

1 International Criminal Court
2 Pre-Trial Chamber I - Courtroom 1
3 Situation: Democratic Republic of the Congo
4 In the case of The Prosecutor v. Callixte Mbarushimana - ICC-01/04-01/10
5 Presiding Judge Sanji Mmasenono Monageng, Judge Sylvia Steiner
6 and Judge Cuno Tarfusser
7 Confirmation of Charges Hearing
8 Wednesday, 21 September 2011
9 (The hearing starts in open session at 9.08 a.m.)
10 THE COURT USHER: All rise. The International Criminal Court is now in session.
11 Please be seated.
12 THE COURT OFFICER: Good morning, your Honours, Madam President. We are in
13 open session.
14 PRESIDING JUDGE MONAGENG: Good morning, everybody. Pre-Trial Chamber I is
15 now in session. Court officer, please call the case.
16 THE COURT OFFICER: Situation in the Democratic Republic of the Congo, in the case
17 of The Prosecutor versus Callixte Mbarushimana, case reference ICC-01/04/01/10.
18 PRESIDING JUDGE MONAGENG: Thank you. This morning we will be taking
19 closing statements and, as advised yesterday, the Prosecutor will be given 30 minutes for
20 his statement, legal representatives of victims will be given 20 minutes each and the
21 Defence will be given 30 minutes. We will now start with the Prosecutor.
22 MR STEYNBERG: Thank you, Madam President, your Honours. For the record, the
23 Prosecution team has one extra member this morning. If it pleases the Court, our intern
24 Anna Wanitschek will sit in for this morning's session.
25 Madam President, in the Defence's opening address, my learned friend asked two

1 rhetorical questions which encapsulate the substance of the Defence's arguments: Firstly,
2 how would the Prosecution convince the Chamber and the victims that it was the FDLR
3 and not one of the other militias operating in the Kivus who committed the crimes for
4 which the suspect is charged and, secondly, where does Mr Mbarushimana fit into all of
5 this?

6 As for the first question, your Honours, I would suggest that the victims will need very
7 little persuasion that it was indeed the FDLR that attacked them. They will need little
8 persuasion that it was the FDLR who burnt their houses and looted their meagre
9 possessions. They will need little persuasion that it was the FDLR who killed their loved
10 ones and raped, beat, tortured and mutilated them and their neighbours. They know
11 this all too well, your Honours, because they were there, they saw their attackers and
12 many of them knew their attackers who had been cohabiting among the local Congolese
13 population for many years.

14 As for this Chamber, your Honours, I submit that the evidence of the 15 so-called insider
15 witnesses and the ten crime base witnesses, whose evidence the Prosecution has presented
16 and whose evidence all implicates the FDLR as the perpetrators of one or more of these
17 incidents, will cumulatively have emphatically answered the first question. This
18 evidence, taken as a whole, establishes that the FDLR combatants committed each of the
19 13 crimes alleged by the Prosecution.

20 The evidence presented by the Prosecution does not therefore rest solely on the evidence
21 of attribution based on ethnicity or language, as the Defence would suggest, although
22 these are factors which indeed provide indicia that it was the FDLR that were responsible
23 for these attacks. Obviously, these must be considered in the light of the other acceptable
24 evidence. Neither does it rest solely on raw fieldwork of NGOs, or other international
25 organisations.

1 It is true, however, that the Prosecution has not advanced insider or crime base witnesses
2 for each of the 15 attacks against civilians alleged.

3 PRESIDING JUDGE MONAGENG: Excuse me, Mr Steynberg. Please give us a few
4 minutes. We don't have a transcript.

5 MR STEYNBERG: Certainly, Madam President.

6 (Pause in proceedings)

7 PRESIDING JUDGE MONAGENG: Mr Steynberg, you can continue.

8 MR STEYNBERG: Thank you, Madam President. I was just saying that it is correct that
9 the Prosecution has not advanced insider or crime base witnesses for each of the 15 attacks
10 against civilians alleged.

11 In total, the Prosecution submits that the witnesses advanced establish the FDLR's
12 involvement in crimes against civilians at at least six locations alleged in the charging
13 document; namely, Kipopo, Mianga, the two Busurungi incidents, Mandje, Malembe and
14 the village of Witness 673 and 674. Additionally, they establish FDLR involvement in
15 two further military clashes for which extraneous evidence attributes atrocities to the
16 *FDLR; namely Katoyi and Pinga.

17 Therefore, your Honours, these eight incidents, which are in themselves sufficient to
18 prove a widespread and systematic attack against the civilian population, for these
19 incidents the public reports are in fact corroborated by the evidence collected by the
20 Prosecutor.

21 The Chamber has heard over the last two days how the Defence has painstakingly
22 dissected each individual piece of evidence presented by the Prosecution that could affect
23 the additional seven incidents also mentioned to prove the chapeau elements. The
24 Defence pointed out the individual flaws, both real and imagined, in my respectful
25 submission, and concluded that none of them are worthy of credence or as it was

1 sometimes put that they were open to substantial doubt.

2 The Prosecution submits, however, that when determining whether it has established

3 substantial grounds to believe that the FDLR and not one of the other groups in the Kivus

4 was also responsible for these attacks, the Chamber should take into account the following

5 factors:

6 Firstly, that it was the FDLR who was the target of the Umoja Wetu and Kimia II

7 campaigns. It was therefore the FDLR who had the motive to seek retribution against

8 the civilian populations who welcomed the government forces into their villages. It was

9 the FDLR who issued its troops with specific instructions to attack civilians. It was the

10 FDLR who needed this leverage to secure the political concessions which it sought.

11 It was the FDLR who told its troops to consider civilians, whom they perceived as

12 co-operating with government forces, to be enemies and it was the FDLR who *repeatedly

13 warned the Congolese civilians that they would be punished for co-operating with the

14 government forces; warnings, your Honour, which were echoed in the derisive comments

15 made by the FDLR attackers to their victims.

16 All of these factors, together with the fact that where the Prosecution has managed to

17 obtain crime base or insider evidence this has confirmed several of the attacks attributed

18 by the various organisations; provide, in my submission, the necessary corroboration to

19 establish substantial grounds to believe that the FDLR was indeed responsible for each of

20 the incidents alleged, notwithstanding their individual shortcomings.

21 I should perhaps emphasise, your Honours, that the task of the Prosecution is not in fact

22 to prove the incidents but, rather, to prove the crimes committed. And my submission is

23 that as long as your Honours are persuaded that the Prosecution has provided evidence of

24 each of the crimes alleged in the charging document this will be sufficient to confirm the

25 charges; provided, of course, that the necessary chapeau elements - contextual

1 elements - have also been proved.

2 My colleague, Ms Solano, will shortly address some of the major criticisms raised by the
3 Defence against the Prosecution evidence. These will, of course, be expanded upon in
4 our written submissions. I will now confine myself to making a few submissions about
5 the standard which should be applied to the assessment of credibility and reliability at the
6 confirmation stage.

7 As this Chamber has previously stated, your Honours, the confirmation hearing is neither
8 a mini-trial, nor is it a trial before the trial. I remind the Chamber of this because there
9 were times during my learned friend's presentation when it sounded as if he was
10 presenting his closing submissions at the end of the trial, inviting the Chamber to embark
11 upon precisely the sort of in-depth scrutiny of the credibility and reliability of individual
12 pieces of evidence which, in my submission, is neither anticipated nor in fact possible at
13 the present proceedings.

14 Such an assessment, we submit, can only properly be made after the credibility, reliability
15 and consistency of the evidence has been fully explored through the questioning and
16 cross-examination of the witnesses.

17 As a Single Judge in the Kenya 1 case has recently confirmed, the presentation of witness
18 evidence by way of written statements is to be considered the norm at confirmation given
19 the nature and purpose of the hearing. The Prosecution submits that a fair assessment of
20 the credibility and reliability of such witness statements is simply not possible on the basis
21 of written statements alone.

22 By way of example, my learned friend has directed many criticisms against the so-called
23 insider witnesses. It is true that certain of them have been less than forthcoming about
24 the crimes committed by the FDLR, in particular crimes involving a sexual element. I
25 submit there may be good reasons for this.

1 There may be good reasons why these witnesses would not wish to open up about the
2 crimes they had committed to strangers coming across the sea from The Hague, and these
3 are the sort of issues that can only be fully ventilated and fully assessed after the witnesses
4 have been called to testify and obviously the answers and the explanations they've given
5 have been tested in cross-examination.

6 The Prosecution submits therefore, your Honours, that the assessment at this stage should
7 be limited, firstly, to assessing whether the evidence presented is relevant and admissible
8 and then whether it is in fact able to sustain the charges.

9 I turn now to my learned friend's second question: Where does Mr Mbarushimana fit
10 into all of this, sitting miles away from the Kivus in his Parisian flat. The Prosecution
11 submits that he fits squarely in the middle. He was intimately involved in the affairs of
12 the FDLR and clearly linked to the crimes which were committed.

13 In fact Mr Mbarushimana's flat was a veritable archive of documents pertaining to the
14 FDLR and reports and media articles about his activities, and it is clear that he
15 meticulously tracked any allegations about FDLR atrocities. And the Prosecution
16 reiterates, your Honours, that there are at least substantial grounds to believe that
17 Mr Mbarushimana knew of the FDLR's ongoing commission of the crimes in the Kivus,
18 and I refer to the following facts:

19 As I've mentioned, his knowledge of the repeated public allegations of atrocities levelled
20 against the FDLR by international organisations and reputable NGOs. His de jure
21 position as executive secretary and steering committee member, and this is not to be
22 under-emphasised, he was the fourth highest elected official in the entire FDLR.

23 His de facto position as one of the inner core of leaders, trusted adviser of
24 Murwanashyaka and the leader of the *extortive international campaign and his
25 consistent contact with other senior FDLR leaders who were implicated in the decision to

1 create a humanitarian catastrophe, as well as his access to information from the field.
2 Further, your Honours, the fact that he did not take any appropriate steps to satisfy
3 himself as to the truth or otherwise of these reports, in circumstances I submit an innocent
4 person would have taken those precautions. And, finally, his consistent knee-jerk
5 denials of responsibility in circumstances where he did not and could not have verified
6 the veracity of his denial and in at least one clearly-established incident relating to
7 Busurungi where he positively knew that denial to be false.
8 The evidence, in my submission, goes even further than showing that Mbarushimana was
9 aware of the FDLR's commission of the crimes. There are at least reasonable grounds to
10 believe that he had actual knowledge of the organisational policy to create a humanitarian
11 disaster, given the de facto and de jure positions in the organisation which I have referred
12 to and in particular, your Honours, given his critical role in the implementation of the
13 international campaign to deny the FDLR's criminal activities and simultaneously use it to
14 extort concessions of power.
15 I ask the Chamber to ask itself, would the FDLR have entrusted such a critical role to a
16 person who they kept in the dark about the other side of their organisational policy?
17 That would have been very risky, indeed, in my submission.
18 The Prosecution, therefore, submits that the Chamber should determine that there are
19 substantial grounds to believe that the FDLR in fact perpetrated the crimes alleged and
20 that Callixte Mbarushimana intentionally and knowingly contributed to the crimes
21 committed and, therefore, responsible in terms of Article 25(3)(d) of the Rome Statute.
22 In the time that remains, I would like to hand over to my learned colleague, Ms Solano,
23 who will address a few of the main criticisms. Thank you, your Honours.
24 MS SOLANO: Good morning, your Honours. The Defence has put to your Honours
25 the possibility that the FDLR's 2009 attacks may have been lawful because they were

1 directed against military targets rather than against the civilian population as such. The
2 question is whether the civilian victims of the FDLR's attacks were lawful collateral
3 damage.

4 Counsel for the Defence also asserted yesterday that the crimes committed at Busurungi
5 in particular came as a surprise to the FDLR leadership and that they were the result, and
6 I quote from the transcript of yesterday's hearing at page 49, from line 2, "of the illegal
7 orders of an errant and insubordinate officer."

8 Let me refer to some of the evidence that shows that this was not the case. I will first
9 refer to the question as to whether the attacks were lawful. The evidence I will quote
10 from relates to the three main attacks of Mandje, Malembe and Busurungi.

11 According to Witnesses 562, 693 and 564, the military presence in Mandje was negligible
12 at best when the FDLR burned the village down. According to Witness 693, there were
13 three FARDC soldiers left but these, and I quote from the witness's statement, "... could
14 not do anything to confront the enemy and were killed just like that." Witness 693 was
15 left wondering, and I quote, "Why they also had to burn the village down?" For these
16 three witnesses 562, 693 and 564, the relevant EVD numbers are 0708, 0742, and 0670.

17 Your Honours, the Prosecution submits that attacking a wholly or practically undefended
18 place, as part of an alleged strategy to eliminate all possible shelter for the enemy, reveals
19 an intent to target and punish the civilian population at Mandje rather than to merely gain
20 a military advantage.

21 In respect of Malembe, Witness 562 says that the order was to, and I quote, "Destroy
22 everything." That's EVD-0706, from page 1285, lines 179 to 245. As for the supposed
23 military advantage to doing so, of destroying everything in Malembe, since it appears that
24 that's the Defence's argument, I *note that this witness says that they found one weapon.
25 That's EVD-PT-D06-01280, pages 1290 through 1305.

1 Witness 544 confirms that the orders they received personally from Second Vice-President
2 Iyamuremye were to, and I quote, "Go and shoot at everything they see and burn
3 anything of theirs." This is EVD-1298 on the Defence list, at page 1684.

4 At Busurungi, according to Witness 652, the orders received by the FDLR troops were,
5 and I quote, "... to attack and kill everything that moves, be it a person or a domestic
6 animal. Everything that moves, or breathes, should be destroyed and killed. That is to
7 mean even a civilian breathes and moves." I refer to EVD-0857 at page 1302. This
8 witness, Witness 562, further states that, according to the orders, after the attack
9 Busurungi would need to, and I quote, "... look for another name to call that place."
10 That's EVD-0857 at page 1315.

11 This clearly demonstrates an intention to target both military and civilians alike and
12 constitutes a deliberate attack on the civilians. The reasons why we submit this, your
13 Honours, are clear from the statement of Witness 544, who says that the soldiers were told
14 that, and I quote, "... anybody they see is an enemy."

15 Let me quote further what the witness heard Kalume say, "He said that those militaries
16 and those civilians are the ones who showed militaries where are our refugees. 'If you'd
17 see them, don't leave them.' I've heard him saying those words on the radio." That is
18 from EVD-PT-D06-01292 at page 1564.

19 The same witness recalls that during the fighting Kalume kept repeating those orders on
20 the radio. Witness 561 also says that the orders he received prior to the attack on
21 Busurungi were that, and I quote, "Everything which has breath shouldn't be there at all,"
22 which the witness says he interpreted as, "... an order to annihilate the whole place ...",
23 and I'm quoting, "... as a sign sent to the Congolese that they wouldn't try anything again
24 because they have attacked the Rwandan refugees." That is EVD-0631 at page 1350.

25 Your Honours, such orders framed so broadly cannot truly be considered orders to attack

1 a military target. They reveal an intent to deliberately attack the civilian population, as
2 such.

3 I refer to the evidence of Witness 650, EVD-0597, at page 0117, paragraphs 46 to 48. This
4 witness, who survived the Busurungi attack, recalls that people who were asleep died
5 inside their houses set afire by the FDLR.

6 I also refer to the evidence of Witness 562, who participated with the FDLR in the attack.
7 He said that, "After chasing away the soldiers ...", and I quote, "... then the next step was
8 there were people who were killed by machetes and small hoes and then the incident that
9 I have witnessed with my eyes is that we burned children and women in a house."

10 And the witness said further, and I quote, "And even the one who managed to run away,
11 so we shoot him or her. So after we burned houses and after shooting those who
12 managed to run away, we burnt houses that is the time when a lot of people died,
13 innocent people died. Among them, there were women, children, young people who
14 didn't manage to run away." Those quotes, your Honours, are from EVD-1303 on the
15 Defence list at pages 0130 to 0131. Witness 552 also confirms that the houses were
16 burned after the FARDC had run away. I refer to EVD-0645 at pages 0305 to 0306.
17 Witnesses 683 and 694 are also clear about the fact that, when they were attacked, the
18 government soldiers had already fled. I refer your Honours to EVD-0699 and 0743.

19 Your Honours, Defence counsel submitted yesterday that this alleged conduct by the
20 FDLR, and I quote from yesterday's transcript, "... has unpleasant consequences for those
21 formerly residing in the burned houses." Yes, indeed, your Honours, it does, but that is
22 really a gross understatement of what it meant for civilians in the Kivus to have their
23 dwellings burned to the ground and not being able to return to them, as was the case with
24 Busurungi. I refer here to the evidence of Witness 562 and 560.

25 We submit to your Honours that the evidence provides substantial grounds to believe that

1 the orders to burn the houses were framed so broadly - all of the houses, entire villages at
2 a time - that they reveal an intent to harm the civilian population as such. Certainly they
3 cannot be justified by the laws of combat as the Prosecution understands them.
4 Your Honours, the Defence does not deny FDLR involvement in the attack on Busurungi,
5 but claims that the atrocities committed there were completely unauthorised and that
6 FOCA High Command had no knowledge of them after they were committed.
7 Contrary to this assertion, the evidence provides substantial grounds to believe that not
8 only the attack on Busurungi, but also the crimes committed there, were intended and
9 approved by the FDLR's top command all the way up to Sylvestre Mudacumura.
10 The Defence relies on Witness 562 to suggest that the order to attack civilians in
11 Busurungi was only an order given by a rogue commander and executed by the butcher
12 Mandarine.
13 The Prosecution does not share this interpretation of the evidence. As the head of the
14 largest FDLR unit participating in the attack and as the most senior commander involved
15 in the attack Kalume indeed issued the order to attack the civilians to his troops, but if it
16 were true that the crimes allegedly committed at Busurungi were only Kalume's and not
17 the FOCA High Command's design, if it were true that he issued an illegal order, he
18 would undoubtedly have been removed from his function and punished for his
19 insubordination. Instead, despite having been according to the Defence the person - the
20 sole person - responsible for the most widely condemned FDLR attack in 2009, Kalume
21 remained in his position as head of the Reserve Brigade. As for Mandarine, about a
22 month after the attack on Busurungi he was in fact promoted to commander of a company
23 within the Reserve Brigade, the FDLR's elite brigade, in recognition for contribution to the
24 same attack. Hardly, once again, punishment for his alleged misconduct. I refer to
25 EVD-0762 at page 0061, EVD-1344, at page 0352, and EVD-0634 at pages 1474 to 1490.

1 Your Honours, to suggest that Murwanashyaka was surprised to hear that civilians were
2 killed in Busurungi, the Defence relies on a text message that Iyamuremye sent to
3 Murwanashyaka. It is EVD-0265. In this text message, Iyamuremye said that the FDLR
4 is being accused of having killed civilians in Mianga and Busurungi. This the Defence
5 takes as an indication that Murwanashyaka was not receiving positive information as to
6 the commission of crimes by the FDLR.

7 I would like to draw your Honours' attention, however, to the phone conversation
8 between Murwanashyaka and Iyamuremye that took place shortly after this text message
9 was sent. In it Iyamuremye reports on the events in Mianga and Busurungi and adds,
10 and I quote from EVD-0270, "Some if not all of the soldiers and Mai-Mai refused to leave
11 without their whores, or their entire families. The FDLR FOCA consequently accepts no
12 responsibility should the civilians be killed in the fighting."

13 Another indication that there was no surprise here is to be found in the email that
14 Murwanashyaka sent to Callixte Mbarushimana and others stating that, "In Busurungi ...",
15 and I quote from EVD-08066, "... 37 people died, as well as some of the women, because
16 they spent the night together."

17 Instead of reacting as someone who was truly and honestly surprised, your Honours,
18 shortly after sending out this email Mr Murwanashyaka instructed a high-ranking FDLR
19 commander, and I quote from EVD-0264, "We must keep on giving them a rough time."

20 Counsel for the Defence further mounts this argument about the surprise on the fact that
21 Witness 587, who worked closely with Mudacumura, did not hear about the plans to
22 attack Busurungi. The explanation as to why this witness did not hear about these plan,
23 your Honours, in our submission is quite simple, and that is that Witness 587 did not have
24 access to confidential information, as he says himself in his statement. I refer to
25 transcripts of his interview EVD numbers 1378 at pages 12 --

1 PRESIDING JUDGE MONAGENG: Excuse me, your time is up. Ms Solano, your time
2 is up.

3 MS SOLANO: Yes, your Honour. Thank you, your Honour.

4 PRESIDING JUDGE MONAGENG: Excuse me, you left a sentence midway. Can you
5 complete that sentence, please.

6 MS SOLANO: Thank you, your Honour. I do apologise for that. I was simply putting
7 on the record the relevant transcripts of Witness 587's interview, where he explains that he
8 did not have access to confidential information, and those are EVD numbers: 1378, at
9 pages 1278 to 1280; EVD 1379, at page 1297; and EVD 1379, at page 1298. Thank you,
10 your Honours.

11 PRESIDING JUDGE MONAGENG: Thank you very much.

12 Legal representatives, and please mention your name for the record.

13 MR MABANGA: (Interpretation) Thank you, Madam President. I am Mr Mabanga
14 for Victim 93, who is authorised to participate in the procedure.

15 Madam President --

16 THE INTERPRETER: Interpreter's correction: From 93 victims.

17 MR MABANGA: Madam President, your Honours, I would like to say by way of
18 introduction that, in the light of Article 61(7) of the Statute, what is required of your
19 Chamber, in contrast to the impression that we received throughout the Defence
20 presentation, is not to declare today that Mr Callixte Mbarushimana is guilty of the
21 offences alleged against him. If that had been the intent of the legislators, it would not
22 have been intended for the court of first instance to do so.

23 All you are required to do is consider the evidence submitted to you and judge whether
24 there are substantial grounds for believing that the suspect committed the crimes alleged.
25 We believe that those reasonable and substantial grounds exist on the basis of the

1 evidence submitted.

2 There are events that followed the Umoja Wetu and Kimia II campaigns, and those events
3 are sufficiently well-documented. There is the Human Rights Watch report of 2009, the
4 report of the United Nations of 2009; two documents which the Defence dismisses out of
5 hand.

6 In the documentation, you see that these organisations were largely staffed by people
7 from Kigali, but we believe that the Chamber will avoid taking such short-cuts in
8 assessing their merit.

9 When you look at the report of Human Rights Watch, for example, or even the United
10 Nations' report, those documents will tell you that all of the armed groups that
11 participated in those two operations committed crimes which fall within the competence
12 of this Court.

13 When I take the Human Rights Watch report, the specific facts that are imputed to the
14 FDLR appear between pages 52 and 90, some 38 pages. The facts alleged to the FARDC
15 and LIs are detailed on pages 93 to 124, that is 31 pages.

16 This is by way of indicating that the report is far from constituting some sort of plot
17 against or conspiracy against the FDLR. The report is sufficiently well-balanced; it
18 covers all of the armed groups which participated in these operations without distinction.
19 It is understood that here we are talking about the FDLR because it is the organisation that
20 relates to the suspect Callixte Mbarushimana, who is here before you. If other armed
21 groups were to be brought before your Court tomorrow, then the team would come and
22 make the same submissions with regard to them.

23 Madam President, we have followed the Defence presentation. Essentially it submits
24 that, first of all, there are doubts concerning the involvement of the FDLR in the alleged
25 offences. The Defence also says that accessory to that the relevance of the facts, the

1 material relevance of the facts, is not sufficiently demonstrated. They say that there was
2 collateral damage, there was mortar fire which happened to destroy houses in villages.
3 Incidentally, yesterday they particularly stressed a point, according to which it is not
4 established, that Mr Callixte Mbarushimana is sufficiently responsible under
5 Article 25(3)(d).
6 Madam President, your Honour, with regard to these three points, therefore, I would like
7 to give you a few brief comments; first of all, those elements that identify the FDLR.
8 Madam President, I am not going to go back over those two reports which clearly
9 implicated the FDLR in all of the crimes which today are alleged against the suspect.
10 What I'm going to do today is give you other indications that the FDLR was truly
11 responsible for the attacks, which are described in the charging document. I am not
12 going to stress the language issue, but one of the indicators is that the FDLR is essentially
13 an armed group made up of Rwandans who speak Kinyarwanda. That is only one
14 element, but I will give you other considerations as well.
15 Your Court should be concerned if it were to hear that people alleged that the attackers
16 were FDLR speaking Chumba, Lingala or Kilombo. When you hear, however, that they
17 are speaking Kinyarwanda that is a clue to their identity.
18 The second such clue is that these soldiers were recognised by the victims. You even
19 have one victim -- now, we are in open session so I will not cite the victim's number, or the
20 name of the village, but you have one victim who says "During the month of
21 February 2009 the Interahamwe (FDLR) --" in the charging document you have been told
22 why most people locally called the FDLR the Interahamwe "-- the Interahamwe (FDLR)
23 arrived in my village. They took me, they tortured me and they forced me to work,
24 carrying their loot into the Ziralo forest (Bishewa) for a period of two weeks as a prisoner
25 until the day I escaped."

1 When somebody has been abducted, who has been forced to carry looted property, who
2 has lived in the FDLR camps for two weeks, and you tell that person "No, no, you have no
3 way of knowing that the people who abducted you are FDLR," that quite simply
4 constitutes an incoherent method of Defence.

5 There are victims. There are women who were held in sexual slavery, who were in the
6 FDLR camps. There is even one who said "I personally saw one of our attackers, who
7 had a scarf around his neck which had the FDLR insignia embroidered into it and he wore
8 that scarf constantly." Now, these are some of the elements identifying the FDLR which
9 appear in the documentation.

10 There is another element. Now, we've heard in this hearing that there are doubts
11 concerning the identity of FDLR soldiers, but I would say that these FDLR soldiers in the
12 field were not hiding their identity. They were stating openly "We are FDLR. We have
13 lived among you for a long period of time. Your government wants to drive us out.
14 Well, you are the ones who are going to pay for that." That is what victim 123 and 11
15 says.

16 In the form, when he is -- when this person is asked "What enables you to identify the
17 authors of this crime?", this victim, this woman says "They are FDLR. They said so.
18 They stated that they were the masters of the land and the fields. They were not hiding
19 their identity."

20 Now, we are in a hearing here today. I understand the argument, the doubt we may
21 have here today, but out there in the field they had control over the villagers. They were
22 the masters of the land; they had no reason to hide who they were or to hide their identity.
23 A final clue that I would like to add, going beyond what may be in the file already, the
24 method - the FDLR method - Madam President, your Honours, as I told you earlier, at the
25 beginning of my presence, all of the armed groups committed crimes that fall within the

1 jurisdiction of your Court.

2 But what is specific to the crimes alleged against the FDLR is that, first of all, these
3 soldiers, if I may put it this way, implemented a systematic scorched-earth policy. It was
4 not it was not mortar fire which targeted all of these villages or houses; the witnesses who
5 are victims, who were personally affected, have said and stated that they saw these FDLR
6 soldiers coming. Those who were lucky managed to escape, took some of their property,
7 and their houses were burned; but those who were unlucky, were burnt in their houses.

8 A systematic scorched-earth policy, that is the FDLC method.

9 A second method and most of the victims who have submitted applications before this
10 Court have said that these were people who were distinguished by a particular type of
11 cruelty, particular cruelty, such that for the victims simply dying was a fortunate escape.
12 If you died through a simple bullet, you had got off lightly. That was not enough in this
13 case; death was accompanied by atrocious suffering. People, women, children, young
14 and old were locked into their houses and their houses were set on fire.

15 For the women, rape alone was something which was acceptable, so long as it was not
16 accompanied by violence, by cruelty, particularly severe cruelty, such as the introduction
17 of sharp objects into their vaginas, such as execution carried out by shooting into the
18 genitalia of victims.

19 Madam President, I'm going to cite a single example. Victim A/2181/11, this victim states
20 as follows in the form filled out: He says, excuse me, his mother was killed by machete.

21 His house was burned. He lost his personal property. She was traumatised by the
22 shooting and the decapitation of her mother.

23 Madam President, I'm giving you this quote to help you to realise that when read the
24 charging document, in the introduction to that document particular stress is quite rightly
25 laid upon the link between the FDLR and the Rwandan genocides.

1 While it is true that many of the soldiers of the FDLR were very young at the time of the
2 genocide and, therefore, cannot reasonably be alleged to have participated in that
3 genocide, that is not true of the main leaders, the main commanders, including the
4 operational commander himself, Commander Mudacumura, who himself was a former
5 soldier of the Rwandan Armed Forces. And all of these armed soldiers, many of whom
6 were in Kigali, committed genocide and then came to settle in the Democratic Republic of
7 the Congo after 1994. Various armies succeeded each other and then the FDLR was in
8 place as from 2000.

9 They tried to wipe the slate clean in a way, but we know that within their ranks the
10 leaders were people who were in Rwanda in 1994 and there, Madam President, it is to this
11 day sufficiently well-known that the Rwandan genocides were characterised by
12 particularly severe cruelty.

13 I would like to quote a short passage of the judgment of 3 December 2003 of the
14 International Tribunal for Rwanda in the matter of Jean Bosco -- Jean-Pierre Bosco. This
15 is what was said, Madam President, in paragraph 119: "The witness described how he
16 hid in the ceiling of a dairy in 1994, after the Interahamwe and the soldiers launched
17 grenades and shot into the room in which he was hiding. He heard them come in and
18 finish off with knives those victims who were not yet dead, cutting open the abdomen of a
19 pregnant woman and pulling her baby out of her body before killing her.

20 Witness FY mentioned the death of Daniel Kabaka on 7 April 1994. When the rest of his
21 family had run away, Shin (phon), his 12-year-old daughter, had stayed behind with him,
22 saying that she wanted to die with her father. She took three bullets to the chest and
23 died immediately -- "He received three bullets ...", excuse me, "... and then two bullets
24 were fired upon the daughter, who died two weeks later;" acts of cruelty which you will
25 observe to be perfectly similar to the acts of cruelty described in the two reports and also

1 by our clients.

2 Madam President, that is to demonstrate that far from there being an international
3 conspiracy against the FDLR, the facts are sufficiently well-documented. There are
4 sufficiently serious specific and concordant indicators today concerning the responsibility
5 of the FDLR for the crimes that are alleged against them.

6 Secondly, Madam President, about the material reality of the facts, I won't go into this in
7 any detail, but the facts speak for themselves. We are told that there is not sufficient
8 evidence, that this is collateral damage and that, and I quote the Defence Counsel,
9 transcript of the hearing of 19 September 2011, page 74, lines 1 to 7, where he says, "I have
10 difficulty in believing that the Pre-Trial Chamber will base itself on non-identified
11 sources."

12 But, Madam President, first of all we are not talking about unidentified sources and, as
13 pointed out quite rightly by the Prosecutor, we are not here at trial. This might happen if
14 you so decide and then all these people the Defence believes are not identified will come
15 and speak to the Court. However, Madam President, here before you, right here before
16 you, there are victims being represented who went through all this and declared quite
17 clearly that the FDLR were the ones to commit those deeds against them.

18 Let me finish, Madam President, by saying that, as for the responsibility of Callixte
19 Mbarushimana under Article 25(3)(d) - and this will be my final words - well, one doesn't
20 really understand what the Defence wants, because the Defence says that
21 Mr Mbarushimana wasn't truly responsible and in fact when the president died
22 Iyamuremye replaced him, but at the same time it is said that 25(3)(d) does not relate to
23 the persons who were in the main circles of decision-makers. Well, in that case there is
24 no problem.

25 Madam President, you are signalling to me. I have finished and for the time being I will

1 stop there.

2 PRESIDING JUDGE MONAGENG: Please introduce yourself and you have 20 minutes.

3 MR KASSONGO: (Interpretation) Thank you, Madam President.

4 Madam President, your Honours, first of all I'd like to thank you on behalf of all the
5 victims. My name is Mr Kassongo and I am representing 37 victims.

6 This day is coming to an end and our wish here is to make an observation first of all in
7 terms of the words, but moreover the details which will be contained in written
8 submissions.

9 Madam President, I would now like to talk about the words; the words used by
10 Mr Kaufman. Let me take up his words as regards two things: The facts, but even
11 more importantly in law which I will develop later on.

12 Madam President, words are in themselves powerful, but they also have their weaknesses.
13 To develop its arguments, Defence used the word "falcon" in opposition to sincerity. I
14 am summarising what was said by Mr Kaufman in French, in the French translation,
15 saying that, "Callixte Mbarushimana is not a falcon. He is sincere."

16 THE INTERPRETER: If the interpreter understood correctly.

17 MR KASSONGO: (Interpretation) Now, for the victims that I represent here today, the
18 suspect is not sincere. He is insincere - he is - because the strategy developed by the
19 suspect is exactly in line with the strategy of a hawk. The truth must be dressed up,
20 concealed. What is of the essence is to improve the image of the FDLR in the media at all
21 costs. We must present an image of a movement that is capable of negotiating on an
22 international scale and, to use another word, one capable of geopolitics. It is true that the
23 region of the Great Lakes attracts enormous attention in respect of geopolitical
24 considerations.

25 Madam President, the Defence, to develop a negative thesis, bases itself on statistics.

1 Statistics are figures. Figures represent victims - the victims. In the eyes of the victims
2 that we represent here today, the figures are meaningless. Perhaps in order to destroy
3 the truth by basing oneself on the minimal version of these figures but, in the eyes of the
4 victims that we represent here today, those figures can be revised upwards.

5 Simply when children are involved, foetuses are removed from wombs, people are burnt
6 to death, well, it's difficult to give figures and to actually reflect -- that actually reflect a
7 criminal reality which goes much further than the estimates that are challenged so
8 strenuously by Defence.

9 Madam President, we believe that words have meaning. When one talks about
10 punishment, that gives a certain meaning to a certain action. The victims believe that
11 there are no facts without actions and that the actions follow on from the facts. The
12 brutality of revenge, the brutality of words, those words conceal actual criminal policy.

13 Madam President, we are not talking about one single crime perpetrated. We are talking
14 about several crimes that arise from a series of facts, or deeds. The words used by the
15 Defence to reduce the scope of the criminal cruelty which is unacceptable to -- in the eyes
16 of the victims. It is unacceptable to the victims that we represent to see behind what the
17 interpretation given of 25(3)(d) - Article 25 (3)(d) - of the Statute that is negationist, based
18 on words.

19 Madam President, your Honours, the victims believe that today what is expected of the
20 Chamber, or the Court, is not to interpret words, to translate words. No, of course not.
21 It is a matter of applying law.

22 The facts are established. The reality of the crimes is unchallenged. When the Defence
23 challenges the responsibility - questions the responsibility - of Mr Mbarushimana, we're
24 not talking about words. The word that is bandied about here, well, in other words
25 imaginary or actual responsibility, in any case the interpretation of the law must not allow

1 reality to be set aside. The reality at hand is a criminal one. The words used, "collateral
2 damage," cannot conceal what actually happened on the ground.

3 The Chamber will not be interpreting in an extensive fashion not only the Statute, but also
4 international criminal law, customary law. What is at hand here is to apply the law as
5 already written.

6 The victims believe that through the arguments developed, in order to deny the
7 responsibility, the criminal responsibility of the suspect, goes against their interests.

8 Words are an argument that must be set aside. In other words, challenging those reports,
9 challenging the contribution, challenging the materiality of the facts, the victims that we
10 represent here today have a single concern now and that is to urge the Chamber that it
11 should confirm the charges.

12 I won't repeat what my learned colleague said, who so effectively demonstrated this, but I
13 certainly go along with his observations. I would like to express the worry, the concern
14 and the interest of the victims and, moreover, their expectations as to the outcome of
15 today's hearing.

16 The Court will have time to look at the merits, but let me end with a quotation because
17 here, we talk about words and expressions, "Those who want peace must prepare, must
18 make ready for war."

19 The reason the suspect took the trouble to take on this role that created the specific
20 conditions for peace, it was in order to conceal a criminal reality. For what reason would
21 he take the trouble to take on this role on behalf of the FDLR? The devil is to be found in
22 the details. Behind words one can find the criminal reality.

23 In any case, all of the victims that we represent anticipate one thing and one thing alone,
24 as I said earlier on: Confirmation of the charges in accordance with the arguments
25 brought forward by Prosecution. Thank you very much.

1 PRESIDING JUDGE MONAGENG: Thank you very much, Mr Kassongo. Mr Kaufman,
2 and for the record inform as whether your composition has changed.

3 MR KAUFMAN: Thank you, Madam President, your Honours.

4 Today was meant to be closing submissions but from Ms Solano's intervention it sounded
5 rather like a *damage limitation exercise. Of course, if one looks hard enough, she
6 might find evidence from a victim or a foot soldier who states something that would
7 counter the Defence suggestion that Busurungi was a military attack, but that is not the
8 issue here. The issue is: How has the Prosecution analysed the whole of its evidence?
9 The onus is on the Prosecution to prove the unlawfulness of the attack. It is not on the
10 Defence to prove the opposite, namely, the lawfulness, and with the serious contradictions
11 that I have shown, how can it be said that the Prosecution has proved their case even on
12 substantial grounds?

13 Ms Solano tries to impute authorisation for the attack on Busurungi from the fact that
14 Kalume was not disciplined but promoted. Well, how does she reconcile the evidence of
15 Witness 672, that oh so important officer who they just decided to disregard? He says
16 that Mudacumura was furious with Kalume. He says that Kalume should have prepared
17 himself for The Hague. The fact that he was promoted is irrelevant. Maybe the
18 Prosecution should be knocking on Mr Mudacumura's door and seeking to impute him
19 Article 28 liability, but what's the relevance to Mr Mbarushimana?

20 I turn to Maître Mabanga, who spoke very passionately, as is his want, as how the victims
21 knew the identity of their attackers? They were, as he stated, Interahamwe, but he has
22 totally missed the point. How can his victims be certain that these attackers were FDLR
23 and not one of the splinter groups, RUD or Rasta? Of course he does have a certain
24 advantage. He can refer to the many victims' applications that were filed. Remember
25 the one he referred to, with the scarf, and on that scarf written FDLR? Well, the Defence

1 has no idea where this place was, where this attack took place because it was redacted,
2 and I would suggest that the Honourable Chamber cannot rely on this evidence as means
3 of proving crimes committed by the FDLR. It would be totally unfair to the Defence.
4 I would suggest that it is a very poor form of legal analysis to exploit the horrors of the
5 Rwandan genocide, as Maître Mabanga did, in order to impute liability to Sylvestre
6 Mudacumura. In fact, listening to Maître Mabanga, I think he probably just got on the
7 wrong plane when he arrived in The Hague. Maybe he should have just booked his
8 ticket for Arusha.

9 Now, your Honours, to this day I am still not sure what exactly the Prosecution wants
10 from my client. In English there is an expression: "You will be damned if you do and
11 damned if you don't." If Mr Mbarushimana was, as the Prosecution claims, contributing
12 to the elusive criminal common purpose by masterminding the FDLR propaganda
13 machine, what on earth could he possibly have done, according to the Prosecution case
14 theory, in order to avoid criminal liability?

15 If he denies allegations of crimes he's guilty and if he admits to allegations of crimes he's
16 even more guilty. It's a no win situation.

17 Remember what Ms Bensouda told you, the Deputy Prosecutor herself, and I quote:
18 "Callixte Mbarushimana contributed to those crimes by carrying out an international
19 campaign aimed at refuting the allegations of crimes perpetrated by the FDLR despite
20 their veracity."

21 Now, maybe Ms Bensouda thinks that I am also committing a criminal offence by
22 standing here today and likewise refuting the allegations of FDLR criminal activity in the
23 Prosecution charge sheet. Indeed, why not let us just take it one step further? Why not
24 just agree that Mr Mbarushimana's statutory right to plead not guilty actually means
25 confessing to guilt and we can all go home for tea without the expense of having an

1 expensive and costly trial.

2 What an upside down world we have entered and why have we stumbled, I submit, into

3 the realm of prosecutorial fantasy? Because the Prosecution does not have a clue on how

4 to present the mode of liability. In fact, the mode of liability in this case has become

5 somewhat of a moving target, as Professor Ambos said, in contravention of the Defence's

6 right to know the nature of the charges which have been presented against

7 Mr Mbarushimana. The creation of a humanitarian catastrophe according to the Deputy

8 Prosecutor was, "Intended to prompt the international community to compel Rwanda to

9 accept the return of all FDLR members in all impunity for *their previous actions."

10 She also stated that Mr Mbarushimana participated in these crimes by orchestrating the

11 campaign of FDLR extortion to convince the entire world that the atrocities would not end

12 as long as Rwanda did not give into FDLR commands. She said it so eloquently and

13 without batting an eyelid, despite the inherent and obvious contradiction in the

14 Prosecution case theory.

15 After all, how could the FDLR possibly extort concessions through committing crimes if it,

16 at the same time, according to the Prosecution, was denying the commission of these very

17 same crimes?

18 What sort of extortion is that? Fairly non-effective, I would say. I think the Prosecution

19 should just come clean and admit that it has been guided by what it asserted in paragraph

20 125 of the document containing the charges. The FDLR, as they said, is not a legitimate

21 political party. Says who, I ask? Says the United Nations, is the answer.

22 For this reason, membership of the FDLR could be a criminal offence, as Professor Ambos

23 said, in a country which has *proscribed membership of this organisation. But this is not

24 the case as Professor Ambos also said at international law.

25 We do not punish people for membership of organisations. It is almost as if the

1 Prosecution is saying: If the FDLR is not legitimate, then everything it does is not
2 legitimate, whether it be engaging in military combat, in complete accordance with
3 International Humanitarian Law, or presenting its ideology to the world.
4 The simple truth of the matter is, and I stated it right at the outset, the world community
5 was baying for blood. It needed to have a high profile culprit here in The Hague. It
6 couldn't have Bosco Ntaganda because President Kabila wouldn't hand him over. It
7 couldn't have Laurent Nkunda because President Kagame wouldn't hand him over. The
8 Germans had already got Ignace Murwanashyaka and Straton Musoni, and that left only
9 one other prominent person who had spoken out about the conflict in the Kivus, but the
10 Prosecution had a problem. They couldn't place Mr Mbarushimana in a chain of
11 command for Article 28 despite their claim, which we dispute, that he was a leader.
12 They couldn't show he was making any form of concrete and essential contribution to
13 criminality despite their claim that he was a linchpin. All they could point to is what
14 Mr Mbarushimana has never hidden: His sympathy for the cause of the FDLR and its
15 call and only its call for regime change in Rwanda and its advocacy of the rights of Hutu
16 refugees. So let's make no bones about it.
17 What the Prosecution has done, as I've said, with superb sleight of hand, has been to
18 criminalise free speech. Nothing less than that. Now as hard as the OTP has beavered
19 away, burning the midnight oil, trying to pick holes in my critique of its evidence, one
20 glaring fact remains: The document obtained from the group of experts with the
21 transcribed order is the only piece of evidence which speaks to the creation of a
22 humanitarian catastrophe, and in respect of Mr Murwanashyaka it is a fifth-hand hearsay
23 document, received by the group of experts from a radio operator who transcribed
24 something somebody else communicated to him as having purportedly originated from
25 Mudacumura, who allegedly heard it from Murwanashyaka; one, two, three, four, five, a

1 fifth-hand hearsay document, which the Prosecution cannot prove was known of by
2 Mr Mbarushimana.

3 How can this be reconciled with the log-book of Witness 672 which detailed the FOCA
4 order to maintain good relations with the local population?

5 How does this fit in with Mudacumura's explicit instruction, according to Prosecution
6 witness, that the civilian population should not be killed or victimised? How finally
7 does this tally with the decisions taken at Comité Directeur, the steering committee, in
8 January 2009, of which Mr Mbarushimana was allegedly a member and called for the
9 avoidance of all abuses of the local population?

10 In my submission, the Prosecution has not analysed its evidence. It has selected the few
11 things which it thinks can support its outlandish case theory.

12 What is more, cognisant of the weaknesses of its own case, the Prosecution has tried to, in
13 my submission, distract your attention criticising on at least two occasions the expertise of
14 Dr Phil Clark. "He's only held his PhD for six years," said Mr Steynberg. What sort of
15 critique is that? Now, Mr Steynberg is a very experienced Prosecutor but he has only
16 been at this Court for one year. Does that make him any less qualified to pronounce on
17 matters of International Humanitarian Law? "He is not of sufficient expertise on the
18 subject at hand," said Mr Steynberg, "save for a couple of articles." I'm not sure whether
19 Mr Steynberg read the same report as I commissioned, but I will quote from its
20 introduction as to the expertise of Dr Phil Clark. "As an expert on causes of legal and
21 non-legal responses to conflict in the Great Lakes, I have conducted 23 months of field
22 work in the region, including seven months in eastern DRC, over the last eight years and
23 more than 1,000 individual interviews with suspected and convicted perpetrators and
24 victims of serious human rights violations, national government and judicial officials,
25 domestic and international defence and prosecution lawyers, local and international NGO

1 observers and members of national populations both locally and in a diaspora. Since
2 2006 I have conducted more than 450 field-based interviews in eastern DRC and Northern
3 Uganda, which form the basis of a nearly completed book project on causes of conflicts in
4 these countries, as well as the efficacy of international, national and community-based
5 transitional justice mechanisms."

6 Now, Mr Steynberg with his jaundiced view, and perhaps instructions to defend his case
7 at all costs, might not think Dr Clark an expert, but others do, including organisations
8 which he has advised on his work product -- and on whose work product, I am sorry, the
9 Prosecution relies as evidence in this case, such as the United Nations Office of the High
10 Commissioner for Human Rights and the International Crisis Group. Dr Clark has
11 advised the UK Foreign Office and the International Criminal Tribunal for Rwanda on
12 issues relating to the conflict in the Great Lakes region.

13 How can Mr Steynberg say, with a straight face, that Dr Clark is not an expert on the
14 matter at hand? I challenge him to find someone more expert. Well, he certainly had
15 his opportunity but as you see, the Prosecution brought no one, not even their erstwhile
16 witness Dr Gérard Prunier, with whom I also spoke and who recommended Dr Clark.

17 Your Honours, the burden of proof is on the Prosecution and it has to satisfy you that
18 substantial grounds exist to believe that Mr Mbarushimana committed the crimes with
19 which he has been charged.

20 What is the meaning of the word "substantial"?

21 Well, it has of course to be more than "reasonable." Webster's dictionary provides the
22 following definition: "Considerable in quantity, significantly great." Webster's
23 dictionary provides the following synonyms, "Big, consequential, monumental, weighty."

24 Can anyone in this courtroom honestly say, after hearing and having heard the evidence
25 in this case, that the Prosecution has satisfied you of the substantial nature of its case?

1 Your Honours, I ask you to refuse to confirm the charges against Mr Mbarushimana.

2 Thank you for listening.

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

4 This concludes the formal presentation of closing statements.

5 Now, before we rise, I wish to make the following reminders: We set the date of

6 6 October for the Prosecution and legal representatives of victims to file their written

7 submissions. 21 October 2011 for the Defence, and we also are allowing 50 pages each to

8 the Prosecution and the Defence, and as we mentioned earlier, 25 pages each for the legal

9 representatives of victims.

10 At this juncture, and on behalf of the Chamber, I wish to thank the Office of the

11 Prosecutor's team, legal representatives of victims, the Defence team, and of course

12 Mr Mbarushimana himself, for their very helpful participation in this hearing.

13 I also wish to acknowledge the efficiency with which Court interpreters and reporters

14 discharged their tasks during the hearing and in particular their availability to the Court

15 and the Chamber all the time.

16 Let me also thank all court officials and Chamber staff and my colleagues, the Judges, for

17 their very useful participation.

18 Please give me just one minute. And on behalf of the Chamber, if there is nothing else,

19 especially from Mr Kaufman, you are fine? Thank you. On behalf of the Chamber, I

20 declare the confirmation hearing proceedings in this matter closed. I thank you.

21 THE COURT USHER: All rise.

22 (The hearing ends in open session at 10.38 a.m.)

23 CORRECTIONS REPORT

24 The Court Interpretation and Translation Section has made the following corrections

25 In the transcript:

- 1 *Page 3 line 16
- 2 "...to the FDLC; namely Katoyi and Pinga." Is corrected by "...to the FDLR; namely
- 3 Katoyi and Pinga."
- 4 *Page 4 line 12
- 5 "...who repeated warned the Congolese civilians..." Is corrected by "...who
- 6 repeatedly warned the Congolese civilians..."
- 7 *Page 6 line 24
- 8 "...the leader of the extorted international campaign..." Is corrected by "...the leader
- 9 of the extortive international campaign..."
- 10 *Page 8 line 24
- 11 "...I know that this witness says..." Is corrected by "...I note that this witness says..."
- 12 *Page 23 line 5
- 13 "...it sounded rather like a damaged limitation exercise." Is corrected by "...it
- 14 sounded rather like a damage limitation exercise."
- 15 *Page 25 line 9
- 16 "...all impunity for the previous actions." Is corrected by "...all impunity for their
- 17 previous actions."
- 18 *page 25 line 23
- 19 "...which has prescribed membership of this organisation." Is corrected by "...which
- 20 has proscribed membership of this organisation."