

1 International Criminal Court
2 Pre-Trial Chamber I - Courtroom 2
3 Presiding Judge Sanji Mmasenono Monageng, Judge Sylvia Steiner,
4 And Judge Cuno Tarfusser
5 Situation in the Democratic Republic of Congo - ICC-01/04-01/10
6 In the case of the Prosecutor versus Callixte Mbarushimana
7 Confirmation of Charges Hearing
8 Monday, 19 September 2011
9 The hearing starts at 9.03 a.m.
10 (Open session)
11 COURT USHER: All rise. The International Criminal Court is now
12 in session. Please be seated.
13 COURT OFFICER: Good morning, your Honours, Madam President. We
14 are in open session.
15 PRESIDING JUDGE MONAGENG: Good morning, everybody.
16 Pre-Trial Chamber I is now in session.
17 Court Officer, please call the case.
18 COURT OFFICER: Situation in the Democratic Republic of the Congo
19 in the case of the Prosecutor versus Callixte Mbarushimana, case
20 reference ICC-01/04-01/10.
21 PRESIDING JUDGE MONAGENG: Thank you.
22 The composition of the Chamber has not changed and I wonder if
23 the Prosecution's composition has changed?
24 MR. STEYNBERG: Madam President, your Honours, only by the
25 absence of Ms. Bensouda and Mr. Turlan, otherwise we are the same.

1 PRESIDING JUDGE MONAGENG: Thank you.

2 Legal Representatives.

3 MR. MABANGA: (Interpretation) There is no change, Madam

4 President.

5 MR. KAUFMAN: Yes, good morning, Madam President, Your Honours.

6 I'm privileged to welcome Ms. Karlijn van der Voort, fresh from the

7 Cambodian Tribunal.

8 PRESIDING JUDGE MONAGENG: Thank you very much.

9 This morning we continue with the presentation of the Prosecutor.

10 MS. WEISS: Thank you, Madam President, your Honours.

11 Before the Court adjourned on Friday, I had just completed

12 presenting the Prosecution's submissions regarding 15 incidents of

13 attacks on civilians. I will now continue by presenting the

14 Prosecution's evidence supporting the specific elements of Counts 2, 3,

15 10, 11, and 12 of the charging document.

16 Counts 2 and 3 charge the suspect for the crimes -- crimes of

17 murder constituting a crime against humanity and murder constituting a

18 war crime. The Prosecution alleges that from on or about 20 January to

19 31 December 2009, throughout the course of the FDLR's campaign against

20 the civilian population of the North and South Kivu Provinces, FDLR

21 troops deliberately murdered civilians. They were killed both en masse

22 in the course of organised military attacks and individually in random

23 acts of violence. Some people were burnt alive in their houses and

24 others were mutilated before being killed. Decapitation and

25 dismemberment of limbs were part of the *modus operandi* employed by the

1 FDLR.

2 Civilians were killed by gun-shot, machete, bayonet, knife, or
3 beating. Even babies were pounded to death. The Prosecution submits
4 that the horrific nature of the killings is further evidence of the fact
5 that these killings were intended to send a message, both to the local
6 population and to the world.

7 Your Honours, the incidents of murder in Counts 2 and 3 of the
8 charging document are illustrative of the extensive pattern of killings
9 committed by the FDLR throughout 2009. The Prosecution's core evidence
10 of specific incidents of murder includes the statements of crime-based
11 witnesses, such as 673, who describes civilian killings in his village;
12 Witness 693, who provides evidence of FDLR soldiers killing civilians in
13 Manje; and Witness 687, who provides first-hand evidence of FDLR killings
14 in Mianga, including the village chief. There are also numerous other
15 witnesses to killings in Busurungi on which I will make submissions
16 shortly.

17 Other core evidence which attributes the killings of civilians to
18 the FDLR includes the statement of former FDLR soldiers, those who knew
19 or took part in the attack, in the planning and execution of these
20 attacks. For example, Witness 561 describes incidents of killings in
21 Kipopo and Busurungi. Witness 542 and 552 provide evidence regarding
22 killings in Busurungi, and Witness 564, another demobilised FDLR soldier
23 who also describes civilian killings by the FDLR, particularly in Mianga
24 and Manje.

25 Your Honours, the evidence shows that the first common elements

1 of both Count 2 and 3 are satisfied in that the FDLR attackers killed one
2 or more persons in each of the attacks. Furthermore, the victims were
3 clearly civilians and the attackers were aware that they were civilians.
4 This can be deduced from the evidence of insider and crime-based
5 witnesses alike. Finally, the Prosecution submits that the intention to
6 kill must be inferred from the deliberate nature of the killings.

7 The Prosecution submits that Callixte Mbarushimana was aware of
8 the fact that the FDLR troops were killing civilians. This is evidenced
9 by his numerous press releases, his access to reliable reports of such
10 killings and his *de jure* and *de facto* position in the FDLR.

11 Your Honours, I now turn to the specific counts -- specific
12 elements of Counts 11 and 12 of the charging document, being the
13 destruction of property and pillaging constituting war crimes.

14 Your Honours, whilst carrying out the attacks through the Kivu
15 Provinces, FDLR troops routinely and methodically razed villages. The
16 purpose of this was to ensure that the civilian population had nothing to
17 come back to. Orders were given and carried out to pillage the
18 population's belongings before burning down their houses, depriving them
19 of a home, possessions, food, livestock and livelihood. In many
20 instances, possessions that were not looted were gratuitously vandalised.
21 Massive displacement resulted, forcing the survivors to flee to refugee
22 camps or search for new lodgings. Human Rights Watch reports that in the
23 first nine months of 2009 over 900.000 people were forced to flee their
24 homes as a result of the conflict between the FDLR and government
25 soldiers. The Prosecution alleges that a substantial portion of these

1 were displaced by the FDLR's deliberate destruction of the villages.

2 Witness 587 is a demobilised former FDLR officer. The summary of
3 his interview, your Honours, is item -- is EVD item 00860 and relevant
4 transcript of this interview is item 1382. According to this witness,
5 General Sylvestre Mudacumura gave, and I quote at lines 314 to 317 of the
6 transcript:

7 "A general order that they had to burn houses of civilians so
8 that civilians would flee and it would be difficult for the Government of
9 Congo to manage the war."

10 The witness saw the written order signed by Mudacumura, which was
11 sent out to the leaders in the field in February 2009. As is evident
12 from discussion notes of a Steering Committee meeting held in January of
13 2009, the FDLR leadership was aware of the pillaging taking place on the
14 ground and, we submit, condoned it. I'm referring to item ending with
15 EVD number 1069, which is a document recovered during the search and
16 seizure operation conducted at the suspect's residence.

17 Point 36 of these notes say that the non-conventional logistics
18 were to be regulated so that troops would profit and capitalise from it.
19 These non-conventional logistics, as attested by Witness 559, another
20 former FDLR insider, it is a mechanism for self-financing methods by FDLR
21 soldiers. Your Honours, the summary of his interview is item 0848 and
22 the relevant portion of his interview is item 1326, lines 1204 to 1346.

23 Your Honours, the Prosecution submits that these -- this concept
24 of non-conventional logistics is a euphemism for pillaging, an activity
25 which was conducted by the FDLR, by the leadership and widely practiced

1 by -- sorry, which was condoned by the FDLR leadership and widely
2 practiced by troops on the ground. The Prosecution alleges that the
3 incidents of crimes against civilian property, as specified in Counts 11
4 and 12 of the charging document are illustrative of a wider pattern of
5 crimes against civilian property perpetrated by the FDLR in the Kivu
6 region in 2009.

7 The Prosecution's core evidence includes the statements of
8 crime-based witnesses, such as 673 and 674, whose property was pillaged
9 and destroyed by FDLR. Witness 693's property was pillaged and house
10 burned by the FDLR in Manje. Witness 687 provides evidence about the
11 destruction of his village, being Mianga. Demobilised FDLR soldiers
12 provide evidence of FDLR troops pillaging and destroying property at
13 various locations, including Mianga, for example, Witness 587 and 564.
14 At Manje, Witness 562 and 564 speak of this. And Malembe, Witness 542,
15 561, 562, 544, and 564 speak of this.

16 The evidence shows that the specific elements of the war crime of
17 destruction of property are also satisfied. As attested by former FDLR
18 combatants and civilians alike, FDLR troops destroyed the property of an
19 adversary, the adversary being the civilians of the North and South Kivu
20 Provinces which were protected from destruction. Your Honours, civilians
21 perceived to be aligned with government forces were regarded as enemies,
22 which I will explain in a moment when I turn to the crime of persecution.
23 The evidence shows that the FDLR troops were aware of the factual
24 circumstances establishing the status of this property, being the
25 property of civilians, and that the destruction was not required by

1 military necessity.

2 The evidence also satisfied -- satisfies the specific elements of
3 the war crime of pillaging. FDLR troops appropriated the property of
4 civilians in North and South Kivu, intending to deprive them of it. They
5 appropriated for private or personal use without the consent of the
6 owner.

7 Madam President, your Honours, I now turn to Count 13, being
8 persecution, constituting a crime against humanity. Your Honours, the
9 FDLR specifically and deliberately targeted members of the civilian
10 population in the North and South Kivu Provinces for their apparent
11 collaboration and support of government forces. Those civilians, whether
12 individually or collectively, as residents of a given locality were
13 considered enemies of the FDLR. The retaliation against civilians was
14 brutal. Before or while burning down villages, killing, looting, raping,
15 or committing other atrocities upon civilians, FDLR soldiers either
16 verbally, through warning letters, or obvious revengeful attacks made it
17 clear to the victims why they were being attacked.

18 Witness 564 is a former FDLR officer. According to his evidence
19 the leaders in Europe instructed soldiers on the ground that they could
20 not trust anyone who was not on the FDLR's side. Anyone else should be
21 considered an enemy. You can find this item at 0668, lines 287 to 297.

22 Witness 677 is also a former FDLR soldier. His evidence shows
23 that the Congolese population is split into two parties; those on the
24 side of the FARDC are considered enemies and those on the side of the
25 FDLR are considered friends of the FDLR. Your Honour, the summary of his

1 statement is item 0762, particularly at paragraph 57. It was with this
2 mind-set instilled by the leaders in Europe and passed down through the
3 military chain of command that the FDLR troops persecuted the people of
4 the Kivus. They were considered to be either for the FDLR or against
5 them. Neutrality was not an option.

6 The Prosecution's core evidence of specific counts of persecution
7 includes crime-based witness 673, whose house was burned and his family
8 were killed by the FDLR in his village because he co-operated with the
9 FARDC. Witness 650, and I refer to item 0597, found a warning letter
10 from the FDLR before the Busurungi attack, which said that anyone who
11 stays in Busurungi was considered being, and I quote from his statement,
12 "together with the government." Witness 687 says that the chief of
13 Mianga was killed by the FDLR because he, and I quote, "brought the
14 FARDC." Item 0741, your Honours.

15 Witness 693 was given a note by the FDLR after the attack on
16 Manje which said, and I quote from the summary of his statement, item
17 0742, paragraph 29, "that civilians should not follow the government's
18 line."

19 Your Honours, the evidence shows that the specific elements of
20 the crime against humanity of persecution are satisfied. Through the
21 commission of the acts listed in Count 13 of the charging document, the
22 FDLR deprived victims of fundamental rights contrary to international
23 law. These include, but are not limited to, the right to life, the right
24 not to be subjected to torture, the right not to be subjected to cruel or
25 inhuman or degrading treatment or punishment, the right to health, and

1 the right to property.

2 The evidence establishes that members of the Congolese civilian
3 population were targeted, individually or collectively, based on their
4 perceived political affiliation with the FARDC.

5 Your Honours, for the final part of my presentation, I will
6 provide the Court with an illustrative incident where crimes were
7 committed by the FDLR and the denial mechanism in practice. The location
8 is Busurungi. On the night of 9th to 10th of May, 2009, it is my
9 submission that the crimes including all those I have addressed today
10 took place. Attacks against civilians, murder, crimes against civilian
11 property, and persecution. The FDLR Reserve Brigade initially targeted
12 an FARDC battalion station in Busurungi. After the FARDC were defeated,
13 the FDLR did not retreat. Instead, they continued the attack as planned,
14 targeting the civilian population. When FDLR soldiers were briefed
15 before the attack, they were instructed to kill anything that moved. In
16 execution of this order, they shot members of the civilian population and
17 burned down their houses, often with people still in them.

18 Witness 562, a demobilised FDLR soldier who took part in the
19 attack on Busurungi, described the attack against civilians. I refer
20 your Honours to the transcript of his interview, which is item 0857,
21 lines 311 to 340, and I quote:

22 "When we reached in the Busurungi centre after chasing out the
23 enemy, every person who would just come out of their house had been
24 killed. There was no distinction between civilian or soldier because we
25 had an order that read that everything that moves in Busurungi should be

1 killed. So after we burnt houses and after shooting those who managed to
2 run away, we burnt houses. That is the time when a lot of people died,
3 innocent people died. Among them there were women, children, young
4 people who didn't manage to run away."

5 Eye-witness 655 heard gun-shots and bombs and the shouting of
6 FDLR soldiers as they attacked his village. Witness 650, a former
7 Busurungi resident, saw soldiers shooting at and killing civilian
8 inhabitants, setting fire to houses, burning down the village, stealing
9 whatever they could. He counted 79 bodies in the aftermath of the
10 attack, including those of children. In his signed statement he recounts
11 the carnage he saw the following day in the village, item 0597, your
12 Honours, and I quote from paragraph 64:

13 "Others were killed by machete. For some there were only bones
14 remaining. For some people we were able to determine where they had
15 died, but for others we only found body parts and we could not identify
16 who they were or how they had died."

17 Former FDLR soldier Witness 562 went back to the ravaged village
18 two days later with the FDLR on a patrol mission. He saw corpses,
19 including those of women and children. I refer to item 0705 and quote
20 from lines 967 to 971.

21 "It was visible that some had been burnt because you can see --
22 you could see on the skin, but others were -- you could see that they had
23 been cut into pieces. And others were -- you would wonder how they had
24 died because there was no cut, there was no bullet, and I presume that it
25 was the clubs because you could see that the -- the head was kind of

1 broken away."

2 Witness 650 corroborates this report. He too came back the next
3 day and there was nothing left of his village. He saw bodies, some cut
4 in two, everything burned down. The village was annihilated. Over 700
5 civilian lodgings were destroyed. Civilian houses and military positions
6 alike were set on fire. FDLR troops went from door to door, burning and
7 looting houses one after the other.

8 Witness 528, another former FDLR soldier who took part in the
9 attack, described the method employed that night to maximise the effect
10 of burning civilian houses. The summary of his statement is item 0859,
11 your Honours, and the relevant transcript of interview is item 1314,
12 particularly at lines 425 to 434. According to crime-based Witness 683,
13 item 0699, paragraph 31, your Honours, the FDLR - and I quote - "were
14 going in and out of houses removing goods, clothes, cooking utensils,
15 mattresses. Anything they were not able to carry they burned."

16 The people of Busurungi were persecuted. They were subjected to
17 the attack I have just detailed for the perceived allegiance with the
18 enemy. According to a report of the Office of the High Commissioner for
19 Human Rights, Busurungi was considered sacred, being the main village of
20 the locality and the very place where customary power was exercised. I
21 quote from item 0309, paragraph 9, which is this report.

22 "The burning of Busurungi and the blood that had been spread
23 there is seen as a profanation and complicated ceremonies will be needed
24 in order to stabilise the village. This aspect was well-known to the
25 FDLR."

1 Your Honours, just before the May attack, Witness 650 saw a
2 letter the FDLR had left on the road to Hombo, item 0597. He recalls the
3 letter read, and I quote from paragraph 42:

4 "The population of Busurungi has to leave. Anyone who stays
5 behind means they're together with the government."

6 Madam President, your Honours, as I mentioned a little earlier
7 and also on Friday, Callixte Mbarushimana issued a press release denying
8 FDLR involvement in the attack on Busurungi. I will now demonstrate
9 exactly how we get from an attack on a village in North Kivu in DRC to a
10 press release being issued by Mbarushimana in France in a matter of
11 weeks. I ask your Honours to consult the visual aid on your monitors --
12 which will appear on your monitors as I guide the Chamber through the
13 Busurungi denial process.

14 Reports of the Busurungi attack surfaced in the media not long
15 after it happened. These included reports attributing FDLR
16 responsibility, such as the one dated the 13th of May, which was
17 retrieved from the Prosecution from one of Mbarushimana's hard drives,
18 item 1252, your Honours. On the 15th of May, Ignace Murwanashyaka,
19 president of the FDLR, sent an e-mail to Mbarushimana, item 0866, your
20 Honours. He reports on the weapons seized, the retaliatory nature of the
21 attack, that it was carried out by the Reserve Brigade and soldiers from
22 FOCA command, and propaganda surrounding the incident. Shortly after the
23 e-mail is sent, Murwanashyaka, in Europe, speaks with an FDLR field
24 commander who is on the ground in the Kivus by satellite telephone, item
25 0264, your Honours. He also reports on the Busurungi incident, saying

1 that, and I quote, "the harvest was good."

2 On the 16th to the 17th of May, the FDLR second vice-president
3 based in the field, Gaston Iyamuremye, is in contact with Murwanashyaka
4 several times. They arrange for further discussions on ideas for denials
5 of the Busurungi and Mianga incidents, item 0265, 0268, and 0269, your
6 Honours.

7 On 17th May, Iyamuremye phones Murwanashyaka and reads a prepared
8 statement out to him as a basis for a press release. The relevant
9 intercept is item 0270, your Honours. He provides detail about the
10 attack on Busurungi, including time, dates, and battalion involved, that
11 it was a surprise raid and the surprise was achieved, types and numbers
12 of weapons seized, and casualties. As for civilian casualties,
13 Iyamuremye suggests that, and I quote from the translation which is item
14 0605:

15 "The FDLR/FOCA accepts no responsibilities should these civilians
16 be killed in the fighting. As a rule, our operations take place at night
17 and it is difficult to differentiate." Lines 58 to 60 there, your
18 Honours.

19 On 18th of May, Murwanashyaka and an FDLR field commander speak
20 by satellite telephone. Murwanashyaka makes arrangements to have contact
21 with the Reserve Brigade commander on the ground for further details.
22 Item 0271, your Honours. On 21 May, Murwanashyaka e-mails a draft press
23 release for review to Callixte Mbarushimana and others. This is item
24 0746, your Honours. The draft includes text, saying that the target of a
25 Mianga and Busurungi -- that the target of Mianga and Busurungi attacks

1 were not civilians and that they had warned Mayi-Mayi and FARDC not to
2 mix with civilians because the FDLR would attack whenever the enemy was.
3 Later the same day, Mbarushimana and Murwanashyaka have a telephone
4 conversation about this draft. The intercept is item 0381, your Honours.
5 Mbarushimana suggests, and I quote from the English translation which is
6 item 0592, lines 15 to 16, your Honours. He suggests removing "anything
7 anywhere that could give the impression that we ourselves are admitting
8 and saying that we might have killed some civilians."

9 Murwanashyaka acknowledges that civilians are killed because the
10 attacks take place at night. He says at lines 39 to 41:

11 "We aren't able to distinguish whether a person who's lying in a
12 bed is a soldier or a woman or something else."

13 Mbarushimana reminds him of the laws protecting civilians under
14 international law. At lines 56 to 62, your Honours, I quote:

15 "We mustn't forget the law which governs international law,
16 international humanitarian law. In theory, when you plan to attack a
17 given location, you must first ensure that there aren't any civilians at
18 that location. When saying that you found out afterwards that they were
19 there with the others in this instant won't clear you of the
20 responsibility of what happened. That's the thing. That's precisely
21 what we have to be careful about."

22 Murwanashyaka then suggests that the press release should instead
23 say that the FDLR were counter-attacking and that it was the FARDC
24 initiating hostilities. Your Honours, this is the opposite of what
25 actually happened. As confirmed by FDLR -- former FDLR soldiers who took

1 part in the attack and by Iyamuremye himself, when he reported to
2 Murwanashyaka a few days prior to this conversation, it was the FDLR who
3 planned and launched this, and I use Iyamuremye's words, "surprise raid
4 on Busurungi."

5 Mbarushimana ensures -- assures Murwanashyaka that he will take
6 care of it, which he does. The press release is published on 27th of May
7 in Callixte Mbarushimana executive secretary of the FDLR's name. As
8 agreed, it states that the FDLR were attacked by the RDF and FARDC in
9 Busurungi and blames -- and places the blame of civilian casualties
10 squarely on the coalition.

11 Court Officer, could you please display item EVD-PT-OTP-1160.

12 COURT OFFICER: Counsel, could you please confirm that this
13 document is public so that it can be broadcasted outside this courtroom.

14 MS. WEISS: It's a public document.

15 COURT OFFICER: Just for the record of the case, the documents
16 bears number DRC-REG-0100-0628, and it's a public document.

17 MS. WEISS: Court Officer, if you could display the second page
18 of that document.

19 I quote from the second page, your Honours.

20 "The FDLR cannot be held liable for the victims caused by the
21 coalition attacks against civilians used as human shields. The damage
22 caused by these attacks on the coalition, whether direct or collateral,
23 should be allocated primarily to those who have undertaken to conduct
24 this war and those who force them to safe-guard their interests and,
25 secondly, those that lead to these murderous attacks, namely coalition

1 soldiers, APR (RDF)/FARDC."

2 Follow-up denials of the Busurungi massacre and rejections of
3 Human Rights Watch allegations of crimes committed by the FDLR were also
4 published in July.

5 To sum up, Madam President, your Honours, the Prosecution submits
6 that there are substantial grounds to believe that the FDLR committed the
7 offences described in Counts 1 to 3 and 11 to 13 of the charging
8 document. The Prosecution has demonstrated how Callixte Mbarushimana, a
9 prominent member of the FDLR leadership system -- leadership,
10 systematically denied FDLR involvement in these crimes in the public
11 domain, knowing that, in fact, the opposite was true. The crimes were
12 the result of his own activities as an FDLR leader.

13 Madam President, your Honours, that concludes my presentation. I
14 now defer to my colleague Ms. Marion Rabanit who will take the floor.

15 MS. RABANIT: (Interpretation) Madam President, your Honours, in
16 this part of the Prosecution's presentation I shall be describing a
17 selection of the main evidence that show that the crimes of torture of --
18 war crimes and crimes against humanity of rape and torture, a war crime
19 of cruel treatment and mutilation, and crimes against humanity of inhuman
20 acts.

21 Your Honours, the Prosecution's investigation has confirmed the
22 allegations about the modus operandi of the crimes committed by the FDLR.
23 This is apparent even during the conflict through the reports of various
24 agencies of the United Nations, NGOs, and the media. The plan of massive
25 and brutal attack against the population during which all these different

1 crimes, as reflected in the various counts in the charging document,
2 that -- and the fact that when all these crimes are committed at the same
3 time, this is illustrative of the final purpose of the FDLR, i.e., to
4 cause an ordered, planned humanitarian catastrophe.

5 The Prosecution would like to highlight the gender dimension of
6 this humanitarian catastrophe. I'm referring here to the notion of
7 "gender" in English which is translated into French in the Rome Statute
8 by "sex" in Article 7(3) which defines it.

9 Sexual violence is aimed at very specifically destroying the
10 individuals and the social structures of entire communities. By
11 committing rapes, sexual torture, and genital mutilations, the FDLR
12 attacked and damaged the very identity of these victims and the role that
13 they are assigned in their communities as men and women. Women whose
14 foetuses were extracted from their womb were attacked in a way that can
15 affect only women. They were deprived of being able to give birth and to
16 be mothers. Women who were victims of rapes were humiliated and broken
17 down as both women and spouses. Men who went through -- who were
18 castrated before the people, their families, were deprived of their
19 masculinity, as it is defined socially, or else as they identify with it.
20 The effect of this is to vilify them before their families. A man whose
21 penis has been cut off by the soldiers of the FDLR later on asked his
22 wife about this, and I quote him:

23 "Who am I today," he said, "and on this earth?"

24 Sexual crimes and, more generally, damage to the physical
25 integrity of civilians was a crucial component of the FDLR's plan to

1 terrorise the population. The Reserve Brigade soldiers, some of them,
2 were proud to say, for instance, Witness 562, to say that they had
3 introduced the spears into the vaginas of women during the attack against
4 Mianga in April 2009. This can be found in document 858, page 1363,
5 lines 714 to 735. A lieutenant of the FDLR was going about during that
6 attack with a freshly mutilated penis in his hand after the battle and
7 before this very same victim. He was also proud to say, in front of
8 other soldiers and in front of Witness 561, that what he was doing was
9 *gushahura*, i.e., mutilation of masculine sexual organs. This can be
10 found in document that ends with number 634, page 1461, lines 1474 -- I'm
11 sorry, let me say that once again. Actually, I'm speaking about page
12 1474 to 1490. This lieutenant was promoted for his contribution during
13 the Busurungi attack.

14 Witness 562 also saw the bodies of civilians that had spears
15 through them two days after the attack on Busurungi. Some of them had
16 been decapitated. This information can be found in an exhibit 705 ERN,
17 page 1216 to 1243, lines 967 to 971.

18 Madam President, your Honours, the evidence of Prosecution does
19 assign to the FDLR the crimes that they are charged with. Prosecution's
20 witnesses have absolutely no hesitation about the identity of their
21 attackers. The inhabitants of the Kivus are very familiar with the FDLR,
22 or as they are often called, like all of Prosecution's witnesses, the
23 Interahamwe. Indeed, these members of the militia lived in the
24 hinterland and had been living there for some 15 years since they had
25 left Rwanda in 1994. Some of the witnesses also knew the officers of the

1 FDLR who were in charge of their men, such as Witness 650. This
2 information is found in document 597, paragraph 18. The civilians in the
3 Kivus knew a little Kinyarwanda that the FDLR soldiers spoke and they
4 able at least to recognise that Kinyarwanda being spoken because they
5 were exposed to this language for many years. By way of example, let me
6 refer you, your Honours, to the narrative of Witness 656, 683, 693, and
7 694, and respectively 694 and document -- respectively documents 594,
8 595, 699, 759, and document 743. The language is not the only criterion
9 that attributes the charged crimes to the FDLR.

10 Some victims indeed knew by name or by sight the attackers
11 because they had already met them when they lived close to their
12 villages. And they knew them as being soldiers that belonged to the
13 FDLR. This is the case for Witness 656 and Witness 674, and I would
14 refer you to documents 594, 595, and 724. This is also true of the wife
15 of the man who was decapitated in Busurungi in March, and I'm referring
16 here to 597, document 597, particularly paragraph 25.

17 Furthermore, the direct perpetrators simply pointed out that they
18 belonged to the FDLR when they committed the crimes. Very often they
19 explained to their victims that they were attacking them because they had
20 allegedly called on the soldiers of the government's army and that
21 they -- a letter had been sent to the Kivus to drive out the FDLR. And I
22 would refer you here to Witness 683 and Witness 692, documents 699 and
23 759.

24 Finally, the crimes take place -- took place during the attacks
25 conducted by the FDLR as confirmed by Prosecution's witness who are

1 former members of the FDLR or else as conceded by the suspect himself
2 through press releases. And in this respect and to avoid repetition,
3 Madam President, your Honours, I would refer you to the presentation made
4 by my colleague Ms. Weiss concerning the assignment of the attacks. But
5 furthermore these criteria for identification are not isolated, they are
6 always in combination with other things, giving rise to corroborative --
7 various corroborative elements that identify the FDLR as the perpetrators
8 of those crimes.

9 While the FDLR troops deliberately committed mutilations, rapes,
10 and torture in the Kivu Provinces, Callixte Mbarushimana was conducting
11 the role that was assigned to him in the mechanism set up by the group of
12 people acting with a common purpose. In the framework of the media war
13 of the FDLR, he constantly and unblinkingly reacted against the
14 accusations of the media, the NGOs, and the various United Nations
15 agencies. Callixte Mbarushimana systematically disguised the commission
16 of crimes by the FDLR using a highly uniform rhetoric of denial.

17 Now, in interviews with the media or through his press releases,
18 he constantly rejected responsibility and attributed the responsibility
19 for those abuses on other armed groups, asking for additional
20 investigation. As soon as investigations attributed the crimes to the
21 FDLR, Callixte Mbarushimana accused everybody to -- of working for the
22 Kigali regime.

23 By way of illustration, could I refer you to document 1112,
24 document 19, and document 1094, which are three press releases, two of
25 them from February 2009 and one from July 2009, which bear the suspect's

1 signature and which deny the allegations of the organisation Human Rights
2 Watch and the United Nations Mission in the Congo concerning rapes and
3 other serious abuses committed by the FDLR.

4 Presiding Judge, your Honours, Callixte Mbarushimana's
5 contribution to the group of people acting in concert goes beyond the
6 simple expression of public denial by the FDLR. As Ms. Weiss
7 demonstrated in her analysis of the intercepted communications between
8 the suspect and the president of the FDLR after the Busurungi attack,
9 Callixte Mbarushimana's contribution was to show how to effectively hide
10 the crimes of the FDLR so that the organisation could remain legitimate.
11 Bearing in mind the obligations of military law, it must -- it could
12 never be conceded that the FDLR was attacking civilians. The solution
13 was to disguise reality and to demonise the enemy as being the sole
14 entity responsible for the suffering of the population. This suffering
15 was used for political ends, through the voice of the suspect, with the
16 ultimate aim of forcing the end of the military offensive that was aimed
17 at driving out the FDLR and of extorting their return to Rwanda under
18 favourable conditions.

19 Presiding Judge, your Honours, the Prosecution will now present
20 the main element supporting Counts 4 to 10 in the charging document. The
21 Prosecution submits that certain crimes charged must be confirmed under
22 different counts in order to reflect the full range of criminal conduct
23 on the part of their authors. Certain cases of rape, such as collective
24 rape, rape accompanied by beatings, and the rape of children, also
25 constitute acts of torture because they are committed with certain

1 specific elements of that crime, that is, the intentional infliction of
2 pain, of acute suffering, with the aim of punishing or intimidating.

3 As you know, your Honours, these elements are not required for
4 the crime of rape. They are, however, sanctioned under other provisions
5 of the Statute. These additional acts go further than the physical act
6 of rape and should be represented in a relevant manner. The same
7 reasoning applies to certain cases of mutilation, which also constitute
8 acts of torture.

9 Finally, the Prosecution notes that the material acts described
10 under Counts 1 to 12 should also be characterised as acts of persecution
11 for political reasons. This crime found under Count 13 in its fourth
12 element provides for the commission of a crime that falls within the
13 competence of the Court. Furthermore, the additional material element of
14 discriminatory targeting is clearly supported by the evidence of the
15 Prosecution as are the specific and additional elements required for the
16 crime of persecution.

17 The Prosecution makes reference to arguments previously submitted
18 concerning the widespread and systematic nature of the crimes, the
19 non-international character of the conflict which is the context in which
20 the alleged crimes took place and supports the recognition of these
21 elements. The Prosecution submits that it follows from these facts that
22 the direct perpetrators of each of these crimes also were cognizant of
23 these elements.

24 Presiding Judge, your Honours, the evidence demonstrates that
25 FDLR soldiers committed rapes as alleged in Counts 7 and 8. Soldiers of

1 the FDLR used their sexual organs or objects to forcibly penetrate the
2 bodies of the members of the civilian population in the Kivu Provinces in
3 2009. The FDLR raped children and women under threat by fire-arms and
4 often accompanied by beatings. Victims were immobilised often with the
5 assistance of other co-perpetrators. The Prosecution submits that it
6 follows from the deliberate nature of these acts and in a self-evident
7 manner that each perpetrator of the crime in question was motivated by
8 the requisite criminal intent.

9 Presiding Judge, your Honours, I am now going to turn to the most
10 determinant elements of the evidence of the Prosecution. The examples of
11 the broader phenomenon of rapes committed by the FDLR. In Busurungi,
12 during the attack of the 9th to the 10th of May, 2009, Witness 656 was
13 gripped by two soldiers of the FDLR speaking Kinyarwanda. Witness 656
14 recognised one of those people as a soldier of the FDLR who would pass in
15 front of the victim's house every week. This person threw the witness to
16 the ground and held her down. The FDLR soldier penetrated the vagina of
17 Witness 656 with his penis. The other soldier came to him to say in
18 Swahili that he would kill her if she tried to escape. This can be found
19 in document 594 and 595.

20 That same night of the 9th of May, Witness 653 tried to flee the
21 attack on Busurungi. Two FDLR soldiers speaking Kinyarwanda and armed
22 with machetes caught her in the forest. One of them penetrated Witness
23 683's vagina with his penis while the other held her by the throat,
24 telling her not to try to escape, and then they swapped roles. Both of
25 those soldiers raped her. This may be found in document 699.

1 During the same attack on that same night, when Witness 692 tried
2 to leave her house, three soldiers of the FDLR speaking Kinyarwanda
3 caught her and dragged her into the forest. Each of the three soldiers,
4 taking turns, penetrated Witness 692's vagina with his penis while
5 threatening her with death, and I refer you to document 759.

6 While she was trying to hide in the forest to escape from the
7 attack on Busurungi in May 2009, Witness 694 saw five FDLR soldiers force
8 a woman to lie on the ground and they then immobilised her. Each of
9 those soldiers penetrated the woman's vagina with his penis, taking
10 turns. This may be found in document 743.

11 Close to the village of Witness 673 and 674 on Masisi territory,
12 in the second half of the year 2009, Witness 674 and other women were
13 abducted on the roadway leading to the market by some ten soldiers of the
14 FDLR. Witness 674 knew one of those soldiers by sight and by name
15 because he used to come to her village to go drinking. Under threat of
16 death the soldiers forced the women to lie down in the forest and raped
17 them all. Witness 674 was raped by two men, and I refer here to document
18 724.

19 Presiding Judge, your Honours, evidence shows that FDLR soldiers
20 committed acts of torture as alleged under Counts 9 and 10. Evidence
21 shows that FDLR soldiers inflicted physical -- acute physical and mental
22 pain on members of the civilian population under their control in several
23 places in the Kivu Provinces in 2009. These abuses did not result from
24 legal sanctions, but rather had the aim of intimidating or punishing
25 their victims because of those victims' alleged support for the

1 governmental forces. The FDLR committed collective rape or rape upon
2 women or young children, sometimes for periods of several hours. The
3 FDLR beat civilians, stabbed them, lacerated and mutilated them, and
4 sometimes this occurred during the rapes.

5 Victims were forced to watch members of their family being raped
6 or mutilated. FDLR soldiers caused intense mental and physical suffering
7 at the time of the events but also with lasting consequences. Attacks
8 caused significant internal and external haemorrhaging, leading to
9 several weeks of hospitalisation and causing profound trauma for the
10 survivors.

11 The cruelty and the deliberate violence of these acts clearly
12 demonstrates that the direct perpetrators intended to inflict acute
13 mental and physical pain upon victims who they knew to be civilians under
14 their control. It follows from the facts that the perpetrators of these
15 acts could in no way have thought that such suffering was the result of
16 legitimate sanction.

17 Finally, they intended to inflict such suffering with the aim of
18 intimidating and punishing.

19 In this regard, Presiding Judge, your Honours, warning letters
20 addressed to the population and other public threats of reprisals reveal
21 the purpose of the tortures inflicted by the FDLR. The intent was to
22 intimidate or to punish the Congolese population, which was suspected of
23 supporting the FARDC coalition which had come to drive them out of the
24 Kivus. By way of illustration, the FDLR left a letter found by Witness
25 650, warning civilians not to stay in their village or they would be

1 considered to be allies of the FARDC and would be attacked as such. This
2 may be found in document 597 on page 0116 at paragraph 42.

3 As promised, several days later the FDLR launched the bloody
4 attack on Busurungi. Witness 677, Witness 587, and Witness 564, all
5 three being former soldiers of the FDLR, have clearly indicated that they
6 had received the message according to which Congolese civilians who were
7 not on the side of the FDLR were to be considered as enemies. This may
8 be found in documents 762, paragraph 85 -- excuse me. In document 860 on
9 page 82, and in document 668 on page 1165 and 1166. More specifically,
10 Witness 552, also a demobilised soldier, explains that a rape committed,
11 and I quote him, "upon an enemy civilian" was not considered to be an
12 offence within the FDLR, as anything that was done to an enemy was
13 considered acceptable. This may be found in document 653 on page 0650.

14 Before tying up, lacerating, and decapitating a civilian in
15 Busurungi in March 2009, FDLR soldiers in front of the victim's wife
16 blamed the Congolese for having brought the FARDC to the village. This
17 may be found in document 597 in paragraph 25.

18 When FDLR soldiers raped victim 656 on the night -- in Busurungi
19 during the attack towards the 9th to the 10th May, she was still a young
20 adolescent. She went through intense suffering and in her statement
21 describes a huge amount of blood that was flowing from her vagina after
22 the rape. This may be found in document 594 and 595.

23 Two soldiers group-raped victim 683 during the same attack. She
24 felt a great deal of pain throughout her entire body. The two soldiers
25 left her in the forest, saying to her, and I quote, "Go away, idiot. The

1 government soldiers were not able to help you." This may be found in
2 document 699.

3 Still during the same attack on Busurungi, and I refer now to
4 document 799, three FDLR soldiers group-raped victim 692 in the forest
5 while violently beating her and repeatedly punching her in the face.
6 When the rapists had finished with her, they left her for dead on the
7 ground with blood flowing from her vagina. In attacking her the FDLR
8 soldiers said to the witness in Kinyarwanda, a language of which she
9 understands a little, that the Tembos - the Tembos are one of the leading
10 Congolese ethnic groups in the Kivus - had sent their soldiers against
11 the FDLR. They also told her that they, the women, had been arrogant
12 towards the men.

13 Presiding Judge, your Honours, because it is necessary to
14 guarantee the anonymity of witnesses and by reason of the unique nature
15 of their accounts, I request your authorisation to present several
16 comments now in private session.

17 PRESIDING JUDGE MONAGENG: Mr. Kaufman.

18 MR. KAUFMAN: Yes, I -- the Defence made a written filing, I
19 believe, on this matter and the Defence is quite happy for -- to leave
20 the matter to the discretion of the Chamber. The only thing that we
21 noted was that redactions have already been applied. So if there is a
22 need to present something in court which exceeds those redactions, then
23 of course that should be something which should be brought before the
24 Chamber before the decision is made.

25 PRESIDING JUDGE MONAGENG: Ms. Rabanit.

1 MS. RABANIT: Yes, it's -- actually it concerns portions of those
2 witness statements that are redacted for the public, not for the Defence.
3 That's why I think the private session is necessary in this case.

4 PRESIDING JUDGE MONAGENG: Mr. Steynberg, are you saying
5 something?

6 MR. STEYNBERG: I beg your pardon, I was just conferring with my
7 colleague.

8 (Pre-Trial Chamber confers)

9 PRESIDING JUDGE MONAGENG: As we are all aware, the primary
10 responsibility of the Chamber is to minimise the risk to victims and
11 witnesses as much as possible, and in this particular case the Chamber is
12 of the view that we should go into private session. Thank you.

13 (Private session at 10.23 a.m.)

14 (Expunged)

15 (Expunged)

16 (Expunged)

17 (Expunged)

18 (Expunged)

19 (Expunged)

20 (Expunged)

21 (Expunged)

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7 (Expunged)

8 (Expunged)

9 (Expunged)

10 (Expunged)

11 (Expunged)

12 (Expunged)

13 (Expunged)

14 (Open session at 10.26 a.m.)

15 COURT OFFICER: We are in open session, Madam President.

16 PRESIDING JUDGE MONAGENG: Thank you. Ms. Rabanit.

17 MS. RABANIT: (Interpretation) Thank you, your Honour. In the
18 forest close to the village of Witness 673 and 674, during the second
19 half of the year 2009, two FDLR soldiers collectively raped Witness 674,
20 taking turns throughout the entire night and violently beat her while
21 they were doing so. The other women abducted with her were also
22 subjected to group-rape by up to six attackers while being beaten
23 throughout the entire night. All of these women had to be hospitalised
24 to treat significant injuries. The husband of Witness 674, Witness 673,
25 confirms that he found his wife very much weakened and depressed

1 following the abduction and the rapes that she had suffered. This may be
2 found in document 724 and 725.

3 Presiding Judge, your Honours, evidence demonstrates that the
4 FDLR committed inhumane acts and cruel treatment as alleged under Counts
5 5 and 6 of the charging document. FDLR soldiers inflicted great
6 suffering and seriously affected the physical and mental integrity of
7 members of the civilian population in several places in the
8 Kivu Provinces in 2009. FDLR troops, among other things, violently beat,
9 seriously injured, or deprived of their freedom women, men, and children
10 who were members of the civilian population. It clearly emerges from the
11 facts that these acts were intentional and their consequences were
12 intended. The direct perpetrators could not be in ignorance of the civil
13 status of their victims. I refer you to documents 759 and 699.

14 Witnesses 692 and 683 indicate that after the attack on Busurungi
15 they saw a number of seriously injured people in hospital with wounds to
16 their chests, their head, their arms, and their necks. Witness 650
17 recounts that a young boy from Busurungi was severely stabbed during the
18 attack of May 2009. He barely survived the attack. He was slashed by an
19 FDLR soldier whom he knew because that soldier lived in the village
20 before the Umoja Wetu operation which forced the FDLR into the forest.
21 That account can be found in document 597.

22 Your Honours, once again - and I would like to point out for the
23 last time - I would like to ask to be allowed to go briefly into private
24 session so as to preserve the anonymity of the witness.

25 PRESIDING JUDGE MONAGENG: Felipe, please private.

1 (Private session at 10.31 a.m.)

2 (Expunged)

3 (Expunged)

4 (Expunged)

5 (Expunged)

6 (Expunged)

7 (Expunged)

8 (Expunged)

9 (Expunged)

10 (Expunged)

11 (Expunged)

12 (Expunged)

13 (Expunged)

14 (Expunged)

15 (Expunged)

16 (Expunged)

17 (Open session at 10.32 a.m.)

18 COURT OFFICER: We are in open session, Madam President.

19 PRESIDING JUDGE MONAGENG: Thank you.

20 Please continue.

21 MS. RABANIT: (Interpretation) Thank you, Madam President.

22 Your Honours, the evidence clearly shows that the FDLR

23 perpetrated the crime of mutilation as charged in Count 4. The soldiers

24 of the FDLR completely removed organs and appendices of the civilians.

25 Clearly these acts were neither motivated by medical treatment nor

1 carried out in the interests of the victims. To the contrary, the facts
2 clearly illustrate that the perpetrators of those acts intended to
3 mutilate the civilians. Amongst other things, the FDLR soldiers
4 decapitated civilians, pulled out foetuses from the stomachs of their
5 mothers, and amputated their victims as well as their genitals, and I'm
6 referring to documents 569.

7 In March 2009, near Busurungi, FDLR soldiers arrested a villager
8 and his wife, accusing them of supporting the soldiers of the government.
9 That person was able to flee but the soldiers of the FDLR decapitated
10 his -- her husband.

11 In order to avoid repetitions, I'm going to refer to details in
12 private session and I would refer to documents 743 and 709 relating to
13 the acts of mutilation perpetrated by the members of the FDLR during the
14 attack on Busurungi on the 9th and 10th of May, 2009.

15 Madam President, your Honours, the Prosecution submits that the
16 sample of evidence presented before the Chamber as well as the evidence
17 contained in the list of evidence clearly establish substantial reason to
18 believe that the FDLR troops perpetrated rapes, torture, cruel treatment,
19 inhuman acts, and mutilation against the members of the population of the
20 Kivus during the year 2009. The Prosecution submits that
21 Callixte Mbarushimana, through his intentional contribution which was
22 made in full knowledge of the facts to the common purpose, is responsible
23 for the facts charged against him in Counts 4 to 10.

24 Madam President, your Honours, thank you very much for your kind
25 attention. This completes my presentation. I'm now going to hand over

1 to my colleague Madam Solano.

2 (Pre-Trial Chamber confers)

3 PRESIDING JUDGE MONAGENG: Thank you.

4 You may go ahead.

5 MS. SOLANO: Good morning, your Honours. Madam President, your
6 Honours, during this next session I will address the mode of liability.
7 I will begin with an overview of the FDLR's common purpose and of
8 Mr. Mbarushimana's role in it. I will expand on the Prosecutor's
9 allegation that Mbarushimana was the linchpin of the common plan because
10 of his ability to transform the FDLR's crimes on the ground into
11 political capital. I will also explain the effect that Mbarushimana's
12 contribution had on the commission of the FDLR's crimes. I will then
13 make some brief legal submissions on common purpose liability. And
14 finally, I will refer to some of the evidence that we allege provides
15 substantial grounds to believe that Callixte Mbarushimana is responsible
16 for the FDLR's crimes in 2009 pursuant to Article 25(3)(d) of the
17 Statute. All of the evidence I will discuss is relevant to establishing
18 the existence and functioning of the Common Purpose Group,
19 Mr. Mbarushimana's contributions to the common plan, and his knowledge
20 and intent.

21 Your Honours, the Prosecution does not accuse Mr. Mbarushimana of
22 ordering or personally committing the murders, rapes, destruction of
23 property, and other crimes described in the document containing the
24 charges. Nor do we accuse him of masterminding a global conspiracy to
25 create a humanitarian disaster, as Defence counsel suggested in his

1 opening address on Friday. We accuse him nonetheless of being
2 responsible for these crimes pursuant to common purpose liability.

3 As you heard from Mr. Steynberg, the FDLR's structure and
4 leadership were organised so as to avoid isolation and gain international
5 legitimacy. While Mudacumura implemented the plan to create a
6 humanitarian catastrophe, Mr. Mbarushimana waged what he himself called a
7 war of information. I refer to EVD number 0782 on the Prosecution's
8 list. Your Honours, I beg your indulgence for a moment. I seem not to
9 have the realtime transcript.

10 Madam President, I still don't have the transcript. I can,
11 however, continue if somebody can assist me in the meantime.

12 Your Honours, I have just referred to item 0782 on the
13 Prosecution's list and I have relied on that item to establish that
14 Mr. Mbarushimana waged what he himself described as a war of information.
15 The aim of this war was to exploit politically the humanitarian
16 catastrophe unfolding on the ground. Mr. Mbarushimana exploited the
17 crisis on behalf of the FDLR in two ways: By denying the FDLR's
18 responsibility for the crimes and by presenting the FDLR as part of the
19 solution rather than as part of the problem in Eastern Congo.

20 Let me explain this in more detail. Let's first examine the
21 reasons for the denials and how they interplayed with the humanitarian
22 catastrophe. Your Honours may ask why would the FDLR want to create a
23 humanitarian catastrophe and deny responsibility for it? Why didn't the
24 FDLR openly threaten to commit more crimes if their conditions were not
25 met? The reason, your Honours, we submit, is that as a politico-military

1 organisation the FDLR aims to maintain outward legitimacy in order to
2 regain political power. The humanitarian catastrophe would only benefit
3 the FDLR if it could be used to trigger a political process, a process
4 that would enable the FDLR to participate as a key actor in bringing
5 stability to the Great Lakes region. Following this logic, an open
6 admission of responsibility by the FDLR for the crimes we allege they
7 committed in the Kivus would confirm rather than repair the FDLR's
8 leaders' reputation as mass murderers. Internal FDLR documents seized
9 from the suspect confirm that shedding this reputation was a constant
10 preoccupation.

11 The goal of the Common Purpose Group, therefore, was to create
12 the humanitarian catastrophe but to distance themselves from it.
13 Mr. Mbarushimana used his press releases to pursue this goal by denying
14 responsibility for the crimes and at the same time by portraying the FDLR
15 as a necessary part of the solution to the misery in Eastern Congo. This
16 also explains why, as part of his information war, Mr. Mbarushimana did
17 not deny the occurrence of the crimes but only the FDLR's hand in them.

18 In fact, your Honours, the successful accomplishment of the plan
19 made it absolutely necessary for the world to know about the catastrophe
20 taking place in the Kivus. Mr. Mbarushimana's role was to ensure that no
21 one would blame the FDLR. He sought to convince the international
22 community that the FDLR had to be brought into a political process also
23 involving the Congolese government and Rwanda and that they had to be
24 treated as a major political actor.

25 Why, you may ask, why was Mbarushimana so essential to the FDLR's

1 common plan of using a humanitarian catastrophe to extract political
2 concessions? He was their key man because he was the one FDLR leader
3 abroad who was willing to represent the FDLR in a visible manner and he
4 faced no obstacles to do so, quite unlike President Murwanashyaka, whose
5 freedom of speech and of political participation had been restricted by
6 German authorities in 2006. Mr. Mbarushimana was thus the man who could
7 capitalise on the FDLR's humanitarian catastrophe by forcing a political
8 negotiation that would allow the FDLR leaders to return to power in
9 Rwanda. His mandate was to be the voice of the group's extortive
10 political demands. We say "extortive" because the end of the
11 humanitarian catastrophe imposed by the FDLR was conditional on those
12 demands being met. According to Witness 587 who worked closely with
13 Commander Mudacumura, the order received by the soldiers was to burn the
14 civilians' houses so that the population would flee and become a burden
15 on the Congolese government.

16 Your Honours, the evidence provides substantial grounds to
17 believe that this and various other crimes, in fact, were committed.
18 FDLR insiders confirm it. Mr. Mbarushimana's press releases did not deny
19 that they occurred. They just denied the FDLR's responsibility for them.
20 We allege that this was deliberate because he wanted the international
21 community to know about the unfolding crisis but wanted to deflect
22 responsibility for it by blaming the Government of Rwanda and blaming
23 other armed forces. Through his press releases he tried to portray the
24 Kigali regime as the cause of the murders and the rapes committed by the
25 FDLR in Congo with the aim of improving the FDLR's relative political

1 positioning in Rwanda.

2 Mr. Mbarushimana's role was not marginal to the commission of the
3 FDLR's crimes. He was not merely a propagandist. His role was critical
4 to the success of the FDLR's overall goal to gain power in Rwanda, a goal
5 that they sought to achieve through criminal means. It was in this sense
6 he was the linchpin, as Ms. Bensouda told your Honours on Friday.
7 However, his essential contribution to the overall common goal of the
8 FDLR must not be conflated with an allegation that he made an essential
9 contribution to the commission of the crimes, as counsel for the Defence
10 appear to do in their opening address, in the sense that he was able to
11 frustrate the commission of the crimes. The Prosecution does not charge
12 the suspect with liability under Article 25(3)(a) as a co-perpetrator.

13 Nevertheless, the Prosecution alleges that through his extortive
14 negotiation demands, his denials, and misinformation, Mr. Mbarushimana
15 contributed to the commission of the FDLR's crimes in two interconnected
16 ways.

17 First, he contributed to the commission of the crimes because so
18 long as his demands and denials were perceived as sincere, they kept the
19 FDLR in the diplomatic game.

20 Witness 689 confirmed that Mr. Mbarushimana was seen as a valued
21 interlocutor in high-level peace negotiations. He positioned himself as
22 a peace broker able, for example, to approve the use of humanitarian
23 corridors, as attested to by Witness 689. And I refer here to item 01264
24 on the Defence's list of evidence. Through his denials and his
25 participation in peace negotiations, Mr. Mbarushimana thus provided the

1 necessary political cover-up for the FDLR and ensured that the group
2 continued to be seen by some as a possible negotiating partner for peace
3 in the Congo. The plausible deniability he provided through his denials
4 contributed to the commission of further crimes by the FDLR because it
5 made it possible for the persecutory campaign against civilians to
6 continue unabated.

7 This leads me to the second way in which Mr. Mbarushimana
8 contributed to the commission of the FDLR's crimes in 2009. His
9 contribution had a legitimising and encouraging effect on the actions of
10 FDLR commanders and on the troops. So long as they could still believe
11 in the idea of a political agreement they would continue to fight.
12 Mr. Mbarushimana's and President Murwanashyaka's messages of
13 encouragement had a positive effect on the FDLR army's preparedness to
14 commit further crimes in implementation of the order to create a
15 humanitarian catastrophe.

16 According to Witness 552, who was (Expunged) in the South
17 Kivu division, it was the norm for the FDLR to deny alleged crimes
18 publicly and the soldiers were happy when they did so because it helped
19 them, the soldiers, to do their job. I refer here to items 0656 on the
20 list of evidence at page 0653 from line 553, and to item 0655 at page
21 0619 from page 599. Finally, also to item 0660 at page 0767 to 0769.

22 I also refer your Honours to the statements of Witnesses 559 and
23 632, both of whom confirmed that the FDLR received press releases and
24 messages from the FDLR's leaders in the field and that they were
25 disseminated among the troops to boost their morale. I refer to items

1 1322 at page 1685 from line 487, and to item 1350 at page 0388 to page
2 0402.

3 This encouragement, your Honours, also made it possible for the
4 campaign of FDLR crimes to go on.

5 The evidence shows how Mr. Mbarushimana contributed to the FDLR's
6 common purpose with his false denials. You have already heard from
7 Ms. Weiss about how the suspect took care of the Busurungi denial,
8 despite his knowledge that civilians had been killed in the attack,
9 despite his self-declared knowledge of the requirements of international
10 humanitarian law, and of his awareness of the off-handed manner in which
11 FDLR personnel in the field minimised the group's responsibility for the
12 killings in Busurungi.

13 This was not unique to the Busurungi attack. Indeed,
14 Mr. Mbarushimana executed Mr. Murwanashyaka's instructions to deny the
15 FDLR's crimes within days, sometimes within hours, of their public
16 denunciation. Mr. Mbarushimana made his contribution with the required
17 knowledge and intent. He knew of the FDLR's criminal aims and activities
18 because he was an active leader in the organisation as well as from
19 internal FDLR sources and from the numerous public sources. He accepted
20 the mandate of contributing to them and to help advance them.

21 Your Honours, the evidence seized from the suspect's home as well
22 as the evidence of the constant telephone communications between
23 Mr. Mbarushimana, President Murwanashyaka, Commander Mudacumura, and
24 field-based FDLR personnel confirms that the FDLR leadership, including
25 the suspect, was extremely well co-ordinated. This evidence shows that

1 Mr. Mbarushimana and President Murwanashyaka knew about the crimes
2 committed by FDLR soldiers in the Kivus, and it shows that the members of
3 the Steering Committee, including Mr. Mbarushimana, explicitly included
4 the international media campaign in their criminal common purpose.

5 Callixte Mbarushimana was more than an ordinary member of this
6 leadership. As executive secretary and Steering Committee member, he was
7 one of a handful of elected civilian leaders. His role was, in fact, so
8 central in the FDLR that he filled the part of President Murwanashyaka's
9 role after his arrest in late 2009. I refer to EVD-1080 on the
10 Prosecution's list of evidence.

11 Mr. Mbarushimana had direct access to President Murwanashyaka and
12 collaborated closely with him. The evidence on the Prosecution's list
13 provides multiple indications of intense, constant communication between
14 the two leaders and other members of the Common Purpose Group. I will
15 show you some examples in a moment. The call data records presented in
16 annex 3 of filing 403, which is part 2 of the Prosecution's list of
17 evidence, give concrete evidence of several hundred communications in
18 between Mbarushimana, Murwanashyaka, Mudacumura, and FDLR members in the
19 field. This includes over 190 telephone communications between
20 Mr. Mbarushimana and President Murwanashyaka in a period of ten months in
21 2009. There is also direct evidence of their frequent e-mail
22 communications. And for the purposes of the international media
23 campaign, Mbarushimana had direct and indirect contact with other FDLR
24 senior leaders who were implicated in the decision to create a
25 humanitarian catastrophe and through them access to information about the

1 conflict as it unfolded.

2 Your Honours, Madam President, I'm mindful of the clock. I have
3 less than a minute to continue and then I can break at a suitable place
4 with your Honour's leave.

5 PRESIDING JUDGE MONAGENG: That's the position.

6 MS. SOLANO: In addition to his frequent contacts with
7 Mr. Murwanashyaka, the suspect had the means to reach Commander
8 Mudacumura if he wished and was in touch with him or other FDLR members
9 based in the Kivus from the political and military branches. He was
10 therefore far from being an innocent man, misled by Murwanashyaka or by
11 others in the FDLR or led astray because of his personal convictions.
12 Mr. Mbarushimana was not a lonely politician cut off from the FDLR in
13 Europe. Instead, he was a willing participant in the execution of a
14 common plan. That plan required Mbarushimana to deny all allegations of
15 criminal responsibility irrespective of their merit. It required him to
16 deny responsibility for operations that were described to him as punitive
17 operations, in line with what FDLR soldiers themselves were told. He was
18 therefore not naive or ignorant, your Honours. He was a man with a
19 mandate and a man with a mission.

20 Madam President, with your leave, I can continue after the break.

21 PRESIDING JUDGE MONAGENG: Thank you very much, Ms. Solano.

22 We will now break for a 30-minute sojourn. Thank you.

23 COURT USHER: All rise.

24 Recess taken at 10.59 a.m.

25 On resuming at 11.31 a.m.

1 (Open session)

2 COURT USHER: All rise. Please be seated.

3 PRESIDING JUDGE MONAGENG: Are you ready, Ms. Solano?

4 MS. SOLANO: Yes, Madam President. Thank you.

5 PRESIDING JUDGE MONAGENG: Please start your presentation.

6 MS. SOLANO: Your Honours, before showing some of the evidence
7 that the Prosecution relies on to establish Mr. Mbarushimana's
8 responsibility, I will make some brief observations and submissions
9 regarding the common -- regarding the legal elements of common purpose
10 liability.

11 First, it is important to emphasise that this Chamber held in the
12 Lubanga case in decision 803 at paragraph 337 that common purpose is a
13 residual form of accessory liability, that criminalises contributions to
14 group crimes not covered by subparagraphs (b) or (c) of Article 25(3).
15 Common purpose liability can therefore be distinguished from other modes
16 of liability in that it does not require the commission of acts that are
17 criminal in nature. The contribution that a person makes pursuant to
18 Article 25(3)(d) may be technically lawful and still contribute to a
19 criminal common purpose and to the commission of crimes.

20 Similarly, common purpose liability does not require proof that a
21 person's contribution is essential to the commission of the crimes.
22 Indeed, the Statute does not set any minimum threshold for the level of
23 the person's contribution. Although the requirements of common purpose
24 are less onerous than other modes of liability in these respects, we
25 submit that it is a fundamental tool for addressing crimes committed by

1 international -- by criminal organisations. The inclusion of this mode
2 of liability in the Statute is, in the Prosecution's submission, the
3 culmination of theories of responsibility developed in the post-World War
4 II era by the Nuremberg Tribunal and domestic courts. These theories
5 made it possible to prosecute war criminals who contributed to the
6 commission of crimes through diverse means, including through
7 contributions that seen in isolation were technically lawful.

8 I have just identified some of what common purpose liability does
9 not require, so what does it require? It requires the Prosecution to
10 show, and I will now display a visual aid on your screens, your Honours,
11 it requires the Prosecution to show, first, that the person made a
12 contribution in any other way to the commission or attempted commission
13 of the crimes, that is, that he made a contribution in a way other than
14 through instigation or facilitation. Second, that the person's conduct
15 was intentional, meaning that it was voluntary and not coerced or
16 accidental. And third, that the person acted with the additional
17 required intent or knowledge in line with one of the two subparagraphs of
18 Article 25(3)(d).

19 To prove a case under the first subparagraph, common purpose (i),
20 the Prosecution must show that the suspect sought to advance in some way
21 the activity or purpose of the Common Purpose Group. Since the
22 subparagraph requires that activity or that purpose to be criminal, the
23 suspect must also have known that it included acts that are criminal
24 under the Statute. In the Prosecution's submission, under the first
25 subparagraph it is sufficient for the suspect to be aware on a general

1 level of this criminal element in the group's activities or purpose.
2 Applied to this case, common purpose 1 requires the showing that the
3 suspect sought to help the FDLR achieve its common purpose of regaining
4 power in Rwanda through political and military means, means which he knew
5 to involve the commission of crimes.

6 To prove a case under subparagraph 2, common purpose (ii), the
7 Prosecution must show that the suspect knew that the group intended to
8 commit the crimes. In our submission, this does not require advance
9 notice or involvement in the planning of specific operations, in
10 particular where the group's crimes affect thousands of victims and take
11 place over a prolonged period of time, making the repeat commission of
12 the crimes entirely predictable. Applied to the present case, the
13 knowledge of the intention of the group to continue to commit crimes that
14 it had committed many times before can be inferred from at least three
15 different sources.

16 First, from the suspect's level of access to FDLR political and
17 military personnel who shared with him information about the FDLR's
18 military activities and about the FDLR's crimes.

19 Second, from the fact that informed observers such as Witness 689
20 approached the suspect directly with information or with questions about
21 alleged FDLR crimes. This too indicates that Mr. Mbarushimana gave the
22 impression to such informed observers that he was a man with access to
23 internal FDLR information.

24 Finally, the knowledge required under common purpose (ii) can
25 also be inferred from the suspect's access to the public denunciation of

1 FDLR crimes in the news by a multiplicity of credible sources over a
2 prolonged period of time coupled with the notable absence of his
3 investigations into the merits of such allegations.

4 Your Honours, common-purpose (i) emphasises intent over
5 knowledge. Common purpose (ii) emphasises knowledge over intent. The
6 two sub-paragraphs appear in the Statute in the disjunctive. The
7 Prosecution need therefore only show the additional required intent or
8 the additional required knowledge. The more specific the suspect's
9 awareness of a criminal purpose or activity, the less demanding the
10 intent requirement is and vice versa.

11 We allege that the evidence relied on in the present case
12 establishes both the required additional intent and the required
13 additional knowledge. However, we submit that either one or the other
14 would suffice to confirm the charges.

15 Let's now look at some of the evidence that establishes the
16 elements of common purpose. The evidence shows, first of all, that
17 Mr. Mbarushimana, President Murwanashyaka, and Commander Mudacumura
18 were senior FDLR elected officials and Steering Committee members and that
19 they discharged their duties in line with the FDLR's Statute. I refer to
20 EVD number 1080 and to the evidence listed in support of paragraph 108 of
21 the document containing the charges. Together with other FDLR members,
22 including the first vice-president Straton Musoni; the second
23 vice-president, Gaston Iyamuremye; the external relations commissioner,
24 Djuma Ngilishuti, and others, they constitute the Common Purpose Group.

25 The evidence also shows that this group of persons acted with the

1 common purpose of creating a humanitarian catastrophe and using it to
2 extort political concessions for the FDLR. In this regard I refer
3 specifically to the evidence highlighted by Mr. Steynberg concerning the
4 order to create a humanitarian catastrophe and its implementation by FDLR
5 troops throughout 2009.

6 I refer, furthermore, to the decisions adopted by the top FDLR
7 leaders during the Steering Committee meeting that took place in January
8 2009, immediately prior to the commencement of the crimes charged. The
9 evidence relating to this meeting shows that Mr. Mbarushimana's
10 contribution to the common purpose was not random but a contribution
11 required by the Steering Committee and therefore an integral part of the
12 common plan.

13 The two documents I am about to pull up show that
14 Mr. Mbarushimana received a mandate from the highest functioning organ of
15 the FDLR of which he was also a member. Both documents were seized from
16 the suspect's home. The first document is titled: "Conclusions,
17 recommendations, and decisions of the Steering Committee meeting." I
18 will refer to it as the Steering Committee's final document.

19 Court Officer, could you please display EVD number 1025.

20 PRESIDING JUDGE MONAGENG: Is the document for public
21 consumption?

22 MS. SOLANO: Yes, your Honour.

23 PRESIDING JUDGE MONAGENG: Thank you very much.

24 Court Officer, please display the document.

25 COURT OFFICER: Yes, Madam President. The document is available

1 on your screens if you press the button "PC 1." The document is public
2 and the reference is DRC-REG-0007-0752 or EVD-PT-OTP-01025.

3 MS. SOLANO: Your Honours, this document sets out the FDLR's
4 goals and strategies for 2009.

5 Court Officer, can you please display the last page, 0756, and
6 zoom in to the end of the page.

7 As you can see from this last page, the final document is dated
8 19 January 2009. Mbarushimana and Murwanashyaka's names appear at the
9 bottom of it.

10 Court Officer, can we go back to the first page to points 1 and
11 9, please.

12 Point 1, please. Points 1 and 9 to 14 of this final document
13 deal explicitly with what we call the international media campaign. I
14 will quote some of the key information in points 1 and 9. I'm going to
15 read them in French.

16 (Interpretation) "Recommendations area by area.

17 "A. Area of political affairs.

18 "Item 1. The work of having the organisation's image changed
19 must continue through the media, conferences, events, working groups,
20 associations, and co-operation with other organisations that are located
21 in the countries where the Rwandan diaspora has settled.

22 "C. The area of information media campaign.

23 "Item 9. To immediately and systematically react to reports,
24 statements, and other accusations against the organisation so as to
25 defend its interests and its image."

1 (In English) Court Officer, can you please display EVD-1069.

2 PRESIDING JUDGE MONAGENG: Ms. Solano, again, is it a public
3 document?

4 MS. SOLANO: Yes, your Honour.

5 PRESIDING JUDGE MONAGENG: Thank you very much.
6 Court Officer, please.

7 COURT OFFICER: Document EVD-PT-OTP-01069 is available on your
8 screens and it's a public document.

9 MS. SOLANO: This second document doesn't have a title, but I
10 will call it the Steering Committee's "European Discussion Document"
11 because it contains the views of the FDLR leaders based in Europe
12 regarding the issues that were on the agenda of the Steering Committee's
13 January 2009 meeting. In part 1 on this first page, under C, "*Domaine*
14 *information,*" point number 14 uses the same language I've just quoted
15 from the final document regarding the FDLR's reactions to reports,
16 statements, and other accusations made against the FDLR. It talks of
17 immediate and systematic reactions.

18 Court Officer, can you please display page 0961.

19 On this page the document deals, under part III, with the
20 strategy to confront the ongoing multi-dimensional threat faced by the
21 FDLR. The source of this threat, as your Honours can see in point 86,
22 was the impending attack on the FDLR by the Congolese and Rwandan
23 coalition forces.

24 Next page, please.

25 The document states in point 87 that the FDLR should be prepared

1 to fight on various fronts, including the sensitisation and mobilisation
2 front, the media, the diplomatic, and the military fronts and that the
3 group should prepare accordingly for this fight. Point 87.2 on this same
4 page deals with the media front in the following terms, and I will again
5 quote from the document in French.

6 (Interpretation) "The media front ..."

7 (In English) Second bullet point.

8 (Interpretation) "The establishment of a crisis cell to manage
9 the situation is necessary and the availability of the members for the
10 purpose of drafting communiqués and memos must be assured. This cell
11 will have, amongst others, tasks of permanently showing the enemy up as a
12 devil, denouncing his intentions and deeds, accusing him of everything,
13 reacting quickly, if not immediately, to anything or anyone that is
14 saying something against our organisation, whatever its significance ..."
15 et cetera.

16 (In English) In point number 87.3, the document deals with the
17 diplomatic front. It gives guide-lines for the international media
18 campaign. A review of Mr. Mbarushimana's press releases from 2009
19 reveals that he implemented these guide-lines carefully, including the
20 requirements to play the Rome process card continuously, to make peace
21 statements repeatedly, and to insist on direct dialogue with the Rwandan
22 government which should be shown to be the principal obstacle to peace in
23 the region. The document thus further defines the scope of the
24 international media campaign.

25 The European discussion document and the final document also

1 provide reasonable grounds to believe that the military campaign and the
2 media campaign were part of a single common plan. They reveal that the
3 FDLR conceived the fight ahead as a multi-dimensional one and show that
4 the Steering Committee took action to ensure greater integrated political
5 and military action. I refer to points 53 through 57 of the final
6 document.

7 Your Honours, we submit that you ought to place considerable
8 weight on these two documents as evidence that the FDLR leaders had the
9 dual common purpose of responding to the impending attack by coalition
10 forces militarily and through the international media campaign. The
11 language of both documents - and I repeat, immediate and systematic
12 reactions - shows that the plan was to deny all allegations made against
13 the FDLR irrespective of their merit. They are also evidence of the
14 suspect's participation in the formulation and adoption of that common
15 plan and of his knowledge of the critical importance of the media
16 campaign to it.

17 The two documents are highly relevant and probative, given that
18 they purport to record the resolutions adopted by the highest functioning
19 body of the FDLR and of the discussions leading up to the adoption of
20 those decisions. They are unquestionably authentic, since they come from
21 the suspect's own records. They also set out the FDLR's plans for 2009.

22 The evidence shows that the final document was the result of
23 intense discussions among the members of the Common Purpose Group.
24 Between the 2nd and the 19th of January, the FDLR leaders in the DRC and
25 in Europe exchanged views by telephone, text message, and e-mail, in

1 preparation for the Steering Committee meeting. The FDLR second
2 vice-president Iyamuremye and a high-ranking military commander based in
3 the field channelled their input on the points on the agenda to
4 Murwanashyaka and Mbarushimana, who incorporated them in the final
5 document. We have collated the evidence -- we have collated this
6 evidence on a time-line so that it is easier to see it in its temporal
7 context.

8 I seek the usher's assistance to distribute copies of this
9 time-line to your Honours and to the Defence. We can also provide
10 electronic copies after the hearing, your Honours.

11 They're the same, your Honour.

12 Your Honours, I do not intend to take you through this time-line
13 now, but I will explain what it is and how it is organised. It is
14 divided into 11 parts. Each one, each part, covers a different topic and
15 the 11 parts succeed each other in chronological order. In each part we
16 have linked public reports of alleged FDLR crimes, internal FDLR
17 documents and intercepted telecommunications or other telecommunications
18 data. We have placed all of this evidence along a maximum of three
19 horizontal lines which, from top to bottom, show, first, reports of main
20 events such as news of alleged FDLR attacks or meetings; second, evidence
21 of Mr. Mbarushimana's contribution or knowledge; and third, intercepted
22 communications or telecoms data.

23 In part 1 of this time-line, your Honours will find all of the
24 evidence which we allege shows that in January 2009, the FDLR leadership
25 decided to conduct the international media campaign in parallel with the

1 campaign of attacks on civilians.

2 Your Honours, the close collaboration between the FDLR political
3 and military leaders based in Europe and in the field at the time of the
4 Steering Committee meeting was not exceptional. The evidence shows that
5 information flowed freely between the FDLR leaders, irrespective of its
6 political or military content. Indeed, as indicated by the
7 Steering Committee's European Discussion Document displayed earlier in my
8 presentation and to number 72 on page 0959 of that document in
9 particular, the top FDLR leaders in the field, Mudacumura and Iyamuremye,
10 were informed regularly about the developments on the peace negotiation
11 and media fronts and the top leadership in Europe, including
12 Murwanashyaka and Mbarushimana, had access to information about the
13 FDLR's military activities and crimes.

14 The content of intercepted communications identified throughout
15 the lists of evidence shows that Mr. Mbarushimana and President
16 Murwanashyaka and the FDLR commanders and personnel in the field
17 discussed the FDLR's activities in the Kivus routinely and in a detailed
18 way. They shared information about FDLR units present at specific
19 locations and involved in specific operations. They discussed the
20 outcome of the operations. It is apparent from the communications that
21 the leaders were also in regular contact with FDLR divisional and brigade
22 commanders and staff officers subordinated to Mudacumura and that they
23 obtained details of the FDLR's attacks from them.

24 My colleague Ms. Weiss referred earlier today to the
25 collaboration between Mbarushimana, Murwanashyaka, Iyamuremye, and a

1 field-based FDLR commander for the purposes of the Busurungi press
2 release, from which it is evident that the FDLR leaders in the field kept
3 Murwanashyaka and Mbarushimana informed about the details of their
4 military operations and of the crimes committed by the FDLR. The
5 evidence relevant to the fabrication of that denial is contained in part
6 9 of the time-line. I will not return to that evidence now except to
7 draw your Honours' attention to the fact that the punitive nature of the
8 attack as described by Iyamuremye in EVD-0818, which bears ERN
9 DRC-OTP-2039-0101, was known to the suspect and seemingly crossed out
10 from a draft version of the Busurungi press release seized from his home.
11 That is EVD number 1213, both items appear in part 9 of the sequence --
12 of the time-line, your Honours.

13 For other examples of this free exchange of information among the
14 military and political branches and of Mr. Mbarushimana's access to
15 information about the FDLR's military activities and crimes, I refer your
16 Honours to the evidence collated in part 2 of the time-line. It provides
17 an example of the circulation of military information between
18 Mbarushimana, Murwanashyaka, and Levite, a cabinet member based in the
19 field. The evidence shows that Murwanashyaka, Mudacumura, and
20 Mbarushimana were in constant communication with each other as well as
21 with other FDLR personnel in the field.

22 In addition to his numerous direct communications with the field,
23 the evidence shows that Mr. Mbarushimana received information via
24 Murwanashyaka or vice versa. There was, thus, a triangular flow of
25 information between the two leaders and the field.

1 Most of the evidence of specific contacts among Mbarushimana,
2 Murwanashyaka, and Mudacumura and other FDLR field personnel is listed in
3 annex 3 to filing 403. That annex identifies at least 333 communications
4 between the three leaders in 2009. That is an average of over seven
5 communications per week, of which more than four were communications
6 between Mbarushimana and Murwanashyaka and more than two communications
7 per week between Murwanashyaka and Mudacumura on average.

8 The content of many communications between the leaders indicates
9 that further exchanges took place in addition to the 333 telephone
10 communications I've mentioned. I refer as examples to EVD numbers 0624,
11 0395, and 0424 on the Prosecution's list which make reference to other
12 calls, e-mails, or text messages.

13 In addition to the direct contact between the three leaders,
14 Mbarushimana and Murwanashyaka received information from three key FDLR
15 members based in the Kivus. First from General Iyamuremye, the FDLR's
16 second vice-president, who reported directly to Murwanashyaka from the
17 field. In 2009, Iyamuremye was in telephone communication with
18 Murwanashyaka more than 200 times and 14 times with Mbarushimana
19 according to the records presently available. The importance of these
20 contacts cannot be over-emphasised, given that Iyamuremye was appointed
21 acting president of the FDLR in 2010 following Murwanashyaka's arrest in
22 Germany as well as his responsibility for the defence and national
23 security portfolios in the FDLR. I rely in this respect on EVD numbers
24 1021 and 1080, as well as on the evidence of Witnesses 544, 562, 564,
25 527, and 559 regarding General Iyamuremye's role in the FDLR.

1 Secondly, your Honours, Mbarushimana and Murwanashyaka also
2 received information from cabinet member Levite, as I mentioned before.
3 The telecommunications data in annex 3 to filing 403, as well as
4 additional communications listed in item 0070 on the Prosecution's list,
5 indicate that Levite was in contact with at least 33 times between
6 January and September 2009, and with Mbarushimana at least 65 times
7 between January and October 2009.

8 Finally, the two leaders were in contact with Laforge, the FDLR's
9 information commissioner and spokesperson in the field. Mbarushimana was
10 in touch with him 112 times between June and November 2009 alone.

11 For the purposes of the international media campaign, there was
12 also a constant exchange of information among Mbarushimana;
13 Murwanashyaka; first vice-president Musoni; the external relations
14 commissioner, Djuma Ngilishuti; Levite; the FDLR deputy executive
15 secretary, Laurent Ndagijimana; and the FDLR information commissioner and
16 spokesperson in the field, Laforge.

17 This small group, your Honours, was consulted by e-mail in
18 preparation of the FDLR press releases and collaborated in the drafting.
19 The pattern was simple: the FDLR was accused of crimes in the media,
20 Mbarushimana or Murwanashyaka took the lead and circulated a draft press
21 release for discussion, and the denial was promptly published.

22 As an example of how this worked, I refer to the evidence
23 collated in part 6 of the time-line. It concerns the drafting and
24 publication of the press release denying FDLR responsibility for the
25 crimes allegedly committed in Luofu and Kasiki on 17 April 2009. In

1 addition to showing the process, part 6 of the time-line shows that
2 Mbarushimana complied with the Steering Committee's mandate and with
3 Murwanashyaka's instructions to publish denials within hours or days of
4 the surfacing of public allegations.

5 Other evidence proving this same point is collated in part 3 of
6 the time-line. This sequence, too, illustrates the systematicity of
7 Mr. Mbarushimana's denials.

8 The evidence I have referred to thus far shows that Mbarushimana
9 was part of a triangle of communications that included him, President
10 Murwanashyaka, and political and military FDLR personnel based in the
11 Kivus. It shows that the suspect had access to information about the
12 FDLR's armed activities in the Kivus routinely from a variety of sources
13 for the purposes of the international media campaign. His press releases
14 show that the suspect used this information in his war of information.

15 The evidence also shows that Mr. Mbarushimana acted as a filter
16 of information from within the FDLR towards the outside world. He shared
17 with President Murwanashyaka the authority to represent the FDLR, not
18 only with peace mediators, such as Witness 689, but also with other
19 parties *vis-à-vis* which the FDLR's message had to be carefully
20 controlled.

21 I draw your Honours' attention in this regard to the evidence
22 collated in the seventh part of the time-line which shows the agreement
23 between the Europe-based political leaders and the field-based military
24 leaders that any contacts with external sources had to be channelled
25 exclusively through Murwanashyaka and Mbarushimana. According to the

1 evidence that your Honours may find in that part of the time-line,
2 controlling the message was particularly important given the FDLR's fears
3 of desertions and demobilisations.

4 I also draw your attention to the evidence collated in part 8 of
5 the time-line, which shows Mbarushimana liaising with UN representatives
6 on behalf of the FDLR in relation to the UN's investigation into the
7 incident at Shalio.

8 Mbarushimana's position in the FDLR can be summed up by
9 Murwanashyaka's own comment to Mudacumura. And I refer to EVD number
10 0681 on the list. Everything relating to the FDLR is under
11 Murwanashyaka's and Mbarushimana's responsibility. This was a comment
12 that Mudacumura agreed with.

13 I referred earlier in my presentation to the fact that
14 Mbarushimana's contribution was essential to the FDLR's common plan. His
15 importance to the FDLR leaders cannot be overstated. In 2006, German
16 authorities banned Murwanashyaka from expressing political opinions or
17 participating in the activities of the FDLR. In 2009, this ban was
18 enforced by the imposition of a suspended term of imprisonment. I refer
19 to EVD 0581. The FDLR leaders abroad lived in fear of further UN
20 sanctions, as these inevitability resulted in a reduction of the group's
21 much-desired political space. I refer to EVD number 0805, and to EVD
22 0944, and to EVD 1091.

23 Your Honours, as I also said in the beginning of my presentation,
24 the denials contained in Mr. Mbarushimana's press releases did not fall
25 on deaf ears. In addition to their public dimension, they served an

1 internal purpose in the FDLR. They were messages of encouragement for
2 the military commanders and for the troops. The impact on them was
3 deliberate. Mbarushimana helped boost the troops' morale, encouraging
4 them to stay in the FDLR, and to comply with their commanders' orders. I
5 refer in this regard to some examples of Mr. Mbarushimana's press
6 releases, EVDs 0325, 0061, and 0019, in which he praises FDLR fighters
7 and urges them to continue with their fight, as well as to his message
8 concerning Murwanashyaka's arrest, which is EVD 1086.

9 According to Witness 552, anything that is spoken in
10 Murwanashyaka's and Mbarushimana's speeches was believed by the soldiers.
11 For the soldiers the leaders' messages were "really very powerful words."
12 This is EVD 0655 on the list.

13 I'm coming to the end of my presentation, your Honours.

14 We submit that the evidence shows substantial grounds to believe
15 that Callixte Mbarushimana made a voluntary contribution to the
16 commission of crimes by the FDLR in the Kivus in 2009 in implementation
17 of the group's leaders' criminal common purpose. As a trusted senior
18 leader of the FDLR, he was part of a group of persons acting with the
19 common purpose of creating a humanitarian catastrophe and of using it to
20 extort political concessions for the FDLR. He participated in the
21 adoption of the plan to conduct an international media campaign. He was
22 the voice and the face of the FDLR internationally, both in the media and
23 vis-à-vis a range of other actors, including peace mediators, UN
24 officials, and representatives of Rwandan opposition groups, and he
25 controlled the flow of information from within the FDLR towards the

1 outside world. He spear-headed the implementation of the FDLR's
2 international media campaign, implementing the policy of denying all
3 criminal allegations immediately and systematically, in line with the
4 mandate of the Steering Committee and with Ignace Murwanashyaka's
5 directions. He made this contribution with specific knowledge of the
6 FDLR's intent to commit crimes. This knowledge can be inferred from
7 Mr. Mbarushimana's involvement in the leadership of the FDLR and from his
8 participation in the adoption of the policy to respond to the coalition
9 forces' attack by engaging in a war of information alongside the FDLR's
10 military war.

11 His knowledge can also be inferred from the content of his press
12 releases, which explicitly refer to widely publicised allegations of the
13 FDLR's crimes. These allegations, your Honours, were serious, they
14 emanated from multiple sources, and they persisted throughout the whole
15 year 2009. Mbarushimana constantly discussed the allegations in his
16 press releases, as well as in internal FDLR communications, and responded
17 to the allegations with information that he obtained internally in the
18 FDLR. The Prosecution submits that this put him on notice that in the
19 ordinary course of events, the FDLR would commit crimes within the
20 jurisdiction of the Court.

21 There is additional evidence of Mr. Mbarushimana's knowledge. It
22 derived from his direct and indirect access to information about the
23 FDLR's criminal activities from well-placed and high-ranking FDLR members
24 in the field. It also derived from his position as a trusted advisor to
25 the FDLR president Ignace Murwanashyaka. Mbarushimana made his

1 contribution with the specific intention of furthering the FDLR's
2 criminal activities and criminal purpose. This too can be inferred from
3 the evidence.

4 Mbarushimana sought to keep the image of the FDLR clean, and in
5 so doing to achieve its common purpose of regaining power in Rwanda
6 through political and military means.

7 Your Honours, this concludes my presentation. I will hand-over
8 to Mr. Steynberg.

9 MR. STEYNBERG: Madam President, your Honours, thank you. I wish
10 to make a few concluding remarks before closing the presentation for the
11 Prosecution. The first concerns one or two factual matters which my
12 learned friend for the Defence raised in his opening statement which I
13 wish to correct. The first relates to the fact that as he said or he
14 claimed that the communications of the suspect were continually
15 intercepted on an around-the-clock basis. I wish to point out that the
16 suspect's communications were, in fact, only intercepted for a relatively
17 short period and that is from June to October 2010, which is well after
18 the period with which we are concerned today.

19 I should, however, add that the communications of
20 Mr. Murwanashyaka and Mr. Musoni in Germany were intercepted throughout
21 2009, so any communications which the suspect had with them on any of
22 their known numbers would most probably have been intercepted.

23 My learned friend also referred to the large volume of evidence,
24 particularly electronic evidence, seized from his client. I should
25 possibly just remind the Chamber that the Prosecution has been denied use

1 of a substantial proportion -- a substantial portion of that evidence for
2 the present proceedings, firstly, because the outcome of the Defence's
3 blanket privilege claim was not completed with sufficient time to allow
4 the Prosecution a reasonable opportunity to properly analyse that
5 evidence, notwithstanding the Chamber's generous allowance of a
6 postponement for that purpose. In particular, I wish to point out that
7 the Prosecution has been denied the use of what appears to be the most
8 relevant batch of e-mails seized from Mr. Mbarushimana's computers.
9 Since the operation of separating the privileged from the non-privileged
10 data was not completed in time to use or to place this evidence on the
11 Prosecution's list of evidence. And finally, the contents of the eight
12 faulty or encrypted media devices was not supplied in time for the
13 Prosecution to use these.

14 Madam President, your Honours, I wish to address one further
15 issue which in fairness to my learned friend I think I should raise at
16 this time rather than in response, and that concerns the report of
17 Dr. Phil Clark which the Defence has tendered as an expert report. The
18 Prosecution does not object to the admission of this evidence, your
19 Honours, since the Prosecution, unlike the Defence, it must be said, does
20 not seek to deprive your Honours of sight of this evidence in order to
21 make your own determination of what weight to place upon it.

22 The Prosecution does, however, question whether or not the
23 Defence has sufficiently established Dr. Clark's expertise on the issue
24 at hand, and that is the political and military events in North and
25 South Kivu in 2009, and in particular the ethnic and linguistic make-up

1 of the various military groups operating in the Kivus during that period.
2 He may well be an expert on other subjects, your Honours, but his
3 expertise on this particular subject is notably unclear from his report
4 and his accompanying curriculum vitae.

5 Turning briefly, your Honours, to his curriculum vitae, I note
6 that Dr. Clark obtained his post-graduate qualification just six years
7 ago on a subject which is only, in the Prosecution's submission,
8 tangentially relevant to the issues at hand. Scouring the curriculum
9 vitae for relevant experience and publication, one finds little evidence
10 of his expertise on the present subject, in my submission, save possibly
11 for one 2008 journal article and one 2009 chapter which he authored in an
12 edited collection.

13 Finally, I would like to remind the Chamber that one of the two
14 books he has authored, which he, in fact, presents as the first item of
15 the selected publications for the purposes of establishing his expertise,
16 has yet to be published. As the Chamber is well aware, the Prosecution
17 has sought in vain to obtain a draft of this book so that it might
18 establish for itself the relevance of this publication for the
19 establishment of Dr. Clark's expertise. Dr. Clark has not seen fit to
20 provide us with that draft, as is his right, but the Prosecution submits
21 that he cannot then rely on this unpublished work, to which neither the
22 Prosecution nor the Chamber has had access, to establish his expertise.

23 Turning to the report itself, your Honours, I do not propose to
24 say too much about it at this stage, save to note that it appears to
25 suffer from some of the same defects which it attributes to certain

1 reports by the United Nations and other international human rights
2 organisations who have published reports on the violence in the Kivus.
3 For instance, in many instances he provides inadequate or no
4 references to certain assertions. Some examples or authorities which are
5 referred to do not appear to support the propositions advanced. When
6 authorities are quoted, in many instances he relies on the reports of the
7 very organisations which he in the next breath criticises as having
8 inadequate methodologies. Furthermore, there is no explanation of his
9 mandate and no clear definition of the issues to be examined and no
10 description of the applicable standards against which his conclusions are
11 reached. Are these legal standards, scientific standards, academic
12 standards? One simply doesn't know.

13 Now, many of these questions may well have been answered had
14 Dr. Clark come to testify before this hearing, but in my submission, from
15 the evidence before your Honours, one is still left wondering.

16 Finally, I would just like to touch on the relevance of this
17 report. Now, the report itself appears to establish, or attempts to
18 establish, two fundamental conclusions. The first is that crimes cannot
19 be attributed to a particular armed group based solely on the ethnicity
20 or language spoken by the perpetrators. Secondly, the Chamber should
21 exercise caution in relying on the reports of the United Nations and
22 other international observers which ascribe responsibility for crimes to
23 the FDLR. Well, those conclusions may well be fairly apparent, but they
24 do not describe the Prosecution case.

25 As your Honours have heard, the attribution of the crimes to the

1 FDLR are, in my submission, based on a far firmer footing of evidence
2 which is not analysed or even discussed or even mentioned in Dr. Clark's
3 report.

4 And for all these reasons, your Honours, I invite the Chamber to
5 approach this report with similar caution to which Dr. Clark enjoins the
6 Chamber to approach the reports of the United Nations and other bodies
7 and to consider carefully what weight can be attributed to it.

8 Your Honours, unless the Chamber has any questions from me on any
9 portions of the evidence which have been presented, that will then
10 conclude the presentation for the Office of the Prosecutor at this
11 confirmation hearing.

12 PRESIDING JUDGE MONAGENG: Thank you very much, Mr. Steynberg,
13 and your team. You have used only four and a half -- about four and a
14 half of your allocated time and we thank you very much and this brings to
15 a close your --

16 MR. STEYNBERG: I hope that's a good thing, Madam President.

17 PRESIDING JUDGE MONAGENG: -- presentations. I owe you 37
18 minutes --

19 MR. STEYNBERG: You can have it back.

20 PRESIDING JUDGE MONAGENG: You can have it back. Thank you.
21 Thank you very much.

22 We still have an hour to go.

23 (Pre-Trial Chamber and Court Officer confer)

24 PRESIDING JUDGE MONAGENG: Mr. Kaufman, I'm sure you'll remember
25 that we said -- we asked you to be flexible. And if you are ready --

1 MR. KAUFMAN: Yes.

2 PRESIDING JUDGE MONAGENG: -- we would like to start with you
3 now --

4 MR. KAUFMAN: No problem --

5 PRESIDING JUDGE MONAGENG: -- only up to 1.30. Thank you.
6 (Pre-Trial Chamber confers)

7 MR. KAUFMAN: Madam President, your Honours, with your
8 permission, I'd briefly like to address Mr. Steynberg's closing comments
9 because I do feel that he has rather jumped the gun, since according to
10 the schedule, he was permitted the right of reply to the Defence case at
11 the conclusion of the presentation of the Defence case. But in any
12 event, I would like to make two preliminary comments.

13 Mr. Steynberg criticises the Defence for the production of the
14 report by Dr. Phil Clark. The Prosecution criticises Dr. Phil Clark's
15 expertise. In my submission, the report speaks for itself. His
16 expertise is amply set out there. And the way I made contact with
17 Dr. Phil Clark was in fact through a former Prosecution Witness,
18 Dr. Gerard Prunier. Dr. Phil Clark is a colleague and trusted associate,
19 if we may say, from an academical point of view of Dr. Clark (* sic).

20 Now, the Prosecution also criticises the Defence for not
21 producing the unpublished draft of Dr. Phil Clark's latest book. Well,
22 there was litigation on that matter without this Chamber and the Court
23 ruled that Dr. Phil Clark would not have to submit his unpublished draft.
24 But I do find the Prosecution's request, that the Chamber not rely on the
25 conclusions drawn from this unpublished draft, as being rather rich,

1 especially in light of the fact that the Defence has argued that all the
2 communications intercepted in documents seized from Mr. Mbarushimana's
3 house similarly be excised from the record on account of the fact that
4 the Prosecution hasn't produced the judicial warrant necessary to prove
5 the authorisation for such search and seizure. There is an expression,
6 "what is sauce for the goose is sauce for the gander," and I would
7 suggest that that applies here.

8 In any event, I shall move on, and with your permission I shall
9 come back to Dr. Phil Clark's report in due course.

10 Madam President, your Honours, the Defence will present its case
11 in three parts and in a fashion which will differ slightly from the way
12 the Prosecution has presented its case. In the first part, the Defence
13 will analyse each and every one of the incidents listed in the
14 Prosecution document containing the charges, and in so doing, we will
15 show this learned Chamber that for each village where it is alleged that
16 an attack took place, either there is substantial doubt as to the FDLR's
17 involvement or, if the FDLR was involved, that there is substantial doubt
18 as to whether the attack concerned was illegal or doubt as to whether it
19 was authorised by the FDLR or the FOCA high command.

20 Now, the Prosecution has been primed as to the way the Defence
21 will present its case by virtue of my opening statement. It knows that I
22 will allege that for a number of incidents that there are grounds to
23 seriously doubt the involvement of FDLR troops and not, for the sake of
24 example, other Kinyarwanda-speaking militias operating in the region.
25 For this reason, I submit, Ms. Rabanit this morning was at pains to

1 stress that language was not the only identifying feature. She cited the
2 evidence of 656 and 674, who personally knew their attackers as soldiers
3 who belonged to the FDLR. She also cited the evidence of Witness 683 and
4 692, who testified that their attackers announced that they belonged to
5 the FDLR. But all of these witnesses, except for Witness 674, are
6 witnesses to the Busurungi incident, an attack which, as you will later
7 hear from the Defence, is an attack in which I do not deny FDLR
8 involvement. What I do say, however, is that the atrocities committed at
9 Busurungi were completely unauthorised and had no knowledge of the FOCA
10 high command until after they had been committed.

11 So when it comes to the identity of the perpetrators, I repeat a
12 question which should be, in my respectful submission, in all our minds
13 when we examine the evidence: How has the Prosecution satisfied you that
14 it is the FDLR who committed the crimes and not some of the many other
15 separate and distinct groups speaking Kinyarwanda such as RUD-Urunana,
16 which was referred to even in one of the documents that Ms. Solano showed
17 you this morning, that's DRC-REG-0008-0961. Has the Prosecution
18 satisfied you that it's not one of these groups that committed the
19 crimes?

20 So in the course of this first presentation, the Defence will
21 suggest that the Prosecution has been extremely selective in its choice
22 of evidence in support of the elements of the charges. The Prosecution
23 has failed to assimilate evidence as a whole and has ignored evidence of
24 a potentially exonerating nature and has not dealt with it, and there is
25 much of this evidence of a potentially exonerating nature. Just by way

1 of example, why does the Prosecution, as it did this morning, cite a foot
2 soldier, Witness 552, as source for its assertion that rape of the enemy
3 was an institutional policy of the FDLR when the Prosecution knows and
4 has in its possession the FDLR code of conduct which forbade rape?

5 In the second part of the Defence case I will defer to
6 Professor Kai Ambos. He will arrive tomorrow, and he will intervene on
7 the subject of the mode of liability and he will present to you the
8 Defence understanding of Article 25(3)(d). I will then conclude by
9 showing how the evidence on which the Prosecution relies for proving the
10 mode of liability cannot in any way show that Mr. Mbarushimana
11 contributed to creating a humanitarian catastrophe or that
12 Mr. Mbarushimana desired, intended, or even hoped that civilians would be
13 attacked.

14 And whilst I'm on the subject, I would warn your Honours right
15 from the start that the Prosecution, in my opinion, has presented the
16 mode of liability with superb sleight of hand. I refer you to page 40,
17 line 20, of the live transcript from today. Ms. Solano's submission
18 where she states as follows, and I quote:

19 "Mr. Mbarushimana was a willing participant in the execution of a
20 common plan. That plan required Mr. Mbarushimana to deny all allegations
21 of criminal responsibility, irrespective of their merit. It required him
22 to deny responsibility for operations."

23 And why, your Honours, do I submit that this is sleight of hand?
24 Because when this learned Chamber issued its warrant for my client's
25 arrest, it stated quite clearly that the common plan was to create a

1 humanitarian catastrophe by attacking a civilian population. In your
2 Honours' decision on the arrest warrant, the media campaign, contrary to
3 Ms. Solano's assertion, was not part of the common plan. Rather, it was
4 the mode of implementing the common plan.

5 So why has the Prosecution alleged that it is part of the common
6 plan? Well, I suggest that the answer is surprising simple. They just
7 do not have the evidence to show that Mr. Mbarushimana agreed or
8 consented to an attack on a civilian population, whether it be by way of
9 direct evidence, whether it be by way of circumstantial evidence, or
10 whether it be by way even of tenuous evidence. At no stage can it be
11 shown that Mr. Mbarushimana was even aware of the star piece of
12 Prosecution evidence which has been flashed on our screens a number of
13 times, annex 18 to the Group of Experts report, and nowhere in any of the
14 triangulated conversations or in the spreadsheet so carefully prepared
15 can it be shown that Mr. Mbarushimana participated in a conversation or a
16 communication endorsing an attack on a civilian population, prior
17 thereto, or ex post facto. Triangulated conversations with many
18 individuals, some of whom, according to Ms. Solano, were in the crime
19 base, individuals such as Laforge and Levite. How has the Prosecution
20 shown you over the course of its presentation who these individuals were?
21 Where's the evidence to show what they did. We've heard nothing.
22 There's nothing in the Prosecution's list of evidence to that effect
23 either.

24 Now, before I turn, your Honours, to the specific incidents
25 themselves, I'd like to make one brief preliminary comment on the nature

1 of attacks on a civilian population. The Defence does not dispute that
2 the FDLR was forced into a military campaign which was initiated by
3 others against its will. The whole purpose of Umoja Wetu was to clear
4 out the FDLR. The FDLR's involvement, from the evidence, was a campaign
5 which involved in part the need to defend various geographical zones
6 where the coalition, namely the FARDC, had encamped.

7 A considerable number of the ex-FDLR soldiers who were
8 interviewed by the OTP state, most emphatically, that the FARDC had a
9 particular habit of placing their troops among the civilian population.

10 I refer in particular to the evidence of Witness 677 to be found at
11 DRC-OTP-2038-0049 at paragraphs 78 and 80. Even the victims state that
12 when an attack was expected, they would be told to hide under their beds
13 to avoid stray bullets, something which in my view goes to prove that the
14 FARDC anticipated doing battle from within civilian strongholds.

15 Now, it is well accepted that the laws of war do not prevent a
16 military force from attacking a population centre if combatants have
17 encamped themselves among the civilians residing there. However, should
18 a military force choose to attack a target which is populated with
19 civilians, it has to take reasonable steps to discriminate between such
20 civilians and combatants and to pursue its military objective in a
21 proportionate manner.

22 The attacks on Busurungi and Mianga, for example, were planned as
23 military assaults on an enemy stronghold in the more general context of a
24 defensive military campaign. When these attacks were executed and
25 according to the evidence - and this is evidence taken from the

1 Prosecution's demobilised soldiers - the FDLR met with fierce resistance.
2 When considering, therefore, the general issue of attacks on various
3 villages in the North and South Kivus, the learned Pre-Trial Chamber
4 should ask itself, first and foremost, whether the Prosecution has
5 satisfied you that the burden placed on it of proving that the civilians
6 who died were, in fact, killed as a result of a criminal act and not as a
7 result of what is more colloquially called collateral damage.

8 Are we, in fact, dealing with an unlawful attack? Were the
9 attacks on Busurungi and Mianga, for example, planned with the specific
10 intent of harming civilians or otherwise? Once the question is phrased
11 in this fashion, I suggest that the learned Chamber's task becomes more
12 simple.

13 So let me now move to the specific incidents themselves. I start
14 off with Kibua and Katoyi.

15 For the alleged attacks on Kibua and Katoyi, the OTP relies,
16 first of all, on the evidence of Witness 529, who expressly states at the
17 relevant page DRC-OTP-2034-0821 that he was, and I quote:

18 "... not aware of anything in respect of members of the FDLR
19 committing any crimes during Umoja Wetu," line 326.

20 Specifically Witness 529 states that at Kibua, Katoyi, and
21 Kalonge, the latter of which was the base for the FOCA command at the
22 time, the FDLR was attacked and moved, the implication being clear;
23 namely, that the FDLR had not initiated the attack on this village. In
24 its list of evidence the OTP relied on an intercepted SMS passing between
25 Leopold Mujyambere and Ignace Murwanashyaka which states as follows, and

1 I quote:

2 "We have left Kibua, where the enemy is based for the moment."

3 That's to be found at DRC-OTP-2022-0232, French translation.

4 Not one word is mentioned, however, concerning an illegal
5 military attack and not one word is mentioned concerning an attack on a
6 civilian population resident there. So what are we left with? To prove
7 an attack on a civilian population at Kibua and Katoyi. Well, I suggest
8 from the Prosecution list of evidence that it's two Human Rights Watch
9 press releases, an international crisis group and the report of the High
10 Commissioner for Human Rights in the DRC which just recycles data
11 produced by the UN JHRO investigative team.

12 Turning first of all to the High Commissioner's report,
13 DRC-OTP-2021-0038 and 0045, reference is made to the fact that during
14 Umoja Wetu at least 29 civilians were killed - and I stress allegedly
15 killed - and 30 wounded by FDLR elements in three villages near Kibua.
16 This is, of course, wholly insufficient to prove an attack on a civilian
17 population in Kibua.

18 In the Kivus, terminology with respect to spatial and
19 geographical concepts is different from the terminology with which we are
20 familiar. When it's said that a village is near - and I place near in
21 inverted commas - to Kibua, it could be a village which is a day or two
22 walk or march from Kibua. I suggest that there are few roads in this
23 region.

24 Turning to the International Crisis Group report,
25 DRC-OTP-2014-0431. This report confirms and corroborates the import of

1 Witness 529's evidence; namely, that the attack on Kibua, which took
2 place apparently on 27th January 2009, was, in fact, the first mission in
3 Umoja Wetu. An attack by the RDF and the FARDC on an FDLR military camp
4 are most definitely not what the Prosecution claims an unprovoked attack
5 by the FDLR on a civilian stronghold. The ICG report gives specific
6 details as to how the FDLR was forced to flee Kibua and how on 28th of
7 January, the day after leaving Kibua, Lieutenant-Colonel Anaclet Hitimana
8 was ambushed by the Rwandan defence force and killed. With respect to
9 alleged atrocities committed in Kibua, the ICG refers to the Human Rights
10 Watch investigations and press communiqués published in February 2009.

11 I now turn to the Human Rights Watch evidence in respect of Kibua
12 and Katoyi. The Human Rights Watch article referred to by the
13 Prosecution in its list of evidence, DRC-OTP-2014-0229, refers to
14 villages' reports of FDLR reprisal killings and rape of civilians in the
15 Katoyi "area," and once again area in inverted commas, and nothing more
16 concrete than that. Human Rights Watch do not even base their assertions
17 on interviews with victims. They merely make a reference to second-hand
18 hearsay emanating from unidentified and unidentifiable villages.

19 The second Human Rights Watch article, referenced at
20 DRC-OTP-2014-0237, makes an assertion for which no hard evidence is
21 provided; namely, that once learning of the proposed advance on Kibua by
22 the Umoja Wetu coalition, the FDLR allegedly kidnapped, and I quote,
23 "scores of local residents from neighbouring villages and took them to
24 their camp apparently intending to use them as human shields."

25 When the same trapped civilians tried to flee Kibua, Human Rights

1 Watch alleges that the FDLR hacked many to death and others were caught
2 in the cross-fire. Here one unidentified witness apparently saw FDLR
3 combatants killing seven people, a pregnant woman whose womb was slit
4 open. Another witness saw a 10-year-old girl battered to death against a
5 brick wall.

6 Now, this reminds me at this point in time about one of the
7 submissions that was made this morning about babies, and I state babies
8 in the plural, being pounded to death. Now, I've read the evidence in
9 this case and I've only found one example of a baby being pounded to
10 death and this is it, the allegation being made by Human Rights Watch.

11 So I continue and I state that no information is given by Human
12 Rights Watch as to how these two victim witnesses identified the
13 perpetrators of the awful crimes at Kibua as FDLR troops. Was it on the
14 basis of language or was it on the basis of some other unstated
15 criterion? If it was on the basis of language, I would ask this learned
16 Chamber to refer to what Human Rights Watch recorded elsewhere in
17 connection with the alleged FDLR attack on Manje, and I quote from Human
18 Rights Watch:

19 "According to one woman who was in Manje the night of the attack,
20 when the FDLR came, they pretended to be FARDC. Others welcomed them and
21 they ate together and didn't realise that it was the enemy because they
22 spoke the same language."

23 Dr. Phil Clark also said it in his expert report and here a
24 common garden Congolese civilian is saying exactly the same thing, that
25 language cannot under any circumstance be an identifying feature of an

1 FDLR soldier. Let us also not forget that the FARDC and the RDF, Rwandan
2 Defence Force, were the aggressors at Kibua. How has the Prosecution
3 proved its case so that you may be convinced that substantial grounds
4 exist to believe that it was the FDLR soldiers who did the killing of
5 civilians and the slitting of bellies and the battering of children and
6 not the FARDC? It certainly stands more to reason that it would be the
7 FARDC at Kibua because at the time of the attack in question, it was an
8 FDLR population centre. Why in fleeing would the FDLR want to kill their
9 own people?

10 Indeed, an ex-FDLR soldier interviewed by the German
11 investigating authorities -- now, your Honours, with permission here I
12 have a question. There are no witness numbers assigned to these
13 witnesses. They are ex-FDLR soldiers and the only way I can refer to
14 them is by their name. So I would like to consult the Prosecution on
15 this matter because it's information that has been received by the
16 Prosecution from the German authorities, and maybe out of respect for the
17 German authorities or any understanding between the Prosecution and the
18 German authorities, maybe the Prosecution would like to give its view on
19 whether or not I'm permitted to mention the name of this witness.

20 MR. STEYNBERG: I'm indebted to my learned friend for giving me
21 the opportunity. My recommendation, your Honours, would be that my
22 learned friend not refer to the name of this witness. We haven't
23 specifically consulted with the German authorities as to what their views
24 are, but I submit that the witnesses can be adequately identified by
25 their numbers on the Defence witness list as well as the ERNs of the

1 relevant pages without mentioning their names. Those are my submissions.

2 PRESIDING JUDGE MONAGENG: Is that okay?

3 MR. KAUFMAN: Yes, Madam President. I am quite happy to abide by
4 that. For the purpose of my submission I will refer to the ERN number
5 and afterwards I can give you -- so as I said, an ex-FDLR soldier
6 interviewed by the German investigating authorities who was apparently
7 present at Kibua confirms this by stating that the FDLR did not kill
8 civilians at Kibua, nor did the FDLR prevent civilians from fleeing, nor
9 did the FDLR burn houses. I refer your Honours to DRC-OTP-2024-0210.

10 We don't just rely on that ex-FDLR soldier. Another ex-FDLR
11 soldier interviewed by the German authorities corroborates the first FDLR
12 soldier who I referred to. And he also states that he does not believe
13 that civilians were prevented from fleeing Kibua, DRC-OTP-2028-0950.

14 Finally, a Prosecution witness who I can refer to by his number,
15 Witness 677, (Expunged)
16 (Expunged)
17 (Expunged). He also talks about Kibua,
18 which served as his command base before evacuation. This witness
19 disclosed as incriminating and brought to serve the Prosecution's
20 interests states emphatically that there was no strategy of using human
21 shields at Kibua. He says that the civilian population had fled in
22 advance, meaning that Kibua was empty at the time of the military
23 engagement. I refer your Honours to DRC-OTP-2038-0049 at paragraph 80.
24 So much for Kibua and Katoyi.

25 I now turn to Malembe, Mianga, and Busurungi as referenced in the

1 Prosecution document containing the charges. This is an incident which
2 took place in late January 2009.

3 The Prosecution alleges that there were attacks on Malembe,
4 Mianga and Busurungi on or about 30 January 2009, which would make the
5 attacks part of the counter-offensive in the Umoja Wetu campaign. For
6 these attacks, the Prosecution cites Witness 528 at DRC-OTP-2033-1113 at
7 1154. But this witness quite specifically states that these attacks took
8 place within the context of Kimia II, that is, after Umoja Wetu had
9 finished, and he describes the attacks not as an attack on civilian
10 populations but, and I quote, "very serious fightings among soldiers."
11 Lines 1388 and 1356 respectively. The witness goes on to state on the
12 next page that during this fighting the FDLR was acting on the defensive.
13 Prosecution witness.

14 The second piece of evidence in support of the alleged January
15 attacks on Malembe and Mianga is a media report from Radio Okapi cited in
16 the Prosecution list of evidence and referenced as DRC-OTP-2014-0808,
17 which indeed alleges that on 26 January, 36 people were killed by the
18 FDLR at various locations including Malembe and Mianga. First of all,
19 the Radio Okapi report mentions that people were killed, not civilians
20 but people. And insofar as the same report mentions the indiscriminate
21 killing of Congolese, it is totally unclear in which locations such
22 killings took place.

23 In any event, the source for the Radio Okapi report is a
24 spokesperson for the Mayi-Mayi Kifuafa, a rebel force with its own
25 interests directly opposed to those of the FDLR. Indeed, the 2nd Brigade

1 of the Mayi-Mayi Kifuafa at the time of the events in question had been
2 reintegrated into the FARDC. And I refer the learned Chamber to
3 DRC-OTP-2016-0033 at 0042.

4 Now, let me add that the onus is on the Prosecution not just to
5 make a general allegation as to FDLR participation in certain attacks.
6 In order to convince you that it was indeed the FDLR perpetrating such
7 attacks, the Prosecution, in my submission, should be demonstrating to
8 you which unit led by which officer ultimately carried out which attack.
9 That's the way I've been taught to do it in the prosecution of atrocity
10 crimes when I served as a prosecutor.

11 Witness 677, (Expunged)
12 (Expunged), at the relevant time states that he would have been
13 aware of attacks perpetrated by Reserve Brigade. Witness 677 said that
14 he would have been aware of attacks perpetrated by the Reserve Brigade
15 but with respect to Malembe, Mianga, and Busurungi he was not aware of
16 Reserve Brigade involvement in such attacks in January 2009. Now, this
17 is of extreme importance because as the Prosecution shows elsewhere by
18 way of its evidence, the Reserve Brigade, in the larger scheme of things,
19 was directly subordinated to FOCA high command and, by implication, to
20 General Mudacumura. The fact that the Reserve Brigade was apparently not
21 involved in these attacks would tend to suggest that they, if at all
22 committed by the FDLR - which is by no means certain - they were
23 localised attacks, the planning of which and the authorisation for which
24 were not attributable to Mudacumura and, by implication, to the FDLR
25 members in Europe. Such attacks, I suggest, cannot be said to be part of

1 the so-called common criminal purpose.

2 I move on. Remeka, the next village cited in the Prosecution
3 document containing the charges. For this incident, the OTP relies
4 primarily on Human Rights Watch reports with, as we submit, all the flaws
5 and inherent weaknesses identified by Dr. Phil Clark and aggravated by
6 Human Rights Watch's blanket refusal to permit the Defence to access
7 their repository of witness interviews in order to search for exonerating
8 evidence. The first reference to Remeka is to be found in the report
9 "You Will Be Punished," a seminal report otherwise known as the "December
10 2009 report." It's to be found at DRC-OTP-2014-0240, and with respect to
11 Remeka the relevant page is 0306, and it's a footnote. And the footnote
12 reads as follows:

13 "The FDLR deliberately killed civilians in the following villages
14 near Kibua during the first weeks of Umoja Wetu: Remeka, Katahunda,
15 Manje ..." et cetera, and the list goes on. No reasoning is given, no
16 sources cited, not even one of the unidentified and unidentifiable
17 witnesses who elsewhere fed Human Rights Watch with information.

18 The same goes for the second reference cited in the Prosecution
19 list of evidence for the Remeka incident. The second reference is also
20 to be found in the Human Rights Watch December 2009 report, "You Will Be
21 Punished," at DRC-OTP-2014-0240 at 0403. And this reference is even more
22 scanty in that it just lists the number of civilians allegedly killed by
23 the FDLR at Remeka, namely, seven, with no further explanation.

24 Let us not forget that this report was published in December
25 2009, after Human Rights Watch had taken ample time to reflect on its

1 field missions and interviews with the survivors of the purported
2 massacre at Remeka. Is it not surprising, then, that the final
3 end-of-year report, "You Will Be Punished," lists a number of dead at
4 Remeka from the January 2009 incident as seven civilians, whereas the
5 February 2009 press release on which the OTP also relies,
6 DRC-OTP-2014-0237, states that when people tried to flee Remeka, the FDLR
7 erected barriers and then attacked them, killing, and I quote, "dozens,
8 dozens with guns, rocket-propelled grenades, and machetes. 'As I ran,'
9 said the HRW victim who was interviewed, 'I saw bodies everywhere, men,
10 women, and children.'"

11 Your Honours, it sounds like a veritable bloodbath, but let us
12 stop to think for a moment. English is my mother tongue and the word
13 "dozen" means 12. Dozens means at least 24 and more likely 36 people.
14 Why did Human Rights Watch say in February that dozens of civilians were
15 killed at Remeka in their press release only to change this figure to
16 seven in the December 2009 report? Did people come back from the dead?
17 What does this tell us about Human Rights Watch's working methodology?
18 What does this tell us about Human Rights Watch's statistics? I will
19 tell you, they're not worth the paper they're written on.

20 So let us turn to the infinitely more reliable pexo evidence of
21 the ex-FDLR that I referred to earlier, the first on, who was questioned
22 also about the Remeka incident by the German investigating authorities,
23 the BKA. Unlike Human Rights Watch and its unidentifiable and
24 unverifiable sources, this witness was actually present at Remeka in the
25 thick of the battle and he says that no civilians were purposely killed.

1 He also adds that the FDLR did not set up barriers to prevent civilians
2 from fleeing. Another basic tenet of the Remeka incident. And I refer
3 your Honours to DRC-OTP-2024-0204 at 0206.

4 And he's not the only witness. Once again Witness 677, a
5 reliable Prosecution witness listed in their list of evidence, his
6 testimony was disclosed as incriminating evidence, he also was involved
7 heavily in much of the FDLR military activity throughout 2009 and
8 comments on Remeka. This witness states quite clearly that there was an
9 FARDC position at Remeka and a civilian population was living behind it.
10 The witness adds that Remeka was located a bit far from FDLR positions,
11 although he can't rule out the possibility that people went there to
12 loot - people.

13 And I refer the learned Pre-Trial Chamber to DRC-OTP-2038-0049 at
14 paragraph 81. That's Remeka.

15 Let me move on. The next village, Busheke. An alleged attack
16 which took place on 28th of January, 2009. Once again, it's an incident
17 reported by Human Rights Watch and cited in their "You will be punished
18 report" of December of 2009, DRC-OTP-2014-0240 at 0313. The source for
19 this attack is apparently one woman who talks about the murder of her
20 husband, mother, and sister, and her own rape. This Human Rights Watch
21 source also relates how ten other Hutu women and girls were raped and
22 killed during the same attack, something which itself is, in my
23 submission, rather bizarre given that the FDLR, according to the evidence
24 in the possession of the Prosecution, represents primarily the interests
25 of Hutu refugees from Rwanda.

1 In any event, the Prosecution's evidence for the late January
2 attack on Busheke consists of hearsay evidence from one unidentified
3 source who herself reports hearsay evidence concerning the rape and
4 murder of ten women and girls. That is extremely weak evidence. We're
5 already in the realms of second-hand hearsay, in my submission, not
6 sufficient to prove charges on substantial grounds.

7 Indeed I suggest that a prima facie case -- to prove a
8 prima facie case for murder on the basis of such evidence with the
9 appropriate weight according to the circumstances would be far-fetched,
10 and this is before considering the question of how this one source
11 identified the perpetrators as members of the FDLR because the Human
12 Rights Watch report gives no explanation as to how their source
13 identified the perpetrators of the attack. As I say, this is the only
14 source for the attack on Busheke as listed in the Prosecution list of
15 evidence. That's Busheke.

16 I now turn to Pinga, the next village cited in the document
17 containing the charges. For the village of Pinga, since I think that the
18 Defence's views on the quality of the Human Rights Watch reports are
19 fairly clear, I will examine the other available evidence on which the
20 OTP relied in its list of evidence. I start with the UNHCR report
21 referenced at DRC-OTP-2014-0834 at 0839, which mentions the attack on
22 Pinga in less than 20 words; namely, that on 14 February 2009, the FDLR
23 killed a prominent traditional chief and subsequently committed 28 rapes
24 in the same area. Nothing more than that.

25 Another OTP document, the International Crisis Group report at

1 2014-0443, prefaced of course by DRC-OTP, this International Crisis Group
2 report shows us just how dangerous it can be to rely on blanket
3 assertions such as those made by the UNHCR because in reference to the
4 same 28 rapes, it is clarified that MONUC members of an investigative
5 team deployed to Pinga on 16 February 2009 discovered, and I quote, "that
6 Pinga hospital knew of 28 rapes of Congolese women for which FDLR
7 fighters were blamed between 1st of January and 14th of February." And I
8 stress that the time-period for the commission of these 28 rapes, the
9 same 28 rapes referred to in the UNHCR report, started on the 1st of
10 January, 2009, way before the initiation of Umoja Wetu and completely
11 without the period relevant to the document containing the charges. I
12 need say no more concerning these alleged rapes at Pinga. There is just
13 no evidence to prove that they were not all committed before 20th of
14 January, 2009.

15 Now, the Prosecution for Pinga also relies on a BKA intercept.
16 Once again I base my submission here on the Prosecution list of evidence
17 and this BKA intercept is to be found at DRC-OTP-2025-0144, an intercept
18 documenting a conversation which supposedly transpired between
19 Sylvestre Mudacumura and Ignace Murwanashyaka. Here Mudacumura was
20 expressing his surprise that Okapi Radio had reported that the FDLR had
21 killed people - and I stress "people" - in Tinga. And the place referred
22 is not Pinga but Tinga with a T, and nowhere is it mentioned that Okapi
23 Radio had reported that the FDLR had killed civilians. As I said already
24 "people" can mean civilians and it can mean soldiers alike.

25 Now, apart from the HRW report, the final piece of evidence

1 relating to Pinga is the United Nations Group of Experts report from 18
2 May 2009, DRC-OTP-2002-0466 at 0477, which states that the FDLR were
3 conducting guerilla-style counter-attacks in Pinga, something which
4 although it's cited in the Prosecution list of evidence does not in any
5 way suggest the commission of atrocity crimes. And as a footnote and
6 finally, but I should say sparingly, to its credit, Human Rights Watch
7 only cites one death of a civilian in Pinga and for this relies on MONUC
8 as a source. This can hardly be said to be an atrocity crime.

9 I'm wondering would that be a good place to break or should I go
10 on, because I have Kipopo next and that might be a slightly longer
11 incident.

12 PRESIDING JUDGE MONAGENG: Please go on until 1.30.

13 MR. KAUFMAN: Thank you, Madam President.

14 Kipopo, the next town, village, locality, mentioned in the
15 Prosecution document containing the charges. In the Defence's
16 submission, this once again was a military engagement. Witness 544
17 states that he was told that there were FARDC soldiers based at Kipopo,
18 DRC-OTP-2032-1005, who were engaging the FDLR troops at their base in
19 Kibua. As a result, an order was issued by the witness's commanding
20 officer, a brigadier, and transmitted to another officer called Van Kerr
21 (* phon) who was instructed to go with his soldiers to attack the enemy,
22 namely, the FARDC, at the source, that is, at Kipopo. That's to be found
23 at DRC-OTP-2032-1707. Witness 544.

24 Witness 561, his version of the events concerning Kipopo is based
25 entirely on hearsay and speculation. I mentioned Witness 561 because,

1 once again, this is another one of the witnesses on which the Prosecution
2 relies for proving atrocity crimes at Kipopo. Witness 561 makes it clear
3 that he did not hear about Kipopo at the time it happened. Furthermore,
4 his assumption that civilians died there is based on the fact that when
5 there was an attack on Busurungi, people heard on the radio that
6 civilians were killed and said that it was just like what happened at
7 Kipopo, 2028-1526, preceded by DRC-OTP.

8 Witness 561's knowledge of Kipopo events is thus derived from an
9 offhand comment made by way of commentary on a radio report on events at
10 Busurungi. Tenuous evidence, in my submission, to say the least.

11 Apparently Human Rights Watch has interviewed the families of
12 individuals who perished in houses which were burned at Kipopo. I do
13 find it, however, hard to accept that the learned Pre-Trial Chamber will
14 rely on such anonymous sources to incriminate the FDLR and, by
15 implication, Mr. Mbarushimana when Human Rights Watch have refused to
16 allow the Defence to see these interviews in order to assess their
17 accuracy and the reasons given by the survivors for identifying the
18 arsonists as FDLR. In any event, a general unreliability of HRW is
19 apparent on the face of two reports referred to by the Prosecution in
20 respect of this incident, Kipopo.

21 In the April press release, the number of civilian dead at Kipopo
22 was listed as 13, and I refer the Chamber to DRC-OTP-2003-0427. Yet by
23 December 2009, in the full report, the count of deaths had decreased by
24 four, 2014-0306, prefaced by DRC-OTP.

25 The May UN JHRO report, cited at DRC-OTP-2016-0053, while

1 mentioning the 14th of February, 2009, attack on Kipopo does not
2 incriminate the FDLR, whereas the July UN JHRO report, cited at
3 DRC-OTP-2016-0033, makes an extremely casual reference to the arson of
4 houses in four villages allegedly committed by the FDLR. No more details
5 are provided and once again no explanation as to why it was concluded
6 that the FDLR was responsible.

7 Similarly to Human Rights Watch and equally unreliable are the
8 media reports issued by Radio Okapi. On February the 17th, 2009, this
9 radio station reported that the FDLR had killed 14 people at Kipopo as
10 cited in the Prosecution list of evidence, DRC-OTP-2038-0029 --

11 PRESIDING JUDGE MONAGENG: Excuse me, Mr. Kaufman. I should have
12 allowed you to stop. We now have the technical issue of the tape.

13 MR. KAUFMAN: [Overlapping speakers] --

14 PRESIDING JUDGE MONAGENG: Yes. So I guess this is the right
15 time to stop.

16 MR. KAUFMAN: Okay. Yes. I can recapitulate tomorrow.

17 PRESIDING JUDGE MONAGENG: Thank you very much. Just one
18 announcement, tomorrow the courtroom will be available in the afternoon
19 and we had already asked Felipe, the Court Officer, to confer with you
20 and see if you were in a position to continue, but we will get your
21 responses tomorrow since the tape is about to finish. Thank you. Thank
22 you very much. Court is adjourned.

23 COURT USHER: All rise.

24 The hearing ends at 1.26 p.m.

25