International Criminal Court
Pre-Trial Chamber I - Courtroom 2
Presiding Judge Sanji Mmasenono Monageng, Judge Sylvia Steiner,
and Judge Cuno Tarfusser
Situation in the Democratic Republic of Congo - ICC-01/04-01/10
In the case of the Prosecutor versus Callixte Mbarushimana
Confirmation of Charges Hearing
Tuesday, 20 September 2011
The hearing starts at 9.09 a.m.
(Open session)

COURT USHER: All rise. The International Criminal Court is now in session. Please be seated.

COURT OFFICER: Good morning, your Honours, Madam President. We are in open session.

PRESIDING JUDGE MONAGENG: Good morning, everybody.

Court Officer, please read the case out.

COURT OFFICER: Situation in the Democratic Republic of the Congo, in the case of the Prosecutor versus Callixte Mbarushimana, case reference ICC-01/04-01/10.

PRESIDING JUDGE MONAGENG: Thank you.

The composition of the Chamber remains the same, and I will now invite the Prosecution to inform us of any changes in their composition.

MR. STEYNBERG: Good morning, Madam President, your Honours. The Prosecution team is the same as it was yesterday.

PRESIDING JUDGE MONAGENG: Thank you very much.

Legal Representatives, please.

Mr. Kaufman for the Defence.

MR. KAUFMAN: Good morning, Madam President, your Honours. There is, of course, one new face this morning on the Defence team. It is my privilege to introduce Professor Kai Ambos, Professor of Law at Göttingen University and judge of the German Provincial Court. Thank you.

PRESIDING JUDGE MONAGENG: Thank you very much.

This morning we will continue with the presentation by the Defence and I must say that yesterday you used one hour of your entitlement, and if you are going to use all your time, we will go on to 3.00, 3.00 p.m. You have five hours left. Thank you.

MR. KAUFMAN: Thank you, Madam President.

PRESIDING JUDGE MONAGENG: You can go ahead, Mr. Kaufman.

MR. KAUFMAN: When Court adjourned yesterday, I was in the middle of analysing the incident at Kipopo. I had analysed the Human Rights Watch reports and I then turned to the other items of evidence in the Prosecution's list of evidence which are brought in support of this incident. And I said that similarly to Human Rights Watch, there were equally unreliable media reports issued by Radio Okapi. On February the 17th, 2009, this radio station reported that the FDLR had killed 14 people at Kipopo. I refer the learned Pre-Trial Chamber to DRC-OTP-2038-0029.

Two days later, however, on the 19th of February, 2009, this very same radio station was reporting the number of civilian dead at Kipopo as 13, a discrepancy of one body. Once again I'm forced to ask myself

whether one of these individuals had been miraculously resurrected. Of course I do not mean to make light of these matters, but I do stress that without a proper explanation of the methodology used by various human rights bodies, especially Human Rights Watch, very little weight, if at all, should be attached to their statistical conclusions and their imputations of liability.

In the first Radio Okapi report mention is made of the fact that people were shot as well as burned, which just brings me back to what Prosecution Witness 544 said about the attack on Kipopo, namely, that it was a military operation. And I ask: How has the Prosecution made you sure, even on substantial grounds, that the people who died were indeed civilians and civilians who did not die as part of collateral damage involved in attacking a village with incendiary devices such as mortar and machine-gun fire.

The fact that Kipopo was a purely military operation is corroborated by Witness 677, who states that it was a locality which served as the base for a Mayi-Mayi unit which had attacked a company within the FDLR called Zodiac -- a company within the FDLR. According to Witness 677, the attack on Kipopo would have been spontaneous. He heard no messages - and don't forget, (Expunged)- from FOCA command concerning Kipopo and he heard nothing about civilians being killed. That's to be found at DRC-OTP-2038-0049 at paragraph 87. That is my analysis of Kipopo.

However, before I turn to the next locality mentioned in the document containing the charges, I would like to take a break, with your

Honours' permission, and invite Professor Ambos to make his intervention on the mode of liability. I hope that will cause no inconvenience to the Chamber. I do apologise, but this is the way we had intended originally that Professor Ambos would appear first today, but then yesterday the Prosecution finished before time so I had initiate. I hope that's no problem. Does that meet with your Honours' approval?

PRESIDING JUDGE MONAGENG: Yes, sir.

MR. KAUFMAN: Thank you very much.

So at this point in time, it is my privilege to defer to Professor Kai Ambos.

PRESIDING JUDGE MONAGENG: May I make just one small intervention. You are actually entitled to go up to 3.30, not 3.00.

MR. KAUFMAN: 3.30?

PRESIDING JUDGE MONAGENG: That's your five hours.

MR. KAUFMAN: I shall endeavour to do so.

PRESIDING JUDGE MONAGENG: Thank you.

MR. AMBOS: Good morning, Madam President, honourable Judges of this Court. It's a great honour for me to stand here before this Court, which I strongly support, as you know from my writings and other activities. Let me just explain why I'm standing here. I'm here because when I received a phone call by Mr. Kaufman one week ago, more or less, I looked at the document of charges of the Prosecution and, having read this document, I came to the conclusion that the Prosecution is starting from a flawed legal interpretation of the mode of liability which is the core of this case, i.e., Article 25, para 3, subparagraph (d) of the

Rome Statute. I also decided to intervene, since this is the first case, the first confirmation hearing, where this provision will be the object of analysis, i.e., in other words, the Court will set the precedent which is very important for the future international criminal law and it's very important, I shall add, for the legitimacy of this Court.

My presentation will be divided into three sections. First of all, I will make some general remarks on the genesis of this subparagraph (d). I will then try to delimitate subparagraph (d) from subparagraph (a) and subparagraph (c) of Article 25, para 3, in order to then - and that will be the most important part and the main part of my presentation - apply subparagraph (d) to the charges before us.

I will not talk about evidence here. I will make a strict legal analysis, taking into account the Prosecution case, i.e., the case as it was presented by the document of charges and as it was a little bit amended, I must say, in Friday's and yesterday's hearing. I have studied carefully the transcripts and I will explain to you why I think that this case has a little bit shifted.

So let me start with my introductory remarks. As you know, Article 25(3)(d) of the Rome Statute was a compromise when we negotiated this provision in Rome and I was part of the German delegation in Rome and I was participating in the working group of general principals which negotiated, among others, this provision. It represents a compromise between those States' delegations which tried to oppose or opposed any form of anticipated or organisational/collective responsibility and it tried to strike a compromise between this position and the position of

other State Parties which tried to involve some collective element in Article 25(3). Still, this compromise resulted in a provision which focused -- which stresses the individual participations, the individual contribution of the person which in any way may be linked to a common plan, a common criminal purpose. This was the interpretation which was deemed then in Rome in 1998 in accordance with general principles of criminal law, especially the principle of culpability and the principle of legality.

In concrete terms this means the following as to other forms of liability which we well know from our national criminal law. First, subparagraph (d) of Article 25 does not encompass any form of conspiracy, in other words, to make this very clear, it does not encompass any form of anticipated liability where the meeting of minds without any further action with regard to the commission of crimes is punishable. This has been clearly excluded. It was not so that we did not have any precedent. We had from the Statute of the International Military Tribunal of Nuremberg, for example, the conspiracy provision. But it was a conscious decision of the drafters to limit subparagraph (d) to an individual contribution to a crime or at least an attempted crime, an attempted crime.

Secondly, equally, subparagraph (d) does not criminalise - does not criminalise - mere membership in a criminal or terrorist organisation. This form of organisational responsibility, which also can be found in Article 10 of the Statute of the International Military Tribunal of Nuremberg, was also rejected consciously by the drafters.

Indeed, the drafters of the Statute clearly opted for a model of individual responsibility, individual - I must stress it - individual responsibility, i.e., a model of imputation, whereby the individual contribution, the individual contribution, to a criminal result is the indispensable prerequisite of any kind of criminal liability.

I just want to remind the honourable Judges of this Court that our national laws, the laws of Brazil, the laws of Botswana, the laws of Italy and obviously the laws of Germany, the law of Israel and many other laws contain provisions on membership liability. In my written submissions, which you will receive as part of the final submissions of the Defence, you will find all the references. But it is not the case of this Court, we do not have membership responsibility in this Court.

Third, as to joint criminal enterprise, the joint criminal enterprise doctrine as developed by the Tadic Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, this means that it can only be compared to subparagraph (d) as far as subparagraph (d) speaks of a common purpose element. And this is what the Lubanga confirmation decision said. It is not what my esteemed colleague Ms. Solano said yesterday. I quote from the transcript, page 42, line 11 and 12 that the Lubanga confirmation decision in paragraph 337 said.

"... common purpose is a residual form of accessory liability ..."

The Lubanga confirmation decision did not say "common purpose."

You can go to paragraph 337, it says subparagraph (d) is a residual form of liability.

Now, what we can see here and we come back to it, the Prosecution tries to depict subparagraph (d) as a form of common purpose liability. It is misrepresenting the only code of this Court which refers to subparagraph (d), the only code in confirmation decision, I'm not referring to arrest warrant decisions. The only code. It is not talking about common purpose. The Lubanga confirmation decision does not even mention the word "common purpose," speaking about subparagraph (d).

And that means, as I have explained elsewhere and as the Chamber, the honourable Chamber, has to make clear in this confirmation decision, that again - I repeat to make this crystal clear - as to joint criminal enterprise, the only relationship between subparagraph (d) and this form of -- this mode of liability is the mentioning of a common purpose element, but it is not at all structurally comparable with the collective tendency of joint criminal enterprise, stressing the common purpose. In this case, the Prosecution of this Court would be right, but we are not here in the ICTY, we are in the ICC. And we are not applying the ICTY case law and we are not applying the ICTY Statute.

And also there is another point which cannot be underestimated. You cannot just talk about joint criminal enterprise. You must distinguish between the three -- yes, I speak a little bit slower. Thank you very much.

You must distinguish between the three forms of joint criminal enterprise, and if you look at the doctrine and the literature, and only the literature the doctrine has written about, there is no case law of this Court. That may be the first important case here to be decided.

There is a general agreement, if you look at Schabas, if you look at the Cassese commentary, if you look at other writers, Héctor Olásolo I may quote here, that the Joint Criminal Enterprise III liability, which implies a lower mental standard, i.e., foreseeability and *dolus eventualis*, according to the case law of the ICTY, for this very reason cannot be applied under subpara (d). Because, as we shall see later, subpara (d) requires intent, yeah, intent, and that is obviously a higher standard than the recklessness/negligence standard applied under Joint Criminal Enterprise III.

For these reasons, the Prosecution approach which has been really stressed in these transcripts, more than in the document of charges, to interpret subparagraph (d) as a form of common purpose liability - you can read this all over the transcript if you read from pages 33 on - is utterly flawed. It is utterly flawed because it was not the intention of the drafters and it does not go with the wording of subparagraph (d).

Now, what does this mean as regards the delimitation of subparagraph (d) with respect to subparagraph (a) and (c)? As to subparagraph (e) (* sic), which contains three forms of perpetration, and the relevant form here is co-perpetration, it is clear that the difference between subparagraph (e) (* sic) and subparagraph (d) lies on the objective threshold, on the relevant objective threshold. This Court, this Court, in all its case law up to now applies the theory of control of the act, and for co-perpetration this means that a co-perpetrator must make a substantial, indispensable, essential contribution which -- whose omission would frustrate the commission of

the crime.

In our case, obviously, this same Pre-Trial Chamber in its arrest warrant decision has rejected such a contribution and has therefore rejected the application of subparagraph (a). And I can therefore come to subparagraph (c). I just make this distinction to make clear the relationship in paragraph 3 of Article 25 of the different forms of participation.

Subparagraph 3 is the form of assistance to a crime, to an individual crime, we have introduced in the Rome Statute and which speaks of assistance -- assists in its commission or its attempted commission, and requires also contribution. The contribution required under subparagraph (c) has not been defined by this Court. However, if you look at the case law - and in this case we can legitimately look at the case law of the ad hoc tribunals - a contribution in the sense of assistance, aiding and abetting, has been defined as a substantial contribution and this interpretation in the Tadic decision I just quote, if the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed, this interpretation of contribution also must be applied to subparagraph (c). This is just not academic because we have to interpret - and I come back to this later - what does "contribution" under subparagraph (d) mean, and therefore we have first to make clear what "assistance" within the meaning of subparagraph (c) means.

Obviously the most important difference between subparagraph (c) and subparagraph (d) is the higher subjective threshold of subparagraph

(c) "for the purpose of facilitating" and this is the essential difference between subparagraph (c) and subparagraph (d), where we only require an intent.

Now, let me now apply subparagraph (d) to the case before us. Let me first say or remind the honourable Chamber that number 48 of the regulations for the Prosecution call upon the Prosecution to clearly define the mode of liability which it deems appropriate to tackle the alleged conduct. The clarity and precision of the charges is a question of fairness to the accused and has been widely recognised in the case law of the ad hoc tribunals. Certainly, this Court will not want to lag behind the ad hoc tribunals in terms of fairness to the accused. Unfortunately, the charging in the present case taken from the document containing the charges and from the presentations on Friday and on Monday create problems of fairness, create problems of fairness.

The Prosecution now, quite straightforwardly, focuses on subparagraph (d) of Article 25(3), but it fails to provide a clear and traceable argumentation to substantiate that the conduct in question meets all the legal elements of subparagraph (d). This is for an external observer, like myself, quite clear reading the document of charges and making a point-to-point analysis of the elements of subpara (d) to our case. The document of charges, after identifying the circumstances under which alleged war crimes and crimes against humanity have been committed, directly proceeds to the objective requirement of "a group of persons acting with a common purpose." The group element in this definition has already addressed by Mr. Kaufman on Friday.

Obviously if a group exists depends on the definition of the group, how many members such a group may have, and it depends on the actual composition of the leadership of the FDLR as to the common purpose, which is my main concern part of this definition.

I would now like the Court Officer to show the chart the Defence sent to the Court.

COURT OFFICER: The document is available on your screens by pressing the button "PC 1" and in your screens the button "Select/1-2." This is a public document.

MR. AMBOS: So what I have tried with this document, I have tried to disentangle the complex common purpose creation which the Prosecution in the document containing the charges presented to this honourable Court.

Yeah, it could be reduced maybe a little bit more, that you can see the -- at least -- yeah, that's okay. It's better now.

As to common purpose, the Prosecution, as you can see from this chart - based, I repeat, on the document of charges - creates a complex three-level common purpose system. First, an overall common purpose which I call for the sake of convenience Common Purpose "A" which basically exists in the extortion of political power in Rwanda in exchange for ceasing atrocities against civilians, i.e., which is, one could say, the political project of the FDLR and which is obviously a non-criminal common purpose. And then two sub or minor common purposes, one which I call here Common Purpose "B" which is the common purpose, which, by the way, also is a main object of a case in Germany which takes

place at the moment, and which refers to the creation of a humanitarian catastrophe and the relevant part in criminal terms, the underlying acts, attacks against the civilian population and so on. This is Common Purpose "B." And a second sub-common purpose, which is the conduct of an international media campaign, Common Purpose "C."

Now, as you can see, unfortunately, I do not have a pointer to make this clear as in the lecture room, as you can see from the arrows I have put into this chart, there is a relationship, according to the Prosecution case, between Common Purpose "C" and the overall common purpose. I am aware that the Prosecution changed this focus - I will come back to this - during this hearing which for me is a problem of fairness, by the way, because I had then this night to work very hard to get this right here, two days ago, one day ago, changing the Prosecution case. I will come back to this. But as to the document containing the charges, the Prosecution links Common Purpose "C," let's call it the media campaign purpose, to Common Purpose "A," let's call it the political purpose, yeah, the political power purpose or something. But both of these purposes are not criminal. It is not criminal to make propaganda - I will come back to this - even if it's propaganda with regard to international crimes, denying international crimes. And it's obviously not criminal that a political group wants to gain power.

The only criminal purpose -- or to be more precise, that's very important in this case, the only common purpose which has criminal elements in this case is Common Purpose "B." And the criminal elements in this case of Common Purpose "B" is not the humanitarian catastrophe,

as was made clear, by the way, in the German case, it's very clear, it's not criminal as such because a humanitarian catastrophe could be caused by nature, not necessarily by human beings. It's not as such criminal, but the acts which allegedly led to this humanitarian catastrophe, here is a criminal element. In other words, to make a case against Mr. Mbarushimana, his concrete acts, his concrete acts, must be linked to Common Purpose "B" and, to be more precise, to the underlying acts of Common Purpose "B."

Well, we have a problem here. According to the Prosecution - as confirmed by Madam Deputy Prosecutor, Fatou Bensouda, last Friday, Mr. Mbarushimana is a leading member of the FDLR. And we can see this all over the documents of the Prosecution case. They use the word "linchpin," "linchpin." That means that Mr. Mbarushimana, if I followed this argument, is part of the common purpose. He is part of the inner circle of power of FDLR, following the Prosecution case, following the Prosecution case. Well, this creates a big problem with regard to subparagraph (d). Why?

Subparagraph (d), as I already said at the beginning of my presentation, is a form of accomplice or accessory liability and does, in contrast to subparagraph (a), the forms of perpetration, is intended to cover those persons who do not, not, belong to the inner circle of the common purpose or, for that matter, the criminal enterprise. Actually, the Prosecution takes the same view. I think Ms. Solano correctly pointed out in this chart, and also you can read it in the transcript, that common purpose - obviously common purpose is not the subpara (d) but

anyway - does not require showing that the person is a member of the group that commits the crime. I'm quoting the Prosecution. I'm quoting the Prosecution. Yeah.

So what the Prosecution says are two things which are inconsistent and cannot be reconciled. Let me just make very clear this legal point here. Subparagraph (d) does not refer to persons belonging to the inner circle. Who has said it, by the way, in our field was Professor Cassese, I have the reference here, and I think the interpretation of Professor Cassese, which is, I think, beyond controversy in this Court because it was actually taken -- adopted by the Prosecution, as I just showed, is based on a systematic interpretation of subparagraph (d) with regard to subparagraph (a) in particular, and therefore it is important to see all the subparagraphs of paragraph (3). That's why I started with subparagraph (a) and subparagraph (c).

Let me just repeat this point because it's a very important point and it seems to me a legal point which must be addressed by this Chamber.

Subparagraph (e) -- sorry, subparagraph (a) refers to responsibility as a perpetrator in the form of co-perpetration, yeah, one of the three forms contained in subparagraph (a), it is required that there is an agreement between the co-perpetrators, i.e., that these co-perpetrators form the inner circle. They are really the guys who control the criminal acts.

Subparagraph (d), in contrast, is a form of residual, subsidiary, accessory liability, which has been introduced into the Statute for those cases in which a person contributes to a criminal enterprise, to a common

purpose, without being member of this very common purpose. And therefore, Cassese's argument is correct. And the distinction between belonging to the inner circle and not belonging to the inner circle is a crucial distinction in the delimitation of subpara (d) from subpara (a).

But this would mean, and that is the end of the Prosecution case, that if Mr. Mbarushimana belongs to the inner circle of FDLR, as always has been stated here by the Prosecution, he cannot be responsible under subparagraph (d). He cannot be responsible under subparagraph (d). This inconsistency in the Prosecution case which is obvious and which cannot be reconciled with the interpretation, the same interpretation the Prosecution gives of subparagraph (d). You don't even have to refer to Cassese and other academics. We only have to read the Prosecution's submissions, and the Prosecution interprets subpara (d) as requiring that the person does not belong to the inner circle. But Mr. Mbarushimana, according to the Prosecution, belongs to the inner circle. I do not know how they want to square this circle. I don't understand it intellectually.

But let's, for the sake of argument, just interpret subparagraph (d) in a more broader, broader, form. I recognise that we are here a little bit in a creation phase of international criminal law because this Court has not yet dealt with subparagraph (d) and the academic sources are very scarce. So let us just think, for the sake of argument, that subparagraph (d) does not require anything with regard to the inner circle, i.e., that it is -- can be understood in an expansive, extensive way, so as to include also persons who belong to the inner circle, yeah.

I mean, one could argue, just for the sake of argument, also as an academic, that subparagraph (d) would be meaningless if we interpret it, as done by the Prosecution and as done by Cassese, requiring that the person does not belong to the inner circle, as actually this case shows. And therefore, we may just make a broader interpretation of subparagraph (d) and say: Okay, we apply subparagraph (d) to any person who fulfils the legal requirements of subpara (d) independent, independent, of its relationship with the inner circle of the common purpose of the group. That would be a broader interpretation.

But even if one follows this broader what I would call *ratione personae* interpretation of subparagraph (d), in my modest opinion it cannot -- in my modest opinion it cannot be applied in this case.

So let me analyse in detail now the elements of subparagraph (d). Subparagraph (d) requires, apart from its group common purpose element which we already dealt with, a contribution to an attempted crime and this contribution has to be intentional. Consequently, a two-fold objective/subjective nexus contribution intention must connect the alleged contribution to the alleged criminal results.

What now is the accused's -- the suspect's, sorry, the suspect's contribution according to the Prosecution case? According to the document of charges, his contribution was exclusively directed towards the implementation of common purpose "C" if I may direct your attention to my chart, yeah, it was exclusively to common purpose "C," i.e., to conduct an international media campaign. However, this conduct, to conduct an international media campaign, does not, does not - even in the

view of the most extensive interpretation of the relevant provision - constitute a crime under the ICC's Statute nor does any of the suspect's concrete activities mentioned in the document containing the charges. In fact, what is said here in the document containing of charges is, in my very direct words, is that the suspect was or is the propaganda minister of FDLR. He was a front man in terms of propaganda.

Now, let me just remind you of one very important precedent which must be quoted here, and that is a case of Hans Fritsche, Hans Fritsche, the former head of the news division of the Nazi's propaganda ministry led by Josef Göbbels. Not that I want to make any parallels here to the -- between the Nazis and the FDLR, but for obvious reasons I must quote this case because the only precedent in international law which refers to case where we had a similar situation is this case. I'm not referring to the media case of the Rwanda Tribunal, for example, because it is different in the sense that in this case we were dealing with incitement to genocide, yeah. It is very clear that the only form where denial, Holocaust denial, *negacionismo*, what in many of our criminal laws is criminal is punishable under international order the only, only, way is incitement to genocide, but incitement to genocide is not the object of this case.

In the case of Hans Fritsche, the Nuremberg Tribunal, the International Tribunal said -- Hans Fritsche was absolved. He was not convicted, he was absolved, and I give you the most important quote of the IMT in this case.

With regard to war crimes and crimes against humanity, I quote:

"... the Tribunal is not prepared to hold that they," the Nazi propaganda statements of Fritsche, "were intended to incite the German people to commit atrocities on conquered peoples and he cannot be held to have been a participant in the crimes charged. His aim, his aim, was rather, to arouse popular sentiment in support of Hitler and the German war effort."

Now in this case, I repeat, Mr. Fritsche, which for many of the (* indiscernible), like my father, of the German time was the number one Nazi propaganda chief, the number one Nazi propaganda chief, and many Germans did not understand why he was absolved. He was absolved with this reasoning of the International Military Tribunal.

In any case, given that the Prosecution is not able to prove a relevant direct impact of the accused's contribution on the war crimes and crimes against humanity allegedly committed under Common Purpose "B," I now come back to common purpose "B," humanitarian catastrophe underlying crimes. If one reads the document containing the charges, I cannot find any evidence in this document, the Prosecution constructs this, on my chart presented, complex common purpose pyramid, trying to forward Mbarushimana's contribution formed Common Purpose "C," which is his actual contribution. I think it's not in dispute, propaganda, statements, press declarations, forwards this common purpose - which, I repeat, is not criminal, it is not criminal - via Common Purpose "A," the overall common purpose, the political common purpose, to common purpose "B."

Obviously the Prosecution is aware - and this is clear from the

statements especially by my esteemed colleague Ms. Solano yesterday - that it must link the suspect to common purpose "B." It must link the suspect to common purpose "B." And this is a reason why the Prosecution now - not in the document of containing the charges but now in this confirmation hearing - comes up with a new focus, which is that Mr. Mbarushimana encouraged - yeah, they use the word "encouragement" - the common purpose "B" without, however, clearly distinguishing between the general common purpose "B," which is a humanitarian catastrophe, and the underlying crimes. And the only, only relevant thing in this case, again, I repeat it, I insist, is whether this Chamber finds with the standard of the confirmation hearing that Mr. Mbarushimana can be linked using subparagraph (d) to the crimes committed within the framework, the alleged crimes committed within the framework, of common purpose "B."

Now, what exactly requires subparagraph (d) if we analyse it point by point? Subparagraph (d), first of all, requires on an objective level a contribution, a contribution. For this very fact, I repeat, subparagraph (d) is not common purpose liability or so the word "common purpose" is part of the wording, but it's not only part of the wording. We have put into subparagraph (d) the word "contribution" to make clear that subparagraph (d) in the whole structure of our Article 25, paragraph (3) is another form of individual responsibility.

Let me quote just to make clear how misconceived the Prosecution's position is on this point. From yesterday's transcript, page 42, 43, lines 23 and following, Ms. Solano said:

"Also the requirement of common purpose," she's speaking all the time of common purpose as if we were in the Yugoslav Tribunal, "unless onerous then other modes of liability in this respect we submit, we submit, it is a fundamental tool for addressing crimes committed by international criminal organisations," when I read that I thought: What is she talking about? I'm sorry.

Article 25, paragraph (3), subparagraph (d), according to the Prosecution's submission, is a tool to fight international criminal organisations. I remember very well when we had a meeting with the Brazilian delegation, among others, in Rome and the Brazilians wanted to include the responsibility of legal persons, i.e., collective entities, in the Rome Statute, and it was clearly rejected by the States. We're always talking here about individual criminal responsibility. It is plainly wrong, with all due respect to the Prosecution, that anything, anything in this Statute is a tool to fight international criminal organisations. This Statute is directed towards individuals, not towards organisations.

And then Ms. Solano goes on and quotes the post-World War II law by the Nuremberg Tribunal and domestic courts. She says:

"These theories," i.e., the theories of Nuremberg and subsequent theories, it's on page 43 above, "made it possible to prosecute war criminals who contribute to the commission of crimes through diverse means." Well, these theories made it possible, yes, that was the theories of Nuremberg. When we made the Rome Statute we wanted to distance ourselves from Nuremberg. We did not want to include conspiracy

and we did not want to include organisational membership responsibility. Though the Nuremberg precedent does not serve any purpose here, it serves the purpose to clearly show that this Court, due to its respect for the principle of culpability of personal responsibility, is focusing on personal individual contributions and not in any form on collective responsibility.

Well, what then does mean contribution? Contribution, there are two issues here with regard to contribution. One issue is the nature of the contribution and the second issue is what we could call the relevance or the impact of a contribution to the main crime. As to the nature of the contribution, Ms. Solano yesterday made a point in her presentation here on this chart but also in the transcript, it says common purpose does not require the commission of acts that are criminal in nature. I had some problems to understand this, what she wanted to say. I looked at the transcript and what she wants to say is that the contribution not necessarily must be unlawful. That's my interpretation. I hope I do not misrepresent the Prosecution. I think you cannot draw this from here, but if you read the transcript, that is clear.

I would agree with the Prosecution. The contribution as such in subparagraph (d) is neutral, is neutral, but this brings us to a very big, great doctrinal problem. And if the Court considers that the contribution can be neutral -- no, let's make this clear with a case. I could sell food to a concentration camp, as happened in many German cases. This selling of food is a neutral act, is an economic activity. It is not unlawful to sell food. Now, obviously selling food to a

concentration camp makes this concentration camp functioning. Without food they could not kill, torture, so on. Now the question is, the doctrinal question - which, by the way, has been dealt with in Spain, in Brazil, in Colombia, in Germany, in Italy, if neutral acts, neutral acts, neutral acts contributions to a criminal enterprise, for example, running of a concentration camp, are criminal or not criminal. It is not in dispute, and in this the Prosecution is right, that the contribution per se must not be unlawful. It could be lawful. But the question is if a lawful contribution with the doctrine in these countries I just mentioned call neutral acts must be criminalised, and it is highly disputed. We cannot go into this here because this would really take me two or three hours to explain, but what I want to make clear here, if the Chamber take the view that the contribution can be lawful, in other words, any contribution under subparagraph (d) could fulfil the requirements of the concept of contribution, it has to go into this discussion which we have in our national systems about the criminality of neutral acts. There is also a famous Dutch case, the van Anraat case, which comes close to this issue. So this is a big problem which will be opened if one takes this view.

The second element of the contribution, the impact or the relevance of the contribution.

Now, if you remember, I have said that the contribution, the assistance, under subparagraph (c) must be substantial. Admittedly, there is no case law of this Court on this question, but the overwhelming doctrine interpreting assistance within the meaning of the case law of

the ad hoc tribunals, because it's the same wording, has interpreted that the contribution must be essential, significant, important, relevant.

Now, according to the Prosecution - again, this chart and the transcript - a contribution within the meaning of subparagraph (d) must not be essential, must not be essential. I wonder if this can be correct. If we look at the wording of subparagraph (d) and compare it to subparagraph (c) as to the objective element, yeah, I'm talking only about the *actus reus* about the contribution, subparagraph (c) speaks of aids, abets, or otherwise assists, otherwise assists. This is the important part, otherwise assists. While subparagraph (d) says "in any other way contributes ..." I ask the honourable Judges, is there a difference between "otherwise assists" and "in any other way contributes."

According to the Prosecution, the contribution could be any contribution. I must ask even an irrelevant contribution, I wonder. Because if they say it must not be -- it need not be essential, as yesterday, the question is: But what then, what kind of contribution do we need for subparagraph (d)? So my argument would be, I would not see a difference between the contribution necessary for subparagraph (c), given that the wording of subparagraph (d) and subparagraph (d) is basically the same. We can compare the French, Spanish, Arabic, Chinese, and Russian versions and we may find even a closer wording. So there cannot be reasonably a difference between the contribution used in subparagraph (c) and subparagraph (d).

And there is another argument or two arguments which support this

conclusion which are very important.

The arguments refer to fundamental principles guiding the law of this Court. The first is the principle of culpability, which I do not need to explain here, but which obviously requires that there must be some contribution, there must be some impact of the contribution as to the alleged crimes if we want to declare a person culpable, guilty, before this Court. And the second one refers to the policy choices this Court, this Statute, and this very Prosecution takes if its focuses on cases of a certain gravity.

The gravity element in this Court is obvious. It comes up in the preamble, it comes up in Article 17, complementarity, paragraph 1, subparagraph (d); and it comes up four times, four times, in Article 53. And obviously this Prosecution, in the strategy paper they put out on the internet, takes gravity as a very important starting point.

Gravity, however, also refers to the mode of liability, not only to the crime. So one could question at all if a person who may only at best be a contributor within the meaning of subparagraph (d), basically a propaganda man, that this person should be before this Court and should not be left, for example, to the national jurisdictions in terms of gravity.

In any case, if we use gravity as a policy element in the -- in this Court, this means that we should also apply, interpret restrictively the forms of liability, the modes of liability. It is not -- one could also say we need a grave contribution, yeah. If we take the idea of gravity, which is in this Statute at various times, to the mode of

liability we could say that at least the contribution must be grave and not irrelevant.

And then there is still a further argument which is a little bit more doctrinal, but please excuse me if I make these little (* indiscernible) because it is important and it has been relevant in this Court.

Why should we interpret restrictively the word "contribution"? What is required for criminal responsibility in any criminal law system which considers itself a fair law system which uses fair rules of imputation in accordance with the principle of culpability is that there must exist a certain normative relationship or nexus between the alleged contributing conduct, the contribution and the criminal result, a relationship which in any case goes beyond a mere purely naturalistic causal nexus. Even if we would require causality, we would require more than the Prosecution. Because the Prosecution says non-essential contribution. So causal contributions are *per definitionem* essential. A contribution can only be causal if it causes an effect on the main crime and therefore it must have a certain relevance. One can dispute the relevance because the normative criterion, but in any case it must have a certain relevance.

But even more so, in modern criminal law theories used in Colombia, used in Spain, used in Germany, used in Italy, used in Brazil, we have something which we call la *teoría de la imputación objetiva*, the theory of objective imputation, which tries to create a normative link between the act and the criminal result. And how does it do this? For

contribution, assistance, in these systems, let me just make clear there is a form of a normative restriction of causation, which also is accepted, for example, in the French law and which is accepted in the English law, for example, by H.T.H. Smith (* phon), all intents to normatively restrict causation, yeah, in doctrine and in law belong to this theory.

If one applies the theory which is essentially about the fair imputation of criminal results to a person, to a human agent, a contribution can only be punishable if, A, it creates a higher risk for the protected legal interest by having a substantial impact on the actual commission of the main crime. That means we have to examine if the contribution Mr. Mbarushimana allegedly made had a substantial impact as to the alleged crimes in terms of creating a higher risk for the protected interests, for the life of the victims, for the integrity, sexual autonomy, and so on. And secondly, that this risk manifests itself in the commission of the crime insofar as this -- as it has been realised in the commission, i.e., it had a comprehensible, visible, tangible impact on the main crime.

Now, this theory which, as I said, has been or is used in many national jurisdictions including in the common law jurisdiction, you will find the references in my paper, has not made it to this Court. But this Court in the Bemba confirmation decision, in the Bemba confirmation decision, has used the concept of risk increase with regard to the command responsibility doctrine. This Court has said for a commander, a superior, to be responsible for the ensuing crimes of his or her

subordinates, it must be proven that his failure to intervene increased the risks for the protected legal interests, increased the risk of the commission of the crimes by the subordinates.

In other words, this Court, and I have commented on this decision in the Leiden Journal of International Law, has taken the risk increase theory in his case law. Now, the question is if it wants to develop this further or if he just wants to leave it where it stands. It's just a model how to define the contribution because what we have to do here is to define what exactly is the contribution.

I cannot find any contribution in this sense in the document of charges and in the presentation made by the Prosecution as regards Mr. Mbarushimana. But in any case we have a second element which is important and which stresses the individual character of subparagraph (d) and that is the requirement of intent or, as subparagraph (d) says, "such contribution shall be intentional ..." That's the first moment when "intentional" is mentioned.

Now, this intentional, this element of intentional, in subparagraph (d) refers to all objective elements of subparagraph (d), i.e., to the contributing conduct, i.e., to the contribution which must be intentional, the attempted commission of a crime by a group of persons acting with a common purpose and the causal or even normative relationship I have just explained between the contribution and the final criminal result. As to the concrete meaning of "intentional," the term must be interpreted in line with Article 30 of the ICC Statute. That means it does not, as correctly decided by this Court, include *dolus*

eventualis and/or a recklessness or other lower thresholds than knowledge or intent in the strict sense.

In other words, the concept of intent comprises what Article 30 says without *dolus eventualis* taking into account the interpretation of this Court.

Now, in the document of charges of the Prosecution, it is said that the suspect acted intentionally with respect to the committed crimes. However, there are many contradictions in the presentation of the Prosecution case. If you only look at paragraph 147 and compare it to paragraph 149 of the document of containing the charges, you see in paragraph 147 that the Prosecution derives or infers the knowledge of Mr. Mbarushimana from his "position as executive secretary." And in paragraph 149 it is said "he was in a position to demand information about the allegations." I think it cannot be both ways. Either you know because you are commander or you have to demand information. That's a contradiction. Either you are in a position which enables you to know anything what happens, even if you are a thousand kilometres away sitting in Paris or you demand information. You demand information because you don't know. You want to be sure what is happening.

Someone who is demanding information, if this is true - I don't know - I'm just quoting the Prosecution case, can at best be responsible for the standard of Article 28 of the Statute, the "should have known" standard. A person who demands information in this case at best could foresee, could foresee, could maybe have accepted certain results within the meaning of *dolus eventualis*, but this standard, as I just have said,

is not covered by "intentional" in subparagraph (d).

Again here springs up from the Prosecution case the Joint Criminal Enterprise III. Just to remind you, under Joint Criminal Enterprise III, which apparently the Prosecution wants to squeeze into this Statute, it is sufficient and necessary at the subjective level that the member of the joint criminal enterprise, which according to the Prosecution is not Mr. Mbarushimana, the member of the joint criminal enterprise must foresee the possible commission of crimes pursuant to the joint criminal enterprise and must willingly take the risk that these crimes are committed *dolus eventualis*, Tadic Appeals Chamber and any case law of the International Criminal Court for the former Yugoslavia. This is not our law. This is not what is in subparagraph (d) of Article 25(3).

In addition, subparagraph (d) with the two further subparagraphs (i) and (ii) contains two further mental elements. That shows how we tried in Rome and in New York to delimitate responsibility under subparagraph (d). Not only did the States Parties put into subparagraph (d) the contribution requirement and intentional, but in addition, I quote from the Statute:

"Such contribution shall be intentional," we just dealt with intentional, "and shall either," so there is an additional mental element, "be made with the aim of furthering the criminal activity," et cetera, et cetera, or "be made in the knowledge of the intention of the group to commit the crime."

In other words, obviously this is an alternative requirement, the

Prosecution must prove or must for the standard of this confirmation hearing provide reasonable grounds to believe that Mr. Mbarushimana not only acted intentional under the general requirement under subparagraph (d), but also that he either acted with the aim of furthering the criminal purpose, i.e., he acted with volition, with desire, with wanting, with will, that is a volitive element of *dolus*, or he acted with knowledge.

I do not share the Prosecution opinion, as explained by Ms. Solano in her presentation yesterday, that common purpose 1, how she calls it, again common purpose, and she refers to subparagraph (d)(i) and (ii), I quote page 45:

"Common purpose 1 emphasises intent over knowledge and common purpose 2 emphasises knowledge over intent."

I do not agree with this because what we wanted to do in -- basically in these subparagraphs, let's say, of (d) was to have additional subjective thresholds which only need to be proven alternatively, that is clear, but which either must be intentional or volitional. Either cognitive or volitional, either with the aim of purpose or with the knowledge. And again here, the knowledge which is required is knowledge, I quote from subparagraph (d)(ii) of the Statute "in the knowledge of the intention of the group to commit the crime ..."

This is a further restriction you must be aware, honourable Judges, here. The first intention, the first intention subparagraph (d) refers to the objective elements of the first phrase, the first clause, of subpara (d) and the second mental element, which again is alternative

as to knowledge, the last element, refers to the crimes, to the crimes. That has been a further restriction. So what we wanted to make sure is that there must be a knowledge, a positive knowledge, of the crimes, of the person who is liable under paragraph -- subparagraph (d).

Well, let me conclude - I think I talked enough - that given the interpretation of subparagraph (d) in line with the travaux and the wording, and please do consult the travaux, do consult the interpretation by scholars like Cassese, Eser, Schabas and others, has nothing to do -- Héctor Olásolo I should mention here, has nothing to do with common purpose responsibility, nothing. When we had wanted to put this into the Statute, as Ms. Solano seems to imply, we would have said it. We would have used -- we had all the case law of the ICTY and the ICTR as to joint criminal enterprise before us. We could have easily used a formula which comes close to the Nuremberg precedent, which comes close to the case law of the ICTY/ICTR, but we didn't do because we wanted to stress that in any case for a person to be punishable, to be culpable, to be guilty before this Court we must establish, according to the standard of proof of the stage of the proceedings, an individual contribution, we must link his contribution to concrete crimes. And this, in my modest opinion, having studied the transcripts, having studied the document of charges, is not the case here.

Thank you very much for your attention.

MR. KAUFMAN: Thank you very much, Professor Ambos. And now back to earth with a bang. We're going to examine the next locality, Luofu and Kasiki, as mentioned in the Prosecution's document containing the

charges. For the attacks on Luofu and Kasiki, the OTP refers us to the evidence of Witness 632, DRC-OTP-2034-0386 at 0427, who, quite frankly in my opinion, shoots the Prosecution in the foot. This purported incriminating witness, a witness who was specifically brought to support the Prosecution case, states quite openly that the FDLR did not perpetrate either the attack on Luofu or Kasiki. According to him, these attacks were perpetrated by RUD-Urunana, which was a military faction which splintered away from the FDLR and was headed by an individual called General Musare, and I refer the learned Chamber to DRC-OTP-2034-0429.

As Dr. Phil Clark explains, RUD-Urunana is in no way connected either by way of ideology or by way of command structure to the FDLR. What is more serious is that this apparent confusion between RUD and the FDLR is adopted by the victims themselves. In this respect, I refer the honourable Chamber to the Human Rights Watch report of December 2009, I've given the ERN number elsewhere, which based on a survivor's interview specifically states that it was RUD and not the FDLR which attacked Luofu on 17th of April, 2009, killing seven civilians. This attack was particularly shocking at the time because out of the seven civilians killed, five were young children burned alive in their own beds. Apparently, so Human Rights Watch asserts, the attack on Luofu was motivated by an unpaid debt owing to RUD.

Human Rights Watch quite innocently admits that many witnesses refer to both RUD and FDLR/FOCA combatants generically as FDLR or Interahamwe, and I refer the honourable Chamber to footnote 175 on page

72 of the December 2009 Human Rights Watch report. The ERN is DRC-OTP-2014-0240 at 0317. This imprecision of Human Rights Watch goes to the very root of, once again, I must submit, its methodology. Bear in mind that the interviewed witness talks about an attack perpetrated by RUD. It is HRW's speculation or assumption, however, that RUD and FDLR are synonymous, something which is totally rejected by OTP's more reliable soldier witness, 632. The unconnected nature of RUD and FDLR is also stressed by Prosecution Witness 527, a soldier who left the FDLR in order to join RUD and upon repatriation was interviewed by the OTP. This witness, and his interview is to be found at DRC-OTP-2033-0451, states that from 2005 onwards, RUD and FDLR were separate organisations with separate leaderships, that's at 0480, and separate executive committees, 0482.

Coming back to Human Rights Watch, it is inexplicable how in the April 2009 press communiqué, to be found at DRC-OTP-2002-0865, this professional organisation places the blame for the Luofu incident squarely on the shoulders of FDLR, whereas in its December report later in that year, it incriminates RUD without mentioning FDLR involvement. DRC-OTP-2014-0240 at 317.

I just repeat my submission, and I apologise for doing this but it is rather essential to the Prosecution case, the Human Rights Watch reports should be viewed as being of negligible evidential value and should not be relied on for proof of either the substantive elements or the contextual elements of the crimes imputed to Mr. Mbarushimana.

Before concluding my summary of Luofu and Kasiki incidents, I

would like to refer to the BKA statement of Witness 564, which is also relied on by the Prosecution is to be found at DRC-OTP-2024-0166, who at page 180 -- sorry, 0180, mentions that he heard that houses were burned at these villages pursuant to a command order and to pressure the Rwandan government to negotiate with FDLR. Now, my opinion is that there can be no doubt that this witness is trotting out the party line as promulgated by the Prosecution and MONUC, UN DDRRR, especially in light of the overwhelming evidence even from Human Rights Watch that these attacks were carried out by RUD. Indeed, I refer to the report prepared in August 2009, it's by an individual whose name I won't mention, a German individual, and it's to be found at DRC-OTP-2003-0113, which at 0116 in a footnote states that Kasiki was at the time populated by members of RUD, suggesting that it was they that had evicted the previous military occupants.

So much for Luofu and Kasiki. I now move on to the village of Witness 673 and 674.

Witnesses 673 and 674 are husband and wife. Witness 674 describes how on a completely unspecified date she was waylaid by, and I quote, "Rwandese Interahamwe." She does not state that she was waylaid by FDLR, who robbed her. Shortly thereafter, a group of 30 individuals appeared who proceeded to gang-rape both her and her friends. In Witness 674's statement to be found at DRC-OTP-2034-1527, these individuals have no identifying features and there are no grounds for suspecting that they were in any way affiliated to the FDLR. The same goes for the attack on Witness 674's village. This is the sum total of

her evidence, and I do quote:

"On the day we were attacked we were inside and we heard gun-shots. We went outside to see where the gun-shots were coming from ... but we never knew there were others who were closer. People were saying 'they are here, they have reached us.'"

Who these people are, who these "they" are, the witness was not asked and does not explain. If you ask me, these perpetrators could have been anyone. Witness 673, DRC-OTP-2034-1533, places his wife's rape in 2009. But it is the Prosecution who tells us that this happened in mid-2009, but that part has been redacted out of the summary provided. I'm referring to document containing charges, of course.

Witness 673 states that his village was attacked at night, whereas his wife, Witness 674, stated that it happened in the morning. A contradiction that Witness 673 wasn't able to explain. Taken together, both these statements, in my respectful submission, are unreliable and lack weight. So much for Witness 673 and Witness 674.

I now refer to the incidents which the Prosecution called the Busurungi vicinity incidents, not the Busurungi incident, but the Busurungi vicinity incidents. Paragraph 67 of the document containing the charges describes a particularly gruesome incident concerning the discovery of the corpses of three women who had gone missing from Busurungi. These corpses were found - and I do apologise for the nature of what I'm about to read out - "with sticks inserted into their vaginas."

The DCC states that the incidents in question occurred at the end

of April 2009. The evidence, however, says otherwise. Witness 683 states at paragraph 19 of his statement that the incident occurred in March 2009, and Witness 655 states that it took place on 27th February 2009. And I refer the -- honourable Chamber to DRC-OTP-2025-0074. Quite a difference and quite significant because the Prosecution has to prove that this incident, in my opinion, fell within the time-frame of either of the two armed conflicts identified, Umoja Wetu and Kimia II.

Let me remind the learned Chamber of what I believe to be the zigzagging performed by the Prosecution on the issue of the characterisation of the armed conflict. When it first filed its application under Article 58 of the Rome Statute, the Prosecution argued that war crimes were committed during two distinct periods during 2009, from 20th of January to 21st February, when an order was given for the Rwanda Defence Force to cease the Operation Umoja Wetu; and from 2 March to 31 December 2009, otherwise known as Kimia II. At paragraph 57 of the arrest warrant application, the OTP stated quite specifically that Umoja Wetu was, and I quote, "international in nature, given the direct intervention of Rwanda through its troops."

Now, your Honours issued an arrest warrant on the basis of this assertion and made a judicial finding that Umoja Wetu was indeed an international conflict on a reasonable grounds basis, of course. So, I ask myself: What has changed? Well, I submit nothing from an evidential point of view. It is just as Mr. Steynberg seemed to be admitting in his opening presentation, the Prosecution got it wrong from a legal point of view. The involvement of Rwanda, according to him, was not an

occupation. So the more appropriate to classify the conflict as non-international.

Now, I'm not inclined to accept this explanation for the Prosecution's change of mind and I believe that the truth of the matter is that it is more convenient for the Prosecution to define the whole of 2009 as one long non-international armed conflict. That way the Prosecution solves the problem of the doubt which attaches to those charged incidents which could have occurred between 25 February and 2 March.

Now, I ask your Honours to uphold your former ruling or to require the Prosecution to produce evidence to convince you of the fact that during the interim period between Umoja Wetu and Kimia II there was an ongoing military engagement of sufficient intensity for it to be defined as a non-international armed conflict for the purpose of the contextual requirements of war crimes.

Now, this issue should be sufficient, in my submission, for the learned Chamber not to factor the Busurungi incident, discovery of the corpses, into its decision whether or not to confirm the charges of murder, mutilation, and torture. In any event, the charges of mutilation and torture are particularly irrelevant here because there is no way whatsoever that the Prosecution can prove that the dreadful disfigurement of these poor women was committed either before or after their deaths.

I mention, of course, all these matters before I even touch on the question of whether or not the Prosecution has succeeded in proving the identity of the person or persons who killed the three women in

question. (Expunged) states, and I give the reference, DRC-OTP-2032-0803, that the government went to look for the perpetrators but could not find them. Moreover, neither she nor (Expunged), who actually discovered the disfigured bodies, mentions the FDLR as potential suspects. This is also the case with respect to another gruesome incident related second-hand by (Expunged), namely, the rape of a pregnant woman in March of 2009 who was subsequently eviscerated with her foetus extracted. She does not state the identity of the attackers in her statement and the OTP's attribution of this, quite frankly, disgusting crime to the FDLR is speculation. And I provide the reference, DRC-OTP-2032-0799 at 0803, that's paragraph 18 -- 19, sorry.

Only (Expunged) suggests that the culprits of the corpses incident were members of the FDLR and that is on the basis of gossip picked up from some local women. (Expunged) speculates that it was the Interahamwe, the Rwandan soldiers who did the crime, and that is because they had done the same thing elsewhere.

To sum up, there is no credible source for believing that the FDLR had anything to do with this incident.

The document containing the charges also makes reference to another grotesque incident involving the abduction of a young man whose corpse was later found with his - and once again I do apologise for the details - his genitals stuffed into his mouth. Now, out of respect for the dead, I shall of course not mention his name, but out of respect for Mr. Mbarushimana, these unnecessary details should never have been included in a document containing the charges because they bear no

connection whatsoever to the criminal state of mind imputed to him.

In any event, for this shock episode the Prosecution relies on the statement of (Expunged), who states that the killing took place in March 2009 and was reported to her by the men who buried the unfortunate victim. In other words, she never saw the disfigured corpse. (Expunged) also give evidence about this incident. (Expunged) states that it took place on the 3rd of March, 2009, and relates the incident as reported to him by the deceased's wife, second-hand hearsay. According to the wife, the shocking murder, DRC-OTP-2025-0107 at 0112, the murder was carried out not by the FDLR but, and I quote, "Rwandese soldiers."

Now, I will not insult anyone's intelligence by suggesting that Rwandese soldiers and the FDLR are one and the same thing. Given the nature of the military coalition between the FARDC and the Rwandan Defence Force, would it not be more reasonable to assume that these soldiers to which the witness refers in fact belonged to the official Rwandan army? And if that is the case, why has the Prosecutor and his intrepid investigators not gone knocking on the door of the hierarchy of the Rwandese government --

PRESIDING JUDGE MONAGENG: Mr. Kaufman, you have been asked to slow down a bit.

MR. KAUFMAN: Oh, I do apologise. As I said, if that is the case, then the Prosecutor could have explored other avenues of investigation and other hierarchies. The murder of this emasculated Congolese civilian is about as well substantiated against him, the other

people who could have been investigated for this matter, as it is against Mr. Mbarushimana.

As for (Expunged), he states that the murder took place a week earlier, that is, on 22nd February 2009, but far from mentioning decapitation and genitals in the mouth, he states, as he learned it from his sources, that the victim had died not from machete wounds but from gun-shots. And I refer the Chamber to DRC-OTP-2025-0070 at 0073, paragraph 16.

So what can we conclude from all this evidence? First of all, absolutely nothing with the requisite standard of proof. And secondly, it is extremely danger to rely on hearsay evidence. But in the case of various NGO reports it could, for all we know, even be anything up to third-hand hearsay based on speculation.

(Defence counsel confer)

MR. KAUFMAN: I'm about to start Mianga and that's quite a long incident. Would this be a convenient point for the learned Chamber to break?

PRESIDING JUDGE MONAGENG: I think this will be the right place.

MR. KAUFMAN: Thank you, Madam President.

PRESIDING JUDGE MONAGENG: The session is adjourned and will resume at 11.30. Thank you.

COURT USHER: All rise.

Recess taken at 10.53 a.m.

On resuming at 11.34 a.m.

(Open session)

COURT USHER: All rise. Please be seated.

PRESIDING JUDGE MONAGENG: Welcome, everybody.

Mr. Kaufman, before you start, Court Officer, can we go into a private session very briefly.

(Private session at 11.35 a.m.)

(Expunged)

(Expunged)

(Expunged)

(Expunged)

(Expunged)

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(Expunged)

(Expunged)

(Expunged)

(Expunged)

(Expunged)

(Expunged)

(Expunged)

(Open session at 11.36 a.m.)

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

PRESIDING JUDGE MONAGENG: Thank you. Go on, Mr. Kaufman.

MR. KAUFMAN: Thank you, Madam President.

Professor Kai Ambos presents his apologies. For urgent personal reasons he had to leave. But he did ask me to correct one matter which was a verbal slip on his behalf and it's in the realtime transcript at

page 9, lines 13 to 18, he referred to subparagraphs (d) and (e) twice. What he actually meant was subparagraph (d) and (a). As I said, that's not a correction for the transcript, it's a correction of something that Mr. -- sorry, Professor Ambos said.

PRESIDING JUDGE MONAGENG: Thank you very much. We've taken note of that.

MR. KAUFMAN: And before I proceed also I must apologise, so I've been told, to the French translators. I am going too quickly. I will do my best to slow down.

So I now turn to Mianga, an incident which the Prosecution alleges took place in April 2009. For this incident the Prosecution relies on Witness 544, who states that he was not there, i.e., at Mianga, but heard about it from other soldiers who were there and who were allegedly bragging about the anatomy of the local women's genitalia and how, on occasion, objects had been inserted into the said sexual organs. On closer examination of the evidence, however, one understands that the penetration of a spear into the vagina of a woman, a woman concerned in the interview of Witness 544, was actually performed on a corpse. Disgusting, well, may be; dishonouring the dead, may be. It is most certainly not rape nor is it mutilation. Now, desperate for a positive answer, the OTP investigator - and Ms. Solano herself who was present there - asked Witness 562 if this form of penetration was only performed on dead bodies and the answer they received was that he had no information as to whether spears were introduced into the vaginas of living women. I refer the Chamber to 2033-0181, prefaced of course by

DRC-OTP, at line 558.

So what information do we have from this witness, Witness 562, who, in my opinion, is a self-confessed liar, as to crimes committed at Mianga? Nothing. Nothing apart from a bit of hearsay concerning some necrophilic activities. And this is the sole witness on which the Prosecution relies to prove rape, torture, and inhumane acts at Mianga, and I beg the Pre-Trial Chamber not to underestimate the unreliability of this witness. This is the witness who stated that the infamous FDLR officer called Vainqueur, and that's spelled V-a-i-n-q-u-e-u-r, was present at Busurungi in his second statement, yet in his first statement to the OTP stated he was in fact absent at Busurungi because he had gone to plan his wedding. And I refer the Pre-Trial Chamber to DRC-OTP-2033-0191.

For the attack on Mianga, the Prosecution also relies on the evidence of Witness 528, who from the OTP's list of evidence was tendered to show that there was an FDLR attack there. This, however, is not what he states or volunteers. It is, rather, what the investigator puts to him. And I refer the learned Pre-Trial Chamber to DRC-OTP-2033-1113 at page 1154.

Continuing with the attack on Mianga, the Prosecution also relies on Witness 559 who, according to the Prosecution, received an order from Sylvestre Mudacumura, namely, that his unit was required to, and I quote, "chase" the enemy that was based in Mianga. Fair enough. Chasing the enemy, in my submission, means exactly what it says, engaging an enemy stronghold, which, in my submission, is legal, and not attacking

defenceless civilians, which is of course illegal. DRC-OTP-2033-1825. At page 1827, the witness talks about how the FARDC would encamp their soldiers within civilian residential quarters. At page 1832, the witness describes the fact that FARDC forces were attacked during an operation which started at 5.00 in the morning. Subsequently, the FARDC forces fled and some civilians remained in their houses. However, Witness 559 states emphatically that he was ignorant of what happened thereafter.

Witness 587 is also relied upon by the Prosecution, according to its list of evidence, for the Mianga attack. And here reference is made to a general order which was signed by Sylvestre Mudacumura, an order to burn civilian houses, an order that the same civilians would become a burden for the Congolese government. This order which the Defence strenuously disputes was given at the end of February 2009 DRC-OTP-2034-1362 at 1372. However, according to 587, this order was qualified, something which is not mentioned by the Prosecution, it was qualified insofar as it was forbidden to kill civilians and only burn the houses of those civilians from where Congolese soldiers would be coming. I quote the reference DRC-OTP-2034-1362 at page 1373.

Witness 564 also testifies as to having seen burned houses at Mianga, DRC-OTP-2030-1277. But he clarifies that he only arrived there when the attack had ended and cannot therefore state whether the houses were deliberately subjected to arson or set on fire as a result of collateral damage in the heat of battle. As I said, there is ample evidence in the Prosecution's databases to show that mortars and heavy machine-gun fire was used, and we all know what that type of weaponry can

cause when fired upon straw houses or houses with straw roofs.

Mianga, the Prosecution also relies on Witness 632. He merely confirms that the FDLR attacked Mianga because it was an FARDC stronghold and that they seized guns and bullets, something which is corroborated by the intercepted SMS allegedly sent between Leopold Mujyambere and Ignace Murwanashyaka listing the number of military casualties, DRC-OTP-2013-4936. Indeed, the Prosecution list of evidence cites an SMS from Leopold Mujyambere to Ignace Murwanashyaka which supports the Defence case; namely, that Mianga was a military attack during which FDLR soldiers, including a battalion commander, were killed. It also mentions the massacre of Hutu refugees, a theme repeated in a second SMS referred to in the Prosecution list of evidence for this incident, DRC-OTP-2022-0319.

I do not, in the circumstances, see the need to dwell too much on a human rights report which deal with the Mianga attack when the Prosecution's own ex-FDLR witnesses do not confirm that there was deliberate targeting of civilians. Suffice it to say that the UNJHRO report, DRC-OTP-2016-0033, confirms at paragraph 23 that the FARDC 25th Brigade had established a position in Mianga village. And at paragraph 26 states that the FDLR attacked this position defeating the resistance. After the attack six civilians were allegedly killed, but the fact that this was undeniably a military operation and the fact that only military losses were reported back to Murwanashyaka would tend to confirm that there was no plan - and I stress no plan - to attack the civilian population per se, but such attacks on civilians, if they did indeed

happen, were wholly unauthorised. Indeed, the Reuters article cited by the Prosecution at DRC-OTP-2020-0513 states that more soldiers were killed at Mianga, namely, ten of them, than civilians, four of them, something which once again confirms that the motivation for the attack was not to terrorise the village residents but to suppress the FARDC.

So before I conclude my examination of the Mianga attack carried out in April 2009, I would like to point out one particularly interesting SMS which Gaston Iyamuremye is alleged to have said to Ignace Murwanashyaka. This SMS is to be found at DRC-OTP-2013-5538 and its translation at DRC-OTP-2021-0202. Here the alleged second vice-president of the FDLR is petitioning, allegedly, the president of the FDLR and telling him that he would send the file concerning Busurungi and Mianga in which, and I quote, "we are accused of having killed the inhabitants."

It is almost as if Gaston is telling Ignace that there are people making false allegations against the FDLR and that Ignace needs to do something to deal with the matter. After all, if Gaston knew that the FDLR had killed inhabitants, why would he say to Ignace "we are accused of killed inhabitants"? Surely he would say: I'm passing you the file of Busurungi and Mianga where we actually killed inhabitants. All this, in my submission, goes to prove, as we shall see later, that even Ignace Murwanashyaka was not receiving positive information as to the commission of crimes by the FDLR.

So now I turn to the notorious, infamous Busurungi incident about which we have heard so much, the incident which occurred in May 2009.

First Prosecution witness, Witness 562. He makes it abundantly clear that the Busurungi incident occurred as a result of the illegal orders of an errant and insubordinate officer who, acting, in my submission, on a frolic of his own, commanded the soldiers under his authority to attack civilians. Witness 562 makes it clear that before the attack on Busurungi was initiated, there was a reconnaissance mission and thereafter a briefing. After the reconnaissance mission, Witness 562 states that the order, and I quote, "... was to go and fight against the soldiers and not the civilian people," and I stress the word "not." Subsequently the witness added that he got surprised when he heard that he and his fellow soldiers had to attack and kill everything that moves, be it a person or animal. This surprise being namely the savage twists to the attack on Busurungi. All this is to be found at ERN-DRC-OTP-2033-0135.

When asked who gave the order to destroy everything that moved in Busurungi, the witness stated the Colonel du Brigade Kalume. Now, this is a name which will be repeated quite a lot in the course of my submission on Busurungi. I refer the Pre-Trial Chamber to DRC-OTP-2033-0141.

Before these atrocities took place, however, there was, according to Witness 562, a fire-fight between the opposing forces so fierce that the villagers were instructed that they had to hide under their beds so that the bullets could not reach them. In any event, the orders for the crimes committed at Busurungi according to this witness were executed by Lieutenant Mandarine, who on instruction -- who was acting on the

instruction of Colonel Kalume after the reconnaissance mission and after the briefing before the attack -- and at the briefing before the attack, I apologise. I refer the Chamber to DRC-OTP-2033-0132.

Now, what is surprising here are the kid gloves with which the Prosecution dealt with this witness who is nothing more or less than a cold-blooded murderer. The OTP offered him immunity from Prosecution pursuant to Rule 55(2), only then to hear his confession as to shooting dead innocent civilians and thereafter totally exculpate the FOCA command from any involvement.

Despite the butchery, Witness 562 states quite frankly that he did not see any incidents of sexual assault during the attack DRC-OTP-2033-0152. Unsatisfied, however, with this answer, the OTP investigator then tried his luck with what must be one of the more bizarre questions in the annals of criminal investigating, and I quote the question and answer:

"Q. But is it also possible that it," namely sexual assault, "happened and some people did it but they would not have told you?

"A. Yeah, it is possible and maybe they kept it confidential because that's a crime."

To be found at DRC-OTP-2033-0159.

The investigator, unsatisfied, then tried exploring whether there were any mutilations at Busurungi, given that the previously mentioned Mandarine apparently had a morbid penchant for cutting off penises as souvenirs. The witness admitted lying in his first interview, as I have mentioned already, DRC-OTP-2033-0176, which obviously destroys his

general credibility and said that he heard about penis mutilations but had not seen such and nor could he tell whether such mutilations were performed on civilians or soldiers, alive or dead, DRC-OTP-2033-0175.

Continuing with Busurungi, let's turn to another witness, Witness 528. He also confirms that the attack on Busurungi was intended to be purely military, and I quote from the Prosecution's summary, DRC-OTP-2040-1389 at 1404. I turn to French.

(Interpretation) "The witness added that civilians also died because of the shots fired and the bullets that had been shot at night. It was impossible to distinguish in the darkness what -- to make out what the target was nor what direction the bullets were travelling in. The witness added that he knew before the attack that he was going to be going off to attack a military position, not civilians in the village of Busurungi."

(In English) That's from the Prosecution's own summary of this witness, an incriminating witness. This witness also, according to the summary and his evidence, knew nothing of alleged sexual violence at Busurungi, DRC-OTP-2040-1389 at 1405. And what is more, stated that a specific order had been given by a certain Colonel Sirusi, that's S-i-r-u-s-i, before the attack that this -- before the attack. Sirusi gave an order that this particular type of aggression, namely, sexual aggression, was prohibited, DRC-OTP-2040-1389 at 1407. Once again I suggest that this just goes to prove that the awful atrocities that were allegedly committed at Busurungi were totally unauthorised.

Witness 542, he also took part in the attack on Busurungi. He

relates, once again, that this was a carefully planned attack on an enemy stronghold where troops had been encamped among civilians, although 542 was told that the order from the operation had come from FOCA, but specifically that the orders to burn houses in the heat of battle came not from FOCA high command but from the brigade, DRC-OTP-2040-1222 at 1240. He stated that the order to burn houses had come from Kalume and that this order was qualified thereafter by Kalume's subordinate Cyrus, that's C-y-r-u-s, who told Witness 542 and his fellow troops that they were to burn houses, and I quote, "once everybody was out. 542 did not testify about the death of civilians but corroborated Witness 528 in stating that if they died, it was unavoidable because of their proximity to FARDC soldiers.

Now perhaps the most conclusive piece of evidence relating to the Busurungi attack, which proves, in my submission, without a shadow of a doubt that it was not a pre-meditated assault on a civilian population, is provided by Witness 587. This witness is an extremely important witness for the Prosecution. I shan't, in mind of Madam President's earlier caution, mention exactly his function, but I will say that he was the eyes and ears of the Prosecution in a certain position he had within FOCA.

I'm wondering whether we could go to private session so I could mention him, his function, just briefly. It is quite important.

(Pre-Trial Chamber confers)

MR. KAUFMAN: It will be the only time I mention it.

PRESIDING JUDGE MONAGENG: Thank you, Mr. Kaufman.

Court Officer, please.

(Private session at 12.02 p.m.)

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(Open session at 12.06 p.m.)

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

(Pre-Trial Chamber confers)

PRESIDING JUDGE MONAGENG: Mr. Kaufman, I understand there's a problem with the French transcript. Do you still want to continue?

MR. KAUFMAN: I was told that I was speaking too fast and that

was the problem with the French transcript. But if it is something which is not connected to the speed of my submissions, then I have no -- may I actually on this matter consult with my client because French, after all, is the language in which he will be consulting the transcript. May I inquire also what the nature of the problem is, perhaps?

COURT OFFICER: Your Honour, if I may, we have lost the connection with the French transcript. It's not related to the speed or the rate of your submissions. We're trying to resolve this issue as soon as possible, and currently the French transcript is not available.

MR. KAUFMAN: If I may just have one short minute to consult with my client.

(Defence counsel and Mr. Mbarushimana confer)

PRESIDING JUDGE MONAGENG: Mr. Kaufman, the problem continues with the transcript.

MR. KAUFMAN: Madam President, I'm happy to say that my client is fully conscious of the tight schedule of this Chamber and he says that there is no problem in us continuing. We will assist him, of course, with any problems that may arise with translating the English transcript.

PRESIDING JUDGE MONAGENG: Legal Representatives, what's your view?

MR. MABANGA: (Interpretation) Your Honour, I believe it is important for us to have the transcript available in French because, as you know, at the end of the various oral submissions we shall have some observations of our own to make, and it would be of import for us to be able to follow in realtime the transcript so that when we have the final

transcript we could perhaps be in a position to see whether there were any mistakes or not. I obviously appreciate the concern of the Defence, but I do believe that it is important for the correctness of our proceedings that the transcript should be available in French as well. Thank you, your Honour.

PRESIDING JUDGE MONAGENG: Are you okay, Mr. Kassongo? Thank you.

(Pre-Trial Chamber confers)

PRESIDING JUDGE MONAGENG: If I may address Legal Representatives, the procedure is that at the end you will have the record, the edited record in realtime. So this is a temporary problem. So we can continue. You will afterwards get the full record.

Thank you very much, Mr. Kaufman, we can continue.

MR. KAUFMAN: So as I said, for reasons which were mentioned in private session, Witness 587 was the eyes and ears of the Prosecution in FOCA high command and he, in my submission, would have known things that were going backwards and forwards between Sylvestre Mudacumura and Ignace Murwanashyaka. Concerning the Busurungi incident, Witness 587 has the following interesting information, and I quote from the Prosecution's summary of his evidence:

"In Busurungi, civilians were killed in April or May 2009. It was announced on the news. In order for Ignace Murwanashyaka to know what really happened in the field, Mudacumura had to report back with a sitrep. This request came via Thuraya, then went via the transmission centre so that Sylvestre Mudacumura could know what happened in the

field. Mudacumura wrote the commander of the Reserve Brigade Kalume," that name once again, "informing him that the president wanted to know if they had really killed civilians."

So what can we learn from this? Well, in my submission, it basically destroys the Prosecution case. Here we have the most well-positioned individual to report on communications from the field to Europe telling us that the death of civilians at Busurungi had surprised Ignace Murwanashyaka and he wanted to know whether it was true. Are these the acts of a man who had planned an attack on a civilian population? Quite the opposite, I submit. These are the acts of a man who had no idea what had gone on at Busurungi.

Kalume replied the following day with a sitrep, stating that civilians were intermingled with soldiers at Busurungi and got killed as well. According to Witness 587, Mudacumura then transmitted this message to Ignace Murwanashyaka via Thuraya. As if there remains any doubt, this well-positioned witness specifically states that he did not hear of an attack being planned on Busurungi. I refer this time not to the summary but to his evidence, 2034-1400, prefaced by DRC-OTP, at 1402. The witness furthermore adds that units which perform attacks such as Busurungi have no direct communication with FOCA high command. What happens is that the units write a sitrep and give it to their commander who in turn refers the sitrep to FOCA.

Witness 587 saw no message transmitted by radiophonie concerning a report to attack Busurungi nor did he see any sitrep that came back to FOCA during -- during the attack on Busurungi, DRC-OTP-2034-1400 at 1402.

Witness 587 was also questioned about the sexual violence committed at Busurungi and stated that no such information had ever reached him at FOCA, documenting such criminal activity. DRC-OTP-2034-1400 at 1408. He also states emphatically that the FDLR code of conduct taught to even the lowest-ranking soldiers forbade sexual violence, DRC-OTP-2034-1411.

To conclude, Busurungi might have been a well-planned attack to oust the FARDC from that village, that locality, but neither Mudacumura or Ignace Murwanashyaka even intended harm to the civilians resident there. Indeed, one of the most senior witnesses who is now a PEXO witness, 672, I mentioned his name in private session, now a PEXO witness of course because he, quite frankly, doesn't support the Prosecution case, and he's a former acquaintance of Mudacumura, he states that Mudacumura was not pleased with some of the things that had happened at Busurungi and he had regretted, that is, Mudacumura, that there had been civilians killed. And Mudacumura blamed those that carried out the attack, i.e., Kalume. I refer the Chamber to DRC-OTP-2029-0893, line 672.

Would you believe it, your Honours, this witness, 672, as I said, the highest-ranking FDLR officer interviewed by the OTP and deemed irrelevant to the Prosecution case, stated, in the presence of Ms. Solano, that Mudacumura told the brigade commander, Kalume, that he should be prepared to go to The Hague for what he had done at Busurungi. DRC-OTP-2029-0893 at line 690. So much for Busurungi.

I now turn ...

(Pre-Trial Chamber confers)

PRESIDING JUDGE MONAGENG: Sorry, Mr. Kaufman, we have received a message to the effect that the French realtime is working now.

You may continue.

MR. KAUFMAN: Thank you, Madam President.

I now turn to the alleged attack on Manje on or about 20/21 July 2009, as alleged in the document containing the charges. For this incident on its list of evidence, the Prosecution relied on the evidence of Witness 693, who, in my submission, is apparently talking about a different incident entirely which occurred almost a whole month earlier, in the month of June 2009. PTC, Pre-Trial Chamber, sorry, is referred to the redacted summary of this witness's evidence at DRC-OTP-2036-1155 at paragraph 10, where the witness adds that the attack was carried out, rather bizarrely, by people who prior to the attack were fraternising with government soldiers, that is the FARDC. Here, the witness quite conveniently identifies his (Expunged) as FDLR by virtue of a signed note which they believed -- which they delivered to him purportedly in the name of the FDLR. That's to be found at paragraph 29 of the witness summary. There was, however, nothing incriminating in this note. And on a more general note, Witness 693 did not experience at first hand any atrocities being committed at Manje, such as murder or arson, (Expunged). And as he said, and I quote from paragraph 17 of his summary:

(Expunged)

(Expunged)

Witness 561, an ex-FDLR soldier, reports having heard that Manje

was attacked by a unit under the command of a certain Captain Barozi, B-a-r-o-z-i, whose name I would ask the learned Pre-Trial Chamber to remember since it is corroborated by the next witness to whom I shall refer, Witness 562. However, of all the witnesses brought by the Prosecution for the Manje incident is probably the most reliable. And don't forget that the Prosecution rely on him as incriminating witness. Witness 562 is the only true eye-witness insofar as he is an ex-FDLR soldier who participated in this attack.

Unlike the unreliable victim witness 693, who stated that the attack started at 10.00 at night on June 2009, Witness 562 states that the military assault started at 3.00 in the morning, DRC-OTP-2032-1371 at 1382. The attack according to this witness, 562, was motivated by the fact that Manje was a stronghold, both for the FARDC and for the local Mayi-Mayi. Quite contrary to Witness 693, Witness 562 does not state that the FARDC troops had left before the shooting began and adds that civilians were caught up in the cross-fire. DRC-OTP-2032-1387. Witness 562 then relates how the FARDC soldiers tried to call for reinforcements by waking up their fellow soldiers who were sleeping at the time. Finally, the FDLR elements shot at the FARDC soldiers and overpowered them, DRC-OTP-2032-1389.

Witness 562 makes it quite clear that the same Captain Barozi, who I referred to earlier, gave a legal order, namely, that the soldiers under his command, including Witness 562, were to set fire to the military position alone. When asked by the OTP investigator whether civilians' houses were deliberately torched, the witness denied the

allegation. This Prosecution witness denied it and stated that adjoining houses could have caught fire from the conflagration issuing from the former FARDC position. DRC-OTP-2032-1389, lines 624 to 626. What I've been saying all along, collateral damage in legitimate warfare.

Unlike Witness 562, Witness 564, another OTP witness for the Manje incident, did not participate in the incident on Manje but, rather, heard about it from other soldiers, DRC-OTP-2030-1269. When he was asked about the burning of houses as a deliberate FDLR tactic, the witness stated that the purpose thereof served a legitimate military aim, and I quote:

"... so every time when they made an attack, they first just had to chase out the enemy. Then they came back. Then put fire on houses so that in case the enemy comes back, they could not find shelters to stay."

DRC-OTP-2030-1279 at lines 357 to 9.

Now, whilst not condoning such a tactic, I don't believe that this is the sort of tactic which should be the subject of a criminal prosecution at the International Criminal Court. Such a tactic is employed by many armies in modern-day warfare. It even has a name, it's called area denial. Of course it has unpleasant consequences for those formerly residing in the burned houses, but when these houses provided cover for army troops, armed troops, and thus provided an essential contribution to the military effort, their destruction is a doubtful crime and perhaps a legitimate military objective. In any event -- well, I see the Prosecution look of a bit of disbelief but then, in my submission, this is something which really should have been investigated

at the time, excluding it at any rate as one of the possibilities that could have been taking place there before jumping to the conclusion that this was a crime, a deliberate torching of civilian houses. In any event, in my submission, Witness 564's evidence creates substantial doubt as to whether the burning of houses was a deliberate criminal act committed against civilians and sanctioned by a superior hierarchy.

Finally, the last Prosecution witness on which they rely for the Manje incident, Witness 632, states that all he knows about the Manje incident he learned from Radio Okapi. The Human Rights Watch report "You Will Be Punished" gives many details concerning the Manje attack of July 2009, stating that at least 30 people were massacred. There is, however, no reason why this anonymous victim-based report should be preferred to that of the other more contemporaneous human rights investigation performed by OCHA, and that's to be found at DRC-OTP-2003-0120. And this report is more circumspect as to the number of dead, stating that it was somewhere around ten, of which number we assert soldiers formed a part. So much for Manje. Moving on.

I now turn to Malembe, an August 2009 incident. In its more detailed list of evidence, the Prosecutor -- Prosecution cited Witness 544 for the evidence of an August 2009 attack at Malembe. This witness, 544, gives a very detailed account of the events which transpired. Apparently Rumuli, one of the most senior FDLR commanders had been suffering military losses at the hands of Mayi-Mayi and FARDC entities who had evicted Hutu refugees from Malembe. He thus called in the infamous Reserve Brigade for support, of which Witness 544 was a

member. Witness 544 specifically states that he was ordered to attack not civilians but the Mayi-Mayi and FARDC troops, to shoot at them, and that's to be found at 2032-1619, prefaced of course by DRC-OTP, at 1628. Interestingly, this witness also stated that there were CNDP soldiers present fighting the FDLR, DRC-OTP-2032-1689.

According to Witness 544, however, this incident was in fact at the start of the year and it was the only incident at Malembe concerning which he had knowledge, not in August. Witness 544 even states that no planning for this Malembe incident was even done before his unit reported to Brigadier General Rumuli, DRC-OTP-2032-1681. How, therefore, does the Prosecution impute this incident to the FDLR leadership as a crime of intent?

The next witness, 542, he didn't fight at Malembe yet he corroborates Witness 544 and states that there was an attack on the same locality. The date is not clear, but the target was quite specifically Mayi-Mayi, according to him, and FARDC soldiers and only soldiers were killed there, i.e., not civilians. That's what he states. DRC-OTP-2033-2198 at 2209, lines 364 to 373. He also states that only enemies' houses were burned, not civilian houses, enemy houses, at 2210, lines 396 to 400.

Next witness, Witness 561, he also stated that the attack on Malembe targeted the Mayi-Mayi and clarified that it was carried out by Cen, that's C-e-n, the special company, according to him, of the Reserve Brigade, at the order of Rumuli. According to Witness 561, this attack happened after the May attack on Busurungi. So we have very

confused dates for this attack on Malembe. And I refer the learned Pre-Trial Chamber to DRC-OTP-2028-1532 at 1536 and 7.

Witness 562 also characterises the Malembe incident in similar fashion to Witness 544; namely, that it was a military operation designed to provide support for General Rumuli, who had been besieged by the Mayi-Mayi in the Bunyarwanda forest, just by Malembe, and had lost 18 of his people, DRC-OTP-2032-1216 at 1272. Like Witness 544, Witness 562 participated in the attack on Malembe. According to Witness 562, Rumuli's orders were specific and delivered, not in advance but in the forest right nearby Malembe. They were told to go, and I quote, "destroy all their positions and throw them in the forest where they came from." DRC-OTP-2032-1216 at line 273. The specifics of the attack were communicated to the troops by various commanders, of which one was an officer called Matovu, DRC-OTP-2032-1275.

The OTP also relies on UNJHRO reports, but I would draw the Pre-Trial Chamber's close attention to the working methodology of this group which is based on interviews with high-ranking officers of the FDLR enemies, namely, the Mayi-Mayi Kifuafa, DRC-OTP-2016-0023 at 0024, paragraph 6, including a certain General Delphin Mbaenda who was supposedly the target of an attack on Malembe in August 2009, hardly an objective witness. The same report makes extremely oblique reference to a further alleged FDLR attack on Malembe on 15 September, but no mention whatsoever is made of any deaths, merely that gun-shots were fired. And I referred Pre-Trial Chamber to DRC-OTP-2016-0023 at 0026, paragraph 20. That's Malembe.

I now turn to the next localities mentioned in the DCC, Ruvundi and Mutakato.

For the attack on Ruvundi, the Prosecution in its list of evidence relied on one sentence in the UNJHRO report from December 2009 which attributes the reported death of an unidentified civilian to the FDLR, 2014-1192, prefaced by DRC-OTP, at 1193, paragraph 5. No explanation is given. It is a meaningless attribution and in the circumstances totally indefensible since it can't be investigated. The history of FDLR activity which I have detailed up till now shows that the FDLR pursued a strictly military agenda, according to the evidence of course, targeting primarily not the civilian population, as the Prosecution would have it, but enemy strongholds. In the circumstances, no evidential weight should be afforded this claim, that the FDLR made an unlawful attack on Ruvundi, a claim which is not even sourced to a credible information provider.

The same may be said for the alleged attack on Mutakato, which is similarly unsourced. Indeed, the UNJHRO report from December states the following for Mutakato, and I quote, and I turn to French:

(Interpretation) "Finally, Mutakato village and Musimya village were attacked at the beginning of December 2009."

(In English) No mention is made of the slightest physical harm caused to a villager nor later in the same report, DRC-OTP-2014-1195, that is, later in the same report when Mutakato is referred to once more.

And to the final locality mentioned in the DCC, Kahole. As for the alleged incident at Kahole in December 2009, the Prosecution in its

list of evidence referred us to the UN Group of Experts report, S/2010/596, dated 29th November 2010, to be found at DRC-OTP-2022-2787, relevant page 2825. However, this report makes no mention of any mention of any village called Kahole. Mention is made of an area called Kalole, with an L. So either this is an example of poor drafting or the Prosecution is indeed alleging that an incident took place in a place called Kahole, with an H, in which case, it adduced no evidence in support. Assuming to the Prosecution's credit, however, that they misread their own evidence and we are indeed talking about Kalole, with an L, then the Group of Experts report states that it is not a village but an area which in the DRC can mean a vast geographical expanse. Only one sentence refers to Kalole, with an L, where nine civilians were supposedly executed. No specific allegation, however, is made in this sentence imputing liability to the FDLR. And even if the reference did directly incriminate the FDLR, it is, like many of the other allegations contained in the various human rights reports, unsourced to any verifiable witness.

That concludes, your Honours, my analysis of the incidents which occurred at the localities mentioned in the Prosecution's document containing the charges.

I can now move on to the mode of liability, but I -- my voice is getting a bit dry and I think I can probably finish this in the afternoon session by 3.30. I am just wondering whether this would be a good point to break. If you would like me to continue, I'm quite happy. I'll just take a big sip of water.

(Pre-Trial Chamber confers)

MR. KAUFMAN: Maybe I'll continue. Maybe that will be better. I'm at your Honours' disposal.

PRESIDING JUDGE MONAGENG: No, we were actually going to grant your --

MR. KAUFMAN: Thank you --

PRESIDING JUDGE MONAGENG: -- request.

MR. KAUFMAN: -- that's very kind.

PRESIDING JUDGE MONAGENG: And instead of us coming back at half past 2.00, we could all come back at quarter past 2.00. Is that okay?

MR. KAUFMAN: That's very good. Thank you very much, Madam President.

MR. STEYNBERG: [Overlapping speakers] --

PRESIDING JUDGE MONAGENG: The session is adjourned until quarter past 2.00.

COURT USHER: All rise.

Luncheon recess taken at 12.43 p.m.

On resuming at 2.18 p.m.

(Open session)

COURT USHER: All rise. Please be seated.

PRESIDING JUDGE MONAGENG: Good afternoon and welcome to this afternoon session.

Mr. Kaufman, you can continue.

MR. KAUFMAN: Thank you, Madam President, your Honours. Good afternoon.

Professor Ambos spoke much this morning about the mode of liability. The benefit of that is that I can considerably cut short my submissions this afternoon. I'd just like to echo one thing that Professor Ambos did say and it's a matter of logic in law, in my submission. Managing a deceitful media campaign, if that is indeed what Mr. Mbarushimana did, which we make no admission in this respect, such a thing is not criminal. And I refer the learned Pre-Trial Chamber to general comment number 34 on Article 19 to the International Covenant on Civil and Political Rights which concerns freedoms of concern and expression. At paragraph 49, the Human Rights Committee expressly states as follows, and let me quote:

"Laws that penalise the expression of opinions about historical facts are incompatible with the obligations that the covenant imposes on States Parties in relation to the respect for freedom of opinion and expression. The covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events."

So the only *prima facie* criminal purpose in this whole episode was, in my view, the alleged plan to create a humanitarian catastrophe by attacking the civilian population, as your Honours found in the decision issuing the arrest warrant. This mantra creating a humanitarian catastrophe has its origins in an order which was allegedly transmitted from Ignace Murwanashyaka to Sylvestre Mudacumura and thereafter to the FDLR troops in the Kivus. And this order was first referred to in the Group of Experts final report at DRC-OTP-2010-0045. Now, the actual

order itself was used by the Prosecution in their submissions and the order is to be found at DRC-OTP-2010-0168.

Mr. Court Officer, if you could perhaps display that on the screen whilst I make my submissions because I will make extensive submissions now concerning this particular order.

COURT OFFICER: This document will be published and it will be broadcasted outside this courtroom because it's a public document unless otherwise instructed.

MR. KAUFMAN: Thank you, Mr. Court Officer. Indeed, we have verified that there is nothing which should not be broadcast on that document.

COURT OFFICER: The document as referenced by counsel is available on the screens.

MR. KAUFMAN: Now, your Honours, paragraph 93 of the Group of Experts report details a conversation held between an FDLR informant and an FDLR radio operator in the field. This conversation which allegedly took place in March 2009 was heard by the Group of Experts and transcribed. As we see, it was appended to the report as annex 18 and, please, I do ask you to pay close attention to the methodology of the Group of Experts, which in my submission is unreliable.

If one looks at this annex, one notices that the title states, and I quote: "Transcript taken down by the Group relating to orders given by General Mudacumura and read out by an FDLR radio operator ..."

Yet this is most definitely not what is said at paragraph 93 of

the report. At paragraph 93, the name of the person who gave this specific order is not given. What the report, in fact, states at paragraph 93 is that, and I quote:

"Dozens of FDLR former combatants have also stated to the Group that orders of this nature must be given by General Mudacumura ..."

That is not the same thing as saying that the order at annex 18 was, in fact, given by General Mudacumura. Once again, I just ask for caution when considering the rigour of the human rights reports and the Group of Experts reports, something which, in my submission, has caused the Prosecution perhaps to build its case on feet of clay.

Let us see what Witness 587, on whom the Prosecution also relies, has to say about this particular order. Although apparently endorsing the claim that Mudacumura gave a general order to burn civilians' houses, what the Prosecution neglects to mention that Witness 587 specified which types of houses Mudacumura desired burnt, namely, those sheltering enemy soldiers. I refer the learned Pre-Trial Chamber to the relevant part of Witness 587's evidence. I think I referred to it perhaps this morning, DRC-OTP-2034-1362 at 1373. Witness 587 takes pains to stress that Mudacumura's order was not to kill civilian people but rather to burn houses, in my submission, which contributed to the enemy's military effort. I quote from line 386:

"He," that is, Mudacumura, "said, 'If you saw soldiers of Congo coming from a certain area, that's the area you have to burn ...'"

As I've mentioned elsewhere, war is not a nice business. Yet it is an oversimplification to say that the burning of houses is always a

war crime, especially when Mudacumura's purely military motives have been established before this Chamber this morning. Indeed, it's the Prosecution's duty and obligation, in my submission, to prove that this was not lawful warfare under the rules of war.

Now, this issue is made even more apparent from the next witness on which the Prosecution relies to prove the criminal plan, Witness 632. Although this witness confirms the fact that Mudacumura envisaged the creation of a humanitarian catastrophe by blocking of roads and evicting people from their villages, forcible transfer, if that is what it is, it is not included, this type of crime, forcible transfer, among the crimes with which Mr. Mbarushimana is charged. In any event, as Professor Ambos said this morning, not all humanitarian catastrophes such as drought or famine are criminal.

In the present instance, the investigator concerned specifically asked Witness 632 asked how Mudacumura instructed the troops to deal with civilians who were on the side of the enemy. Once again, a Prosecution witness, an incriminating witness, states that Mudacumura's answer was that the civilians shouldn't be killed or victimised, and I cite in support of this DRC-OTP-2034-0361 at 0375.

Assuming, however, that Mudacumura did issue an illegal order to target a civilian population per se, the Defence submits - which is denied, of course - the Defence submits that the evidence supporting the allegation that such an order emanated from Ignace Murwanashyaka and thus, by association, within the knowledge of people who might be in Europe, this evidence is extremely weak to say the least. In fact, the

only evidence which the Prosecution has to prove such linkage, namely, that Mudacumura was receiving illegal orders from Europe, is the evidence of Witness 552, the person who was questioned about the Group of Experts report and its annex, 18. But Witness 552 does not state that Murwanashyaka demanded that Mudacumura target the civilian population. What he states is that Mudacumura gave an order that developmental work, that is, infrastructure, should be targeted and that these were Mudacumura's words which were done by Murwanashyaka. I use the word "done" because that's what the witness says, is to be found at DRC-OTP-2030-0448, lines 693 to 694.

Let me stress that Witness 552 was never asked how he knew that this order originally came from Ignace Murwanashyaka. The witness just states that he knew that Murwanashyaka was the overreaching authority in the FDLR, and as a result he concluded - I say "concluded," not that he knew - he concluded that orders as a matter of course had to come from him. That's the linkage evidence which the Prosecution have. When asked, however, about the interaction between the FOCA military in the Congo and the European hierarchy or leadership, Witness 552 said something very telling. In fact, something crucial insofar as it concerns the European politicians' ability to give orders and to dictate battle strategy, if that's indeed what they were doing, which is denied. And I quote from DRC-OTP-2030-0775, lines 479 to 481, as properly translated into French.

I turn to French now and I briefly pause.

(Interpretation) "The soldiers do not ask for any order from

politicians to carry out any given attack. Soldiers prepare an attack and carry it out, but give a report, or rather, give information to politicians once the action has finished."

(In English) I continue in English.

It is not clear, however, by any means at all if Ignace Murwanashyaka actually stated that the civilian population should be targeted. In order to impute a criminal state of mind to Ignace Murwanashyaka, one would essentially have to be convinced of the accuracy of an admission which, as we will discover, is third-hand hearsay. This is extremely weak evidence. And if it is the best the Prosecution has, in my submission, the case should definitely not be confirmed.

In any event, what the witness actually imputed to Mr. Murwanashyaka is clarified elsewhere at DRC-OTP-2030-0400 at page 0406. He says that the order transmitted from Murwanashyaka to the troops via Mudacumura was that the FDLR was to destroy infrastructure, and I quote, "so that civilians are going to shout."

The fact that this alleged order came from Ignace Murwanashyaka is something that Witness 552 heard from another Prosecution witness, Witness 564. And for this I refer the Pre-Trial Chamber to DRC-OTP-2030-0405 at lines 156 to 159. Indeed, Witness 552 himself states that the last time he saw Mudacumura was in 2004, DRC-OTP-2030-0445, lines 601 to 602. Much may be said about Witness 552, on whom the Prosecution relies so greatly. 552 is the source, so the Prosecution asserts, for the declaration emanating from

Ignace Murwanashyaka that the FDLR would be waging a war against the whole world. But assuming that Ignace even said that - which is denied - it is not what the witness said. A proper translation reveals the fact that Murwanashyaka purportedly warned on the eve of Umoja Wetu that there would be fightings against the FDLR by the whole world, DRC-OTP-2030-0445 at lines 652 to 654. It's in Kinyarwanda, your Honours, and so the translation will have to be checked by the appropriate authorities.

Witness 552 even has something to say about Mr. Mbarushimana, who according to him has never been to the Congo and, most importantly, "nor did he have knowledge of attacks before they occurred." Witness 552, a Prosecution witness, an incriminating witness, exculpates Mr. Mbarushimana. I refer you to DRC-OTP-2030-0771.

Now I said that Witness 552 heard about this order from Witness 564, but Witness 564 himself was never asked about this specific order emanating purportedly from Murwanashyaka. Indeed, from the interview with Witness 564 conducted by the German intelligence agency, it is quite apparent that Witness 564 never heard an order from Murwanashyaka, but rather assumed or, should I say, speculated that Murwanashyaka would give orders for big military attacks and revenge operations. It's the type of order that he would give, not that he actually heard it being given.

What 564 did hear was Mudacumura saying that civilian population who were on the side of the enemy would have to suffer. But at no stage did Witness 564 state that this was at the instigation of

Ignace Murwanashyaka. Of course, there is plenty of evidence to contradict the substance of his comments, but when asked to clarify elsewhere, Witness 564 stresses that it was not the general civilian population which was to be targeted - and I do stress this - but rather "those who provide intelligence and spy," DRC-OTP-2030-1199. Witness 564 does not state, as the Prosecution would have it, that Mudacumura was advocating the targeting of the civilian population, rather, specific elements who, once again, were contributing to the enemy war effort.

Now, I want to continue my analysis of this supposed order to create a humanitarian catastrophe by once more referring to Prosecution Witness 632. He remembers a specific order being communicated to the troops in March 2009 which specifically dealt with the civilian population and the infrastructure. He even remembers the details of the roads which Mudacumura supposedly ordered to be blockaded, as set out in the transcript taken down by the Group of Experts. He also uses the words "humanitarian catastrophe" to indicate the state of affairs which Mudacumura wished to create. When asked what was meant by "humanitarian catastrophe," 632 stated that it meant eviction. However, when asked whether that would mean physically attacking civilians, 632 stated, and as I have already mentioned elsewhere, that Mudacumura gave a specific order that civilians should not be victimised or killed.

DRC-OTP-2034-0375, line 476.

Now, I could continue analysing this alleged order all day. The Group of Experts is at pains to stress at paragraph 93, as I said, the orders of this nature must be given by General Mudacumura, who in similar

circumstances consults with Mr. Murwanashyaka. Now, I have no idea on what basis the GOE, the Group of Experts, concludes that Mudacumura would consult with Ignace Murwanashyaka on these matters because nothing in the Prosecution evidence, in my submission, at any rate supports that contention. Nevertheless, Mr. Mudacumura would -- if Mudacumura would consult with Ignace, it does not necessarily mean that Ignace Murwanashyaka approved or gave the order to attack a certain locality.

What is even more bizarre is the fact that despite the continual interception of all of Mr. Murwanashyaka's forms of communication by the German intelligence agency throughout 2008 and 2009, as Mr. Steynberg told you, with thousands of conversations at their disposal, the Prosecution has not produced even one conversation in which Mudacumura was heard seeking Ignace Murwanashyaka's permission for an operation or reporting to Ignace Murwanashyaka the deaths of civilians or receiving from Ignace an order to target civilians.

So if this is the case, how did Ignace Murwanashyaka communicate the order which was transcribed by the Group of Experts? Once again, I just do not know. I don't think the Prosecution does either.

The order as transcribed by the Group of Experts does not even reflect what the Prosecution knows about the manner in which orders were communicated in the FDLR. I refer the Pre-Trial Chamber to the evidence of Witness 677, whose role has been mentioned previously. He states that all orders received by radio from high command contained the date, time, origin, and reference number. The order transcribed by the

Group of Experts contains none of these elements, apart from the month, March.

Furthermore, (Expunged) the order in question, he prefaced it with the words "*ordre d'avertissement*," warning order, order urging care to be taken, caution. This is also lacking from the transcription performed by the Group of Experts, annex 18.

Finally, crucial, and ever so importantly, when presented with annex 18 to the Group of Experts report, Witness 552 stated that he received this specific order in French. (Expunged) (Expunged) (Expunged) (Expunged). After receiving this order, the divisional commander made it clear - and I'm quoting from his evidence, 552 - that civilians should not unnecessarily be killed and even adding to the order the following words in French, and once again I turn to French just to quote:

(Interpretation) "Avoid killing the innocent population."

(In English) "Avoid killing the innocent population."

DRC-OTP-2030-0466 at line 153 and line 154. There is, of course, one other very important witness who refers to this order, and his evidence commences at item 125 on the Defence list of evidence, Witness 672, whose role I told you about this morning in private session. This individual, in my submission, is the highest-ranking individual in the FDLR to have been interviewed of relevance to this case by the OTP and because of his function he would have well had knowledge of the

contents of this order, if it was in fact given. He was also a member of the infamous Steering Committee or *comité directeur*. He was interviewed over the course of several days and when he failed to provide the goods which the Prosecution sought, he was simply discarded as a potentially exonerating witness. I say "discarded," because if I were the Prosecution and I had taken this evidence, given the seniority of this witness, it would have caused me to reconsider whether it was indeed appropriate to continue with the case.

In any event, this witness kept a log-book in which he recorded strategic decisions taken at various high-level FOCA meetings, including, in my submission, the implementation of measures decided upon in *comité directeur*. This log-book, it's a pink notebook, is to be found at DRC-OTP-2030-0010. And what is most relevant is the entry for the same month as the order which we see transcribed at annex 18, March 2009. I refer your Honours to page 74 of the log-book. The log-book is DRC-OTP-2030-0010 and the relevant page is at 0084.

It records the FOCA operational orders, and I quote from this March 2009 entry. Once again I turn to French:

(Interpretation) "Maintain good relations with the local population."

(In English) "Maintain good relations with the local population."

Those were Mudacumura's orders and instructions. How does this conform to the Prosecution theory that Mudacumura and, by implication, Murwanashyaka desired to create a humanitarian catastrophe? It doesn't. That's why the OTP dismissed it and that's why the OTP threw their

highest-ranking officer to be interviewed basically in the bin. So much for the criminal order which allegedly emanated from Ignace Murwanashyaka and then was transmitted by Mudacumura to the troops.

Let us assume, however, for the sake of argument, that there was indeed a criminal plan to create a humanitarian catastrophe which involved attacking a civilian population. The next question we have to ask ourselves is: When did this criminal escapade come into existence? Well, according to the Prosecution evidence which I have just detailed, the allegedly criminal order on which the Prosecution bases its case, this allegedly criminal order which is the manifestation of the criminal plan, has a date. It was given in March 2009. Indeed, if this is the only evidence of the criminal plan or organisational policy to create a humanitarian catastrophe, then I would suggest that the Prosecution has totally failed to satisfy you of a criminal agreement prior to March 2009. In other words, the Prosecution has no evidence to show that the FDLR's alleged involvement in Umoja Wetu or the European leadership by association was the product of organised criminality.

But even assuming that in March 2009 a criminal plan was formulated - which we deny - how has the Prosecution proved to you that all the actors in this criminal enterprise agreed on one and the same thing? The Prosecution would like to have you believe that Mr. Mbarushimana was directly communicating with Mudacumura in the Congo. Indeed, in one of the annexes to its list of evidence, I believe annex C, at page 14, there's an entry which documents a seven-minute phone call allegedly between the two of them. But a close inspection of the

evidence reveals that the Congolese number here does not belong to someone who's called Mudacumura but to a different entity entirely, namely, an individual by the name of Jean Bosco Abimane, whoever he is. That's referenced by DRC-OTP-2016-0081, a document supplied by the DRC authorities and received from a local telephone provider, Vodacom.

In any event and on a more general note, I would just like to add that there is nothing incriminating about the fact that records exist showing that Mudacumura and Mr. Mbarushimana on four or five occasions allegedly communicated with each other. The simple fact remains that before the conclusion is drawn the Prosecution has to prove that the telephone lines in question actually belonged to Mr. Mudacumura, something which it hasn't done. And even if that can be proved, the Prosecution has to show incriminating evidence of incriminating content of these conversations by way of intercept, something which it also hasn't done.

I ask, is there one intercepted communication which the Prosecution has presented to you which shows, even on substantial grounds, that Mr. Mbarushimana, Mr. Mudacumura, and Mr. Murwanashyaka ever had a meeting of minds for the purpose of committing a single criminal act? There is nothing of this nature in the evidence. That, I repeat, is why the Prosecution want you to treat this mode of liability as if it were the extended form of Joint Criminal Enterprise or JCE III. But as Professor Kai Ambos told you this morning, it is not that.

The Prosecution has to show you that Mr. Mbarushimana's envisaged and desired -- both envisaged and desired the commission of atrocity

crimes under the Rome Statute; murder, rape, and all the other sadistic brutalities mentioned in the document containing the charges. This, of course, the Prosecution cannot do.

The most the Prosecution can do is point to some loosely phrased press communiqués where Mr. Mbarushimana allegedly predicted on the eve of Umoja Wetu that awful humanitarian consequences would flow from armed conflict. But how is that knowledge of a criminal plan or contribution thereto? In my submission, it is a statement of the obvious. But you don't have to take my word for it. The NGOs have made similar comments and I refer your Honours to the report of the International Crisis Group of 12th May, 2005, to be found at DRC-OTP-2014-0150 -- 0510, I do apologise. And I quote:

"If peaceful avenues for disarming the FDLR are exhausted, the only solution left will be a military one. The UN mission in Congo (MONUC) will not undertake this task; the new Congolese army, which will ultimately have to do the job with the UN and other international help in logistics and training, is not yet fully ready but it could make a beginning. While this would likely result in more displacement and deaths of innocent civilians, at least in the short run, letting the problem continue to fester is not an option; it could well provoke another crisis ..."

And this is an NGO, actively calling for military action. No difference whatsoever between what is stated here and what is imputed from press communiqués to Mr. Mbarushimana.

At no stage did Mr. Mbarushimana state that the FDLR was prepared

to engage in armed conflict. He, rather, expressed his view that a military attack on the FDLR would be counter-productive, DRC-OTP-2020 at 0504. In almost all of the press communiqués attributed to Mr. Mbarushimana, not only does he not - not - extol the military might of the FDLR, but he actually condemns the use of violence. Let me quote one press communiqué on which the Prosecution relied to prove the contribution of Mr. Mbarushimana to the FDLR war effort. And I cite DRC-OTP-2003-0589.

"The FDLR strongly condemns the various wars that have ravaged and still continue to mourn the Great Lakes region of Africa since 1st October 1990 with the attack on Rwanda by the Rwandan Patriotic Front ... and condemn once again in the strongest terms the various wars that have ravaged the Congolese people, particularly the ongoing war in the Eastern Province and in North Kivu."

Mr. Mbarushimana's condemnation of violence in the Kivus is a theme which runs like a golden thread through all the press communiqués which are attributed to him. But I don't ask you to rely on Mr. Mbarushimana himself for a character reference. I have a much better authority and guarantee of personality. He is a Prosecution witness brought initially to incriminate Mr. Mbarushimana, an individual of high morals and a man of the cloth, Witness 689, who in his statement to the Defence stated that he got the impression that Mr. Mbarushimana had a genuine concern for humanitarian issues and a genuine desire to seek the path of peace.

In fact, there exists very little, if any at all, evidence to

connect Mr. Mbarushimana to what was going on in the DRC. Witness 677, as I have stated, participated in the -- sorry, was at least an audio witness to the events at Busurungi in May 2009. And he had the following to say about Mr. Mbarushimana, and I quote, once again from a Prosecution incriminating witness:

"Mbarushimana had no influence on the soldiers in the fields. He was in Europe, so soldiers did not consider him important."

He adds that when Murwanashyaka was arrested, it wasn't Mr. Mbarushimana who took over, as the Prosecution has alleged so much in the application for an arrest warrant; rather, it was General Rumuli who took control of the FDLR.

I'm coming to the end of my submissions. Last subject concerns knowledge and intent and hopefully I will finish within quarter of an hour, 20 minutes.

Now, at paragraph 135 of its document containing the charges, the Prosecution asserts that Mr. Mbarushimana knew that the FDLR would commit crimes in the normal course of events. As I would submit and as Professor Kai Ambos stated this morning, that's a distortion of the mode of liability and has been criticised. The Prosecution states that Mr. Mbarushimana knew that the FDLR would commit crimes in the normal course of events because Murwanashyaka and other members of the FDLR were transmitting insider information of FDLR crimes. He also had knowledge of such crimes, that is, Mr. Mbarushimana, so the Prosecution says, from credible sources.

So who are these credible sources? Well, Human Rights Watch.

The Prosecution also cites three such sources in one of its various lists of evidence. DRC-REG-0002-0819, an e-mail sent to the FDLR secretariat attaching a newspaper clipping reporting allegations made against the FDLR by the UN Office of Humanitarian Affairs. Number 2, DRC-REG-0001-2517, an e-mail sent to the FDLR secretariat attaching another newspaper clipping reporting what Human Rights Watch had published in April of 2009. And the third item on the Prosecution list of evidence, DRC-REG-0002-0314, an e-mail sent to the FDLR secretariat attaching yet another excerpt from a human rights -- sorry, a humanitarian organisation report.

Is this not the ultimate irony? The Prosecution relies on Human Rights Watch, sometimes exclusively, to prove attacks on certain isolated villages, and despite the fact that it - that is, the Prosecution - bears the burden of showing that Human Rights Watch allegations are actually true, it is nevertheless prepared to impute to Mr. Mbarushimana a criminal state of mind because he allegedly doesn't accept Human Rights Watch reports as being the gospel truth.

Indeed, and as we have shown, given the weak methodology, I would say loose methodology, employed by Human Rights Watch, why should Mr. Mbarushimana have accepted their conclusions as opposed to calling for an international independent inquiry into human rights abuses, as he did time after time in his press communiqués. Yes, Ms. Weiss was correct, he did call for international inquiries. And so, credible sources we've dealt with.

What is this mysterious insider information to which

Mr. Mbarushimana was privy? This insider information which enhanced his knowledge of FDLR criminality? Well, the Prosecution only cites one document for this and that is DRC-REG-0003-2481. This apparently is a letter accompanying the circulation of a draft of the *ordre du jour* of *comité directeur*. From the first line it is clear that the document dates from 2010, especially since it refers to the arrest of Ignace Murwanashyaka and Straton Musoni, albeit there are a lot of numerals and letters apparently referring to documents, but to me, this is complete and utter gibberish. I'm not sure that the Prosecution can make head or tail of it, and that is before they conclude that this is a piece of insider information. It's quite unexplained and totally unfathomable. In any event, as a document which relates to April 2010 or thereabouts, it is completely irrelevant for the purpose of proving Mr. Mbarushimana's knowledge or state of mind at the time pertinent to the document containing the charges.

On a final note I would just like to comment on the numerous handwritten notes which the Prosecution has produced to show that Mr. Mbarushimana was receiving information concerning FDLR crimes. First, it has to be proved that these handwritten notes actually are in the handwriting of Mr. Mbarushimana, something which should not be taken for granted, especially in a jurisdiction where the Prosecution does not offer a suspect the opportunity to be interviewed and to set out his version of events and to confirm that that is, in fact, his own handwriting. This is what is done in most normal police forces. They ask for a handwriting sample for the purpose of graphological examination

and comparison.

In any event, all these notes and e-mails insofar as they may be attributed to Mr. Mbarushimana do nothing more than record allegations published in publicly available sources. There is nothing to suggest that Mr. Mbarushimana was receiving information which was not otherwise available from open sources. And if this was not the case and Mr. Mbarushimana was receiving secret and confidential information, the Prosecution has not proved such even with the tiniest piece of evidence.

So that is all the Prosecution can point to in order to show that Mr. Mbarushimana knew of an intent to commit a humanitarian catastrophe in the Kivus or actively desired such.

I'll now prove to you the complete opposite and I will use evidence which the Prosecution itself has disclosed as incriminating. According to the Prosecution's document containing the charges at paragraph 133, it is alleged that Mr. Mbarushimana's role as executive secretary of the FDLR made him fully aware of the FDLR's goals and activities. And I quote:

"As a member of the Steering Committee," so the DCC continues, "Mbarushimana was in a position to demand information from Mudacumura about the allegations of FDLR responsibility for crimes attributed to the group."

And here, your Honours, the Prosecution has hit the nail right on the head. What it states is that all that was being filtered to Mr. Mbarushimana was allegations not actual knowledge of atrocity crimes. And from where does the Prosecution presume that Mr. Mbarushimana had a

duty to inquire of Mr. Mudacumura? As Professor Ambos said, Mr. Mbarushimana is not charged with a breach of superior responsibility pursuant to Article 28 of the Rome Statute and he had no duty whatsoever even if he knew of the actual commission of crimes, which he did not. But what is more interesting is that which the Prosecution states at paragraph 117 of the document containing the charges, and I quote:

"Mbarushimana's official duties as executive secretary and Steering Committee member required him to engage with the common plan. He performed his functions in accordance with the FDLR Statute and the *Règlement d'ordre intérieur* and in implementation of the decisions taken during the January 2009 Steering Committee meeting regarding the international media campaign ..."

So apparently decisions were taken at this Steering Committee meeting of January 2009 which furthered the criminal plan, according to the Prosecution. Well, we do have a written record of the decisions reached at this meeting. The Prosecution showed it to you and they stressed various paragraphs. I think I remember, if I'm not mistaken, paragraph 36. Well, anyway, it's to be found at DRC-REG-0007-0752 and it was among the documents seized from Mr. Mbarushimana's house. Is this the Prosecution's smoking gun? Is this the star piece of evidence which will clinch the Prosecution's case? Indeed, Mr. Mbarushimana's name does appear as an apparent signatory on the last page of this document. Let us see to what decisions exactly this signature is appended less than two weeks before the outbreak of Umoja Wetu. I refer you to page 3 of the document at the document DRC-REG-0007-0754, paragraph (h), and I turn

into French.

(Interpretation) "Fight with all energy any forms of abuses or acts of violence against the civilian population."

(In English) "Fight with energy all forms of exactions against the civilian population."

It seems pretty clear to me that Mr. Mbarushimana was not plotting any form of attack on a civilian population nor any form of humanitarian catastrophe. He was, if we are to believe this as being imputed to him, positively and actively seeking to dissuade any form of mistreatment of the local population in the Kivus.

Your Honours, that concludes my presentation. Thank you very much for listening.

PRESIDING JUDGE MONAGENG: Thank you very much, Mr. Kaufman.

(Pre-Trial Chamber confers)

PRESIDING JUDGE MONAGENG: We have come to the end of the Defence presentation of its evidence, and we have one more hour to go. We have decided that we should continue and we'll give the parties 30 minutes each to respond and to reply, starting with the Prosecution.

MR. STEYNBERG: Thank you, Madam President, your Honours.

My learned friend has analysed in great detail the evidence presented on the Prosecution's list of evidence over the last several hours. It will obviously be impossible in the time available to respond to each and every of his allegations. We will do so in our written reply. I would, however, like to start by addressing the other Defence counsel who spoke this morning, that is, Professor Kai Ambos, and his

submissions on the mode of liability, in particular the mode of liability under 25(3)(d).

At the outset, your Honours, I should perhaps state that, unlike Dr. Phil Clark, the Prosecution does not dispute the expertise of Professor Ambos, but also unlike Dr. Phil Clark, he is not before the Chamber as an expert witness but as counsel for the Defence, and it is with this in mind that I submit his arguments must be interpreted. Therefore, anecdotes and asides as to what happened in Rome are not evidence before this Chamber and I ask the Chamber to concentrate on the arguments which he presented.

How is this Chamber to assess Professor Ambos's arguments? I submit that it's clear from his stated intention of appearing before this Court as well as the impassioned nature of his arguments that he clearly has a point to make and an agenda to reach. And I don't say that in an underhanded way. I don't mean to impute that -- anything underhanded to it obviously, but it's clear that he has a particular vision of Article 25(3)(d) and what it should say and how it should be interpreted and how perhaps his delegation at Rome intended it to be interpreted. But that, with respect, is not the function of this Court. The function of this Court is not to decide what the law should be but to decide what the law is. We are not here to discuss what or to -- to reflect upon what was discussed at Rome, but rather what was decided at Rome. And in my submission, interpretation of Article 25(3)(d) as it now exists does not accord, with respect, in many respects with Professor Ambos's presentation this morning.

I obviously will not be able to respond to each and every argument which was raised. We will again do so in our written submissions, but let me highlight a few points with which the Prosecution takes issue with the presentation.

And at the outset, perhaps I should just stress that the Prosecution does not, I repeat does not, seek to impute any form of collective responsibility into Article 25(3)(d). The Prosecution alleges that the suspect is liable under Article 25(3)(d) as a result of his individual contribution to the crimes committed by the Common Purpose Group. We do not intend to incorporate any form of joint criminal enterprise nor *dolus eventualis* doctrine nor any other form of corporate responsibility into the Statute.

It seemed that Professor Ambos, counsel for the Defence, may have gained this mistaken impression from the Prosecution's use of the words "common purpose" to describe the mode of liability imposed under Article 25(3)(d). He appears to presume that when the Prosecution uses this term, it intends to convey all that is meant by the term "common purpose" in the ICTY and various other international tribunals where this term is referred to as a term of art. This is not correct, your Honours. The term is merely used as a label - nothing more, nothing less - to describe what is contained in Article 25(3)(d), just as Article 25(3)(a), responsibility is often referred to co-perpetration even though the words themselves do not appear anywhere in that article.

Let me be clear then, when the Prosecution refers to the mode of liability of common purpose it means nothing more and nothing less than

liability under 25(3)(d).

This mis-characterisation of the Prosecution's position is, I submit, symptomatic of learned counsel for the Defence's analysis of both the legal requirements of Article 25(3)(d) and the Prosecution's case theory. And this analysis is, with great respect to the learned professor, in the Prosecution's submission, overly formalistic and out of touch with the realities of the interpretation of law and its application to the facts of a criminal case, as is the function -- or as these functions are performed in the courtroom rather than the halls of academia.

Turning to certain other issues I would like to address. First, possibly the most egregious, is what the Prosecution submits to be a fundamental misinterpretation of Article 25(3)(d) and a mis-characterisation of the Prosecution's argument in relation to the application of subsection (d) to persons who are part of the Common Purpose Group or not part of the Common Purpose Group on the other hand.

I submit that the Prosecution's case - what has never been the Prosecution's submission - that Article 25(3)(d) applies only to persons who are not part of the Common Purpose Group. It is true my colleague Ms. Solano made the point that it does apply to persons who are not part of the group but it was not intended to imply that conversely it does not apply to persons who are part of the group. Quite simply, Article 25(3)(d) does not specify it one way or the other. And perhaps if one reads through the entire article in one go rather than in little pieces, this will become clear. It criminalises any person -- let me

start from the beginning.

"A person shall be criminally liable and liable for punishment for a crime within the jurisdiction of the Court if that person in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose."

There's no requirement there that he be within the group or without the group. And applying the logic which Professor Ambos raised with respect to another issue, if that limitation had been intended they would have put it in there, but it doesn't appear.

So the Prosecution submits that such interpretation is not supported by the plain language of the Statute. Furthermore, it would lead to absurd results. If that were the case, an outsider, a person not part of the group, who is charged under this article could escape liability by getting into the witness box and simply saying: I actually had a meeting of mind with these other people, therefore I'm part of the group, therefore I'm innocent of liability under that crime. In other words, by showing a greater degree of participation, he could in fact escape liability.

In my submission, the framers of the Statute must have intended sub-articles (a) and (d) to fit together as a seamless framework which would not allow persons whose conduct satisfies a certain minimum threshold to escape liability based on such a legal artifice.

Neither, your Honours, is this interpretation consistent with the jurisprudence of this Court. It is contrary to the decision of this Chamber when it issued the arrest warrant for Mr. Mbarushimana and it is

also inconsistent with the decisions in the Darfur I and the Kenya I cases when they issued arrest warrants and summonses respectively in respect of Messrs. Harun and Kushayb, and Ruto, Sang and Ali respectively. In those two cases, Mr. Kushayb and Mr. Sang at least can be described as being part of the group of persons who committed the crime. Nevertheless, the Court found at least reasonable grounds for leave that they could be held liable under 25(3)(d). And the fact that this is not at confirmation hearing merely at arrest warrant stage, in my submission is not that relevant, as this is a legal principle rather than an issue that goes to the threshold of proof.

Turning then to the issue of the type of contribution required by Article 25(3)(d). The learned counsel, Professor Ambos, embarks on an interesting exercise of interpretation which culminates in him concluding, if I understand correctly, that the contribution required or the contribution required by Article 25(3)(d) is at least a substantial contribution if not an essential contribution. This interpretation is, with great respect, flawed in several respects.

In the first instance, as I understand his argument, he starts by incorporating the ICTY's substantial contribution requirement for aiding and abetting wholesale into Article 25(3)(c) of the Statute. Again, one wonders why if that were the intention of the framers of the Statute with the knowledge of the ICTY jurisprudence, that they did not specifically incorporate the requirement that the contribution must be substantial. And I submit that there are sufficient differences between Article 25(3)(c) and the legislation in the ICTY to make it at least

seriously questionable whether this same interpretation would be applied here. In particular, there is a distinctly different subjective element which, in my submission, may have led the framers of the Statute to conclude that the higher objective threshold applied by the Chambers of the ICTY was not necessary under this Statute.

Next Professor -- the next step in his logic is to conclude that the same standard of contribution must be applied to 25(3)(d) as to 25(3)(c), namely substantial contribution, based on the similarity of the words "otherwise assists" in 25(3)(c), and contributes in any other way respectively -- sorry, in 25(3)(d) respectively. In my submission, these terms cannot be equated. If one reads Article 25(3)(c), it is apparent that the "otherwise assists" is intended to distinguish some residual assistance from the words preceding it, namely, aiding and abetting. So the person must aid, abet, or otherwise assist. Interpreted purposively, on the other hand, Article 25(3)(d), the words "contributes in any other way" are clearly intended to distinguish this subparagraph from the preceding subparagraphs. In other words, the contribution is distinguished from the -- is distinguished, let me emphasise distinguished, from the contributions required in the previous paragraphs, including paragraph 25(3)(c).

In light of the clear hierarchical organisation of this section of the Statute, of this article of the Statute, it is clear that the contribution is not only different to the preceding paragraphs, but it also requires a lesser contribution, in my submission. And again, I stress that the Statute does not place any threshold on the contribution

required, such as "substantial," et cetera, et cetera. In my submission, all the Court needs to decide is whether, in fact, his acts did as a factual matter contribute to the commission of the crimes.

Now, turning then to Professor Ambos's interpretation of the Prosecution's case theory. If the Chamber will bear with me, please.

(Prosecution counsel confer)

MR. STEYNBERG: I seem to have misplaced my copy of -- it doesn't matter. I seem to have misplaced by document containing the charges. But in at least two places, the DCC actually deals with how the suspect's actions contributed to the crime, and it specifically refers to - I think it's paragraphs 114 and 122 my learned friend is indicating - how his messages of encouragement assisted to combat desertions and to encourage the troops to continue their loyalty to the FDLR corps to follow the FDLR orders.

Now, we have obviously explained in more detail than was possible within the limits of the DCC and the page limits there exactly how the Prosecution says the accused contributed towards the commission of the crimes as opposed to the ultimate common goal, which was to regain political power. Professor Ambos in his analysis has attempted to - and I don't have a copy of the neat diagram that he presented - but he has attempted to pigeonhole the FDLR plan into neat little water-tight compartments, which, while convenient as an analysis tool or as a visual aid, does not, in my respectful submission, accurately reflect the reality of the situation as presented by the Prosecution case and as supported by the evidence.

The FDLR's goal ultimately, as we've said repeatedly, was to find a way to regain political power. In order to do so, it embarked upon a plan which was in itself fairly complex. And I note that there is an implicit criticism by Professor Ambos that our theory is complex. Well, theories are based on facts and unfortunately the facts are complex. If the facts were more simple, we would have a simpler theory.

But the fact is that in order to obtain this goal the FDLR needed to do two things. They needed to create a bargaining chip. If they had one, they wouldn't have had to create one. I've explained in great detail in my last presentation why their backs were against the wall and why they needed to create some sort of leverage which they could use to achieve their ultimate goal, and that leverage was the suffering of the Congolese people. So on the one hand, they needed to create the suffering, and on the other hand, they needed to get the message out to the world at large that people are suffering and that they will continue to suffer unless you give in to our demands.

Now, these can't be simply separated into two neat little boxes. They are intimately and symbiotically connected. Without the killing of civilians, no amount of public press releases and speeches by Mr. Mbarushimana would have made a width's difference to the international community. And without Mr. Mbarushimana's publication of the suffering of the Congolese people and his implicit extortive message that it would continue unless their demands were met, the killing of the Congolese people, the raping, the burning of houses, would have been nothing more than simple acts of vengeance, but ultimately purposeless.

And in this way, your Honours, both parts of the common plan were interconnected and Mr. Mbarushimana's contribution as the spear-head of the international campaign directly contributed to the continuing commission of the crimes by the FDLR. And let me stress "continuing commission." This is not the case where we have a single crime and we can neatly say, well, this person knew of it before or after, et cetera. We have charged an ongoing course of conduct involving the commission of these horrific crimes over a period of nearly a year. And each, in my submission, each of Mr. Mbarushimana's contributions, press releases, et cetera, contributed directly to the ongoing commission of the crimes that followed for the rest of the year.

I trust that is sufficiently clear. If the Chamber will bear with me, please.

(Prosecution counsel confer)

MR. STEYNBERG: Your Honours, that covers what I wanted to say on the mode of liability. I will deal, perhaps in the closing submissions, in a little bit more detail with my learned friend's submissions on the actual evidence of the Prosecution and in particular with Mr. Mbarushimana's actual contribution. Yes, I think I will end it there. Thank you, your Honours.

PRESIDING JUDGE MONAGENG: Thank you very much, Mr. Steynberg.

Mr. Kaufman.

MR. KAUFMAN: Madam President, I think I have nothing to add because Professor Ambos has quite amply presented the mode of liability from the Defence perspective. I most certainly do not pretend to be

someone who can say it better than Professor Ambos, and I think if Mr. Steynberg has no comments on the Defence presentation of the evidence, then I will certainly call it a day. We, of course, will respond to Mr. Steynberg's comments on the mode of liability in our written submissions. Thank you.

PRESIDING JUDGE MONAGENG: Thank you very much.

(Pre-Trial Chamber confers)

PRESIDING JUDGE MONAGENG: Please give us a few minutes.

Thank you very much. We think we have now come to the end of this session. The next batch will continue tomorrow at 9.00 in this courtroom. We -- I don't think we will need more than one and a half hours, about one and a half hours. So we should be through midmorning. Excuse me.

(Pre-Trial Chamber confers)

PRESIDING JUDGE MONAGENG: And to that extent, the schedule had indicated half -- 20 minutes each for the closing statements of the Prosecution and the Defence. We will be much more flexible tomorrow, maybe 30 minutes for each of you if necessary and then, of course, we will increase the Legal Representatives with a few minutes. Thank you very much.

May I take this opportunity to thank all of you, parties, participants, and staff of the Chamber and of the Court, and of course our interpreters and everybody involved in today's hearing. We shall meet you tomorrow at 9.00. Thank you very much.

COURT USHER: All rise.

The hearing ends at 3.38 p.m.