II, München: Beck 2003, at 206 et *seq*.; for a good summary of the German discussion W. Joecks in W. Joecks/ K. Miebach: *Münchener Kommentar zum StGB*, vol. I, München: Beck 2nd ed. 2011, § 27 margin nr. 48-89 (pp. 1265-1276). For an analysis of neutral acts in macrocriminal contexts compare P. Rackow, *Neutrale Handlungen als Problem des Strafrechts*, Frankfurt a. M.: Peter Lang 2007. The discussion also takes place in other jurisdictions, although less intensive than in Germany: for Italy see M. Bianchi, "La 'complicità' mediante condotte 'quotidiane'", *L'indice penale* 1 (2009), at 37-86; for Spain see J.-M. Landa Gorostiza, *La complicidad delictiva en la actividad laboral „cotidiana": contribución al „límite mínimo"de la participación frente a los „actos neutros"*, Granada: Gomares 2002; for Brasil: L. Greco, *Cumplicidade através de ações neutras : a imputação objetiva na participação*, Rio de Janeiro: Renovar 2004. See also K. Ambos, "Beihilfe durch Alltagshandlungen", *Juristische Arbeitsblätter (JA)* 32 (2000), at 721-725; in Spanish "La complicidad a través de acciones cotidianas o externamente neutrales", *Revista de Derecho Penal y Criminología (Universidad Nacional de Educación a Distancia. Facultad de Derecho, Madrid).* 2ª Época. No. 8 (Julio 2001), at 195-206. The problem of a neutral contribution was the core issue in the Dutch *Van Anraat Case*, see for an analytical summary H. Van der Wilt, "Genocide v. War Crimes in the Van Anraat Appeal", *JICJ* 6 (2008), at 563 *et seq*.

the crimes charged. To this end, the slight semantic difference between Article 25(3)(c) and Article 25(3)(d)[47] does not point to a substantive difference between the form and degree of the required contribution.[48] Assuming, therefore, that the objective criterion for accessory participation under Article 25(3)(c) requires it to be "substantial", [49] the same must apply to Article 25(3)(d).[50] The requirement of a "substantial" contribution is also supported by two fundamental principles recognised by the International Criminal Court: on the one hand, the principle of culpability and, on the other, the policy requirement of focusing on cases which meet a certain threshold of gravity.[51] Indeed, gravity plays a role not just with respect to the nature of the charges but also with regard to the imputed mode of liability. The Defence submits that the lower the subjective requirement for proving a mode of liability, the higher the corresponding objective requirement.

28. Thirdly, and finally, the Defence submits that it is necessary to establish a certain link between the alleged contributing conduct and the criminal result which goes beyond a purely naturalistic causal nexus. Modern doctrine recognizes the theory of objective imputation or attribution (*imputación objectiva,*[52] or *objektive Zurechnung*) positing that a criminal result will only be imputed to an individual where his conduct creates an impermissible risk to a protected legal interest and where this risk manifests itself in the commission of

[47] Subparagraph (c) stipulating a contribution which 'otherwise assists' and subparagraph (d) a contribution 'in any other way'. This terminology is virtually identical in the French, Russian, Chinese and Arabic versions of the Statute: toute autre forme -- toute autre manière; каким-либо иным образом -- любым другим образом; 以其他方式 -- 以任何其他方式; اية طريقة اخرى. -- بطريقة اخرى . The Spanish translation of the Rome Statute uses identical terminology ("algún modo").
[48] Contra A. Eser, *supra* note 14, at 802 et *seq*.
[49] Cf. *supra* paragraph 12 footnote 26
[50] Cf. K. Ambos, *supra* note 14, art. 25 margin no. 22.
[51] As expressed in the preamble to the Rome Statute (particularly paragraph 4) and, more importantly, in Articles 17 (1)(d) and 53 (1)(b), (c), (2)(b), (c) of the Statute. Here, regarding a *case*, Art 53 (2) (b) referring back to Art. 17 (1) (d) and Art. 53 (2) (c) ICC-Statute are especially relevant. For the different gravity standards see I. Stegmiller, *The Pre-Investigation Stage of the ICC*, Berlin: Duncker & Humblot 2011, at 332 *et seq*., 425 *et seq*.; K. Ambos, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court*, Heidelberg et al.: Springer 2010, at 44 *et seq*.
[52] S. Mir Puig, *Derecho Penal Parte General*, Barcelona: Reppertor 8th ed. 2010, at p.250 *et seq*.

the said criminal result.[53] Such a theory endeavors to ensure the fair imputation of criminal acts to those truly responsible.[54] Applying this theory to accessorial participation,[55] therefore, a contribution will only be punishable if (a) it creates a sufficiently high risk to a protected legal interest such that it has the potential for a substantial impact on the actual commission of the underlying crime, and; (b) it manifests itself in the commission of the crime insofar as that sufficiently high risk has been realized (*i.e.,* had a comprehensible impact on the commission).[56] While this theory of objective imputation has yet to be fully explored at the International Criminal Court in the context of accessorial liability, it has, nevertheless, as to its risk component, been invoked in the context of command responsibility. The *Bemba* Pre-Trial Chamber, for example, found that a commander would liable where it could be shown that his non-intervention increased the risk of the commission of his subordinates' crimes.[57]

29. In the present instance, the Prosecution has failed to show how the Suspect's concrete acts increased the risk to the legally protected interests and how such increased risk manifested itself in the commission of the alleged crimes. More concretely, the Defence submits that no evidence has been adduced to show how the Suspect's conduct was causally linked to the commission of specific crimes such that it may even be defined as a "contribution". The Suspect's alleged "contribution", as finally presented at the

[53] See C. Roxin, *Strafrecht. Allgemeiner Teil*, vol. I, München: Beck 4th ed. 2006, at 371 *et seq*.; in Spanish: C.Roxin, *La imputacion objetiva en el derecho penal*, Lima: Idemsa 1997, at 83. For an English explanation see K. Ambos, 'Toward a Universal System of Crime: Comments on George Fletcher's *Grammar of Criminal Law'*, *Cardozo Law Review* 28 (2007), at 2664 et *seq*. Compare for the Italian doctrine G. Fiandaca/ E. Musco, *Diritto penale Parte generale*, Bologna: Zanichelli 6th ed. 2009, at 234; for Brasil: Luis Regis Prado, *Curso de Direito Penal Brasileiro*, *supra* note 22 at 82. For a similar tendency in common law see K.J.M.Smith, *A Modern Treatise on the Law of Criminal Complicity*, New York: Oxford University Press 1991, at 88 *et seq*. See also the proximate cause theories understood as normative theories, for references cf. Ambos, op. cit., at 2666 with fn. 110. This is similar to the French 'causalité adéquate', see X. Pin, *Droit Pénal Général*, Paris: Dalloz 4th ed. 2010, at 135 *et seq*.

[54] Cf. G.P. Fletcher, *Rethinking Criminal Law*, Boston: Little, Brown, 2nd print 1978, at 495 speaks of *fair accountability* within a theory of normative attribution.

[55] See e.g. U. Murmann, *Grundkurs Strafrecht*, München: Beck 2011, at 337 with further references in fn. 269.

[56] K. Ambos, *Der Allgemeine Teil*, *supra* note 19 at 628.

[57] Prosecutor v. Jean Pierre Bemba Gombo, 15 June 2009, ICC 01/05-01/08-424, para. 425. For a critique see K. Ambos, 'Critical Issues in the *Bemba* Confirmation Decision', *Leiden Journal of International Law* 22 (2009), at 721 *et seq*.

confirmation hearing, was said to be twofold:[58] Firstly the Prosecution argued that the Suspect "*contributed to the commission of the crimes because so long as his demands and denials were perceived as sincere, they kept the FDLR in the diplomatic game*".[59] Secondly, the Suspect's alleged contribution involved him exercising "*a legitimising and encouraging effect on the actions of FDLR commanders and on the troops. So long as they could still believe in the idea of a political agreement they would continue to fight*".[60]

30. With respect to the first aspect of the Suspect's alleged contribution, the Prosecution has not shown that the Suspect's purported "*demands and denials*" were anything other than sincere. Nor has the Prosecution shown that the Suspect's press releases – in which he also purportedly expressed such "demands and denials"– flouted the principle of freedom of expression.[61]

31. The press releases allegedly issued by the Suspect generally address three issues: (a) a response to a certain issue or incident that was previously raised by another organisation; (b) a demand for an independent investigation so as to find out what truly happened, and (c) a call for peaceful solutions through negotiations. Excerpts from some of those press releases issued throughout the course of 2009 are provided below:-

[58] The Prosecution has not even been consistent as to the nature of the Suspect's alleged contribution to the common purpose. In the DCC passing reference was made reference to the fact that press releases were allegedly "disseminated to FDLR personnel in the field" and that the Suspect supervised the transfers of funds. No evidence was adduced during the Hearing, however, to show how exactly these alleged contributory acts facilitated the commission of specific crimes. Further unexplained "contributions" included the Suspect's alleged role as a "high-level representative", a "focal point", or a "maintaining influence" "using intelligence" from personnel in the field.
[59] ICC-01/04-01/10-T-7-Red-ENG at page 37 line 17.
[60] ICC-01/04-01/10-T-7-Red-ENG at page 38 line 9.
[61] The Prosecution has not shown why the Suspect's alleged press releases are not protected by the freedom of expression, guaranteed, *inter alia*, by Article 19 of the ICCPR and Article 10 of the ECHR. If one were to assume that the Suspect's alleged press releases indeed comprised "denials" of reality, then General Comment 34 to Article 19 of the ICCPR, would offer an explicit defence: "Laws that penalise the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events. Restrictions on the right of freedom of opinion should never be imposed and, with regard to freedom of expression they should not go beyond what is permitted in paragraph 3 or required under article 20".

- February 2009: *"The FDLR urge the International Community especially the MONUC to conduct an investigation without delay to determine the veracity of such killings and to identify their perpetrators. The FDLR are ready to assist any committee created for this purpose so that the truth about these alleged massacres can be unveiled."*[62]
- February 2009: *"The FDLR invite once again the UN Security Council to establish immediately an independent international commission of inquiry in charge of shedding light on the serious violations of human rights taking place in Kivu, to identify their perpetrators and bring them to book."*[63]
- March 2009: *"The FDLR remind the public and the UN Security Council that they remain ready to cooperate in any process aimed at restoring lasting peace and stability in the African Great Lakes region through peaceful means and through direct talks with the Kigali regime."*[64]
- April 2009: *"The FDLR remain convinced that the Rwandan problem which is essentially political can not be solved by war or other terrorist acts that the collation of the RPA (RDF) and the FARDC are carrying out in the Kivu region, but rather by a direct dialogue between the Kigali regime and its opposition."*[65]
- May 2009: *"The FDLR reaffirm their unequivocal condemnation of the war that the Rwandan-Congolese coalition imposed on a peace-loving peoples of our region through the operation UMOJA WETU and KIMIA II operation under preparation and urge the United Nations Security Council delegation to formally condemn this war which is senseless, unnecessary and deadly, to demand its immediate cessation and not to engage UN troops of MONUC in it.*

  […]

  The FDLR urge the UN Security Council delegation to work towards the creation of a framework for talks which will enable all Rwandan stakeholders to

[62] EVD-PT-OTP-00016, DRC-OTP-2001-0047 at 0047.
[63] EVD-PT-OTP-00019, DRC-OTP-2001-0052 at 0053.
[64] EVD-PT-OTP-00020, DRC-OTP-2001-0054 at 0054.
[65] EVD-PT-OTP-00474, DRC-OTP-2022-0402 at 0403.

sit together in order to find a definitive solution to the Rwandan crisis which is the source of insecurity prevailing in the African Great Lakes Region especially in the eastern DRC. […]

The FDLR reiterate their commitment to peace and remain convinced that the war in the African Great Lakes Region can never bring peace but the latter will only be achieved through a frank and direct dialogue between different actors in the regional crisis.[66]

- July 2009: *"The FDLR remind that this war is in the interest neither of the Congolese nor of the Rwandans, but rather in that of international criminals who want to complete their plan to exterminate the peoples of the African Great Lakes Region and the systematic looting of resources using their henchmen in Rwanda and the DRC and by continuing to push the two peoples to kill each other.*

The FDLR urge MONUC to refrain from supporting one or other of the parties in conflict to insure its neutral character that will enable it to fully play its role of peacekeeper. The FDLR remain willing to participate in any initiative of genuine and constructive dialogue to find a just, peaceful and lasting solution to the political problem of Rwanda that remains the main cause of the crisis in the African Great Lakes Region."[67]

- October 2009: *"The FDLR remind the International Community that their members are willing to go back to Rwanda in the framework of the implementation of the Rome Declaration of 31 March 2005. Thus, they urge the International Community and the Mediator in the process of Rome to get actively and positively involved in the immediate implementation of all commitments taken on both sides in Rome on 31 March and on 2 April 2005.*

Particularly, they request all different parties involved in the Rome peace process to set up without delay an International Steering Committee which

[66]EVD-PT-OTP-00479, DRC-OTP-2022-0680 at 0680.
[67] EVD-PT-OTP-00023, DRC-OTP-2001-0060 at 0060.

allows identifying and implementing associated measures as it was agreed upon in Rome."[68]

- November 2009: *"Les FDLR ont toujours condamné et condamnent sans ambages toutes les exactions commises contre les populations civiles dans la Région des Grands Lacs Africains et rétirèrent leur demande d'une mise en place d'une commission d'enquête internationale indépendante pour faire la lumière sur toutes ces exactions, en déterminer les véritables commanditaires et auteurs et les traduire en justice."*[69]

32. With respect to the second form of contribution, which was not pleaded in the DCC and unfairly introduced at the Hearing, no evidence was supplied to support the contention that FDLR foot-soldiers actually heard or read the Suspect's press releases. Nor was any evidence adduced to support the contention that FDLR soldiers would have been any more likely to commit atrocity crimes as a result of being exposed to the Suspect's alleged media activities. Indeed, it has not escaped the Defence's notice that paragraph 7 of the Prosecution's written submissions asserts that the Suspect's public pronouncements "*contributed to the commission of the crimes by boosting the morale of the fighters tasked with committing the crimes*". Such an assertion, however, is not sourced to any item of evidence.

33. At the Hearing, the Prosecution sought to rely on–W-632[70] – mainly because of his assertion that he had read FDLR press releases on his mobile phone,[71] and *"[i]f it was relevant […] on the internet*".[72] Interestingly, however, this same witness understood from the press releases that the FDLR "*deplored*

[68]EVD-PT-OTP-00049, DRC-OTP-2002-0830 at 0830.

[69]EVD-PT-OTP-00323, DRC-OTP-2014-3476 at 3476-3477, an informal English translation reads: *"The FDLR has always condemned and continues to condemn unequivocally all acts of violence committed against civilians in the African Great Lakes Region and reiterates its call for the establishment of an independent international commission of inquiry to shed light on all these extortions, determine the real sponsors and perpetrators and bring them to justice."*

[70] Transcript 19 September 2011, ICC-01/04-01/10-T-7-RED-ENG, at page 38, lines 22-25.

[71] EVD-PT-DO6-01350, DRC-OTP-2034-0386 at 0388, lines 63-70.

[72] EVD-PT-DO6-01350, DRC-OTP-2034-0386 at 0395, lines 306-307.

the fight that is being carried out by the Rwandese military in collaborations with Congolese soldiers". He further learned from the press releases that the "*FDLR does not support the fight, it supports the dialogue*" and "*if it is attacked, it will defend itself*".[73] Nowhere does W-632 imply that these messages boosted his morale such that he was encouraged to commit crimes.[74]

34. It should not be neglected that Article 25(3)(d) also requires that the Suspect's contribution to the common purpose be "*intentional*". In the present case, the notion - "*intentional*" pertains to all the objective elements of Article 25(3)(d), *i.e.*, to the contributing conduct, the (attempted) commission of a crime by a group of persons acting with a common purpose and to the causal or normative relationship between the contribution and the final criminal result.[75]

35. The term "*intentional*" must also be interpreted in line with Article 30 of the Statute. It does not, as most correctly decided by this Pre-Trial Chamber in its former composition,[76] include *dolus eventualis* or recklessness.[77] The concept "*intentional*" comprises both intent and knowledge: Intent entails the notion of "meaning to cause that consequence" (Article 30(2)(a)), and, with this in mind, no evidence whatsoever exists to show that the Suspect desired that civilians should be targeted or harmed. The complete opposite is true. The press releases attributed to the Suspect consistently condemn attacks on the civilians of the Kivus.[78] Furthermore, W-689 – a clergyman - stated that the Suspect - as an

[73]EVD-PT-DO6-01350, DRC-OTP-2034-0386 at 0393, lines 212-215.
[74] EVD-PT-DO6-01350, DRC-OTP-2034-0386 at 0401, lines 503, 506 and 512.
[75] G.P. Fletcher & J.D. Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', *JICJ* 3 (2005) 539-561, p. 549: 'all that has to be intentional is the act of doing something that constitutes a contribution'.
[76]Bemba Confirmation of Charges, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009 para. 360.
[77] K. Ambos, *supra* note 14, art. 25 margin no. 28.
[78] See DRC-OTP-2030-0138 at 0138: *"The FDLR have always condemned and unequivocally condemn all atrocities committed against civilian populations in the Great Lakes Region of Africa and reiterate their demand for setting up an independent and international commission of inquiry to shed light on these abuses, determine their real sponsors and perpetrators and bring them to justice";* DRC-OTP-2022-2592 at 2592: "*Les FDLR condamnent encore une fois et sans équivoque la guerre en cours à l'Est de la RDC*

interlocutor and not as a decision maker - supported the creation of humanitarian corridors to reduce civilian suffering and sincerely sought the path of peace.[79] What is more, the documented pronouncements of the January 2009 FDLR Steering Committee, to which the Suspect was an alleged party, explicitly forbade all forms of abuse against the local civilian population.[80]

36. Article 30(2)(b) of the Rome Statute defines knowledge as the awareness '*that a consequence or will occur in the ordinary course of events*'. The Prosecution provided a test for imputing knowledge of attacks on a civilian population which comprised six elements.[81] Taken together, these elements infer that because of the Suspect's alleged position in the FDLR and his purported access to various sources of information – most of them being open sources -, he *ought to have* known that attacks were to be committed against a civilian population. Put otherwise, the Prosecution appears to argue that the Suspect's alleged "*knee-jerk*" denials[82] were symptomatic of a failure to exercise a duty to enquire[83] – a duty which, if exercised, would have enabled him to ***foresee*** the commission of crimes. ***Foreseeability***, however, whether as an element of *dolus eventualis* or of negligence, does not meet the required subjective standard for imputing criminal knowledge under Article 30(2)(b). [84]

37. The same is true, *a fortiori*, for the requirement of '*knowledge of the intention of the group*' in subparagraph (d)(ii); *possible* knowledge, of the

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que la coalition de l'APR/RDF et des FARDC leur a imposée ainsi qu'aux populations congolaises de l'Est de la RDC et aux réfugiés rwandais."

[79] W-689 in EVD-PT-D06-01264; DRC-D06-0001-0005 at 0008 and 0009.

[80] See 'Conclusions, Recommendations et Décisions de la Réunion du CD réuni en séance ordinaire du 16 au 19 janvier 2009' in DRC-REG-0007-0752 at 0754 where it states : « …39.*Combattre avec énergie toute forme d'exactions contre les populations civiles. 40. Le recrutement des mineurs reste prohibé… »* ; See also in the same document, references to peace negotiations, calling to continue with peace efforts at Ibid, paras. 45-47

[81] Transcript, 16 September 2011, ICC-01/04-01/10-T-6-RED2-ENG at page 65, line 16, to page 66, line 11.

[82] The onus, of course, is on the Prosecution to show that these denials were in fact incorrect – something which it has failed to do.

[83] The Prosecution's argument in the six part test for knowledge that the Suspect's seniority ought to have made him aware that crimes would be committed is contradicted by its argument elsewhere that he was in a position to verify accusations of criminal activity.

[84] Cf. K. Ambos, *supra* 14 art. 25 margin no. 2; for a further analysis K. Ambos, 'Critical Issues in the *Bemba* Confirmation Decision', *supra* note 57, at 717 *et seq*.

commission of *alleged* crimes is not *positive* knowledge as to commission of *concrete* crimes. As to the alternative subparagraph (d)(i), this would require the Suspect to act with the aim of "*furthering*" the criminal activity of the common purpose group. It is a matter of logic that the Suspect would have to be acquainted with the criminal nature of the common purpose as a prerequisite for furthering it. The Prosecution case theory, however, cannot provide for such an eventuality since it is premised on the claim that the Suspect's role was confined to issuing "*knee-jerk*" denials[85] of allegations of FDLR criminal activity *ex post facto*:[86]

> *"His knowledge of exact details about FDLR crimes prior to their commission was irrelevant to the execution of the common plan, since the latter required Mbarushimana to deny all allegations regardless of their veracity*."[87]

38. In conclusion, the Prosecution has failed to correctly encapsulate the Suspect's alleged conduct under Article 25(3)(d) – which, put quite simply, is not criminal. The Prosecution has also failed to link the Suspect's alleged contributory conduct to the offences charged in the DCC which, incidentally, would also entail a lack of jurisdiction.[88] In order to camouflage major lacunae in its evidentiary matrix – not least the failure to prove that the Suspect ever condoned an attack on a civilian population - the Prosecution has resorted to a confusing triangle of common purposes which fails to offer the clarity necessary for a fair legal process.

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[85] Transcript, 16 September 2011, ICC-01/04-01/10-T-6-RED2-ENG at page 66 line 9

[86] Transcript, 16 September 2011, ICC-01/04-01/10-T-6-RED2-ENG at 36, lines 8-25 and at page 64, line 21 to page 65, line 1: "[The Suspect's] mandate was to react "immediately and systematically" to all allegations of FDLR crimes so as to defend the image of the organisation. He was explicitly required by the common plan to, I again quote, "vilify the enemy and accuse it of everything" and "to react promptly if not instantly to everything that was said about the FDLR however unimportant."

[87] *ibid*.

[88] Given that even the effects of the Suspect's purported contribution would not be felt in the territory of the State Party which referred the case to the ICC pursuant to Article 14(1) of the Rome Statute.

III THE SUBSTANTIVE OFFENCES

The Standard of Proof

39. The standard of proof at the confirmation stage of the proceedings is formulated in Article 61(7) of the Statute:

> *The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.*

40. Pre-Trial Chamber I has held on a previous occasion that "*in order for the Prosecution to meet its evidentiary burden, it must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations*".[89]

41. Incorrectly citing Rules 63 and 64 of the Rules of Procedure and Evidence, the Prosecution asserts that the Pre-Trial Chamber should accept all evidence as reliable so long as it is relevant and admissible.[90] The Defence rejects this assertion and submits that the inverse is true. According to Article 69(4) of the Rome Statute the probative value or reliability of evidence is not to be taken for granted but, rather, is a necessary prerequisite for determining its admissibility.[91]

42. The learned Pre-Trial Chamber should not neglect the fact that the Prosecution has made no attempt to deal with the Defence's detailed critique of

[89] *Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, Public Redacted Version with Annex I, Decision on the Confirmation of Charges, Case No. ICC-01/04-01/06-803-tEN, 29 January 2007, para. 39.
[90] ICC-01/04-01/10-448 at paragraph 31.
[91] See for example, Prosecutor v. Katanga and Ngudjolo, Decision on the Prosecutor's Bar Table Motions, ICC-01/04-01/07-2635, 17 December 2010: "20. Probative value is determined by two factors: the reliability of the exhibit and the measure by which an item of evidence is likely to influence the determination of a particular issue in the case. 21. The first factor which the Chamber must consider when determining probative value, is the inherent reliability of an item of evidence. If an item of evidence does not display sufficient indicia of reliability, it may be excluded." See also Trial Chamber I, Prosecutor v. Thomas Lubanga Dyilo, "Decision on the admissibility of four documents", 13 June 2008, ICC-01/04-01/06-1399, para. 30;

the evidence adduced in support of the crime-base incidents. Indeed it is most likely because of the serious contradictions in its evidential matrix that the Prosecution made an implicit attempt to equate the analysis required at the confirmation stage to the Rule 98*bis* procedure practised at the International Criminal Tribunal for the Former Yugoslavia. The Defence rejects such a policy and notes the *Abu-Garda* case where the Office of the Prosecutor sought leave to appeal the decision on the confirmation of charges arguing that the Pre-Trial Chamber ought to have applied the rule 98bis standard:

> "*the Chamber must confirm charges if the Prosecution's evidence - when viewed in the light most favourable to the Prosecution and without regard to possible inconsistencies, ambiguities, absence of corroboration, or the fact that it comes from anonymous sources - could establish substantial grounds to believe that the suspect committed each of the crimes charged*".[92]

43. The Pre-Trial Chamber in *Abu-Garda* rejected this submission as follows:

> "*Although the Statute allows the Prosecution, at the pre-trial stage of the case, to rely on documentary or summary evidence and not to call the witnesses expected to testify at trial, neither the Statute nor the Rules, contrary to the Prosecution's assertion, draws a distinction as to the way evidence shall be assessed before a Trial Chamber and a Pre-Trial Chamber. The free assessment of the evidence presented by a party is, pursuant to the Statute, a core component of the judicial activity both at the pre-trial stage of a case and at trial.*
>
> *The difference between the various stages of the proceedings lies instead in the threshold of proof to be met during the respective stages of the proceedings: for the charges to be confirmed by the Pre-Trial Chamber, there*

[92] Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges'", ICC-02/05-02/09-267, 23 April 2010, at para. 1.

needs to be "sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged"; for the accused to be convicted, the Trial Chamber must be "convinced of the guilt of the accused beyond reasonable doubt".

In light of the above, the proposition put forward by the Prosecution, namely that the Chamber should have applied a different standard to the assessment of the evidence at the confirmation of the charges stage, is without any legal basis. [93]

44. The Defence is, of course, mindful that in issuing a warrant for his arrest, the Pre-Trial Chamber found that ***reasonable*** grounds exist to believe that the Suspect committed the crimes with which he is charged. Notwithstanding, the Defence submits that the Prosecution has failed to show how the evidence which it has accumulated since the issuance of the arrest warrant ought to persuade the Pre-Trial Chamber to change its previous assessment such that it can now be convinced that substantial grounds exist to believe that the Suspect committed exactly the same offences and more. Whatever the case may be, all of the available evidence concerning the attacks on various localities was carefully analysed by the Defence with a view to highlighting the Prosecution's failure to address two central issues:

1) That substantial grounds do not exist to believe that the perpetrators of atrocities at the individual localities selected by the Prosecution were members of the FDLR - as opposed to any other Kinyarwanda speaking militia, and;

[93] Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges'", ICC-02/05-02/09-267, 23 April 2010, at paras. 8-10. *c.f.;* also A Burrow, 'The Standard of Proof in Pre-Trial Proceedings in K. Khan, C. Buisman, C. Gosnell (eds.) Principles of Evidence in International Criminal Justice (Oxford University Press, 2010) at pp. 690-691: "the underlying legal principles of the rule 98bis proceedings at the ICTY are not analogous to the object and purposes of the confirmation hearing: a rule 98bis proceedings is adjudicated in accordance with the standard of beyond reasonable doubt, and if successful, results in an acquittal; rule 98bis applications are also heard and decided without the benefit of any defence evidence, whereas article 61(6) of the ICC Statute expressly enshrines the right of the Defence to present evidence at the hearing, and article 61(7) obliges the PTC to base its decision on the record of the hearing as a whole."

2) That where it may be said that substantial grounds exist to believe that the FDLR did engage in military activities in these localities that such military activities constituted "unlawful attacks".

45. Bearing all this in mind, the Defence submits that the Prosecution's written submissions are quite remarkable for their deliberate avoidance of any attempt to counter the Defence critique of the evidence supplied in support of the alleged crime-base. At the Hearing, despite pronouncing that the Defence "had analysed in great detail the evidence presented on the Prosecution's list of evidence" and promising "to respond to each and every" allegation,[94] the Prosecution quite bizarrely and inexplicably failed to honour such an undertaking.[95] The Defence submits that this failure should even be viewed as tacit approval[96] of the correctness of the Defence critique. Whatever the case may be, it is the Prosecution which bears the burden of proof of convincing the Pre-Trial Chamber of the readiness of its own case to go to trial and the learned Pre-Trial Chamber should not act to remedy prosecutorial acquiescence.

Preliminary Observations

Unlawful attacks against a civilian population

46. The Prosecution asserts that the Defence "*suggested that civilian casualties, injuries and damage to civilian property suffered as a result of FDLR attacks on various villages and their civilian inhabitants were "collateral damage" suffered in the normal course of military operations and thereby permissible at law*".[97] This is not precise. The Defence, as a matter of law, bears no burden of proof and, accordingly, is not obliged to "suggest" any explanation for the events which transpired in each and every one of the localities mentioned in the DCC.

[94] Transcript, 20 September 2011, ICC-01/04-01/10-T-8-RED2-ENG at page 87, lines 19-24.
[95] See for instance paragraphs 9-13 of the Prosecution's written submissions, ICC-01/04-01/10-448, where the Prosecution alleges the occurrence of the first five alleged incidents, without providing a single reference to its List of Evidence.
[96] ICC-01/04-01/10-378 at para. 17 where it was held that a failure appropriately to react may legitimately be regarded as tacit approval.
[97] OTP written submission, ICC-01/04-01/10-448 at para. 90.

47. The burden of proof is on the Prosecution and its obligations with respect to **Count 1** (the war crime of attacking civilians) are clearly set out in the ICC's *Elements of Crimes*. In addition to proving an "*attack*", the Prosecution is required to show that the object of the attack was a civilian population "*as such*" or civilian individuals "*not taking part in the hostilities*". The *Elements of Crimes* also require the Prosecution to show that the perpetrator "*intended*" that civilians should be targeted. The onus is thus on the Prosecution to provide substantial grounds to believe that where civilians were killed it was as a result of the unlawful conduct of hostilities. The Prosecution has failed in this task. Having channelled its resources into garnering *prima facie* evidence to show that civilians died at the various localities mentioned in the DCC, the Prosecution, nevertheless, neglected to address the purported unlawfulness of the hostilities.[98] *Umoja Wetu* and *Kimia II* were offensive operations initiated not by the FDLR but, in the first instance, by a RDF-FARDC coalition[99] and in the second instance by a FARDC-MONUC coalition.[100] The undisputed objective of these two military operations was to destroy the FDLR.[101] As a matter of logic, therefore, the Prosecution should be obliged to dispel the presumption that the FDLR's military activities were a defensive response to these hostilities.[102]

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[98] W-0004 (BKA 003) testifies that there were no orders during Umoja Wetu to attack civilians. The witness states it could occur that individual acts were committed indicating this was neither a pattern nor a result of orders from a command hierarchy: EVD-PT-D06-01285; DRC-OTP-2031-0029-R01 at 0040.

[99] UN Secretary-General Report, 27 May 2009, EVD-PT-OTP-00301; DRC-OTP-2014-0865 at para.8; and Human Rights Watch Report, December 2009, DRC-OTP-2014-0240 at 0288.

[100] UN Secretary-General Report, 27 May 2009, DRC-OTP-2014-0865 at para. 15.

[101] UN Secretary-General Report, 27 May 2009, DRC-OTP-2014-0865 at para. 9 and 15; DRC-OTP-2014-0240 at 0289: "*Government representatives from both Rwanda and Congo emphasized that the mission was not complete and pressed MONUC to join forces with the Congolese army to finish off the FDLR problem…"*

[102] Human Rights Watch Report, December 2009, DRC-OTP-2014-0240 at 0288: "*Rwandan troops quickly forged ahead, sometimes together with former CNDP troops, attacking one of the main FDLR bases at Kibua, in Masisi territory (North Kivu), and other FDLR positions around Nyamilima, Nyabiondo, Pinga and Ntoto (North Kivu).*"The presence of CNDP troops corroborates Dr. Phil Clark's Report on the identity of alleged perpetrators, see para 53-57 of the present written submission. See also, UN Secretary-General Report, 27 May 2009, DRC-OTP-2014-0865 at para.12: "*the start of the joint operation prompted the issuance, on 5 February, of a statement by the President of FDLR, Ignace Murwanashyaka, calling for direct political negotiations with Rwanda and a peaceful resolution to the conflict."* The Prosecution thus makes a selective use of its own evidence by disregarding essential elements in UN reports it relies on and that shed a different light on the FDLR than that presented by the Prosecution regarding the offensive against the FDLR.

48. From the general tenor of its submissions, it appears that the Prosecution implies that the hostilities should be viewed in the wider context of a campaign conducted by legitimate sovereign actors against an outlawed militia; the implication being, of course, that every FDLR manoeuvre is unlawful *per se*. This, however, is an incorrect legal approach and a convenient oversimplification designed to absolve the Prosecution of its duty to analyse the evidence pertaining to each military engagement at the localities specified in the DCC.

> "*The fact that a civilian is killed or injured as a result of an attack does not automatically mean that a violation of international humanitarian law has occurred. Civilian casualties may occur when weapons are directed against military objectives, but the projectiles miss the target...*"[103]

49. It should be noted that at some of the localities listed in the DCC, the evidence indicates that the number of military casualties arising out of an armed engagement was not disproportionate to the number of civilian casualties. In cases such as these, therefore, it is not even possible to infer the unlawful nature of the attack from the circumstances.

50. Similar principles apply to analysis required in order to find liability for the alleged war crime of destroying civilian property as charged in **Count 11** of the DCC. It is legally incorrect for the Prosecution to assert that the burning of civilian dwellings would automatically constitute the war crime of destroying civilian property.[104] In the present case, where ex-FDLR soldier witnesses place

[103] Dörmann, K; War Crimes, (Triffterer ed) Commentary on the Rome Statute of the International Criminal Court at p. 327.

[104] See the Edinburgh resolution, 1969: The Distinction Between Military Objectives and Non- Military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction, available at: www.icrc.org/ihl.nsf/FULL/445?OpenDocument: "*there can be considered as military objectives only those which, by* ***their very nature or purpose or use, make an effective contribution***

themselves at localities mentioned in the DCC, the onus is on the Prosecution to show that civilian dwellings were targeted as such and not because these same straw-roofed edifices either offered a contribution to the FARDC war effort (by providing cover for soldiers) or were incidentally ignited in the course of heavy weapon cross-fire.[105] This need for the Prosecution to prove the unlawfulness of an alleged attack is paramount given that the evidence clearly shows that the FARDC, as a deliberate tactic, embedded its military forces within civilian strongholds.[106]

51. The evidence also shows that the Prosecution has selectively presented ostensibly ambiguous evidence as to contradicting orders given to FLDR soldiers, while omitting to deal with qualifying evidence which clearly indicates that Mudacamura gave an explicit order to the same FDLR soldiers that the civilian population should not be killed or victimised.[107] Indeed, given this import of this above-cited testimony – emanating from one of the Prosecution witnesses[108] - it is quite illogical to infer criminal intent to the Suspect who – according to the disputed Prosecution case theory – concocted the criminal common purpose of attacking a civilian population together with Mudacamura.

***to military action**, or exhibit a generally recognized military significance, such that their total or partial destruction in the actual circumstances gives a substantial, specific and immediate military advantage to those who are in a position to destroy them."*

[105] W 0008 (BKA-008) "*In many cases civilians were killed in attacks because they were mixed with the FARDC."* in EVD-PT-D06-01271; DRC-OTP-2028-0982-R01 at 0994;

[106] W-0587 states that "*the FARDC after having put their positions in Busurungi in a place where there were civilians, Congolese civilians, they left the place, went to attack a place called Shario… in* DRC-OTP-2034-1362 at 1368; W-0552 states: "*because all the position in FARDC they do…they don't put it anywhere else. They always put within the civilians, even in the South Kivu"* EVD-PT-OTP-00645; DRC-OTP-2030-0296 at 0306. W-677 states that at Busurungi there was "*an FARDC Battalion living with and in the same houses as the civilians*"; EVD-PT-OTP-00757 DRC-OTP-2030-0060.

[107] W-544 states that FDLR soldiers knew '*they were supposed to warn civilians before an attack'* DRC-OTP-2032-1532 at 1536.

[108] W632.

The Identity of the Perpetrators

52. The Defence reiterates that the onus is on the Prosecution to prove the identity of those who perpetrated atrocity crimes in each and every locality mentioned in the DCC.

53. At a number of the localities concerned, it cannot be said that "substantial grounds" exist to believe that the acts allegedly committed on the ground were, in fact, committed by FDLR soldiers. How, for example, has the Prosecution proven that it was soldiers of the FDLR who committed the crimes and not of one of the many other Kinyarwandaphone groups such as RUD-Urunana, Maï-Maï, CNDP, Rasta, RDF or FARDC?[109]

54. In his report, Dr Phil Clark[110] mentions "six key dynamics that greatly complicate the attribution of responsibility for human rights violations to specific armed groups in the Kivus, particularly on the basis that the accused are members of the Banyarwanda group or Kinyarwanda-speakers".[111] These dynamics are:-

i. the *proliferation* of armed groups comprising members who could be described as Banyarwanda or Kinyarwanda-speakers;
ii. the *fragmentation* of these armed groups, either through deliberate dispersal of their forces or through defections or splintering into smaller groups;

[109] One witness mentions that there were cases where the FDLR were accused of attacks that had in fact been carried out by RUD. See EVD-PT-D06-01285, DRC-OTP-2031-0029-RO1 at 0038. Another witness testifies that he split from the FDLR and created his own army in 2005, see EVD-PT-D06-01269, DRC-OTP-2028-0924 at 0929. This same witness states that crimes against civilians were mostly done by the untrained Maï-Maï soldiers, see EVD-PT-D06-01269, DRC-OTP-2028-0924 at 0936. W-561 also states that it was the Maï-Maï soldiers, people who deserted from the FDLR and other groups, who committed rapes and acts of sexual violence against the civilian population DRC-OTP-2033-1277 at 1292.
[110] Dr Phil Clark, Identification of Armed Groups in North and South Kivu, Democratic Republic of Congo, DRC-D06-0001-0012.
[111] DRC-D06-0001-0012, at 5-6 (emphasis in original text).

iii. the *forging of alliances or coalitions* between these groups, either in the long or short term;
iv. the *integration* of these groups into the Congolese national army, the Forces Armées de la République Démocratique du Congo (FARDC), a process known as 'brassage' or 'mixing';
v. the *demobilisation and repatriation* of some groups, which involves their disarmament and return to regions of origin (including foreign states such as Rwanda, Uganda and Burundi); and
vi. the *deliberate hiding of identity* by members of some of these armed groups in order to avoid detection, for example by removing of uniforms.

55. Dr Clark identifies seventeen groups – all of which comprise Banyarwanda or Kinyarwanda speakers and several of which contain former FDLR elements.[112]

56. In the circumstances, the Defence submits that the Prosecution bears the burden of dispelling the substantial possibility that crimes could be imputed to the FDLR on the basis of mistaken identity. The complexity of the situation on the ground was such that victims, for the most part, were unable to distinguish clearly which soldiers belonged to which faction. The potential for mistaken identity is considerably aggravated given that members of some of the armed groups deliberately concealed their own identity trying to "[pass] themselves off as members of other groups". Dr Clark mentions that "some combatants remove their uniforms or wear the stolen uniforms of other groups to avoid identification". This aspect of Dr. Clark's opinion was unchallenged by the Prosecution.

[112] DRC-D06-0001-0012, at 6-10, mentions that the FPLC contains *inter alia* FDLR fighters, the RUD-Urunana is an FDLR splinter group, the AN-Imbonezagutabara was in turn formed by fighters from RUD-Urunana, the Rasta includes deserters from the FDLR, and the Soki and Gaheza started with two FDLR who were expelled from the group in 2008.

57. Dr Clark analyzes, in particular, the methodology employed by Human Rights Watch (HRW), the United Nations Joint Human Rights Office (UNJHRO), and the UN Group of Experts for imputing liability for human rights violations in the Kivu provinces. Although HRW apparently recognizes the complexity of such a task, Dr Clark concludes that "*[t]his recognition of the challenges involved in identifying combatants' affiliations, however, has rarely resulted in the requisite circumspection and stringent methodologies by international observer groups. While aware of the need for nuanced information to attribute culpability, these organisations have rarely provided this*".[113] It should not be forgotten that the agenda of non-governmental organisations such as HRW is not primarily motivated by the need to ensure the quality of evidence for use in an international criminal trial.

58. In particular, Dr Clark states that "HRW and the UN Group of Experts regularly fail to distinguish clearly between violations committed by different armed groups with different command structures and different ideology (eg. between the FDLR and RUD-Urunana [...])".[114] HRW even acknowledges this fact by stating that "many witnesses refer to both RUD and FDLR-FOCA combatants as "FDLR" or "Interahamwe".[115]

59. Although the Prosecution challenged the expertise of Dr. Clark in a fairly shallow manner, it did not provide any form of counter-expertise. Dr. Clark's experience speaks for itself and his findings are the product of professional and thorough research. In the absence of counter-expertise, Dr. Clark's findings should be accepted and the Prosecution should be obliged to prove the substantial nature of its case, as mentioned above, by dispelling the possibility of mistaken identity.

[113] EVD-PT-D06-01265; DRC-D06-0001-0012, at 18.
[114] EVD-PT-D06-01265; DRC-D06-0001-0012, at 22.
[115] EVD-PT-OTP-00282, DRC-OTP-2014-0240 at 0317, footnote 175.

The Incidents

Kibua and Katoyi

60. The Prosecution alleges that on 27 January 2009, the FARDC-RDF coalition attacked key FDLR bases at Kibua and Katoyi,[116] North Kivu, where the command centre of the FDLR Reserve Brigade was based.[117] The Prosecution's written submissions, however, are less specific and stipulate that this attack took place "in January 2009".[118]

61. When questioned concerning Kibua and Katoyi, an ex-FDLR soldier W-529 specifically stated that he was "*not aware of anything in respect of members of the FDLR committing any crimes during Umoja Wetu*".[119] The same witness adds that at Kibua, Katoyi, and Kalonge, the FDLR were instructed to defend themselves[120] after they themselves had been attacked - the necessary conclusion being that the FDLR had not initiated the military engagement.[121]

62. The Human Rights Council report cited on the Prosecution's list of evidence in relation to this incident speaks of an attack committed not on 27 January 2009 but on **26** January 2009.[122] Another report on the Prosecution's list of evidence corroborates W-529's testimony that the attack on Kibua was initiated by the RDF and the FARDC and directed at the FDLR military encampment. This report states that on 27 January 2009, "*Rwandan forces attacked Kibua camp ..., where the FDLR's first reserve brigade had established its command centre*".[123] The report continues to state that "*[t]he FDLR troops rapidly*

[116] Document Containing the Charges, ICC-01/04-01/10-330 para. 16.
[117] Though at the Hearing, the Prosecution stated that it "was near to the location of the FOCA high command", see Transcript 16 September 2011, ICC-01/01-01/10-T-6-RED2-ENG at page 77, lines 13-14.
[118] OTP written submissions, ICC-01/04-01/10-448, paragraph 9.
[119] EVD-PT-D06-01365, DRC-OTP-2034-0809 at page 0821, line 326.
[120] EVD-PT-D06-01365, DRC-OTP-2034-0809 at page 0813, line 127 to page 0814, line 135.
[121] EVD-PT-D06-01365, DRC-OTP-2034-0809 at page 0815, line 169-176, and lines 191-194.
[122] EVD-PT-OTP-00372, DRC-OTP-2021-0038 at page 0045, para. 9.
[123] EVD-PT-OTP-00283, DRC-OTP-2014-0431 at page 0442.

abandoned the Kibua camp"[124] thereby confirming the Defence submission that the Kibua incident in late January was not an FDLR "attack".

63. An ex-FDLR soldier interviewed by German investigative authorities (BKA) states that he was present at Kibua and indicates that information that people had been prevented from fleeing Kibua was unreliable and thus incorrect.[125] Furthermore, Witness 677 testifies that the civilians at Katoyi were not injured during the fighting[126] supplementing his belief that at Kibua, it was the FARDC who used civilians as shields whereas the FDLR did not engage in such practice. W-677 adds that, at the time of the military engagement there were no civilians left in Kibua, because they had all fled in advance.[127]

64. The HRW reports cited in the Prosecution's list of evidence do not specify the date and location of the Kibua and Katoyi incident(s) and the imputation of liability for crimes to the FDLR is uncorroborated by reliable evidence.

Malembe, Mianga and Busurungi

65. The DCC alleges that attacks were conducted on Malembe, Mianga and Busurungi, all located in North Kivu, in January 2009.[128] In its list of evidence, the Prosecution cited W-528 in support of one of these attacks. This witness, however, states that the FDLR was on the defensive, and that the military engagement concerned serious fighting "*amongst soldiers*",[129] *i.e.*, **not** an attack on a civilian population. W-528, furthermore, adds that this attack took place during *Kimia II* and after *Umoja Wetu* had come to an end.[130] Witness 677, who was also questioned about these incidents and, by virtue of his former function,

[124] EVD-PT-OTP-00283, DRC-OTP-2014-0431 at page 0442.
[125] EVD-PT-D06-02170, DRC-OTP-2028-0940 at 0950.[126] EVD-PT-OTP-00761, DRC-OTP-2038-0049 at 0064, para. 75.
[126] EVD-PT-OTP-00761, DRC-OTP-2038-0049 at 0064, para. 75.
[127] EVD-PT-OTP-00762, DRC-OTP-2038-0049 at 0065, para. 80.
[128] Prosecution's written submissions, ICC-01/04-01/10-448, para. 10.
[129] EVD-PT-OTP-01313, DRC-OTP-2033-1113 at page 1154, line 1396.
[130] EVD-PT-OTP-01313, DRC-OTP-2033-1113 at page 1154, lines 1388 and 1391.

was in a position to know of the FDLR operational planning, confirms that he was not made aware of the aforementioned attacks on Malembe, Mianga and Busurungi allegedly perpetrated by the Reserve Brigade.[131]

Katoyi

66. The third incident mentioned in the Prosecution's written submissions concerns Katoyi in North Kivu in late January 2009. The Defence is not aware of the Prosecution arguing in the DCC that more than one incident took place in the last days of that month at this specific location. Katoyi is mentioned in combination with Kibua in paragraph 16 of the DCC, and again in paragraph 43. Paragraph 43 only mentions Katoyi, and several other villages, in support of the argument that there was a widespread and systematic attack in North and South Kivu in 2009. In the circumstances, the Defence has not been put on notice of any additional attack occurring at Katoyi and, accordingly, it should not form a part of the Pre-Trial Chamber's deliberations.

Remeka

67. The next incident mentioned in the Prosecution's written submissions concerns an alleged attack on Remeka, North Kivu, in late January 2009. The only sources provided for this incident are HRW reports, which the Defence has criticised elsewhere for their poor methodology.

68. Even if it be established, however, that the FDLR engaged in military activity at Remeka in late January 2009, the Prosecution has failed to show the unlawful nature of such an operation and that it was directed, specifically, at a civilian population. In this respect, the Pre-Trial Chamber is referred to the evidence of W-677 who testified that there was an FARDC position at Remeka and that the civilian population lived behind it.[132]

[131] EVD-PT-OTP-00762, DRC-OTP-2038-0049 at 0063, para. 74.
[132] EVD-PT-OTP-00762, DRC-OTP-2038-0049 at 0065, para. 81.

Busheke

69. The incident at Busheke is only mentioned in paragraph 43 of the DCC, where the Prosecution sums up a number of localities to show the widespread and systematic nature of the alleged attacks. At no other point in the DCC is this location mentioned. The Prosecution's written submissions only refer to this location in one single sentence in paragraph 13 thereof.

70. In any event, for this incident, the Prosecution relies on the ubiquitous Human Rights Watch report "*You will be punished*",[133] which, in turn, bases itself on the account of one woman. The HRW report further specifies that Hutu refugees from Rwanda suffered at the hands of the FDLR. Such an allegation, it is suggested, lacks reason since, as shown in Dr. Clark's report, the FDLR primarily represents the interests of Hutu refugees from Rwanda.[134]

71. No other source is provided for the alleged attack in Busheke, and the Proseuction's written submissions fail to provide further details of this alleged incident. The Prosecution, essentially, relies on information stemming from only one source of double hearsay which must be deemed of questionable weight and insufficient to establish substantial grounds to impute the incident to the FDLR.

Kipopo

72. The Prosecution claims that the FDLR attacked Kipopo, North Kivu, on or about 12-13 February 2009.[135] W-677 reports that a FDLR company of Zodiaque Battalion at Kipopo was attacked by Maï-Maï soldiers stressing that

[133] EVD-PT-OTP-00282; DRC-OTP-2014-0240
[134] EVD-PT-OTP-00282, DRC-OTP-2014-0240 at 0313 and the Defence submits that this is not disputed by the Prosecution.
[135] Prosecution's written submissions, ICC-01/04-01/10-448, para. 15.

only soldiers were killed and **not** civilians.[136]. Defence witness W-0005 (BKA-004) corroborates the fact that the FDLR was not the aggressor at Kipopo.[137]

Pinga

73. The incident at Pinga, North Kivu allegedly took place on or about 14 February 2009.[138] The DCC cites Pinga once, and only then, so it is submitted, in order to support the contextual requirement of crimes against humanity. As indicated at the Hearing, the Defence is of the opinion that the Prosecution evidence advanced in support of this alleged incident is based on conflicting hearsay reports and cannot provide substantial grounds to impute liability to the FDLR .[139]

Mianga

74. The Prosecution refers to an attack at Mianga, North Kivu, on or about 12 April 2009.[140] This incident, as opposed to the previous ones, is mentioned on several occasions throughout the DCC.[141] The Defence submits, once again, that the Prosecution has failed to prove that any alleged harm to civilians resulted from an attack by the FDLR on a civilian population. The fact that there exists Prosecution evidence specifically mentioning the military casualties fixes it with the burden, as mentioned previously, of proving the unlawful nature of the military engagement.[142]

[136] EVD-PT-OTP-00762, DRC-OTP-2038-0049 at 0067, para. 87.
[137] EVD-PT-D06-01286, DRC-OTP-2031-0050-R01 at 0069.
[138] Prosecution's written submissions, ICC-01/04-01/10-448 para. 16.
[139] Transcript, 19 September 2011, ICC-01/04-01/10-T-7-RED-ENG at page 82, line 16 to page 84, line 8.
[140] Prosecution's written submissions, ICC-01/04-01/10-448, para. 18.
[141] Document Containing the Charges, ICC-01/04-01/10-330, paras. 19, 43, 51, 79, 85, 89 and 102.
[142] See EVD-PT-OTP-00236, DRC-OTP-2013-4936

Luofu and Kasiki

75. According to the Prosecution, the villages of Luofu and Kasiki in North Kivu were attacked by the FDLR on or about 17-18 April 2009.[143] Prosecution witness W-632, however, states that it was not the FDLR which perpetrated the attack on Luofu and Kasiki but rather RUD-Urunana.[144] Even HRW concurs stating that the attack on Luofu and Kasiki was conducted by RUD-Urunana and not the FDLR.[145]

Busurungi

76. The events at Busurungi, on or about 9-10 May 2009, were extensively discussed at the Hearing.[146]. The Defence submits that the evidence adduced by the Prosecution with respect to this incident is ambiguous and, as argued orally, does not establish any responsibility of the FDLR-FOCA hierarchy for the alleged atrocities.

The Busurungi vicinity

77. Crimes imputed to the FDLR in the Busurungi "vicinity" – criticised elsewhere for their lack of specificity – were, according to a Prosecution witness,[147] in fact committed by "Rwandese soldiers". The Prosecution has not shown that this could not mean members of the official Rwandan army (RDF). The Prosecution evidence, furthermore, is inconclusive as to the time period when these alleged incidents in the vicinity of Busurungi took place.[148] They

[143] Prosecution's written submissions, ICC-01/04-01/10-448 para. 19 and Document Containing the Charges, ICC-01/04-01/10-330 paras. 43, 85 and 90.
[144] EVD-PT-D06-01350, DRC-OTP-2034-0386 at 0427-0428. According to OTP witnesses, RUD-Urunana operates with a totally different command structure.
[145] EVD-PT-OTP-00282, DRC-OTP-2014-0240 at 0317.
[146] Prosecution's written submissions, ICC-01/04-01/10-448 para. 21; Document Containing the Charges, ICC-01/04-01/10-330 paras. 19, 43, 45, 52-57, 66-70, 80-81, 85, 91-92, and 101.
[147] EVD-PT-OTP-00597, DRC-OTP-2025-0107-RO1 at 0112, para. 25.
[148] Transcript, 20 September 2011, ICC-01/04-01/10-T-8-RED2-ENG at page 37, lines 1-4. In order to prove the commission of war crimes, the Prosecution is obliged to show the existence of an armed conflict throughout the period relevant to the DCC. When the warrant for Mr. Mbarushimana's arrest was issued, the Pre-Trial Chamber found that "*during the period from 20 January until 25 February 2009 and again from 2 March until 31 December 2009, an armed conflict of a certain intensity was waged in the North and South Kivu* [...]". The Pre-Trial Chamber made no specific finding, however, as to whether a

could indeed have transpired during the period which falls without the proven armed conflict between *Umoja Wetu* and *Kimia II*.

Manje

78. For the alleged incident at Manje, the Prosecution relies, inter alia, on W-693. This witness, however, seems to refer to an incident that took place one month prior to the event pleaded by the Prosecution.[149] Another witness cited by the Prosecution - W-562, more importantly fails to support the contention that there was a deliberate attack on the local civilians of Manje indicating that an order was given to set fire to the military position alone.[150] In the circumstances, therefore, the Defence submits that the Prosecution has failed to prove that the events which occurred at Manje were unlawful military activities.

Malembe

79. The Prosecution mentions two incidents at Malembe in North Kivu that supposedly occurred in August and September 2009.[151] W-544, a former FDLR soldier, specifies that, at Malembe, he was ordered to attack Maï-Maï and FARDC troops but not civilians.[152] This witness continued to testify that the incident at Malembe occurred at the start of the year, and not in August. W-544 was not aware of any incident in Malembe in August 2009.[153] W-544 adds that

conflict existed between 25 February and 2 March 2009 and if so whether it met the threshold requirement of intensity to be deemed an "armed conflict". Where the evidence tends to show the commission of crimes in late February or early March 2009, therefore, such charges should not be confirmed unless substantial grounds exist to believe that there were committed as part of an "armed conflict". The Defence submits that the Prosecution failed to produce any evidence to qualify the intensity of any military engagement which might have existed at the conclusion of *Umoja Wetu* and before the initiation of *Kimia II*.

[149] EVD-PT-OTP-00742, DRC-OTP-2036-1155 at 1156 para. 10.

[150] EVD-PT-OTP-00708, DRC-OTP-2032-1371 at 1389, lines 614-626.

[151] See para. 24 of the Prosecution's written submissions, ICC-01/04-01/10-448, and paras. 19, 43, 45, 59, 85 and 94.

[152] EVD-PT-D06-01295, DRC-OTP-2032-1619 at 1628 To 1629: houses that were burned were used by Mai Mai soldiers. There were no civilians in the houses because they ran away and there were signs of military use such as bullets and weapons inside.

[153] EVD-PT-D06-01298, DRC-OTP-2032-1673 at 1679, lines 188-189.

during the military engagement at Malembe only FARDC soldiers were killed and not civilians.[154]

Mutakato

80. The only piece of evidence cited by the Prosecution in support of an incident at Mutakato in North Kivu[155] lacks detail as to nature of the attack and who was responsible for it.[156] No mention, it should be stressed, is made of *civilians* having been attacked which, once again, saddles the Prosecution with the burden of proving the unlawfulness of the military engagement – something which it cannot do in this case.

Kahole

81. Kahole, South Kivu, is the penultimate incident mentioned in the Prosecution's written submissions.[157] While the Prosecution, in its List of Evidence, makes reference to the UN Group of Experts report, this report does not mention Kahole, but rather "Kalole". No evidence is adduced to show that these two locations are in fact one and the same place. Nevertheless, since the report mentions that "Kalole" is a vast geographical expanse, it would not have made make sense for the Prosecution to have meant "Kalole" instead.[158] Further, the report makes no specific allegation imputing the violence committed in "Kalole" to the FDLR, nor is any source quoted in support of its allegations concerning this area.

The village of Witness 673 and Witness 674

82. The final incident cited the Prosecution's written submissions allegedly occurred in the village of Witness 673 and Witness 674 - once again in North

[154] EVD-PT-D06-01334, DRC-OTP-2033-2198 at 2209-2210, lines 364-375.
[155] See Prosecution's written submissions, ICC-01/04-01/10-448 para. 25 and Document Containing the Charges, ICC-01/04-01/10-330 paras. 43 and 85.
[156] EVD-PT-OTP-00310, DRC-OTP-2014-1192 at page 1193 paras. 5 and page 1194 13.
[157] Prosecution's written submissions, ICC-01/04-01/10-448 para. 26, Document Containing the Charges, ICC-01/04-01/10-330 paras. 43 and 85.
[158] See EVD-PT-OTP-00575, DRC-OTP-2022-2787. Only "Kalole" is mentioned at page 2825.

Kivu. Witness 674 describes how she was attacked by "*Rwandese*" and "*Interahamwe*". She identifies her attackers as FDLR troops by their language and their uniform, which was differed from those worn by soldiers of the FARDC.[159] In light of Dr Clark's report, this would be insufficient to identify them as FDLR troops especially since the Prosecution has brought no evidence whatsoever to show what uniform was habitually worn by FDLR troops.[160] Witness 673 fails to give any indication of when, exactly, in 2009 the alleged rape on his wife took place despite the fact the Prosecution guesses that it occurred in the second half of that year.[161] Witnesses 673 and 674 also contradict each other as to the time of day when the alleged attack on their village was initiated.[162]

IV OTHER MATTERS

Cumulative Charging

83. In its oral submissions, the Defence objected to two distinct Prosecution charging practices: (i) duplicity where the objective elements of one charge are subsumed within an other; (ii) and duplicity arising out of the fact that the same conduct is charged as both crimes against humanity and war crimes.

84. In relation to the first practice, the Prosecution justifies its cumulative charges by reference to ICTY precedent in the *Čelebići* case.[163] The Defence, however, is of the view that retaining both counts, as the Prosecution would have it, would entail the risk of convicting the Suspect twice for the same conduct. This, in turn, would offend the *ne bis in idem* principle enshrined in Article 20(1) of the Rome Statute. Pursuant, therefore, to the decision on the

[159] EVD-PT-OTP-00724, DRC-OTP-2034-1527 at 1528.
[160] See also: EVD-PT-D06-01306, DRC-OTP-2033-0274-RO1 at 0304.
[161] EVD-PT-OTP-00725, DRC-OTP-2034-1533.
[162] See EVD-PT-OTP-00725, DRC-OTP-2034-1533 at 1537.
[163] *Prosecutor v. Delalic et.al*, Case No. IT-96-21, AC Judgement, 20 February 2001, (also known as the Celebeci case) referred to by the Prosecution in its written submission ICC-01/04-01/10-448 at para. 44

confirmation of charges in the *Bemba* case[164] and the practice adopted by several national systems of law,[165] the Defence submits that the more specific count should be retained otherwise it would be deemed superfluous. It is apposite to note that the Prosecution has given no justifiable explanation for favouring ICTY jurisprudence while apparently disregarding the dicta enunciated in the *Bemba* case. Ironically, it was the Prosecution itself which, during the Hearing, submitted that "*the jurisprudence of the ad hoc Tribunals must be approached with caution.*"[166]

85. With respect to the second charging practice criticised by the Defence, the Prosecution states that "*charging the same conduct under crimes against humanity and war crimes is a recognized practice of international tribunals and was additionally approved in Bemba*".[167] The Defence acknowledges that the Pre-Trial Chamber in the *Bemba* case found substantial grounds to believe that murder and rape had been committed both as war crimes and crimes against humanity. This is not, however, the same as saying that the *Bemba* Pre-Trial Chamber

[164] Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009. '[T]he prosecutorial practice of cumulative charging is detrimental to the rights of the Defence since it places an undue burden on the Defence. The Chambers considers that, as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative approach'.

[165] For examples from civil law systems see French law: Crim. 25 mai 1992, Dr. Pén., 1993, comm. n° 1 and Crim. 30 juin 1987, RSC, 1987, p.872, obs. Delmas Saint Hilaire; A qualification covering only parts of the facts will also be abandoned in favour of a qualification covering the entirety of the facts, see Crim. 20 févr. 2002, B., n° 38 where the qualification of murder will prevail over the qualification of taking of hostages resulting in the death of the victim; Qualification might not be repetitive but might still be rejected in virtue of the principle *ne bis in idem* , see Crim. 25 fév. 1921, S., 1923, 1, p. 89, note Roux ; 28 janv. 1969, B., n°51 ; 26 mars 1974, B., n°129, Gaz. Pal., 1974 where it was decided that a person can not be prosecuted for one fact under multiple and distinct qualifications and can not not be imposed separate sentences (Crim. 16 mai 1984, B., n°181 ; 4 févr. 1998, Dr. pén., 1998, chron. 15); See Italian Law: Article 15 of Italian criminal code reads "*When a matter is governed by more than one penal law or more than one provision of the same penal law, the specific law or provision of law shall prevail over the general law or provision of law, except as otherwise prescribed*". The term "specific law or provision of law" has been defined as the one which contains all the constitutive elements of the general provision plus one or more specializing elements, see Italian Supreme Court, Ordinanza 19 January 2011, n.1235 - Cass., Sez. Un., 1235/2011; Under common law systems, cumulative charging is permissible. However, it has been found not to be desirable to do so, since a single offence could easily give rise to multiple charges when the lesser count should actually be merged into the more grave count. This creates uncertainty in sentencing, see BOGDAN, Attila, "Cumulative charges, convictions and sentencing at the ad hoc International Tribunals for the former Yugoslavia and Rwanda", *Melbourne Journal of International Law* Vol. 3 No. 2, October 2002, p. 2; See also UK Law on the fact cumulative charging is unadvisable, Regina v. Torr, Court of Criminal Appeal, JJ. Ashworth, Fenton Atkinson, and Widgery, 1965 Dec. 6, **[**1966] 1 W.L.R. 52; *R. v. Harris*, (1969) 53 Cr. App. R. 376, CA;

[166] ICC-0104-0110-T-6-RED2-ENG at page 25 lines 17 and 18.

[167] ICC-01/04-01/10-448 at para. 48.

"*approved*" the Prosecution's charging policy – especially when the *Bemba* Pre-Trial Chamber was not seized of an objection to what the *Mbarushimana* Defence believes to be an additional facet of cumulative charging.

86. The *Mbarushimana* Defence submits that the drafting history of the Rome Statute makes it clear that conduct for the purpose of Article 20 was envisaged to encompass the same historical facts: *"According to it, a trial for a subsequent different qualification based on the same historical facts would be prohibited. If a person was acquitted for genocide, a new trial for crimes against humanity would constitute a bis in idem"*.[168] The debate concerning article 20(3) of the Statute also indicates that the State parties accepted that the utilisation of the word 'conduct' implied that the *ne bis in idem* protection would also apply to convictions or acquittals for ordinary crimes, unless the criteria set out in article 20(3)(a) and (b) were met. Chapeau elements were not, therefore, considered to comprise part of the 'conduct' for an offence.[169]

Speciality

87. At paragraph 56 of its written submissions, the Prosecution asserts that if any issue of speciality arises, then the Pre-Trial Chamber can simply request France to waive any objection it may have to proceedings for conduct other than that for which the Suspect was surrendered. Such an argument must be rejected. In accordance with Rule 121(3), the Prosecutor was obliged to tender all evidence supporting the admissibility and legality of his proffered charges no later than thirty days before the date of the confirmation hearing. Rule 121(8) further specifies that the "*Pre-Trial Chamber shall not take into consideration charges and evidence presented after the time limit, or any extension thereof, has*

[168] I Tallgren, A Reisinger Coracini 'Article 20, Ne bis in idem', (Triffterer ed) Commentary on the Rome Statute of the International Criminal Court at p. 683. See also, under French law: Crim. 20 déc. 1985, B., n°407, D. 1986, 500, note Chapar, JCP, 1986, II, 20655, rapp. Le Gunehec, concl. Dontenwille, Gaz. Pal., 1986, 247 : « que les faits devant être poursuivis sous leur plus haute qualification pénale, un fait qui constitue a la fois un crime de guerre et un crime contre l'humanité doit être poursuivi en tant que crime contre l'humanité ; ».

[169] I Tallgren, A Reisinger Coracini 'Article 20, Ne bis in idem', (Triffterer ed) Commentary on the Rome Statute of the International Criminal Court at p. 692.

expired". As underscored by the Single Judge in the *Muthaura et al* case, while the Prosecution is charged with framing the DCC, the Pre-Trial Chamber will only confirm those charges which meet the requisite legal and evidential threshold.[170] The Suspect has a right to a speedy expeditious confirmation hearing. Any last minute overtures to the French authorities would simply frustrate that right. Such an important right should not be sacrificed due the Prosecution's failure to apply the statutory requirements in a diligent manner.

88. At footnote 61 of its written submissions, the Prosecution also asserts that the rule of speciality merely protects State interests. This is not the case. The drafters of the Rome Statute explicitly recognized that "*…surrender implies a massive infringement*" of a Suspect's freedom.[171] Accordingly, the procedural requirements enshrined in Article 101 of the Rome Statute provide an important *protection* for the surrendered person's rights and interests".[172] For this reason, Rule 196 of the Rules of Procedure and Evidence expressly permits a person surrendered to the Court to provide views on a perceived violation of Article 101 of the Statute.

V CONCLUSION

89. The Prosecution has failed to put forward one piece of evidence that can show that the Suspect ever condoned or ever agreed with the idea of attacking a civilian population. To the contrary, there is plenty of evidence produced by the prosecution that shows that Mr. Mbarushimana actively advocated the protection of civilians in the Kivus. The Defence submits that the Prosecution's

[170] Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali'", 1 April 2011, ICC-01/09-02/11-27 at para 24.
[171] P Wilkitzki, 'Article 101, Rule of Specialty', (Triffterer ed.) Commentary on the Rome Statute of the International Criminal Court(Hart Publishing, Oxford 2008) p.1636 para. 4. Although this refers to the surrender of an extradite, the difference here is irrelevant as the focus is on the actual act of *surrender*.
[172] P Wilkitzki, 'Article 101, Rule of Specialty', (Triffterer ed.) Commentary on the Rome Statute of the International Criminal Court(Hart Publishing, Oxford 2008) p.1636.

overly complex structure of the alleged common purpose and sub-common purposes, attempts to negate this simple reality.

90. In conclusion, the Defence submits that the Prosecution has failed to show substantial grounds:

- to believe that the requirements of Article 25(3)(d) have been met;
- to believe that a group existed with a common criminal purpose, that the Suspect formed a part of that group and that crimes were committed as a result of that common criminal purpose;
- to believe that the Suspect knew of the alleged common criminal purpose, and that he made a relevant and causally linked contribution to the alleged crimes;
- to believe that the alleged crimes were committed by members of the FDLR as distinct from members of other armed groups;

91. For the reasons set out above, the Defence respectfully requests the Pre-Trial Chamber to decline to confirm the charges against the Suspect.

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