

1 International Criminal Court
2 Pre-Trial Chamber I - Courtroom 2
3 Presiding Judge Sanji Mmasenono Monageng, Judge Sylvia Steiner,
4 and Judge Cuno Tarfusser
5 Situation in the Democratic Republic of Congo - ICC-01/04-01/10
6 In the case of the Prosecutor versus Callixte Mbarushimana
7 Confirmation of Charges Hearing
8 Friday, 16 September 2011
9 The hearing starts at 9.04 a.m.
10 (Open session)

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

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

15 PRESIDING JUDGE MONAGENG: Good morning, everybody, and welcome
16 to this morning's proceedings of Pre-Trial Chamber I. The Chamber is now
17 in session.

18 Court Officer, please call the case.

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

22 PRESIDING JUDGE MONAGENG: Thank you.

23 The Chamber is composed of myself, Sanji Monageng, Presiding
24 Judge; Judge Sylvia Steiner on my right; and Judge Cuno Tarfusser on my
25 left. First of all, the Chamber authorises a photographer to enter the

1 courtroom for just one minute for the purposes of taking photographs.

2 A very long one minute. Thank you.

3 I would now ask the parties and participants to introduce
4 themselves. I will start with the Prosecution.

5 MS. BENSOUA: Madam President, honourable Judges, the Office of
6 the Prosecutor is represented by Anton Steynberg, senior trial lawyer;
7 Julieta Solano, trial lawyer; Pascal Turlan, international co-operation
8 advisor; Marion Rabanit and Regina Weiss, assistant trial lawyers; and
9 Kimberly Fleming-Oberndorfer, case manager.

10 I am Fatou Bensouda, Deputy Prosecutor.

11 PRESIDING JUDGE MONAGENG: Thank you very much, Ms. Bensouda.
12 Legal Representatives, please, of victims.

13 MR. MABANGA: (Interpretation) Good morning, your Honours. My
14 name is Ghislain Mabanga at the Paris bar and I am representing a group
15 of 93 victims authorised to participate in the proceedings. Thank you.

16 MR. KASSONGO: (Interpretation) Thank you, Madam President. I
17 am Mayombo Kassongo, Congolese lawyer, and I am representing 37 victims
18 in these proceedings.

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

20 MR. KAUFMAN: Once again, good morning, Madam President, your
21 Honours. My name is Nicholas Kaufman. I am with the Israel bar. I am
22 assisted by Madam Yaël Vias-Gvirsman, also Israel bar; Mr. Daniel
23 Ntawumenyumunsi, our case manager. And we will also be assisted
24 throughout the hearings by Madam Karlijn Van Der Voort and Professor
25 Kai Ambos.

1 And behind me, of course, is Mr. Callixte Mbarushimana.

2 PRESIDING JUDGE MONAGENG: Thank you very much.

3 Representatives of the Registrar, please.

4 MR. PREIRA: (Interpretation) Good morning, your Honours. The

5 Registry has my colleague Cyril Laucci and I, myself, Didier Preira.

6 Thank you.

7 PRESIDING JUDGE MONAGENG: Thank you very much.

8 As a preliminary matter, the Chamber wishes to question the

9 suspect in relation to his detention conditions.

10 Would Mr. Mbarushimana please stand so that I may ask him a few

11 questions. Thank you.

12 Mr. Mbarushimana, could you introduce yourself to the Court.

13 MR. MBARUSHIMANA: (Interpretation) Madam President, my name is

14 Callixte Mbarushimana.

15 PRESIDING JUDGE MONAGENG: Do you mind telling us when you were

16 born, where you were born.

17 MR. MBARUSHIMANA: (Interpretation) I was born in 1963 in Rwanda.

18 PRESIDING JUDGE MONAGENG: Mr. Mbarushimana, do you have any

19 issue related to the conditions of your detention that you would like to

20 address to the Chamber?

21 MR. MBARUSHIMANA: (Interpretation) Thank you, Madam President.

22 Apart from the normal detention conditions of someone deprived of his

23 freedom, I am concerned about the permanent presence of surveillance

24 cameras in the room in which I meet with my Defence team. I'm also

25 concerned about certain communication restrictions between myself and my

1 Defence team recently, particularly when the detained persons are allowed
2 to go out to hospitals. That is it. Apart from that, there is no
3 further concern. Thank you.

4 PRESIDING JUDGE MONAGENG: Thank you very much, Mr. Mbarushimana.
5 Your concerns have been noted. You may sit down.

6 The present case has been triggered by the warrant of arrest
7 issued by the Chamber for Mr. Mbarushimana on 28 September 2010, pursuant
8 to which the suspect was arrested by the French authorities and
9 transferred to the seat of the Court in The Hague. On 28 January 2011,
10 Mr. Mbarushimana appeared for the first time before this Chamber. At
11 that hearing in accordance with Article 60 of the Statute and Rule 121(1)
12 of the Rules, the suspect was informed of the crimes which he allegedly
13 committed and of his rights under the Statute.

14 According to Article 61(7) of the Statute, on the basis of this
15 confirmation hearing, the Chamber will determine whether there is
16 sufficient evidence to establish substantial grounds to believe that the
17 person committed each of the crimes charged. Only in the event the
18 charges brought by the Prosecutor against Mr. Mbarushimana in the
19 document containing the charges are confirmed after this hearing will
20 Mr. Mbarushimana be sent for trial. And now, pursuant to Rule 122(1) of
21 the Rules of Procedure and Evidence I would ask the Court Officer to read
22 the charges.

23 Court Officer, please.

24 COURT OFFICER: Yes, Madam President.

25 Count 1: Attacks against the civilian population constituting a

1 war crime. Article 8(2)(e)(i) read with Article 25(3)(d) of the Rome
2 Statute.

3 Mr. Mbarushimana contributed to the commission of the war crime
4 of intentionally directing attacks against the civilian population at
5 various locations in the North and South Kivu Provinces in DRC.

6 The locations of these attacks include, but are not limited to,
7 Kibua and Katoyi in early January 2009; Katoyi, Remeka, Malembe, Mianga,
8 Busurungi and Busheke in late January 2009; Pinga on or about 14 February
9 2009; Kipopo on or about 12-13 February 2009; Miriki also in February;
10 Mianga on or about 12th April 2009; Luofu and Kasiki on or about 18 April
11 2009; Busurungi and neighbouring villages on or about 28 April 2009 and
12 on or about 9-10 May 2009; the village of W-673 and W-674 in Masisi
13 territory in the second half of 2009; Manje on or about 20 to 21 July;
14 and Malembe on or about 11 to 16 August and 15 September; Ruvundi in
15 October 2009; Mutakato on or about 2 and 3 December 2009; and Kahole on
16 or about 6 December 2009.

17 Count 2: Murder constituting a crime against humanity.

18 Article 7(1)(a) read with Article 25(3)(d) of the Rome Statute.

19 Mr. Mbarushimana contributed to the commission of the crime
20 against humanity of murder perpetrated by the FDLR upon members of the
21 civilian population at various locations in North and South Kivu
22 Provinces in DRC.

23 These locations include, but are not limited to, Remeka in late
24 February 2009; Busheke in late January 2009; Kipopo on or about 12 to 13
25 February 2009; Mianga on or about 12 April 2009; Luofu and Kasiki on or

1 about 18 April 2009; Busurungi and surrounding villages on or about
2 28 April 2009 and on or about 9 to 10 May 2009; Manje on or about 20 to
3 21 July 2009; the village of W-673 and 674 in Masisi territory during the
4 second half of 2009; Ruvundi in October 2009; Mutakato on or about 2 to 3
5 December 2009; Kahole on or about 6 December 2009.

6 Count 3: Murder constituting a war crime.

7 Article 8(2)(c)(i) read with Article 25(3)(d) of the Rome
8 Statute.

9 Mr. Mbarushimana contributed to the commission of the war crime
10 of murder perpetrated by the FDLR upon members of the civilian population
11 at various locations in the North and South Kivu Provinces in the DRC.

12 These locations include, but are not limited to, Malembe and
13 Remeka in late January 2009; Busheke in late January 2009; Pinga on or
14 about 12 February 2009; Kipopo on or about 12 to 13 February 2009; Mianga
15 on or about 12 April 2009; Luofu and Kasiki on or about 18 April 2009;
16 Busurungi and surrounding villages on or about 3 March 2009, on or about
17 28 April 2009 and on or about 9 to 10 May 2009; Manje on 20-21 July 2009;
18 the village of W-673 and 674 in Masisi territory, during the second half
19 of 2009, Ruvundi in October 2009; Mutakato on or about 2 to 3 December
20 2009; Kahole on or about 6 December 2009.

21 Count 4: Mutilation constituting a war crime.

22 Article 8(2)(c)(i)-2 or 8(2)(e)(xi)-1 read with Article 25(3)(d)
23 of the Rome Statute.

24 Mr. Mbarushimana contributed to the commission of the war crime
25 of mutilation perpetrated by the FDLR upon members of the civilian

1 population at various locations in the North and South Kivu Provinces in
2 DRC.

3 These locations include, but are not limited to, near Busurungi
4 in March 2009; Busurungi and surrounding villages on or about 28 April
5 2009 and on or about 9 to 10 May 2009.

6 Count 5: Inhumane acts constituting a crime against humanity.

7 Article 7(1)(k) read with Article 25(3)(d) of the Rome Statute.

8 Mr. Mbarushimana contributed to the commission of the crime
9 against humanity of inhumane acts perpetrated by the FDLR upon members of
10 the civilian population of various locations in the North and South Kivu
11 Provinces DRC, by assaulting people and/or forcing people to carry heavy
12 loads of pillaged goods, thus inflicting great pain and suffering or
13 serious injury to body or mental or physical health.

14 These locations include, but are not limited to, Busurungi on or
15 about the night of 9 to 10 May 2009, and Manje on or about 20 to 21 July
16 2009.

17 Count 6: Cruel treatment constituting a war crime.

18 Article 8(2)(c)(i) read with Article 25(3)(d) of the Rome
19 Statute.

20 Mr. Mbarushimana contributed to the commission of the war crime
21 of inhuman treatment perpetrated by the FDLR upon members of the civilian
22 population of various locations in North and South Kivu Provinces in DRC
23 by assaulting people and/or forcing people to carry heavy loads of
24 pillaged goods, thus inflicting great pain and suffering or serious
25 injury to body or mental or physical health.

1 These locations include, but are not limited to, Busurungi on or
2 about the night of 9-10 May, and Manje on or about 20 to 21 July 2009.

3 Count 7: Rape constituting a crime against humanity.

4 Article 7(1)(g) read with Article 25(3)(d) of the Rome Statute.

5 Mr. Mbarushimana contributed to the commission of the crime
6 against humanity of rape perpetrated by the FDLR on civilian women at
7 various locations in the North and South Kivu Provinces.

8 These locations include, but are not limited to, Busheke in late
9 January 2009; Remeka in late February 2001; Pinga on or about 12 February
10 2009; Miriki in February 2009; Mianga on or about 12 April 2009;
11 Busurungi and surrounding villages on or about 28 April 2009 and on or
12 about 9 to 10 May 2009; the village of W-673 and 674 in Masisi territory
13 in the second part of 2009; and Manje on or about 20 to 21 July; and
14 Malembe in August and on or about 15 September 2009.

15 Count 8: Rape constituting a war crime.

16 Article 8(2)(e)(v i) read with Article 25(3)(d) of the Rome
17 Statute.

18 Mr. Mbarushimana contributed to the commission of the war crime
19 of rape perpetrated by the FDLR on civilian women at various locations in
20 the North and South Kivu Provinces in the DRC.

21 These locations include, but are not limited to, Busheke in late
22 January 2009; Remeka in late February 2011; Pinga on or about 12 February
23 2009; Mianga on or about 12 April 2009; Busurungi and surrounding
24 villages on or about 28 April 2009, and on or about 9 to 10 May 2009; the
25 village of W-673 and W-674 in Masisi territory in mid-2009; and Manje on

1 or about 20 to 21 July 2009; and Malembe in August and on or about 15
2 September 2009.

3 Count 9: Torture constituting a crime against humanity.

4 Article 7(1)(f) read with Article 25(3)(d) of the Rome Statute.

5 Mr. Mbarushimana contributed to the commission of the crime
6 against humanity of torture inflicted by the FDLR upon members of the
7 civilian population at various locations in the North and South Kivu
8 Provinces, DRC, inflicted through severe assaults, aggravated rape,
9 mutilation, and/or inhumane treatment involving the infliction of severe
10 physical or mental pain and suffering upon the victims.

11 These locations include, but are not limited to, Mianga on or
12 about 12 April 2009; Busurungi and surrounding villages on or about 28
13 April 2009, and on or about 9 to 10 May 2009; the village of W-673 and
14 674 in Masisi territory in the second part of 2009; Manje on or about 20
15 to 21 July 2009; and Malembe in August and on or about 15 September 2009.

16 Count 10: Torture constituting a war crime.

17 Article 8(2)(c)(i) read with Article 25(3)(d) of the Rome
18 Statute.

19 Mr. Mbarushimana contributed to the commission of the war crime
20 of torture inflicted by the FDLR upon members of the civilian population
21 at various locations in the North and South Kivu Provinces in DRC
22 inflicted through severe assaults, aggravated rape, mutilation, and/or
23 inhumane treatment involving the infliction of severe physical or mental
24 pain or suffering upon the victims, including, but not limited to, Mianga
25 on or about 12 April 2009; Busurungi and surrounding villages on or about

1 28 April 2009, and on or about 9 to 10 May 2009; the village of W-673 and
2 674 in Masisi territory in the second part of 2009; Manje on or about 20
3 to 21 July 2009; and Malembe in August and on or about 15 September 2009.

4 Count 11: Destruction of property constituting a war crime.

5 Article 8(2)(e)(xii) read with Article 25(3)(d) of the Rome
6 Statute.

7 Mr. Mbarushimana contributed to the commission of the war crime
8 of the destruction of the adversaries' property or the extensive
9 destruction of property not required by military necessity committed by
10 the FDLR at various locations in the North and South Kivu Provinces in
11 the DRC.

12 These locations include, but are not limited to, Remeka, late
13 February 2009; Kipopo on or about 12 to 13 February 2009; Mianga on or
14 about 12 April 2009; Luofu and Kasiki on or about 18 April 2009;
15 Busurungi and neighbouring villages on or about 9 to 10 May 2009; Manje
16 on or about 20 to 21 July; Malembe on or about 11 to 16 August and 15
17 September; and the village of W-673 and W-674 in Masisi territory during
18 the second half of 2009; Ruvundi in October 2009; Mutakato on or about 2
19 to 3 December 2009; Kahole on or about 6 December 2009.

20 Count 12: Pillaging constituting a war crime.

21 Article 8(2)(e)(v) read with Article 25(3)(d) of the Rome
22 Statute.

23 Mr. Mbarushimana contributed to the commission of the war crime
24 of pillaging of the property of the civilian population, including, but
25 not limited to money, gold, household property, food and livestock,

1 perpetrated by the FDLR at various locations in the North and South Kivu
2 Provinces in DRC.

3 These locations include, but are not limited to, Mianga on or
4 about 12 April 2009; Busurungi and neighbouring villages on or about 9 to
5 10 May 2009; the village of W-673 and W-674 in Masisi territory in the
6 second half of 2009; and Malembe on or about 11 to 16 August 2009.

7 Count 13: Persecution constituting a crime against humanity.

8 Article 7(1)(h) read with Article 25(3)(d) of the Rome Statute.

9 Mr. Mbarushimana contributed to the commission of the crime
10 against humanity of persecution perpetrated by the FDLR upon members of
11 the civilian population by intentionally and in a discriminatory manner
12 targeting women and men seen to be affiliated with the FARDC on the basis
13 of their political affiliation, through torture, rape, inhumane acts and
14 inhuman treatment, at various locations in the North and South Kivu
15 Provinces in the DRC.

16 These locations include, but are not limited to, Remeka in late
17 January 2009; Busheke in late January 2009; Pinga on or about 14 February
18 2009; Kipopo on or about 12 to 13 February 2009; Mianga on or about 12
19 April 2009; Luofu and Kasiki on or about 18 April 2009; Busurungi and
20 neighbouring villages on or about 28 April 2009, and on or about 9 to 10
21 May 2009; the village of W-673 and W-674 in Masisi territory in the
22 second half of 2009; Manje on or about 20 to 21 July; and Malembe on or
23 about 11 to 16 August and 15 of September 2009.

24 PRESIDING JUDGE MONAGENG: Thank you very much.

25 Before we proceed, I would like to ask the Registrar to respond

1 to Mr. Mbarushimana's issues to the Chamber, not now, at a later stage.

2 We are running completely out of time, but we maintain or retain
3 the 30 minutes for the next session. But I would request all the parties
4 to try and accelerate so that we gain time.

5 Now I would like to ask the Prosecution, as required by
6 Rule 122(3) of the Rules, whether they intend to raise any objections or
7 make any other observations concerning an issue related to the proper
8 conduct of the proceedings prior to the confirmation hearing.

9 MR. STEYNBERG: Thank you, Madam President, your Honours. The
10 Prosecution makes no comment and no objection to the proceedings.

11 PRESIDING JUDGE MONAGENG: Thank you very much.

12 The Defence has already indicated that they wish to make
13 submissions relating to the form of the document containing the charges
14 submitted by the Prosecutor. I would ask the Defence to proceed with
15 their submissions on this issue and any other issue they wish to raise
16 related to the proper conduct of the proceedings prior to the
17 confirmation hearing, but to bear in mind, like I have already indicated,
18 that 30 minutes have been allocated to the hearing of both the Defence
19 and the Prosecution. Of course the Prosecution is not making any
20 presentation. And secondly, that the Chamber has already received the
21 Defence's written submissions in relation to the specificity of the
22 document containing the charges.

23 So the Chamber expects you to be brief and to the point. Thank
24 you very much.

25 MR. KAUFMAN: I apologise for the disturbance here. Apparently

1 there's a problem with the live feed to our case manager's screen, so
2 whilst that's being sorted out if it's -- since we have a tight schedule,
3 I shall continue.

4 I, of course, note the learned Chamber's comments on the tight
5 schedule and for that reason I shall not re-litigate the matter which I
6 have already submitted in writing. That's finding number 305 in the case
7 record, that is, of course, our filing on the issue of specificity which
8 concerns the various villages and the villages of the Witnesses 673 and
9 674.

10 We have two further preliminary submissions on the form of the
11 document containing the charges and each submission will last five
12 minutes, no more. I shall make the first submission. In my respectful
13 submission, this is an issue which we believe ought to be decided before
14 the substantial evidential hearing which will start on Monday, but of
15 course we leave the matter to the discretion of the learned Chamber.

16 As far as the second issue is concerned, we believe that that can
17 be decided in due course should the Chamber be minded to do so.

18 So the second challenge to the form of the document containing
19 the charges also concerns a lack of specificity and what the Defence
20 would submit is defective pleading. It concerns the mode of liability
21 with which Mr. Mbarushimana has been charged, Article 25(3)(d), which
22 requires an external contribution, and I stress external contribution, to
23 proposed criminal activity by a group of persons. The question which I
24 pose is: What is a group, the definition of the term "group."

25 Now, the international conventions for the suppression of nuclear

1 terrorism and the financing of terror from where the language of
2 Article 25(3)(d) is derived do not define the concept of a group,
3 whether, for example, a group may be satisfied by a membership of two
4 persons or whether there is a minimum number membership requirement of at
5 least three persons or even more. I suggest that the answer may be found
6 in a later convention, which also adopts virtually the same language as
7 Article 25(3)(d). It is the United Nations Convention against
8 Transnational Organised Crime.

9 Now, I've asked Mr. Court Officer to perhaps display that, that's
10 document item number 1 on our list, if that can perhaps be put onto the
11 screens. I shan't waste time. I shall move on. I'm sure that your
12 Honours are fully aware of this convention.

13 I would, first of all, like to refer the learned Chamber to
14 Article 5(1)(a)(ii) where the mode of liability which we see in Article
15 25(3)(d) is set out. This is the so-called Palermo Convention. Now, for
16 the important section for our purposes is Article 2 and a definition of
17 the organised criminal group," and I shall read:

18 "'Organised criminal group' shall mean a structured group of
19 three or more persons, existing for a period of time and acting in
20 concert with the aim of committing one or more serious crimes or
21 offences ..."

22 And it goes on. But for our intents and purposes, the important
23 part is the fact that the group has to comprise at least three people.

24 Now, this view is endorsed by Professor Albin Eser in the
25 standard work on the Rome Statute of the International Criminal Court, a

1 commentary, edited by no less than Professor Antonio Cassese, and serving
2 on the advisory board, His Honour Judge - or President as he was there -
3 Phillipe Kirsch. And I would like to refer the learned Chamber to page
4 802 of that volume, where Professor Eser talks about the group for the
5 purposes of Article 25(3)(d). And I read:

6 "Unlike instigation and aiding and abetting, however, the
7 contribution of the accomplice must be rendered to a crime by a group of
8 persons acting with a common purpose in assuming that it must be
9 distinguished from a couple consisting of two people, the group must
10 consist of at least three persons who are connected by the same
11 purpose ..."

12 And so it goes on.

13 So coming back to the case at hand, I refer the learned Chamber
14 to paragraph 108 of the English version of the document containing the
15 charges. Here the Common Purpose Group mistakenly includes
16 Mr. Mbarushimana. I say "mistakenly" because the whole rationale
17 underpinning Article 25(3)(d) is to provide for an accessory mode of
18 liability and to criminalise the acts of external and non-essential
19 contributors to a concrete criminal purpose. So extracting
20 Mr. Mbarushimana, one needs to ask who remains in the Common Purpose
21 Group? According to the document containing the charges at paragraph
22 108, it is Ignace Murwanashyaka and Mudacumura, together with other
23 members of the FDLR leadership. It is the other members of the FDLR
24 leadership, in my submission, which is insufficient. It lacks
25 specificity. Mr. Mbarushimana is entitled to know exactly which three

1 individuals he is supposed to have assisted in their criminal design so
2 that his Defence may challenge the involvement of each and every one of
3 these alleged actors in the Common Purpose Group. I would suggest that
4 the Prosecution's use of the words "together with other members of the
5 FDLR leadership" is not coincidental. I would submit it is designed
6 perhaps to disguise the fact that there is no evidence concerning the
7 participation of other specific individuals in a defined criminal plan.

8 To conclude, the Chamber is requested respectfully to strike-out
9 all references to the Common Purpose Group in the document containing the
10 charges on the ground of defective pleading as to the number of
11 participants in the group; or in the alternative, the Chamber is
12 requested to order the Prosecution to specify the name of at least one
13 extra member, that is the third member, of this Common Purpose Group.
14 Thank you very much, your Honours.

15 (Interpretation) Now, I would like to ask my assistant to present
16 her submissions.

17 MS. VIAS-GVIRSMAN: (Interpretation) Your Honours, I very
18 briefly, with your leave, will mention two essential points in respect of
19 which the Defence challenges the document containing the charges that was
20 established by the Office of the Prosecutor. First of all, the
21 Prosecutor goes against the rule of speciality in Article 101 of the Rome
22 Statute. * Furthermore, I will be arguing against the cumulative charging
23 of a single criminal act, either because the same alleged facts
24 are characterised in multiple ways or else because some of those
25 characterisations are included in others, which, as a result, means that

1 the charges that are less specific are redundant.

2 On the 28th of September when the Prosecutor asked the honourable
3 Court to arrest Mr. Mbarushimana, its request contained only 11 charges.
4 Now, it was on the basis of that that the Court issued a warrant of
5 arrest against Mr. Mbarushimana which later on formed the legal basis for
6 his arrest by the French authorities on the 10th of October, 2010. * Now
7 the document containing the charges now contains 13 charges
8 rather than 11. The two additional charges are pillaging and mutilation
9 as war crimes.

10 * Defence argues that pillaging as a war crime consists
11 of conduct that does not constitute the crimes for which
12 Mr. Mbarushimana was brought before the Court. As a result, their
13 addition to the document containing the charges infringes the rule of
14 speciality in Article 10. By way of example, the case law of the Court
15 has observed that the constituent elements in pillaging are different
16 from those of destruction of property that are in charge number 11. The
17 Court's decision, the Trial Chamber III, in the case against
18 Mr. Jean-Pierre Bemba, decision 807 of the 12th of January, 2011, in
19 which paragraph 90, the Chamber rejected the request for participation by
20 victims who alleged that their property had been destroyed by fire on the
21 basis that this did not -- this could not characterise pillaging. This
22 case law was later on confirmed in a decision of the 23rd of December,
23 2010, issued by the same Chamber.

24 Nowhere did the Prosecutor ask for a waiver from the French
25 authorities so as to be able to add additional modes of behaviour, as it

1 is required to do by sub-rule 2 of Article 101.

2 We therefore ask that charge number 12 be set aside and taken --
3 removed from the document containing the charges.

4 As for the second additional charge, the crime of mutilation as a
5 war crime and which is number 4, * Defence argues that this is in addition
6 to a series of superfluous characterisations because it reflects a practice of cumulative
7 charging for the same facts or conduct, which is clear in the document containing the
8 charges.

9 There is cumulative charging, either because some
10 charges or counts are included in others, meaning that the less-specific
11 ones are superfluous or else because the same acts unnecessarily received multiple
12 characterisations, thus making them redundant, as we will demonstrate.

13 Defence argues that inhumane acts in -- mentioned in charge 5 and
14 cruel treatment in charge 6 are crimes that are subsumed under torture,
15 which is charges -- which constitute charges 9 and 10. * Now, all three are constituted
16 by the fact that the perpetrator, and here I quote from the elements of the crimes,
17 inflicted on one or several civilians pain or acute suffering or seriously harmed the
18 mental or physical health of the victim. The more specific characterisation
19 being torture as crime against humanity. So Defence argues that
20 torture as an act of war is also more specific characterisation, since it
21 is constituted when the pain or suffering are inflicted to punish, coerce
22 for discriminatory reason or else to extract information.

23 Furthermore, mutilation and rape are more specific means of
24 inflicting forms of torture. * The proof of this in the -- is in the
25 document containing the charges, in which severe assault, aggravated acts of rape,

1 mutilation, and/or inhumane acts are retained as elements of torture.

2 Now, according to the case law of the Court, the
3 Pre-Trial Chamber in the Bemba case refused to confirm additional charges
4 as proposed by the Office of the Prosecutor and considered that it was --
5 there was no -- * it was not relevant to add to the charge of rape, that of torture plus
6 damage to dignity. It considered that cumulating the charges is detrimental to the
7 Defence and places too great a burden on it. In accordance to the
8 principles of a fair trial and the right to expeditious trial, only a
9 distinct crime could justify a distinct characterisation. By way of
10 conclusion on this point, if at this state of the proceedings this had
11 been sufficiently proved, we believe that Counts 5 and 6 and Counts 9 and
12 10, torture as a war crime and crime against humanity, should not be
13 * accepted by your Chamber because they constitute cumulative charging.

14 Let me go to the last point to challenge the -- to challenge the
15 fact that inhumane acts, cruel treatment, rape, Counts 7 and 8; and
16 torture, Counts 9 and 10, are characterised as being crimes against
17 humanity and as war crimes.

18 * Now, that is the case in spite of the fact that these are
19 constituted by the same conduct in the elements of crimes and in the charges and
20 facts alleged by the Prosecutor. Defence challenges this irrelevant multiplication
21 because it places a heavy burden on the Defence and infringes Mr. Mbarushimana's
22 rights as such. * Cumulative charging also infringes the principle of
23 expeditiousness in informing Mr. Mbarushimana about what is alleged
24 against him and does not give him sufficient time and means to prepare his Defence.

25 Furthermore, this multiplication serves no purpose and no --

1 neither in terms of justice nor the victims nor in the battle against
2 impunity. First of all, because there is no hierarchy between the crimes
3 on which the Court exercises its jurisdiction. All the crimes under its
4 jurisdiction are considered to be the most serious crimes without any
5 distinction. The ultimate proof of its absence of hierarchy between war
6 crimes and crimes against humanity under the Rome Statute lies in Article
7 77 of the Statute, Statute relating to the sanctions that an accused
8 risks before this Court without making any distinction between the crimes
9 of which he is accused, hence all crimes are punishable by the same
10 sentences.

11 Furthermore, to be able to take part in the proceedings as a
12 victim, the Statute and case law do not require that the context in which
13 the crimes were committed must be justified * by such victims. They need only
14 to provide evidence of the facts and the prejudice suffered. If the Chamber were to
15 believe that it had enough elements to confirm the charges, then the
16 Defence would ask the Court to set aside certain counts so as to avoid
17 this overlapping.

18 Let me stop there and we can, of course, provide additional
19 explanations and submissions in writing if the Chamber so requires. * Thank you.

20 PRESIDING JUDGE MONAGENG: Thank you very much for your
21 submission.

22 I'll now ask the Prosecution to respond to the Defence's
23 submission very briefly and without prejudice to further submissions in
24 writing. Thank you.

25 MR. STEYNBERG: Thank you, Madam President. I will be with you

1 in one moment.

2 Madam President, your Honours, these two new points that have
3 been raised today, the Prosecution has not received any prior notice of
4 them. We have obviously not prepared any submissions on them. My
5 submission, however, your Honours, is that these are not matters which
6 need to be decided now, in advance of the confirmation hearing. Many of
7 the issues raised will be addressed during the course of our
8 presentations. We disagree, however, with my learned friend
9 Mr. Kaufman's attempt to import restrictions from other legislation into
10 the legislation of this Court. We believe that this is not necessary and
11 not permissible.

12 With respect to the objections of Ms. Gvirsman, I refer, your
13 Honours, to the fact that the Rome Statute Article 101 does not specify
14 that the charges contained in the indictment must be the same as the
15 charges for which the accused person or the suspect has been surrendered,
16 but rather that the course of conduct -- the conduct or course of conduct
17 must be the same. In our submission, this is the case.

18 As to the submissions relating to the -- essentially the --
19 what's alleged to be a duplication of charges, the Prosecution submits
20 that each of the charges mentioned by my learned friend have distinct
21 elements, distinct elements of crime, which distinguish each of them from
22 each other. In particular, the crimes -- war crimes and crimes against
23 humanity are distinguished by the contextual elements and it has already
24 been recognised by this Chamber that a suspect may be charged with both a
25 war crime and a crime against humanity.

1 If I may turn then, your Honours, to the issue which I have
2 prepared, that relates to the specificity of the charges. I note, your
3 Honours, at the outset that my learned friends continued for nearly 20
4 minutes. I hope that's not going to eat into my 15-minute or my share of
5 the -- of the proceedings.

6 The Prosecution has not yet had an opportunity to respond to the
7 specificity of charges argument. The Defence requests the Chamber to
8 strike-out certain portions of the charging document for alleged lack of
9 specificity, mainly referring to the use of the phrase "including but not
10 limited to." A second argument has been raised in this regard by my
11 learned friend which will, to an extent, be covered by this argument.

12 In support of its written request, the Defence has advanced only
13 one authority, namely, the 1999 ICTY case of Krnojelac. In response, the
14 Prosecution will make four main submissions. Firstly, the Prosecution
15 agrees that the suspect cannot be expected to defend himself against a
16 crime for which he has not received advanced notice, nor to defend
17 himself against surprise allegations at confirmation or at trial. But he
18 has not been unfairly surprised here. The specific events currently
19 established are specified in the document containing the charges,
20 including times and places. The use of language "including but not
21 limited to" allows the Prosecution to prove other events to establish the
22 same crime. However, Madam President, this is acceptable so long as the
23 Defence is given adequate notice.

24 In this case, the Defence has received adequate notice through
25 the Prosecution's disclosure of evidence and its provision to the Defence

1 of a list of evidence and a witness list at confirmation. If the charges
2 are confirmed, your Honours, it will receive similar notice prior to
3 trial.

4 Secondly, Madam President, the decisions by the Chamber of this
5 Court support the Prosecution's position, that it is permissible to
6 charge a pattern of crimes in a defined period and geographical area and
7 to include as examples specific incidents, particularly at confirmation
8 stage.

9 Thirdly, your Honours, as a general matter we disagree that this
10 Court's decisions should be rejected in favour of decisions or even a
11 body of law from the ICTY and other ad hoc Tribunals. Decisions of other
12 Tribunals may be instructive but they can also be less than helpful if an
13 issue arises under this Statute and the Rules or relates to a procedure
14 which is unique to this Court such as the confirmation procedure.

15 Finally, your Honours, even if one were to look at the
16 jurisprudence of the ICTY and other ad hoc Tribunals, they do not in fact
17 support the Defence's proposition. Due to the limited time assigned to
18 these submissions, your Honours, I have prepared and filed a list of
19 evidence. I did send a courtesy copy to the Chambers. May I inquire
20 whether your Honours have had access to that list of evidence?

21 PRESIDING JUDGE MONAGENG: We got it just before we got into
22 court.

23 MR. STEYNBERG: Thank you, your Honours. I apologise that I
24 wasn't able to submit it earlier.

25 Turning, your Honours, to the jurisprudence of this Court,

1 Prosecution submits that it does not support the Defence's objections.

2 Regulation 52(b) of the regulations simply states that:

3 "A statement of fact that -- that the document containing the
4 charges must include a statement of fact, including the time and place of
5 the alleged crimes which provide a sufficient legal and factual basis to
6 bring the person to trial."

7 We must therefore look to the decisions of the Court for further
8 guidance. Your Honours, two Pre-Trial Chambers have already confirmed
9 charges containing similar language to that which the Defence now objects
10 to. In the Bemba confirmation decision - and I refer to item 1 on the
11 list of authorities - Pre-Trial Chamber II rejected essentially the same
12 challenge, namely, that the DCC was not sufficiently precise because it
13 employed the phrase "including but not limited to," and I quote:

14 "The Defence's challenge cannot be upheld. The Chamber finds
15 that at the pre-trial stage, the Prosecutor needs to provide not all but
16 only sufficient evidence which allows the Chamber to determine whether
17 there are substantial grounds to believe that the suspect committed each
18 of the crimes charged."

19 And I emphasise:

20 "Therefore, the Chamber is of the view that the expression
21 'include but not limited to' does not infringe the rights of the Defence
22 at this stage."

23 The Chamber further added:

24 "The Chamber bears in mind the evidentiary threshold to be met at
25 the pre-trial stage, the substantial grounds threshold, and the fact that

1 in the case of mass crimes it may be impractical to insist on a high
2 degree of specificity."

3 In paragraphs 250 and 251 of the Lubanga confirmation decision, I
4 refer to item 3 on the list of authorities, Pre-Trial Chamber I confirmed
5 charges relating to a policy to recruit child soldiers including similar
6 phrases such as "several localities in Ituri," areas surrounding Bunia on
7 August 2002.

8 The Prosecution notes, your Honours, that this language is
9 remarkably similar to the reference in the present charges to Busurungi
10 and surrounding villages to which my learned friend objected.

11 The Chamber also explained that the charging document is not to
12 be read in isolation, but rather in conjunction with the list of
13 evidence. Accordingly, your Honours, the Prosecution submits that the
14 charging document in this case read in conjunction with the list of
15 evidence provides ample details to the charge to enable the suspect to
16 properly prepare his defence.

17 Your Honours, the Prosecution submits that the jurisprudence of
18 the ad hoc Tribunals must be approached with caution. In light of the
19 limited time, I will simply refer your Honours to items 5 and 6 on the
20 list of authorities. I think this is a submission or a position which is
21 fairly trite.

22 Turning then briefly to the jurisprudence of those tribunals and
23 the submission that they do not support the Defence position, while the
24 victim in Krnojelac correctly sets out the general policy with respect to
25 the specificity of charges, these tribunals all recognise that in

1 appropriate circumstances, the specificity -- less specificity is
2 acceptable. In determining the degree of specificity required, the
3 ad hoc tribunals consider two main factors to be relevant. Firstly, the
4 proximity of the accused to the crimes for which he is charged; and
5 secondly, the scale or magnitude of the crimes charged.

6 As to the first issue, the jurisprudence of both the ICTR and
7 ICTY establish that the further removed an accused is from the actual
8 physical commission of the crime, the less precision is required in the
9 description of these crimes. Where an accused is based -- is charged on
10 the basis of accessory liability, greater emphasis is placed on detailing
11 the conduct of the accused person on which the Prosecution relies. In
12 the instant case, the mode of liability alleged is that of common
13 purpose, an accessory mode of liability, and consequently, in these
14 circumstances even the ICTR and the ICTY would not require the level of
15 detail which the Defence demands.

16 Turning to the second issue. Both the jurisprudence of the ICTR
17 and ICTY established that in certain cases the sheer magnitude of the
18 crimes committed may make it impracticable to require a high degree of
19 specificity in issues such as identity of victims and specific locations
20 of criminal activity.

21 Your Honours, in relation to the last point I forgot to refer
22 your Honours to items 7 to 13 on the list of authorities, and in respect
23 to the present point, I refer your Honours to items 14 to 16.

24 Finally, I point out that even in the ad hoc tribunals, the use
25 of non-specific language has been approved of, including words such as

1 "including" or "including but not limited to." And I refer to items 17
2 and 18 on the list.

3 With regards to the village of W-673 and 674, the lack of
4 specificity in relation to this incident is a result of security issues
5 which have been brought to the Chamber's attention, and the Prosecution
6 submits that the withholding of the specific location and date of the
7 attack is necessary for the protection of the relevant parties. It is
8 justified and that there are no lesser measures that will suffice. The
9 need to protect these parties was recognised by the Single Judge in
10 decision number 167, and in these circumstances, the Prosecution submits
11 that the lack of precision as to the date and the location of the attack
12 are necessary and permissible, particularly at confirmation stage.

13 As your -- as Madam President has indicated, we do intend to
14 submit further written submissions on the points raised today if the
15 Chamber will allow that, and unless there are further questions from your
16 Honours, those are my submissions.

17 (Pre-Trial Chamber confers)

18 PRESIDING JUDGE MONAGENG: Thank you very much, Mr. Prosecutor.
19 We have noted your submissions. As I indicated earlier, both parties and
20 participants will be given an opportunity to further strengthen their
21 submissions through written submissions.

22 Mr. Kaufman, do you wish to address any issue that has arisen?

23 MR. KAUFMAN: (Microphone not activated)

24 I do apologise. No, Madam President, we have no observations on
25 the conduct of the proceedings. Thank you.

1 PRESIDING JUDGE MONAGENG: Thank you very much.

2 The Chamber has heard the submissions of the parties and will
3 decide upon these issues as well as the Defence's challenge to the
4 admissibility of the materials seized from Mr. Mbarushimana's house at
5 the time of his arrest and the contents and records of communications
6 intercepted by the French and German authorities in conjunction with its
7 consideration of the merits of the case in the decision of the
8 confirmation of charges. The Chamber will also issue a decision shortly
9 on the Defence's jurisdictional challenge.

10 Now we can proceed to the hearing on the merits. The Prosecutor
11 will be the first to take the floor. And, Mr. Steynberg, you have been
12 allocated 20 minutes in the schedule for the confirmation hearing to make
13 your opening statement.

14 Before you take the floor, Mr. Steynberg, I would like to remind
15 the parties and participants to speak slowly and to pause for five
16 seconds after every sentence so as to allow the interpreters and court
17 reporters to do their work in the best possible manner.

18 I would also like to remind the parties that during public
19 sessions as well as in closed sessions, they should refrain from
20 mentioning confidential information, and in particular to refrain from
21 referring to the names of witnesses and victims and refer to them only by
22 their respective numbers. At any time, the Chamber by its own motion or
23 upon request of the parties deeming it necessary will turn the session
24 into a private or into a closed session.

25 At the information session we were told that at the end of a

1 sentence we should count 1 to 5. That will give the interpreters enough
2 time to do their work. Thank you very much.

3 Mr. Steynberg, you have the floor.

4 MR. STEYNBERG: Thank you, Madam President, I hand the floor over
5 to my colleague, the Deputy Prosecutor.

6 MS. BENSOUA: (Interpretation) Madam President, your Honours,
7 the case that the Prosecution shall present before this Chamber relates
8 to the contribution of Callixte Mbarushimana to the criminal activities
9 carried out by the *Forces Démocratiques pour la Libération du Rwanda*, or
10 Democratic Forces for the Liberation of Rwandan, that is the FDLR, in the
11 course of the year 2009. Callixte Mbarushimana contributed to those
12 crimes by carrying out an international campaign aimed at refuting the
13 allegations of crimes perpetrated by the FDLR despite their veracity and
14 also to assist in the opening up of political negotiations.

15 Mr. Mbarushimana also acted as the person responsible for
16 relations with the mediators for peace who were trying to resolve the
17 conflict in the Kivu Provinces. He informed them of the demands made by
18 the FDLR in order for them to put down their weapons. He contributed to
19 decision-making at the highest level, as well as a member of the
20 Steering Committee of the FDLR. Furthermore, in his capacity of
21 executive secretary he made a significant contribution to the
22 organisation and day-to-day functioning of the FDLR.

23 The FDLR movement put in place a deliberate policy of attacks
24 against civilians aimed at provoking a humanitarian catastrophe which by
25 its magnitude was intended to prompt the international community to

1 compel Rwanda to accept the return of these forces to the country. A
2 return of the members of the FDLR in all impunity for their previous
3 actions in addition to their right to participate in political life. In
4 the final analysis, the FDLR had as objective to take over power in
5 Rwanda.

6 In 2009, in the implementation of that policy, the FDLR killed,
7 raped, and tortured civilians in this region, they carried out pillaging
8 and burnt down entire villages. This led to the displacement of members
9 of the population on a great scale. The suspect, Callixte Mbarushimana,
10 participated in the perpetration of these crimes by orchestrating the
11 international campaign of propaganda and extortion of the FDLR which was
12 supposed to convince the entire world that the atrocities would not end
13 as long as the Governments of the Democratic Republic of Congo and Rwanda
14 did not give in to their demands.

15 The methods used by the FDLR consist in perpetrating crimes in
16 order to attain their political objectives, and this is a result of the
17 organisation of the Hutu militants responsible for the Rwandan genocide.
18 The former Rwandan armed forces, that is, the ex-FAR and the Interahamwe
19 who had orchestrated and perpetrated the massacre of more -- of close to
20 a million people, fled Rwanda and took refuge in the two Kivu provinces
21 in the east of the country, which at that time was known as Zaire. The
22 Prosecution submits that the FDLR needed to distance themselves from
23 their past in order to have a real chance of negotiating a return to
24 Rwanda under conditions that would be favourable to them.

25 The internal organisation of the FDLR also reflected a need to

1 distance themselves from their past of -- from their violent past and to
2 present themselves as a legitimate political movement. The FDLR set up a
3 political wing based mainly in Europe within which the suspect had as his
4 main role to masquerade this movement as a legitimate and moderate
5 political movement with the objective of reaching a peaceful settlement
6 of the conflict. And yet the military branch of the movement pursued its
7 armed operations in the Kivu Provinces under the direct command of
8 General Sylvestre Mudacumura.

9 At the end of 2008, the governments of Congo and Rwanda
10 re-established their diplomatic relations after a break of ten years.
11 The activities carried out by the FDLR in the east of Congo had for a
12 long time been the main cause of the conflict between the two states.
13 The resumption of dialogue between the two countries and the announcement
14 made on the 5th of December that the powerful Rwandan army would unite
15 its forces with the forces of the Congolese army to fight against the
16 FDLR made it clear to the FDLR that their days were numbered in the Kivu
17 Provinces.

18 At the same time there were an increasing number of desertions
19 within the movement thanks to the efficiency of the demobilisation
20 campaign carried out by the UNO. This is how come, in early 2009, the
21 FDLR was facing three threats: Increasing political isolation,
22 adversaries that were clearly superior and that they could not defeat in
23 a conventional manner, as well as the desertions within the movement,
24 that is, in -- that was the context in which the leaders of the FDLR were
25 in 2009.

1 (In English) Leaders in 2009 were the FDLR President,
2 Ignace Murwanashyaka; Commander Sylvestre Mudacumura; executive secretary
3 Callixte Mbarushimana, assisted by others including first vice-president
4 Straton Musoni and second vice-president Gaston Iyamuremye. The
5 Prosecution alleges that this inner core of leaders formed the Common
6 Purpose Group that adopted and executed a common plan involving the
7 commission of crimes for which the suspect, Mr. Mbarushimana, now stands
8 accused. Murwanashyaka and Musoni are already on trial in Germany
9 accused of conduct of crimes of this same conduct.

10 The first element of the common purpose plan was a policy of
11 deliberately attacking civilians in order to create a humanitarian
12 catastrophe. The objective of this policy was to make the cost in blood
13 and human misery so high that public and international pressure would
14 force the coalition forces to abandon their military campaign in favour
15 of a negotiated political solution on terms favourable to the FDLR. This
16 part of the plan was implemented by the FDLR military wing under the
17 command of General Mudacumura.

18 Shortly after the coalition forces of Rwanda and the Democratic
19 Republic of Congo, supported by MONUC, launched Operation Umoja Wetu
20 against the FDLR in January of 2009, the group retreated deep into the
21 forests of the Kivus from where it conducted a campaign of terror and
22 violence against the civilian population which lasted throughout 2009.

23 The FDLR targeted mostly villages, villages whose inhabitants
24 were perceived to have collaborated with their enemies. One after
25 another villages within their grasp were attacked, pillaged, and burned

1 to the ground. Civilians were shot, hacked, or bludgeoned to death.
2 Others were burnt alive in their homes. Throughout the year, hundreds
3 were killed and many thousands left homeless or destitute by such
4 attacks.

5 In several attacks, women were also brutally raped, often
6 repeatedly and by several attacks in turn. These rapes, Madam President,
7 were frequently accompanied by acts of extreme violence, such as
8 beatings, torture, or mutilation. On this point, the Prosecution
9 emphasises the gender dimensions of some of the crimes alleged. Raped
10 women or castrated men were assaulted and injured, not only physically
11 and psychologically, but also in their identities as men and women in
12 society. In this way, these types of crimes seek to destroy the
13 identities of individuals, the cohesion of families and the social
14 structure of communities. Through all of these means, the FDLR forces
15 indeed succeeded in creating the humanitarian catastrophe which their
16 leaders had designed.

17 The second element, Madam President, of the common plan was to
18 conduct an international propaganda campaign to advance the FDLR's
19 agenda, simultaneously attempting to maintain their legitimacy by denying
20 responsibility for the atrocities and casting the blame on their
21 opponents or others. It was to this part of the plan, Madam President,
22 honourable Judges, that the suspect made the greatest contribution.
23 Mr. Mbarushimana represented the respectable public face of the FDLR. To
24 the world at large, he spoke the language of peace. He sought to present
25 the FDLR as a legitimate political organisation whose military forces

1 sought only to defend themselves and Rwandan refugees from unprovoked
2 attacks by coalition forces or their proxies. Behind this message of
3 peace, however, was the implicit threat that unless the FDLR's enemies
4 stopped trying to oust them by military force and gave into their
5 demands, the killings of civilians would continue.

6 The Prosecution alleges that there are substantial grounds to
7 believe that Mr. Mbarushimana bears criminal responsibility for the
8 crimes committed by the FDLR on the civilian population of the Kivus on
9 the basis of common purpose. Unlike other modes of liability under the
10 Rome Statute, common purpose does not require a suspect to actively
11 participate in the commission of the crimes or instigate others to commit
12 them, nor does it require, Madam President, that a suspect directly
13 assists those who are physically committing the crimes. Rather, the
14 Prosecution need only establish that he contributed in some way to their
15 commission with the requisite intention and knowledge. This mode of
16 liability recognises that when crimes are committed by a group or
17 organisations, persons who knowingly contribute to the functioning of
18 that group or organisation also bear responsibility for the crimes that
19 the group or organisation commits.

20 The Prosecution alleges that Mr. Mbarushimana played the leading
21 role in the FDLR's extortive international campaign. Firstly,
22 Madam President, he drafted or contributed to the drafting of numerous
23 FDLR press releases, all of which were issued in his name in 2009. His
24 statements repeatedly denounced the military campaign against the FDLR
25 and warned of the dire consequences for the civilian population. He

1 cautioned that the only way to stop the suffering of civilians was to
2 call off the campaign and engage in political negotiations. However, the
3 very civilians whose suffering the suspect used as a bargaining chip in
4 this campaign were the ones that the FDLR itself deliberately attacked.
5 He also consistently and automatically denied FDLR responsibility for
6 atrocities against civilians and frequently cast the blame onto other
7 groups. In this way, Madam President, he created the plausible
8 deniability which allowed FDLR to maintain its facade of legitimacy. It
9 also helped to sustain the troops' commitment to the cause.

10 Secondly, Mr. Mbarushimana's contribution also served as a
11 contact point for peace mediators attempting to find a solution to the
12 conflict in the Kivus, to whom he stressed the FDLR's conditions for
13 laying down its arms. In this way, too, he disseminated the FDLR's
14 extortive message, communicating through peace mediators the FDLR's
15 conditions.

16 Finally, Mr. Mbarushimana contributed to the overall functioning
17 of the organisation that was responsible for the crimes alleged as
18 executive secretary and as member of the FDLR's Steering Committee. The
19 Prosecution accordingly alleges that the role played by Mbarushimana in
20 2009 contributed to the commission of the crimes by the Common Purpose
21 Group. The group itself considered the international campaign in which
22 Mr. Mbarushimana played the main role to be the essential for the
23 achievement of their ultimate goals. Mbarushimana played an important
24 role in the goal of retaining political credibility for the group through
25 his denials of the FDLR's involvement in atrocities and his

1 representation of the FDLR in peace negotiations.

2 The perception of legitimacy, particularly among members of the
3 Rwandan diaspora, was also critical to ensure continued financial and
4 popular support. However, Madam President, his blanket denials of the
5 crimes assisted the FDLR's military operation to continue unabated
6 throughout 2009, and his morale-boosting messages to the troops in the
7 field helped to combat desertion.

8 In short, Madam President, honourable Judges, he was the
9 linchpin, the man who could transform crimes committed in the Kivus into
10 political leverage for the FDLR in Rwanda. The Prosecution, Madam
11 President, does not, however, allege that Mbarushimana had prior
12 knowledge of each specific crime committed by the FDLR or alleged in the
13 Prosecution's charges. His knowledge of exact details about FDLR crimes
14 prior to their commission, Madam President, we are submitting --

15 PRESIDING JUDGE MONAGENG: Excuse me --

16 MS. BENSOUDA: -- was irrelevant.

17 PRESIDING JUDGE MONAGENG: -- your time is up.

18 MS. BENSOUDA: Very well, Madam President. If I may just end
19 this sentence.

20 His knowledge of exact details about FDLR crimes prior to their
21 commission was irrelevant to the execution of the common plan, since the
22 latter required Mbarushimana to deny all allegations regardless of their
23 veracity. It was also the consequence of the deliberate FDLR policy to
24 distance the political leadership from any direct involvement in the
25 commission of crimes. He did, however, have knowledge from public

1 sources and from other intense internal contacts with the group's other
2 leaders and FDLR members in the field that the crimes were, in fact,
3 being committed by FDLR troops.

4 Madam President, if I may now consult with my team. I'll come
5 back.

6 (Prosecution counsel confer)

7 MS. BENSOUA: Madam President, senior trial lawyer will now take
8 over the presentations. Thank you.

9 PRESIDING JUDGE MONAGENG: You were given 20 minutes for opening
10 statements and you have gone beyond, 23 minutes.

11 MS. BENSOUA: Madam President, if -- with your permission,
12 Mr. Anton Steynberg would respond to the Chamber's questions.

13 MR. STEYNBERG: Madam President, what my learned colleague was
14 conveying to the Chamber was that what is left in the presentation I will
15 include in my allotted time on the merits. So we -- that concludes our
16 opening statement.

17 PRESIDING JUDGE MONAGENG: Thank you very much.

18 May I now very respectfully ask the interpreters if they could
19 indulge us just six minutes after 11.00 so that we conclude the Legal
20 Representatives' presentation. I hope that is okay. We will make the
21 time up.

22 May I now ask the Legal Representatives. How are you going to
23 make your presentations in 20 minutes? Are you doing ten minutes each?

24 MR. MABANGA: (Interpretation) Thank you, your Honour. We're
25 going to take 15 minutes each to present our preliminary observations.

1 PRESIDING JUDGE MONAGENG: Okay. Please go ahead.

2 MR. KASSONGO: (Interpretation) Thank you, your Honours, various
3 members that make up this Court. First of all, as earlier on, we are
4 going to share out the 30 minutes between ourselves. My colleague
5 Mr. Mabanga will take the floor in a minute and Mr. Kassongo is speaking
6 on behalf of 37 victims as their Legal Representative.

7 Your Honour, I am the representative of the 37 victims,
8 practically all of whom are women and children who are crying but not
9 being heard, and the cries are not heard before but it is now here before
10 you and the international community will also be hearing them.

11 Victims are only victims legally on the basis of damage caused by
12 a crime to them and it is only on that basis that they can come before
13 this Court to make observations. The victims that I represent are not
14 only inhabitants of the eastern part of the DRC in the Kivu area, but
15 they are very much linked and tied to their villages of North and South
16 Kivu. They have all experienced exactly the same thing but in different
17 forms.

18 Planned terror is their everyday fate. This planned terror is a
19 direct consequence of the criminal methods, using the same methods of
20 persecution according to an elaborate criminal plan by a group of
21 criminals operating as armed bands and which they, the victims, could
22 identify. They say, all of them without exception, the FDLR. All the
23 victims designate the FDLR by the language they speak and what they wear.
24 Whether we are talking about what happened in the villages of South Kivu
25 or those of North Kivu. Whether the attack was against the villages in

1 the territory from Walikale, Kitutu, Shabunda, Busurungi or anywhere
2 else, every time the methods were identical and led to the same criminal
3 facts. The names of those villages that were attacked are known and
4 those names resound in the ears of the international community as -- like
5 a sound, a sound that is a cry, that of the weak victims, the victims
6 left to their own devices.

7 These methods were those of a group that had weapons and had
8 predefined objectives, i.e., to erase any peaceful living, because the
9 FDLR attacked those villages, raped those women, and killed the babies,
10 as in Busurungi, as a group, always acting as a group. These slaughters
11 were a series of acts perpetrated during the conflict between the two
12 camps, between the two armies. And it is in this respect that those
13 murders are war crimes.

14 The group of the FDLR that was under the common leadership with
15 the suspect, Callixte Mbarushimana, elaborated criminal methods.

16 Presiding Judge, various members of the Court, these planned
17 methods to commit those crimes are not random. They were committed
18 throughout the year and every month -- no month could go by without a
19 crime of this type being perpetrated against them. Those crimes were
20 perpetrated over a year, such as the calendar year 2009. This is what
21 these victims experienced during 2009 in various places and to various
22 degrees in the villages of Kivu.

23 The victims in the North Kivu and those in the South Kivu were
24 attacked throughout the year, without respite, January, February, March,
25 April, June, July, all the way through to December. In any case, not a

1 single month went by without a crime being committed by the FDLR.

2 A method is a process designed for the purposes of an armed plan
3 of attack for reasons or -- for specific reasons all aimed at specific
4 targets. Why should rape be committed with a weapon? The use of a
5 weapon was made to destroy the body of a man or a woman, of a child, be
6 it a stick, a rifle, or anything else. The victims expect an answer to
7 those questions and this can only come from the perpetrator of this
8 organisation, of their organisation.

9 The suspect, Callixte Mbarushimana, could not have not known
10 about the objectives of the organisation. When a dignitary accepts a
11 position of responsibility, it is to set up guide-lines. All these
12 victims have the same profile, their great vulnerability. The victims
13 that I represent, your Honour, are nearly all and without
14 exception - according to me - extremely vulnerable. Their great and
15 extreme vulnerability is expressed in legal terms, psychological terms,
16 and medical terms. Because they are vulnerable and deprived, they will
17 fade and die by lack of care, lack of food. These are the children and
18 women who are asking for nothing but just simple protection, even very
19 slight. They are the survivors of the massacres and they crowd together
20 in places in Bukavu, without any links, wandering aimlessly.

21 Your Honours, the victims that I represent have not only been
22 left to their own devices when the events took place in 2009, but they're
23 also defenceless. Right to this day they have no protection, no defence,
24 because these attacks continue against the civilian populations, for
25 instance, in Walikale, as well as all over the Kivus currently.

1 The victims that I represent are those who lost everything that
2 they had. They have become what we can call people who have nothing, so
3 as to avoid using poverty because poverty in the West is defined
4 according to acceptable minimum standard figures. I'm talking about
5 orphans who escaped death and the massacre of their beloved ones, such as
6 the little boy who fled in the night while the FDLR were raping his
7 mother, and when he came back found his father's head lying down in the
8 entrance. These victims expect justice from the international community.
9 So if supreme law exists in this world for them, it will be the law of
10 the international community.

11 For instance, this case of the grandmother who was raped and
12 escaped the massacre but was obliged to hand-over her grandchildren to
13 the orphanages because she herself had seen the massacre of all her own
14 children. We are confronted with the reality of the world, the criminal
15 reality. The world community might be able to count on the tranquility
16 afforded by the forest, but this is not the case for the victims in the
17 North or South Kivu. And for these victims of the FDLR, the harsh
18 reality of the forest is that it is a place where the most horrible
19 crimes ever experienced by humanity are committed. Armed gang rapes,
20 deportation, kidnapping, and the most serious forms of murder, all these
21 are perpetrated there. And these survivors, these victims, will be the
22 ones to provide the explanations.

23 It is in the forest that the plan of attack is devised. It is
24 where it all started from. The forest is also where, later on, the armed
25 bands take shelter to go out again and start all over again. It is in

1 the forests that the women, men, and children are taken away to and
2 enslaved. It is in the forest that the FDLR goes into hiding, to come
3 back and commit crimes and other atrocities of all types. It is in the
4 forests that collective rapes, forced pregnancies, forced child
5 deliveries, and all sorts of slaughters are prepared. The forest is
6 dangerous for traders who travel on -- for business reasons in their
7 cars. If -- the reason the victims were able to survive is because they
8 escaped the attacks of the armed bands, who by killing certain people
9 were able to loot the convoy. These victims can no longer cross the
10 villages by road all the way through this forest, whether we speak about
11 North or South Kivu, whether we talk about the territories of Shabunda,
12 Walikale, Kingulube, Muenga, on the road to Uvira or in Masisi, Kanune,
13 Buleisa, Busurungi, Kingulube, Ombo and elsewhere. This forest is an
14 accursed source of wealth for these wandering victims in Bukavu who have
15 to beg because nobody takes care of them.

16 None of these victims dares to go and get water from the river or
17 go into the fields. One certainty for all of the victims that I
18 represent, your Honour, is that these methods are the execution of a plan
19 designed by the FDLR. And when a cadre who wants to lead an organisation
20 does this, he does so to bring his own ideas or his own contribution.

21 Suspect Callixte Mbarushimana knew that in the territories of
22 North and South Kivu, his organisation had organisation had committed the
23 most serious crimes that humanity has ever experienced. He could not not
24 know that the troops under their orders and their instructions were
25 committing those crimes. Armed band, collective rapes everywhere, in all

1 villages on a whole-scale basis, inhuman treatment, destruction and
2 plundering of property, murders, mutilations, and torture, slaughtering
3 of babies, the objective was to consume the acts until the victim lost
4 consciousness, providing he or she had remained alive, collective rape --
5 collective planned rape as a war weapon --

6 PRESIDING JUDGE MONAGENG: Excuse me, excuse me, you are
7 encroaching on your friend's time. We are not going to extend beyond ten
8 past 11.00, so you've got to round up.

9 MR. KASSONGO: (Interpretation) Yes. Thank you, your Honour.
10 Let me ask my colleague.

11 With my colleague's permission, I shall continue and then give
12 him the floor.

13 A group of FDLR catches a victim, rapes him, then abandons the
14 victim once she had fainted in the forest instead of killing her. The
15 expression collective rape is -- as a war weapon is something that comes
16 from the press, which means that these acts are beyond human
17 understanding.

18 My conclusion is that in any case all these victims are asking
19 for one thing alone, they want to see the suspect judged, brought to
20 trial, so as to be answerable for his acts. The confirmation of the
21 charges by bringing the suspect to trial will be the beginning of a
22 process of restoring peace for the pain experienced by the victims.
23 Thank you, your Honour.

24 MR. MABANGA: (Interpretation) Madam President, your Honours, I
25 will be brief because we had 15 minutes each, but apparently we have ten

1 minutes. Ovid used to say that when you are happy you have many friends,
2 but when you are sad, you are alone. In February 2009, the skies of the
3 Kivus became cloudy because, in the course of the night, the FDLR
4 soldiers came into the village and started shooting in the air. The
5 population of that village found themselves alone. Their only choice was
6 to flee the village quickly, and amongst them there was victim a/2576/11,
7 and the young mother took the decision to take her young children deep
8 into the forest in the night. And this means that the presence of wild
9 animals seemed to her to be more secure than the presence of the FDLR.
10 And even in that forest, if they were to die, then they would die with
11 some dignity. And when that mother returned, she had only her eyes to
12 cry because all her property had been looted and her house had been burnt
13 down. But the FDLR troops had stayed in the village and they raped her
14 in front of her children, and those children are traumatised for life.

15 Not far from that village there was another village and during
16 the same period the same events occurred. There is victim a/2166/11 who
17 experienced a similar event. During that period she was living in her
18 house with her father. The FDLR soldiers arrived. They locked her
19 father in the house and burnt down that house.

20 This means, your Honour, that the victims that we represent here
21 have lost everything. They have lost close relatives, they have lost all
22 their property. The only thing that remained with them was their
23 dignity, but even their dignity has been removed from them because
24 parents were dishonoured in front of their children and parents were also
25 embarrassed in front of their children.

1 Today, your Honours, the victims are coming before this Court to
2 demand justice, but they are also aware that there is no punishment,
3 there can be no punishment or reparation without a trial. And there is
4 no trial without a confirmation of the charges. So they are fully aware
5 of the importance of our hearing, which opens today. And for the first
6 time, they refuse to continue to be the victim of events. It is their
7 intention to actively contribute to the proceedings and they're going to
8 do that in two ways, with regard to the procedure and during the case on
9 the merits.

10 With regard to the procedure, they intend to oppose all
11 objections intended to delay the organisation of a trial, and your
12 decision of the 11th of August, 2011, is of capital importance to them
13 because, for the first time, they can face their aggressors and say
14 no - no - to the objection of lack of jurisdiction; no to provisional
15 release; and no to all delaying tactics. They were subjected to violence
16 in the past, but today in front of this Court they have the possibility
17 to say no. Of course it is incumbent on your Chamber to answer all these
18 questions, but at least they would have the satisfaction of having been
19 heard.

20 With regard to the merits, the victims intend to contribute
21 actively to the ascertainment of the truth, and to that end they are
22 bearing in mind a decision of this Chamber dated the 13th of May, 2008,
23 in the Katanga case --

24 PRESIDING JUDGE MONAGENG: Excuse me, we have a technical matter.
25 The tape has to be changed and we are going to take a very short break,

1 five minutes, while the technicians deal with that and come back and
2 finish his presentation. Is that okay? Thank you.

3 COURT USHER: All rise.

4 Recess taken at 11.01 a.m.

5 On resuming at 11.37 a.m.

6 COURT USHER: All rise. Please be seated.

7 PRESIDING JUDGE MONAGENG: Welcome back.

8 The Legal Representative will continue for ten minutes.

9 MR. MABANGA: (Interpretation) Thank you, your Honour. And I
10 will make an effort to comply with the time-limit.

11 A short while ago at the beginning of my statement, I was saying
12 that the victims that we represent wish to see a trial and to that effect
13 they intend to contribute actively to the proceedings, specifically with
14 regard to procedural issues and also the proceedings on the merits. They
15 bear in mind a decision of the 13th of July, 2008, of this Tribunal, and
16 in paragraph 134 of that decision it is stated that:

17 "At this particular stage of the proceedings, the victims have
18 the right to examine the evidence."

19 They are going to do so within the framework of this case and
20 particularly during the closing arguments and the closing brief. They
21 intend to do this because they do not wish to see any doubts persist
22 about the material facts so that when it comes time to make a decision,
23 your Chamber should confirm all the charges made against the suspect. We
24 will respond to the objections raised by the Defence in writing, but our
25 clients are simply asking you to retain the 13 counts retained by the

1 Prosecutor against the suspect.

2 And if the victims wish the confirmation of the charges, it is
3 also because they would like to understand. They wish to understand why
4 they have been harassed and practically taken hostage by the FDLR to the
5 point where in their own country they are compelled to be refugees and to
6 live in a state of permanent fear. They wish to understand why
7 throughout the world today there are about 1.4 billion people living in
8 poverty, with at least 400 million living below the poverty threshold,
9 but not all those people are attacked, not all those people are raped on
10 a permanent basis, like they are being -- like it is happening in their
11 country. So they are expecting clear answers to those questions.

12 It is for that reason, Madam President, from the point of view of
13 the victims the holding of a trial is of capital importance. At the
14 beginning of my statement, I told you that at one point the victims had
15 felt that they were alone and that is absolutely true. At some point
16 they had the feeling that they had been heard. Things were happening
17 around the world, they were being spoken about, politicians and
18 associations loudly denounced all the violence that had been perpetrated
19 against them. But at the same time, they realised that the suspect was
20 appearing in the media, smiling, and telling everyone that his men had
21 done nothing, that they were honest, and that they had never perpetrated
22 the crimes alleged against them. And from that time, the victims
23 understood that there are two things that neither politicians nor the
24 associations can provide to them, and that is punishment and reparation.
25 It is only your Court that can provide those things, and for that to

1 happen, there has to be a trial and that trial begins with this
2 confirmation of charges hearing.

3 By confirming all the charges that have been retained against the
4 suspect, your Chamber will be sending a clear message to the entire world
5 in general and to this particular region of the east of the Democratic
6 Republic of Congo, in particular to the effect that, one, women should no
7 longer be considered as war booty; secondly, no political conflict or
8 struggle justifies the perpetration of the serious crimes committed
9 against civilians who were taken hostage, attacked, and raped and
10 dishonoured for almost a decade now.

11 Madam President, the people of the Kivus, that is, the North and
12 South Kivu, are peaceful people. And I am saying this because I know
13 those people. Personally, I spent a part of my life in that country.
14 More than 30 years ago I attended primary school in Masisi, in Fisi (*
15 phon), and this was a region that was at peace at that time but which
16 today has been completely destroyed.

17 Recently when I was speaking with some of my clients, they told
18 us that we have understood that our problems have come from the fact that
19 President Mobutu, in 1974, accepted to welcome refugees that came into
20 the country, and we have understood that the worst thing that a
21 government can do is to welcome refugees. I'm convinced, Madam
22 President, that with the decision that you will hand down you will show
23 those victims that they are wrong, by telling them that it is a good
24 thing to welcome refugees, but war criminals and people who perpetrate
25 crimes against humanity are to be tried in front of this Court and

1 punished for the crimes they have perpetrated. Thank you.

2 PRESIDING JUDGE MONAGENG: Thank you very much.

3 We will now give Mr. Kaufman exactly 20 minutes to make his --
4 oh.

5 MR. KAUFMAN: Madam President, your Honours, never has so much
6 been expended to prove so little. Never have so serious charges been
7 levelled against an individual so remote from the commission of crimes.
8 I have sat here listening to speeches of counsel for the Prosecution and
9 for the victims, speeches full of grief and personal tragedy, speeches
10 full of horror and cruel inhumanity, speeches which cannot fail to raise
11 feelings of anger and revulsion; speeches, however, which are designed
12 for a public sitting in that gallery and without the walls of this
13 building, speeches designed for a public which knows little about the
14 arcane rules of international law but a public which demands a culprit
15 and a person to blame. But I rest assured that this honourable Court
16 will not dispense justice on the basis of speeches. Your Honours are
17 professional Judges and know full well that emotion is not a substitute
18 for evidence. And we will prove that the evidence which supposedly links
19 my client, Mr. Callixte Mbarushimana, to the commission of these awful
20 crimes simply does not exist.

21 When Mr. Mbarushimana first appeared before this Court, he
22 condemned the barbarity of what was happening in the eastern region of
23 the Congo, and, yes, tragic and awful things have indeed taken place in
24 the Kivus. Many innocent civilians have been victimised in the most
25 appalling way, and as Maître Kassongo has said, they deserve to see those

1 that harmed them punished. But the greatest disservice that may be
2 afforded to these victims is to convict an innocent man of something he
3 did not do.

4 The greatest insult to these victims is to deliver justice as a
5 knee-jerk reaction. Justice, your Honours, is not a process initiated
6 because somebody in New York, Kinshasa or Kigali has decided that one
7 individual should pay the price for the failure of the international
8 community to protect the people of the Kivus.

9 In the course of the next few days you will hear much talk about
10 crimes allegedly committed by the FDLR, but what the general public may
11 think of the FDLR and what the politicians in New York may say about the
12 FDLR is irrelevant. The only thing that counts is what the Prosecution
13 has brought by way of its investigation before this Chamber, and this
14 Prosecution, as we will show, has abjectly failed to show substantial
15 grounds to believe that the FDLR actually committed the crimes that they
16 impute to Mr. Mbarushimana.

17 Your Honours, Article 54(1)(a) of the Rome Statute is a mandatory
18 provision. It obliges the Prosecution to investigate both incriminating
19 and exonerating circumstances. Now, I wait with bated breath to hear how
20 this Prosecution has executed its obligations in this respect. How has
21 the Prosecution investigated the crime base so that he can convince this
22 Court and the victims that it was the FDLR and not one of the many other
23 militias operating in the Kivus who committed the crimes with which
24 Mr. Mbarushimana is charged. How has the Prosecution imputed liability
25 to the FDLR? Is it because the rapists, murderers and mutilators looked

1 like Hutus? Or was it because of their dress, or because they spoke
2 Kinyarwanda, as Maitre Kassongo said? If that be the case, then let the
3 Prosecution explain why members of the CNDP, the Mayi-Mayi, the Rwandan
4 Defence Force, RUD-Urunana, PARECO, the FPLC, the Rasta and various units
5 of the Congolese unit, the FARDC, themselves could not be potential
6 suspects.

7 I urge you to read the report the Defence commissioned from
8 Dr. Phil Clark, a recognised expert on the conflict in the Great Lakes
9 region. He says, and I submit, that all these militias speak Kinyarwanda
10 and many comprised members of Hutu ethnicity. Some of these militias are
11 splinter factions of the FDLR. Some of these have always been
12 fundamentally opposed to the FDLR. So why has the Prosecutor not
13 investigated these militias? Why are their leaders so conspicuous by
14 their absence at this Tribunal? Only yesterday Human Rights Watch
15 criticised this aspect of the Prosecution's strategy in a report entitled
16 "Unfinished Business." What is for sure, however, is that in the present
17 case the Prosecutor's investigators, in our submission, have not
18 corroborated their sources and have not excluded the possibility of
19 mistaken identity.

20 This ought to have been the purpose of the OTP's investigation,
21 to verify suspicions and to ascertain the truth, not to blindly adopt the
22 raw field-work of human rights NGOs.

23 But let us assume for the sake of giving argument that the
24 Prosecution can by some means convince us that the FDLR is to blame for
25 the crimes before this Court. Where does Mr. Mbarushimana fit into this

1 picture? Well, the Prosecution would have you believe that from the
2 cramped Parisian apartment where he scraped out a meager living with his
3 wife and three children, Mr. Mbarushimana was sending out his tentacles
4 into the darkest region of the Eastern DRC, masterminding, as it were, a
5 global conspiracy to create a humanitarian catastrophe.

6 Ms. Bensouda this morning said that my client, Mr. Mbarushimana,
7 was the linchpin. In my understanding of the English language, linchpin
8 implies an essential contribution. Without him, it would not have
9 happened. But that's not what your Honours found when they issued the
10 decision ordering my client's arrest. They said that Mr. -- you said
11 that Mr. Mbarushimana made a non-essential contribution. He wasn't any
12 linchpin.

13 And so how did Mr. Mbarushimana, according to the Prosecution,
14 promote this conspiracy and contribute to its purpose? Well, according
15 to the Prosecutor, it was through the power of the spoken word.
16 Mr. Mbarushimana was instructed and abused the freedom for speech he
17 enjoyed in France to deceive the public, to lie to the international
18 community.

19 Of course we strenuously deny this, but I would like to ask
20 whether there is anyone who seriously thinks that lying to the
21 international community is a criminal offence? Have not politicians and
22 statesmen far greater and far more influential than Mr. Mbarushimana done
23 this, whether it be on issues concerning global warming or weapons of
24 mass destruction? No amount of Prosecution's smoke and mirrors can hide
25 the fact that Mr. Mbarushimana's alleged contribution to the common

1 purpose was simply not criminal.

2 I challenge the Prosecution to show to this learned Chamber one
3 piece of evidence, the tiniest and most slight piece of evidence, which
4 can show that Mr. Mbarushimana ever condoned or ever agreed with the idea
5 of attacking a civilian population. The Prosecution has certainly had
6 enough information at its disposal to take up the gauntlet. They have
7 boasted to the Chamber that they seized one terabyte, that is 1.000
8 gigabytes, of information from Mr. Mbarushimana's house. All of this, by
9 the way, without showing the Court any form of judicial authorisation.
10 Thousands of press communiqués, intercepted telephone calls, documents
11 and e-mails, all allegedly emanating my client and his associates. But
12 as hard as they have tried, they found nothing, nothing whatsoever, and
13 is this not significant. If we're to accept the Prosecution's most basic
14 premise that Mr. Mbarushimana committed all his criminal activity in
15 Paris and did so by communicating his nefarious plans to his fellow
16 conspirators, how is it that these several thousand communications have
17 not revealed one paltry, one slight sign of an agreement to the
18 commission of a humanitarian catastrophe? These communications, after
19 all, were intercepted on a 24-hour, round the clock basis.

20 Every first-year law student, your Honours, knows that in order
21 to prove a common criminal purpose, or put otherwise, a conspiracy, one
22 has to prove a meeting of minds, an agreement. So how exactly does the
23 Prosecution believe that Mr. Mbarushimana participated in this
24 sophisticated criminal design with his fellow conspirators? How did he
25 communicate his agreement with this evil scheme to target innocent

1 civilians? Was it by mental telepathy, by carrier pigeons, or perhaps by
2 wishful thinking --

3 PRESIDING JUDGE MONAGENG: Mr. Kaufman, please just give us a few
4 minutes, we are not getting any transcript.

5 Thank you, Mr. Kaufman. You can continue.

6 MR. KAUFMAN: Thank you, Madam President.

7 So I ask, how did or how does the Prosecution allege that
8 Mr. Mbarushimana communicated his agreement to this scheme for targeting
9 innocent civilians? I don't know. I don't think the Prosecutor knows
10 either because if he did, he would not have charged Mr. Mbarushimana, in
11 my submission, with such a far-fetched mode of liability.

12 But let us not be mistaken as to the real reason why I believe
13 Mr. Mbarushimana is now in custody. It is because he is a man who,
14 according to the Prosecution's evidence, spoke his mind, spoke his mind
15 and said things that certain people did not want to hear, a man who
16 shares an ideology with an organisation that calls for justice and regime
17 change in Rwanda, a man who is accessible and who could be silenced by
18 arrest and incarceration. But do we punish a man for exercising his
19 democratic right to free speech? Of course not. Is not the freedom of
20 speech an ancient principle, as sacred as the rules of law and due
21 process which will be exercised in this courtroom.

22 As I said, there is absolutely no evidence to show that
23 Mr. Mbarushimana endorsed the loss of civilian life. There is, however,
24 plenty of evidence to show that Mr. Mbarushimana actively advocated the
25 protection of civilians, residents in the Kivus, something which

1 Mr. Mbarushimana told you at his initial appearance. This is evidence,
2 which despite a generously staffed investigative team, the Prosecution
3 has either failed to identify or chosen to ignore, and do not be mistaken
4 as to the extraordinary lengths to which the Prosecution has gone in
5 order to incriminate Mr. Mbarushimana. They even descended upon a priest
6 of the Roman Catholic church who had on occasion served as spiritual
7 confessor to Mr. Mbarushimana, but the Prosecution wasn't interested in
8 obtaining information that might exonerate Mr. Mbarushimana. That had to
9 be left to the Defence, who interviewed him a couple of months later, and
10 this is what he had to say. This is what this senior and respected
11 cleric had to say about Mr. Mbarushimana.

12 And I now turn to French as I've been instructed to inform the
13 Chamber.

14 (Interpretation) It is quite clear that with us he has always
15 given the impression that he understands our approach and to accept the
16 road towards peace and even to actively seek out peace. He also led us
17 to understand the difficulties involved in taking certain decisions.

18 A)the question is: Was he sincere or not? Mbarushimana, I believe, was
19 sincere. Recently we spoke a lot about humanitarian issues because
20 Mbarushimana had accepted the proposal for a humanitarian corridor so as
21 to allow civilians to leave the men who were under the control of the
22 FDLR. He was in agreement that such a corridor was essential to reduce
23 the suffering of the population and even to find an overall solution.

24 (In English) I turn back to English.

25 I'm inclined to believe that a man of God is by and large a man

1 who speaks the truth. Apparently the Prosecution agrees with me because
2 they've listed him as one of their own witnesses. Your Honours, I ask
3 you to take careful note of this clergyman's words, to believe them, and
4 to refuse to confirm the charges against Mr. Mbarushimana. Thank you.

5 PRESIDING JUDGE MONAGENG: Thank you, Mr. Kaufman.

6 The Chamber ...

7 MR. STEYNBERG: Thank you, Madam President. If the Chamber will
8 bear with me one moment, please.

9 PRESIDING JUDGE MONAGENG: Mr. Steynberg, according to our
10 schedule, you -- you will respond to Mr. Kaufman in writing.

11 MR. STEYNBERG: As the Chamber pleases.

12 PRESIDING JUDGE MONAGENG: Thank you.

13 MR. STEYNBERG: Madam President, your Honours, my learned friend
14 has raised many questions in his opening statement, many of which --

15 PRESIDING JUDGE MONAGENG: Mr. Steynberg, are you now making your
16 presentation?

17 MR. STEYNBERG: I'm making my presentation.

18 PRESIDING JUDGE MONAGENG: Okay, before you do that, we -- I have
19 to make a few remarks. I thought you were responding to him.

20 MR. STEYNBERG: No, I merely wanted to say that many of the
21 questions I hope will be answered during the course of our main
22 presentation of the evidence. The rest we will answer in writing.

23 PRESIDING JUDGE MONAGENG: Thank you.

24 The Chamber has heard the opening statements of the Prosecution,
25 the Defence, and the Legal Representatives of Victims, and before we

1 begin with the presentation of the evidence by the Prosecutor, I would
2 like to briefly address the issue of the final written submissions of the
3 parties and participants.

4 The Prosecution, the Legal Representatives of Victims, and the
5 Defence are entitled to file a document in which they may address those
6 issues to be raised during the confirmation hearing which are of
7 relevance for the purpose of the decision to be taken by the Chamber
8 under Article 61(7) of the Statute. The Chamber decides that the
9 Prosecution and the Legal Representatives of Victims shall have until the
10 6th (* Realtime transcript read in error "16th") of October, 2011, to
11 file their final written observations, and the Defence shall have until
12 Friday, 21st of October, 2011, to file its written observations.

13 Also in accordance with this precedence, the Chamber considers
14 the end of the confirmation hearing to be the submission of the last
15 written observations, and therefore the 60-day time-limit provided for in
16 Regulation 53 of the regulations of the Court for the Chamber to deliver
17 its decision confirming or not the charges shall start running on the
18 first day after the filing of the Defence final written observations.

19 That said, we can start with the presentation of evidence by the
20 Prosecution, and, Mr. Steynberg, this will go on until 1.30. Thank you
21 very much.

22 MR. STEYNBERG: As the Chamber pleases.

23 Madam President, your Honours, the Prosecution evidence
24 establishes substantial ground to believe that Mr. Callixte Mbarushimana
25 is responsible for the crimes charged and should be committed to trial.

1 The Prosecution alleges that he was both a senior and an active leader of
2 the FDLR, an organisation that pursued an objective of regaining power in
3 Rwanda through both military and political means. The evidence further
4 shows that the suspect had knowledge of this goal. The organisation is
5 composed of two different branches, a political and a military wing,
6 co-ordinated at the top by a Steering Committee. The suspect is a member
7 of this Steering Committee by virtue of his *de jure* position as executive
8 secretary of the FDLR. The evidence further shows that Mr. Mbarushimana
9 was one of the most active members of such committee.

10 In early 2009, the Prosecution alleges that this organisation and
11 its leaders adopted a policy to conduct widespread and systematic attacks
12 against the civilian populations of North and South Kivu Provinces; in
13 order, your Honours, to create a so-called humanitarian catastrophe.
14 Hand in hand with this policy, the leadership also mandated a
15 simultaneous international campaign to persuade the DRC and Rwanda
16 governments, as well as the international community, to negotiate with
17 the FDLR. This campaign was led by the suspect.

18 The aim of the FDLR was to extort from these governments and the
19 international community concessions of political power in Rwanda in order
20 to stop the atrocities against the civilians.

21 Your Honours, I will first present on the historical roots of the
22 FDLR's use of violence, which provides an explanation for the
23 organisational policy adopted by the FDLR and Mr. Mbarushimana's role.
24 Secondly, I will analyse the leadership, structure, and functioning of
25 the FDLR in 2009. This will establish that the FDLR is an organised

1 armed group and will also prove that the suspect was both *de jure* and
2 *de facto* one of the top leaders. I will then focus more specifically on
3 the FDLR's organisational policy to create a humanitarian disaster,
4 proving that Mr. Mbarushimana's contribution was in accordance with the
5 criminal plan approved and implemented by the organisation. Finally, I
6 will present the reasons to conclude that the crimes were committed as
7 part of a non-international armed conflict.

8 My colleague Ms. Weiss will then present the evidence proving
9 that the FDLR conducted a widespread and systematic attack against the
10 civilian populations and that Mr. Mbarushimana wilfully contributed to
11 the denial of the FDLR's responsibility. At the same time, your Honours,
12 using the attacks as bargaining tools in the political negotiation
13 process. She will also outline the evidence establishing the commission
14 of the crimes by the FDLR of persecution, murder, destruction,
15 property -- destruction of property, I beg your pardon, and pillaging,
16 and she will highlight in her presentations how victims and demobilised
17 FDLR cadres proved that it was the FDLR who committed these crimes.

18 Next, Ms. Rabanit will focus on sexual violence, torture,
19 inhumane acts, and cruel treatment perpetrated by the FDLR and
20 Mr. Mbarushimana's constant denials thereof. Finally, Madam President,
21 Ms. Solano will analyse the mode of liability and present evidence of
22 Mr. Mbarushimana's contribution to the crimes committed by the FDLR as
23 part of their common plan.

24 During our presentations, your Honours, the Prosecution will
25 refer to and highlight only key facts in evidence; however, we

1 specifically rely on all facts and allegations contained in the charging
2 document and the corresponding materials on our list of evidence. The
3 Prosecution also relies on the transcripts of the witness interviews
4 contained in the Defence list of evidence which it has introduced back
5 into evidence. When referring to evidence, the Prosecution will refer to
6 the sequential number on the list of EVD numbers filed by the Registry.
7 Your Honours will note that the sequential numbers correspond exactly
8 with the EVD numbers that have been assigned to the corresponding pieces
9 of evidence. I hope this will be clear.

10 Turning then, Madam President, to the historical roots of the
11 FDLR's use of violence. In order to appreciate the suspect's
12 contribution and knowledge of the FDLR's criminal plan in 2009, it is
13 important to understand that one of the main objectives for the creation
14 of the FDLR in 2000 was to attempt to distance the group from the Rwanda
15 genocide of 1994. The FDLR's founders needed to disguise their
16 connection to this genocide so as to avoid isolation and to gain
17 international legitimacy, clearing the way for their participation in
18 political negotiations, aimed ultimately at regaining power in Rwanda.
19 The Prosecution alleges that the need to shed the stigma was instrumental
20 in the establishment of an ostensibly separate political wing largely
21 based in Europe, it also shaped the roles assigned to these political
22 leaders, including Mr. Mbarushimana.

23 Your Honours, as a consequence of its marginalisation during the
24 negotiation after the Congo Wars, the FDLR adopted a bifurcated
25 structure, a split structure. On the one hand it established its

1 European leadership which was ostensibly unconnected with either the
2 genocide or with the crimes currently being committed in the Kivus. This
3 group would represent the FDLR on the world stage, as the suspect has
4 done. This was necessary in order to sanitise the FDLR's image so that
5 it could participate in the political negotiations necessary to achieve
6 its ultimate goals.

7 On the other hand, however, the FDLR maintained a military force
8 of thousands of soldiers in the Kivus under the command of General
9 Sylvestre Mudacumura, who were tasked with the creation of a humanitarian
10 catastrophe in order to extort the political concessions which the group
11 sought, as I will explain shortly. Excuse me.

12 History, your Honours, provides the reasons for this approach.
13 As briefly presented by the Deputy Prosecutor in her opening statement,
14 the FDLR is the most recent incarnation of a succession of Rwandese rebel
15 groups formed by some of the génocidaire that fled to the DRC after the
16 1994 genocide. Some members of the former Rwandan army and of the
17 Interahamwe militia who masterminded and executed the Rwandan genocide
18 used the refugee camps in the country then known as Zaire to recruit and
19 train members to form politico-military groups with the aim of gaining
20 power. One of these groups was the RDR, a predecessor to the current
21 FDLR.

22 Your Honours, the RDR planned and implemented attacks against the
23 forces of the new Rwandan government on Rwandan territory during 1995 and
24 1996. These activities triggered the first Congo War in 1996, when
25 Rwanda decided to take action to disband the RDR and similar groups.

1 They were supported by the Ugandan armed forces and also the AFDL, a
2 Congolese group which came to be led by one Laurent-Désiré Kabila. In
3 May of 1997, their forces reached Kinshasa and ousted Zaire's then-ruler
4 Mobutu Sese Seko.

5 When the RDR disbanded, a new rebel group known as ALIR was
6 formed from its remnants. This group subsequently split along
7 geographical lines into two distinct entities known as ALIR I and ALIR
8 II. When the second Congo War started, your Honours, in 1998, ALIR II
9 fought in support of the then DRC President Laurent Kabila --

10 PRESIDING JUDGE MONAGENG: Mr. Steynberg, slow down a little bit,
11 please.

12 MR. STEYNBERG: As your Honour pleases. I will repeat.

13 When the second Congo war started in 1998, ALIR II fought in
14 support of then-President Laurent Kabila in return for the political and
15 military support necessary to return to Rwanda and oust the Kagame
16 regime. However, your Honours, when the second Congo war finally ended
17 in 1999, when the DRC, Uganda, and Rwanda, and other states and militias
18 involved signed the Lusaka Cease-fire Agreement, this agreement required
19 disarming armed groups present on Congolese soil and invited State
20 Parties to the agreement to offer amnesty and political asylum to former
21 combatants.

22 Importantly, your Honours, this agreement explicitly excluded
23 génocidaire from amnesty. I refer your Honours to the cease-fire
24 agreement, which is item 1 on the list. It was in this growing -- in
25 this context of growing political isolation of former génocidaire that

1 the FDLR was created in early 2000. From a splinter group of ALIR II
2 leaders, including Mudacumura. There are numerous connections between
3 the original RDR, ALIR and the FDLR. One example, as I have mentioned,
4 is General Sylvestre Mudacumura who was one of the founders of the RDR in
5 1995 and also a leader of ALIR II and currently is the leader and supreme
6 commander of the FDLR military wing. Another is Ignace Murwanashyaka,
7 who was appointed first vice-president and then, in 2001, president of
8 the FDLR. Murwanashyaka was a student in Germany in 1994 without obvious
9 connections to the Rwandan genocide. However, in 1997, he was the RDR's
10 representative in Germany and was later also associated with ALIR II.

11 Your Honours, after Joseph Kabila succeeded his late father as
12 DRC president in 2001, the Congolese government's support for the FDLR in
13 the Kivus progressively dwindled. In July of 2002, President Kabila
14 signed the so-called Pretoria Accord with the Rwandan government in which
15 he committed to dismantle FDLR camps and expel its leaders from the DRC,
16 further isolating the group. However, little effort was made by the DRC
17 government to implement this agreement until the launch of the joint
18 Rwandan and Congolese military offensive in January 2009, to which I
19 shall return shortly.

20 How, your Honours, are these historical events related to the
21 crimes charged in 2009?

22 Madam President, they are crucial to understanding the FDLR's
23 organisational structure and the policies which they adopted. Firstly,
24 they provide a rationale to the FDLR policy of having its political
25 leaders in Europe who are not personally involved in the armed operations

1 and to establish the suspect's knowledge and intention to contribute to
2 the group's common purpose.

3 Secondly, history shows a consistent use of criminal activities
4 by the FDLR which culminated in their 2009 decision to adopt a deliberate
5 policy of attacking civilians. These FDLR criminal activities over the
6 years were publicly and officially exposed. Between 2002 and 2010, the
7 United Nations Security Council repeatedly expressed serious concerns
8 about the military activities of the FDLR in Eastern DRC. It
9 characterised the group as a threat to peace and security, a cause of
10 insecurity in the Great Lakes region, and a threat to the local civilian
11 population. Furthermore, numerous respected and independent
12 international organisations and non-governmental organisations repeatedly
13 exposed the catalogue of abuses committed by the FDLR combatants against
14 the civilian population of the Eastern DRC.

15 Mr. Mbarushimana, who was an active FDLR leader since at least
16 2004, was well aware, your Honours, of the criminal means used by the
17 organisation to achieve its goals.

18 In the face of this knowledge he denied all involvement and all
19 accusations made against the FDLR. Evidence will be led in due course to
20 show that this denial was preplanned and decided at the highest levels of
21 the FDLR. His mandate was to react "immediately and systematically" to
22 all allegations of FDLR crimes so as to defend the image of the
23 organisation. He was explicitly required by the common plan to, I again
24 quote, "vilify the enemy and accuse it of everything" and "to react
25 promptly if not instantly to everything that was said about the FDLR

1 however unimportant."

2 The evidence, your Honours, will show how Mr. Mbarushimana
3 implemented this mandate in relation to the 2009 attack on Busurungi.
4 For example, despite having been pertinently informed by FDLR leaders in
5 the DRC that its troops had killed civilians in Busurungi, he published a
6 fabricated account of the events for the explicitly stated purpose of
7 avoiding condemnation for the FDLR's violation of international
8 humanitarian law. The Prosecution thus alleges that while he made this
9 contribution, Mr. Mbarushimana knew of the criminal purpose of the FDLR.
10 He was not sitting in ignorance in his Paris flat with no knowledge of
11 what was going on.

12 He also knew of the organisational policy to create a
13 humanitarian disaster and the international -- associated international
14 campaign to extort political concessions. Your Honours, the Prosecution
15 submits that this knowledge is established by the following facts.
16 Firstly, his knowledge of the repeated public allegations of atrocities
17 levelled against the FDLR by international organisations and reputable
18 NGOs, particularly during 2009.

19 Secondly, from his *de jure* position as -- in the FDLR as
20 executive secretary and Steering Committee member, one of the highest
21 elected officials in the organisation.

22 Thirdly, his *de facto* position in the FDLR as one of the inner
23 core of leaders and, as (Expunged)
24 (Expunged) Ignace Murwanashyaka and as leader of the extorted
25 international campaign.

1 Fourthly, your Honours, from his constant contact with other
2 senior FDLR leaders who were implicated in the decision to create a
3 humanitarian catastrophe and his clear access to information from the
4 field.

5 Fifthly, from the fact that he did not take any appropriate steps
6 to satisfy himself as to the truth or otherwise of these reports in
7 circumstances when an innocent person in that position would have done
8 so.

9 Finally, your Honours, from his consistent knee-jerk denials of
10 responsibility in circumstances where he did not and could not have
11 confirmed the veracity of his denial.

12 I turn next, your Honours, to the leadership, structure, and
13 functioning of the FDLR in the year 2009.

14 PRESIDING JUDGE MONAGENG: Mr. Steynberg, there's an
15 intervention.

16 MR. KAUFMAN: (Microphone not activated)

17 Yes, I do apologise. It's not my habit to interrupt, but I am --
18 I believe at line 64, 6, maybe something might have to be redacted and
19 I'm taking advantage of the 30-minute delay. 64 -- page 64, line 6, the
20 first three words. Yes. Thank you. And I once again apologise to
21 Mr. Steynberg.

22 JUDGE STEINER: Mr. Kaufman.

23 MR. KAUFMAN: Yes.

24 JUDGE STEINER: Next time you want to suggest a redaction, please
25 send it by mail to the Bench --

1 MR. KAUFMAN: Certainly.

2 JUDGE STEINER: -- because sometimes calling the attention in
3 public session makes things more difficult.

4 MR. KAUFMAN: I appreciate that. Thank you.

5 PRESIDING JUDGE MONAGENG: Thank you very much.

6 MR. STEYNBERG: Thank you, Madam President. I'm not sure if the
7 redaction had anything to do with the name of a witness who I also
8 mentioned earlier, if that is the case, then the redaction would also
9 have to be applied to my presentation. If the Chamber will bear with me.

10 (Prosecution counsel confer)

11 MR. STEYNBERG: Madam President, the FDLR is a political
12 military -- a political military movement aimed at regaining power in
13 Rwanda. As explained, it has two branches clearly defined, the military
14 wing situated in the eastern DRC under the direct command of General
15 Sylvestre Mudacumura and the political wing whose top leaders are based
16 mainly in Europe. I refer your Honours to a slide which should be
17 appearing on your screens. Your Honours, there appears to be a technical
18 problem with the broadcast of the slides. This will affect my
19 presentation fairly substantially. I wonder whether we couldn't -- is it
20 there -- thank you. Does your Honours have that?

21 COURT OFFICER: Your Honour, if I may, there is no technical
22 problem so far. If everybody wants to see the slide shows that are going
23 to be presented directly by the Office of the Prosecution, they just need
24 to have access to the second live feed of the screen by pushing -- by
25 pressing the button that is next to the screen and then by pressing the

1 button "PC 1" on your black remote controls.

2 MR. STEYNBERG: May I proceed, Madam President? Thank you, your
3 Honours.

4 The slide which I've called up shows an overview of the
5 leadership structure of the FDLR. However, your Honours, as clearly
6 described in its own statute, both military and political wings formed
7 integral parts of the same organisation. I refer to item 1080 on the
8 list, which is a copy of the FDLR statute seized from Mr. Mbarushimana.

9 President Murwanashyaka has, in fact, also confirmed his overall
10 leadership and I refer to item 282 on the list at ERN 0324.

11 The military wing, your Honours, is structured along the lines of
12 a conventional army, with a clear command structure. It is organised
13 into two main divisions dubbed SONOKI and SOSUKI, or Operational Sector
14 North Kivu and Operational Sector South Kivu respectively. A further
15 mobile Reserve Brigade is based in the provincial border areas between
16 the north and south. The chain of command leads up to the high command
17 which is composed of the general staff of the FDLR's military wing and
18 then to the commander of the army, General Mudacumura, based in the Kivu
19 provinces.

20 Although it is an important fighting force, the FDLR did not have
21 the military capacity to defeat the combined armies of Rwanda and the
22 DRC. And it is for this reason the Prosecution alleges it adopted a
23 policy of attacking civilians in order to achieve its goals.

24 For the reasons already explained, the FDLR also adopted a
25 sophisticated political structure. I refer to the next slide, with a

1 president; two vice-presidents; executive secretary,
2 Callixte Mbarushimana; deputy executive secretary; and ten executive
3 commissioners.

4 Next slide, please. I call up a slide which details the
5 functions of the executive secretary as mandated by the statute and I
6 highlight that one of the functions was to co-ordinate and report on the
7 activity of the commissioners. Sorry, could you go back to the previous
8 slide. I'm sorry, I've gone too fast.

9 I'd like to highlight one of the activities of the commissioners
10 which was to conceive, define, and ensure the execution of the FDLR
11 defence policy in close collaboration with the FDLR army's high command;
12 and another, to conceive, defend, and promote the FDLR's position
13 *vis-à-vis* the international community. These are two of the functions
14 which in his *de jure* position as executive secretary the suspect was
15 expected to co-ordinate and report on. I refer again to the statute,
16 item 1080, and the evidence referred to in paragraph 29 of the charging
17 document.

18 Your Honours, the statute also aims to ensure the proper
19 co-ordination between the two FDLR branches at the level of *comité*
20 *directeur* or Steering Committee, which is comprised of equal numbers of
21 civilian and military leaders as indicated in the slide, and includes
22 Executive Secretary Mbarushimana.

23 Although this is not the highest decision-making body in the
24 FDLR, it was the highest functioning decision-making body in the FDLR in
25 2009. The two nominally higher groups, namely, the National Congress and

1 The National Resistance Committee, had not met since 2006. In these
2 circumstances Article 40 of the FDLR statute provides that the
3 Steering Committee would fulfil their functions. Therefore, Prosecution
4 alleges that the suspect was a member of the highest decision-making body
5 of the organisation. One of the duties of that body, your Honours, was
6 to develop the organisational policies relative to defence and security
7 of the FDLR, to which the suspect would have been party.

8 The evidence establishes that Mr. Mbarushimana's responsibility
9 as executive secretary and member of the Steering Committee was not
10 merely a formality. He, in fact, performed his duties in accordance with
11 his prescribed role. He was, your Honours, in near and constant contact
12 with the FDLR president and other prominent FDLR members and he played a
13 very active role in the leadership of the organisation.

14 The Prosecution does not, however, allege that the suspect
15 himself had direct command responsibility over the military, that is not
16 the mode of liability that we rely on. However, the Prosecution alleges
17 that Murwanashyaka and Mr. Mbarushimana, together with the top leaders
18 based in the field, were the key decision-makers in 2009. As active top
19 leaders of the FDLR and members of its Steering Committee, the
20 Prosecution alleges that Murwanashyaka, Mudacumura, and the suspect were
21 all party to the determination of the organisational -- of the
22 organisation's critical defence and security policies. This, in our
23 submission, would include the decision to conduct attacks against
24 civilians. He was entrusted, your Honours, by the Steering Committee
25 with the task of spear-heading the FDLR's international campaign.

1 And my learned friend, Ms. Solano, will explain how he undertook
2 that task.

3 Turning then to the organisational policy to attack civilians.

4 Madam President, your Honours, the Prosecution alleges that during
5 January 2009, the FDLR leadership took a deliberate policy decision to
6 launch a campaign of attacks against the civilian population of North and
7 South Kivu in order, your Honours, to create a humanitarian catastrophe.
8 The policy of attacking victims was an integral part of the common plan
9 to which the suspect made his contribution, as Ms. Solano will explain.
10 This policy or the adoption of this policy followed the announcement on
11 the 5th of December of the joint Rwandan and Congolese offensive against
12 the FDLR dubbed Operation Umoja Wetu, and I refer to the joint communiqué
13 of this operation, item 288 on the list. This military operation was
14 aimed at dislodging the FDLR from its strongholds in the Kivus. Your
15 Honours, this resumption of ties between these two countries and the
16 announcement that the powerful Rwandan army would join forces with the
17 Congolese army against the FDLR was a dramatic new development which
18 completed the growing isolation of the FDLR since the culmination of the
19 Congo Wars. Essentially, the FDLR had lost its last ally.

20 This development left the FDLR with a dilemma. The group did not
21 have military strength to beat the coalition forces in a conventional
22 battle. This is, in fact, confirmed by one of the former FDLR combatants
23 interviewed by the Prosecution, and I refer to item 668 on the list at
24 lines 1546 and 16 -- sorry, to 1609, nor could it overthrow the Kagame
25 regime by force. Its only hope, therefore, was to find a way to persuade

1 the government forces to call off their offensive and to force them,
2 rather, to the negotiating table. To face this new challenge, the FDLR
3 leadership adopted the organisational policy to create a humanitarian
4 catastrophe. And in execution of this policy it embarked on a brutal
5 campaign of deliberate attacks against the civilian population of the
6 Kivus, who presented a far easier target than the armies of the DRC and
7 Rwanda.

8 The policy was intended to make the human cost of the coalition
9 alliance -- rather, of the coalition offensive so high that public and
10 international pressure would oblige these governments to abandon their
11 military campaign in favour of a negotiated settlement, ultimately aimed
12 at regaining power in Rwanda.

13 The existence of this policy, your Honours, is confirmed by
14 various sources of evidence. Several witnesses confirm that orders to
15 attack civilians were sent to the field during the first quarter of 2009.
16 In fact, a transcript of one such order which was transmitted to FDLR
17 units in the field is attached as annex 18 to the United Nations group of
18 evidence final report.

19 I ask the Court Officer to call up item number 75 on the list at
20 ERN 0168. I believe I referred to it as the United Nations group of
21 evidence, it should in fact be the United Nations Group of Experts final
22 report. I apologise.

23 I refer your Honours to the third bullet which I will not attempt
24 to read in French, but as your Honours can see it -- I beg your pardon.
25 It specifically instructs the FDLR troops to attack towns and civilian

1 populations. The stated purpose is to create - in its own words - a
2 humanitarian catastrophe. The purpose of this is to pressurise the
3 international community to force the Rwandan government to negotiate with
4 the FDLR.

5 This is not the only evidence of such an order. The existence of
6 this order is confirmed by a number of former FDLR members, who either
7 heard the order read out to the FDLR troops or saw copies of such order
8 with their own eyes. For instance, Witness 677, a former FOCA member
9 confirms that he saw this order in his unit's message book, which
10 recorded incoming signals and incoming orders. He further confirms that
11 this order originated from the FOCA high command. And I refer your
12 Honours to item number 762 on the list, paragraphs 52 to 55.

13 The witness states that this order was received during the period
14 of Operation Umoja Wetu, which we know lasted from 20th of January until
15 25th of February, 2009. The existence of the order is also confirmed by
16 Witness 632, another former FDLR combatant. He states that the order
17 instructed the troops to create a humanitarian disaster so that the world
18 would see the people running to different camps and the international
19 community would realise that it had made a mistake. I refer to item 837,
20 lines 582 to 584.

21 Witness number 587, another former FDLR combatant, confirms that
22 he saw the order and that it was signed by Mudacumura. He confirms there
23 was a general order to burn civilian houses so that they would flee and
24 be a burden to the government. I refer to item 860 paragraphs 71 to 74,
25 and paragraph 82. This is a witness summary. I refer also to the

1 corresponding portions of the transcript on my learned friend's witness
2 list.

3 Witness 582, furthermore, states that the message to attack
4 civilians and target development work to dissuade the FDLR -- sorry,
5 states that -- ah. I beg your pardon.

6 This witness states that the message to attack civilians and
7 target development work in order to dissuade the FDLR and its allies from
8 attacking the FDLR was sent from FOCA high command. However, he explains
9 that it, in fact, originated from President Murwanashyaka. He also
10 confirms the order was read out by unit commanders to their troops in the
11 field. And I refer to item number 649, lines 183 to 185; lines 192 to
12 216; and 218 -- I beg your pardon, correction 228 to 253. I understand I
13 referred to Witness 582. It should be Witness 552. My apologies.

14 I refer also to a further transcript of the same witness, item
15 650, at lines 971 to 991; and item 651, lines 67 to 72.

16 All of these witnesses, witnesses whose evidence has been
17 obtained by the Prosecution, confirm the evidence of other open-sources,
18 that there was indeed such an order and that it was conveyed to the
19 troops in the field.

20 Your Honours, the FDLR troops also targeted civilians as
21 punishment for the population's perceived support of the government
22 forces' efforts to dislodge the FDLR from the Kivus. This, it is
23 alleged, had the dual purpose of dissuading the local population from
24 co-operating with the coalition forces and of diminishing public support
25 among the Congolese population for their government's military campaign

1 against the FDLR. This too was part of the strategy conceived by the
2 FDLR leadership.

3 Witness 564, a former officer of the FDLR, confirms that there
4 was an order originating from President Murwanashyaka that the civilian
5 population who sided with the enemy were "considered as enemies and
6 traitors." I refer to item number 668, lines 828 to 836, and 887 to 898.

7 Madam President, apart from this direct evidence of the existence
8 of such a policy, it may also be inferred from the objective facts of
9 this case, such as the sheer number of attacks, the clearly deliberate
10 nature of the infliction of suffering on the population of North and
11 South Kivu. In the present case, the attacks were also carried out by
12 different units of the FDLR over a protracted period of time, almost a
13 year, and at numerous locations, some of them over a hundred kilometres
14 apart. This, it is submitted, show its widespread character and provides
15 further support for the conclusion that these attacks were planned,
16 directed, and organised and not simply spontaneous or isolated acts of
17 violence. This is also confirmed by the similarly brutal and deliberate
18 nature of these atrocities. My colleague, Ms. Weiss, will elaborate on
19 the widespread and systematic nature of these attacks in due course.

20 In summary, your Honours, all the evidence shows firstly that the
21 policy to attack the civilian population was adopted by the leaders of
22 the organisation, that the organisation in question had the capacity to
23 perform acts which infringe upon basic human values, and that given those
24 orders, the organisation did conduct the attacks pursuant to or in
25 furtherance of its policy.

1 Your Honour, I turn to the final section of my presentation which
2 deals with the existence of an armed conflict, as required by the chapeau
3 of Article 8 of the Rome Statute. As mentioned by the Deputy Prosecutor,
4 the Prosecution alleges that an armed conflict existed in the provinces
5 of North and South Kivu between Rwanda and DRC armies supported by UN
6 peacekeepers on the one hand and the FDLR on the other. This armed
7 conflict commenced on the 20th of January, 2009, and is, in fact, still
8 ongoing. The Prosecution refers the Chamber to paragraph 13 to 21 of the
9 charging document and the corresponding items contained in the list of
10 evidence. The preceding announcements by the Governments of Rwanda and
11 the DRC on the 5th of December that they had agreed upon a joint military
12 plan to address the presence of the FDLR in the Eastern Kivus was
13 effectively an announcement of their intention to commence hostilities.
14 Although this conflict was comprised of two separate military campaigns,
15 named Operation Umoja Wetu and Operation Kimia II respectively, it was to
16 all intents and purposes continuous.

17 Your Honours, I would like to refer you to the map on your screen
18 which identifies the main attacks involving the FDLR during 2009. I
19 apologise that it is -- the font is a little small and, if necessary, I
20 can provide printed copies in due course.

21 This map, your Honours, includes both clashes between the FDLR
22 and the government forces as well as attacks on the civilian population,
23 both of which are alleged to constitute hostilities which may found the
24 existence of an armed conflict under international humanitarian law. In
25 certain of these incidents both military targets and civilian targets

1 were attacked. My colleague Ms. Weiss will address specifically those
2 attacks which were directed against civilians, either exclusively or in
3 conjunction with attacks against military forces.

4 As mentioned, the Umoja Wetu campaign commenced on the 20th of
5 January when between 3.500 and 4.000 Rwandan troops crossed into the
6 Eastern DRC. They were joined by up to seven brigades of the Congolese
7 defence force, or FARDC. These advanced into the North Kivu along three
8 axes. Although, your Honours, in many instances the FDLR retreated in
9 face of the advancing coalition forces, United Nations human rights
10 organisation reported clashes in the Nyabiondo area and across the
11 southern Walikale and Masisi territories. The major military clash
12 between the FDLR and the coalition forces during this campaign occurred
13 at Kibua and Katoyi, which was near to the location of the FOCA high
14 command. This attack involved FDLR's elite Reserve Brigade. During this
15 attack the FDLR is alleged to have used civilians as human shields. I
16 refer to item 282 on the list at 0305.

17 Your Honours, coalition forces succeeded in dislodging the FDLR
18 from most of its strongholds in Rutshuru, Lubero and Masisi territories.
19 Having achieved this goal, the Umoja Wetu was terminated on 25th of
20 February and the RDF forces began to withdraw across the border to
21 Rwanda.

22 However, despite suffering a major military defeat, the FDLR was
23 far from destroyed as a fighting force. The Umoja Wetu campaign sparked
24 off a series of bloody reprisals against the civilian population which
25 continued through the rest of the year, as will be described by my

1 colleagues in due course. During the course of the Umoja Wetu and Kimia
2 II campaigns, the FDLR attacked civilians at all of the locations
3 specified in Count 1 of the charging document.

4 Your Honours, after the withdrawal of the Rwandan forces,
5 however, the armed conflict did not cease. The FARDC supported by the
6 United Nations mission in the DRC, or MONUC, commenced follow-up
7 operations aimed at protecting civilians and preventing the FDLR from
8 regaining territory over which it had lost control. The operation
9 commenced in North Kivu and gradually spread down into South Kivu over
10 the course of 2009. This operation continued throughout the year and was
11 finally terminated on the 31st of December. It was followed by another
12 operation which is not relevant to this presentation.

13 During the second period, Kimia II, the armed conflict took on a
14 different dynamic. Rather than a conventional battle, it comprised
15 mainly of guerilla-style FDLR attacks on FARDC positions, especially on
16 remote FARDC positions, and on other armed militia perceived to be
17 aligned with the DRC forces. I refer, your Honours, to item number 668
18 on the list at lines 1575 to 1582, where a former combatant confirms that
19 they had to or they were ordered to adopt guerilla tactics. These
20 attacks were conducted both in an effort to retake lost ground and to
21 re-take lucrative lost income sources. However, your Honours, whenever
22 the FDLR forces encountered members of the civilian population who were
23 perceived to have collaborated with the FARDC forces, they were also
24 ruthlessly attacked. I refer, your Honours, to items number 310 on the
25 list and 575. The latter at paragraph 72.

1 The Prosecution further alleges that the armed conflict took
2 place between armed groups with the requisite degree of organisation, as
3 required by the statute. On the one side of the conflict the forces of
4 the RDF and the FARDC, supported by MONUC, consisted of professional
5 armed forces. On the other side, I have already explained the FDLR was a
6 political and military organisation that operated with a well-defined
7 decision-making process and, in 2009, the FDLR was fully capable of
8 planning operations, executing orders, and enforcing discipline.

9 Finally, I address the issue of the characterisation of the armed
10 conflict. The Chamber will recall that in the arrest warrant application
11 on the 20th of August last year, the Prosecution characterised the
12 initial period of the campaign against the FDLR, that is, Umoja Wetu, as
13 an international armed conflict due to the involvement of the Rwandan
14 army. However, the Prosecution has since reconsidered this position. It
15 is now alleged, for reasons I will shortly explain, that despite the
16 presence and participation of the RDF, the armed conflict must be
17 characterised as non-international throughout the period covered by these
18 charges.

19 The Prosecution submits that there are three situations in which
20 the law of international armed conflict applies. Firstly, where two or
21 more states are fighting against each other with their own armed forces;
22 secondly, where two or more states are fighting against each other
23 through proxy forces under the requisite control; and thirdly, in a
24 situation of military occupation.

25 The Prosecution submits that the facts of this case clearly

1 demonstrate that neither situations one or two were applicable. At no
2 stage during the relevant period were the Rwandan and Congolese forces
3 fighting either other, either directly or through proxies. On the
4 contrary, they were conducting a joint operation against a common
5 adversary, the FDLR.

6 As to the third situation, the Prosecution submits that although
7 the Rwandan forces were present in the DRC territory, this did not
8 constitute a military occupation. As defined by Article 42 of The
9 Hague -- I'll try again. As defined by Article 42 of The Hague
10 Regulations of 1907, the definition of military occupation is codified as
11 follows:

12 "Territory is considered occupied when it is actually placed
13 under the authority of the hostile army."

14 In the present case, the RDF can never -- never assumed authority
15 over any part of the territory of the DRC and can therefore not be
16 considered an occupying force. It entered the DRC specifically for the
17 purpose of the joint military operation and departed once these strategic
18 objectives had been achieved. Therefore, your Honours, the Prosecution
19 submits that the conflict must be characterised throughout the period as
20 non-international.

21 Thank you, your Honours, that concludes my presentation. With
22 the leave of the Chamber I would now like to hand over to my colleague
23 Ms. Weiss.

24 PRESIDING JUDGE MONAGENG: Ms. Weiss, you go up to 1.30.

25 MS. WEISS: Madam President, your Honours, I will start by

1 presenting evidence which shows that the crimes against humanity the
2 Prosecution pleads in its charging document were widespread and
3 systematic. The same evidence will also establish that the offences
4 occurred in the context of a large-scale commission of crimes, as
5 envisaged in Article 8(1). Next, I will highlight the evidence proving
6 the specific elements of the crimes of attacks against civilians, of
7 murder, of destruction of property, of pillaging, and of persecution, as
8 listed in the charging document. Finally, I will underscore the main
9 evidence relating to one particular incident, Busurungi, a location where
10 the Prosecution submits that these crimes were perpetrated by the FDLR.
11 I will show how after this attack Callixte Mbarushimana conspired with
12 his fellow FDLR leaders to formulate a press release which falsely denies
13 FDLR attribution for the crimes in Busurungi.

14 Madam President, your Honours, the evidence shows substantial
15 grounds to believe that from, on, or about the 20th of January to
16 December 31, 2009, the FDLR committed widespread and systematic attacks
17 in the -- on the civilian population of the North and South Kivu
18 Provinces. Some attacks were directed against villages where government
19 troops were stationed, although the FDLR attacked civilians and soldiers
20 alike. Once any military resistance was overcome, FDLR troops continued
21 to brutally attack the undefended civilians.

22 Other villages -- other attacks were directed against completely
23 undefended villages. Most were launched in the early morning, your
24 Honours, when everyone was asleep. During their attacks, the FDLR
25 killed, raped, tortured, mutilated, inflicted inhumane treatment on men,

1 women, children, destroying and pillaging property, all with the
2 intention of persecuting their victims.

3 The charges in this case involve an untold number of assaults on
4 civilians, some 700 killings, widespread pillaging, and the burning of
5 over 7.000 houses and other buildings, leading to the massive internal
6 displacement of the civilian population, a humanitarian catastrophe, your
7 Honour. In accordance with a decision adopted by the Steering Committee,
8 Mbarushimana reacted swiftly to these attacks once NGOs, international
9 organisations, or media identified the FDLR as the responsible group.
10 The suspect's inevitable response was to publicly deny any FDLR
11 involvement in the crimes and also to shift blame to government forces or
12 other armed groups. But he also acted to use these attacks and the
13 resulting civilian casualties as a bargaining chip. The aim? It was to
14 turn public opinion against the military campaign being waged on the FDLR
15 and to force the Rwandan and DRC authorities to capitulate to the FDLR's
16 demands.

17 Madam President, your Honours, the Prosecution submits that the
18 crimes committed by the FDLR were both widespread and systematic. There
19 can be no denying that the attacks alleged in the charging document
20 occurred and that they were widespread. I refer your Honours once again
21 to the map of the Kivus my colleague Mr. Steynberg referred to, this time
22 with the location and dates of the 15 incidents I will focus on today
23 will appear.

24 Are your Honours able to see the map? Thank you.

25 As your Honours will see from this map which lists the 15

1 incidents of attacks I'm about to focus on, you will notice the
2 geographically widespread nature of the attacks. The evidence
3 establishes that the attacks were committed on a large scale against many
4 civilians and that the FDLR was responsible. According to sources
5 including the Office for the Co-Ordination of Humanitarian Affairs, Human
6 Rights Watch, and the United Nations Joint Human Rights Office and also
7 media reports, the FDLR was responsible for over 300 incidents of attacks
8 against civilians in the North and South Kivu areas in 2009.

9 The Prosecution, as I mentioned, will focus on 15 such incidents,
10 which we submit are illustrative of a wider policy of attacks perpetrated
11 by the FDLR. The attacks were systematic and committed as part of a
12 deliberate policy formulated by the FDLR leadership to create a
13 humanitarian catastrophe, as Mr. Steynberg has just explained.
14 Mbarushimana was a core member of that leadership. There is evidence
15 from former FDLR combatants that the attacks were carefully planned. The
16 strikingly similar *modus operandi* employed in the attacks also speaks to
17 the improbability of these attacks being random occurrences.

18 Madam President, your Honours, I now turn to these 15 attacks
19 directed by the FDLR against the civilian population. In January 2009,
20 the FDLR attacked and killed civilians in the village of Kibua --
21 villages of Kibua and Katoyi in Masisi territory, North Kivu. On or
22 about the 30th of January, the FDLR attacked the villages of Malembe,
23 Mianga, and Busurungi, in Walikale territory, North Kivu, resulting in
24 numerous casualties. Also on or about this date, the FDLR again attacked
25 Katoyi and also Remeka, both being in Masisi territory. These attacks

1 all resulted in civilian casualties. Thereafter it attacked Busheke,
2 which is in Kalehe territory, South Kivu. Once more, civilians were
3 killed by FDLR elements.

4 Shortly after these attacks, on the 2nd of February, 2009,
5 Callixte Mbarushimana issued a press release in his capacity as FDLR
6 executive secretary. It denies reports that the FDLR killed 36 civilians
7 in villages between Masisi and Walikale. I refer your Honours to item
8 489 on the list for this press release. In it he claims at paragraph 11
9 that the report is false information aimed at tarnishing the image of the
10 FDLR. On the 13th of February, Human Rights Watch published an article
11 also reporting these January attacks and attributing responsibility for
12 atrocities to the FDLR. Once again Mbarushimana responded swiftly,
13 issuing a press release the very next day. This item is number 492 on
14 the list, your Honours.

15 He denies allegations and claims, and I quote:

16 "That Human Rights Watch is an organisation that has always
17 worked for the Kagale regime."

18 Your Honours, FDLR troops attacked civilians in Kipopo, Masisi
19 territory, North Kivu, on or about the 12th to 13 February, after
20 coalition troops had passed through. They locked civilians in their
21 homes before setting those and other houses on fire. Some 100 houses
22 were burnt and many people were killed. A few days later, on about -- on
23 or about the 14th of February, FDLR troops attacked a village, Pinga, in
24 Masisi territory, again North Kivu. RDF troops had occupied the village
25 for two days, but after they had left the FDLR went in and killed a

1 prominent chief. Less than one week after the attack, your Honours, FDLR
2 executive secretary, Callixte Mbarushimana, issued press release in his
3 name dated 20th of February, 2009. Item 494 on the list, your Honours.
4 It denies reports by MONUC which attributes responsibility for the
5 massacre of a hundred people in Pinga to the FDLR. According to this
6 press release, the incident simply didn't happen. Mbarushimana, as
7 usual, shifts blame. I'm referring to paragraphs 4 and 5, your Honours,
8 and I quote paragraph 4:

9 "The information from MONUC that the brave fighters, Abacunguzi,
10 have engaged in looting, abductions, rape, and murder are completely
11 false and unfounded and are only intended to tarnish the image of the
12 FDLR and their leadership."

13 Paragraph 5:

14 "Rather, it is the military coalition formed by the RPA and the
15 FARDC, supported by elements of MONUC, who are committing war crimes and
16 crimes against humanity."

17 Your Honours, the FDLR carried out more than one attack on Mianga
18 in Walikale territory, North Kivu, but the largest of these took place on
19 or about the 12th of April.

20 Witness 559, a former FDLR soldier, saw the written order for
21 troops to attack Mianga. The summary of his statement is item 848 on the
22 list, your Honours. The attack began in the early hours of the morning
23 neutralising the FARDC position in the village and leaving the population
24 undefended. Many civilians were able to flee their village and escape
25 the shooting, but the FDLR killed others, including the chief who was

1 decapitated.

2 Witness 687, an eye-witness to the attack and former resident of
3 Mianga, says the chief was targeted by the FDLR because of his presumed
4 good relationship with the FARDC. Your Honours, the summary of his
5 statement is item 741 on the list.

6 On the 27th of May, Callixte Mbarushimana issued a press release
7 denying that the FDLR attacked civilians in Mianga, item 1160, your
8 Honours. The press release instead claims that the FDLR were attacked by
9 coalition forces. However, the Prosecution's evidence shows the opposite
10 was true and that this was known to Mbarushimana. I will explain that
11 evidence a little later. The villages of Luofu and Kasiki, southern
12 Lubero territory, North Kivu, were attacked by FDLR elements on the 17th
13 to 18th of April. Civilians including children were killed and houses
14 were burned to the ground in both villages. The attack was reported in
15 the media on the 18th of April with responsibility attributed to the
16 FDLR. Two days later, on the 20th of April, Callixte Mbarushimana, as
17 executive secretary of the FDLR, issued a press release denying any FDLR
18 involvement in the attacks on Luofu and Kasiki. Your Honours, this press
19 release is item 506 on the list.

20 The same press release, your Honours, accuses officials of the
21 UN -- and I'm quoting:

22 "Officials of the mission in the DRC (MONUC), animated by bad
23 faith, have rushed on 18th of April, 2009, to criminalise the FDLR as the
24 perpetrators of the attack."

25 Interestingly, the same press release goes on, and I'm quoting:

1 "It calls upon the United Nations in collaboration with the
2 African Union to establish without delay an independent and international
3 board of inquiry to identify the perpetrators of those crimes and bring
4 them to justice."

5 As per normal, the press release ends by calling for direct
6 negotiations between the FDLR and the Kagame regime.

7 In late April or early May, FDLR soldiers attacked civilians in
8 the vicinity of Busurungi, Walikale territory, North Kivu. (Expunged)
9 (Expunged)
10 (Expunged). Shortly afterwards, on the 9th and 10th of May, FDLR attacked
11 and destroyed Busurungi village itself and brutalised its occupants. The
12 attack on Busurungi was reported in the media on the 13th of May. On the
13 27th of May, Callixte Mbarushimana, as executive secretary of the FDLR,
14 issued a press release, denying FDLR involvement in the attack on
15 Busurungi and also Mianga, shifting the blame to the FARDC, RDF, and
16 Mayi-Mayi coalition forces. I will also return to this press release and
17 the proceeding sequence of communications between the FDLR and other
18 leaders leading up to its publication. I will show how they conspired to
19 mislead the public regarding the FDLR's responsibility for this attack.

20 Around the 20th to 21st of July, the FDLR advanced on the village
21 of Manje, Masisi territory, North Kivu, a place where FARDC troops had
22 been stationed. On their arrival they found that the FARDC had already
23 left. The FDLR attacked the village anyway, killing civilians and
24 burning houses to the ground. Former FDLR fighter Witness 562
25 participated in the assault on Manje. He provides a detailed account of

1 the planning and execution of the attack which culminated in the burning
2 of village houses and killing of civilians, your Honours.

3 The relevant portion of the transcript of his interview is item
4 708 on the list. Your Honours, particularly from lines 334 to 796.

5 The FDLR attacked the village of Malembe, Walikale territory,
6 North Kivu, at least once, and likely twice, between the period 11 to 16
7 August and then again mid-September. Over the course of these attacks,
8 civilians were targeted and killed. Eventually, the entire village was
9 burnt to the ground. On or about the 2nd to 3rd of December, FDLR troops
10 attacked civilians in the village of Mutakato, Walikale territory,
11 North Kivu. A few days later, on or about the 6th of December, the FDLR
12 attacked the civilians in the village of Kahole, Shabunda territory,
13 South Kivu. In the second half of 2009, FDLR troops attacked the village
14 of Witnesses 673 and 674 in Masisi territory. The witnesses describe how
15 the FDLR killed, burned houses, raped, and pillaged. The summaries of
16 their statements, your Honours, are 724 and 725 on the list before you.

17 Your Honours, these are not all the FDLR attacks on civilians
18 during 2009, but we submit that they provide an adequate illustration to
19 establish substantial grounds to believe that the attacks did, in fact,
20 occur and that they were both widespread and systematic.

21 The same evidence also establishes the specific elements of the
22 war crime of attacking civilians. The perpetrators deliberately directed
23 the attacks that I have described against the civilian population in
24 general as well as individuals not taking part in the hostilities. Your
25 Honours, the Prosecution submits that the evidence shows the attacks on

1 civilians alleged in the charging document were committed by the FDLR.
2 Former FDLR combatants tell of the orders to attack civilians and the
3 execution of such orders.

4 Eye-witnesses speak of knowing their attackers, having seen them
5 in their villages, or even knowing them by name and identifying them as
6 belonging to the FDLR. I refer your Honours to the transcripts of
7 interview, statements, and summaries pertaining to 15 former FDLR
8 insiders and ten crime-based witnesses on the Prosecution's list of
9 evidence which we are relying on for the confirmation hearing.

10 Furthermore, Mbarushimana's public denials demonstrate that the
11 attacks were conducted following the plan adopted by the FDLR's
12 Steering Committee. They also demonstrate the suspect's knowledge and
13 intention that the FDLR troops were attacking civilians.

14 Madam President, your Honours, I can go on to start the next part
15 of my presentation or it may be a good time to stop. I'm at your
16 indulgence.

17 PRESIDING JUDGE MONAGENG: Yes, I think it won't make any
18 difference really. I think we should stop. Thank you very much.

19 Before we adjourn, I have one or two issues that I want to convey
20 to you. In the transcript at page 56, line 2, the dead-line for the
21 final written observations of the Prosecutor and Legal Representatives
22 reflects as 16th of October. In actual fact it is the 6th of October.

23 And secondly, we would wish to inform the parties that we are
24 allowing 50 pages of submissions. And taking into account that Legal
25 Representatives don't bear any burden of proof, we -- the Chamber has

1 decided to allow them 25 pages each.

2 Now I want to assure the OTP that we have noted that we owe you a
3 few minutes, about 37, that this will be adjusted if you need it as we go
4 along.

5 And at this juncture, I wish to thank all parties and
6 participants, court staff, court interpreters for their indulgence, court
7 reporters, and everybody else. The hearing is adjourned until Monday,
8 19th September, at 9.00 a.m. Thank you.

9 COURT USHER: All rise.

10 The hearing ends at 1.30 p.m.

11 CORRECTION REPORT:

12 The Court Interpretation and Translation Section has made the following corrections
13 in the transcript:

14 * Page 16 lines 22-23:

15 "Furthermore, I will be arguing against the addition of the characterisation of a
16 single act," is corrected by

17 "Furthermore, I will be arguing against the cumulative charging of a single criminal
18 act,"

19 * Page 17 lines 6-8:

20 "Now the document contained -- contains the charges now contains 13 charges rather
21 than 11." Is corrected by

22 "Now the document containing the charges now contains 13 charges rather than 11."

23 * Page 17 lines 10-12:

24 "Defence argues that pillaging as a war crime consists in modes of behaviour that are
25 not constituent elements of the crimes for which Mr. Mbarushimana was brought

1 before the Court." Is corrected by

2 "Defence argues that pillaging as a war crime consists of conduct that does not

3 constitute the crimes for which Mr. Mbarushimana was brought before the Court."

4 * Page 18 lines 5-12:

5 "Defence argues that this is in addition to a series of superfluous characterisations

6 because it reflects an addition of characterisations that relate to the same mode of

7 behaviour which is clear in the document containing the charges. There is an

8 adding of characterisation, superfluous characterisation, because some charges or

9 counts are included in others, meaning that the less-specific ones are superfluous or

10 else because the deeds are -- received several characterisations and make them

11 redundant." Is corrected by

12 "Defence argues that this is in addition to a series of superfluous characterisations

13 because it reflects a practice of cumulative charging for the same facts or conduct,

14 which is clear in the document containing the charges.

15 There is cumulative charging, either because some charges or counts are included in

16 others, meaning that the less-specific ones are superfluous or else because the same

17 acts unnecessarily received multiple characterisations, thus making them redundant,

18 as we will demonstrate."

19 * Page 18 lines 15-19:

20 "Now, all three are constituted by the fact that the perpetrator inflicted on one or

21 several civilians pain or acute suffering or seriously harmed the mental

22 or physical health of the victim. The characterisation -- the more specific

23 characterisation being the latter." Is corrected by

24 "Now, all three are constituted by the fact that the perpetrator, and here I quote from

25 the elements of the crimes, inflicted on one or several civilians pain or acute suffering

1 or seriously harmed the mental or physical health of the victim. The more specific
2 characterisation being torture as crime against humanity."

3 * Page 18 lines 24-25 and page 19 line 1:

4 "The proof of this in the -- is in the document containing the charges, such as -- well,
5 the severe acts of rape and/or inhumane acts as elements of torture." is corrected by

6 "The proof of this in the -- is in the document containing the charges, in which
7 severe assault, aggravated acts of rape, mutilation, and/or inhumane acts are retained
8 as elements of torture."

9 * Page 19 lines 5-6:

10 "it was not relevant to add rape to torture plus damage to dignity." is corrected by

11 "it was not relevant to add to the charge of rape, that of torture plus damage to
12 dignity."

13 * Page 19 line 13:

14 "accepted by your Chamber because they are additional one to the other." is corrected
15 by "accepted by your Chamber because they constitute cumulative charging."

16 * Page 19 lines 18-20:

17 "Now, that is the case in spite of the fact that these are constituted by the same modes
18 of behaviour in the facts alleged by the Prosecutor." is corrected by

19 " Now, that is the case in spite of the fact that these are constituted by the same
20 conduct in the elements of crimes and in the charges and facts alleged by the
21 Prosecutor."

22 * Page 19 lines 22-24:

23 "It also places -- infringes the principle of expeditiousness in informing Mr.

24 Mbarushimana about what is alleged against him and does not give him sufficient

25 time to prepare his Defence." Is corrected by

- 1 “Cumulative charging also infringes the principle of expeditiousness in informing Mr.
2 Mbarushimana about what is alleged against him and does not give him sufficient
3 time and means to prepare his Defence.”
4 * Page 20 lines 13-14:
5 “Only the facts and the damage must be brought forward as evidence.” is corrected by
6 “* by such victims. They need only to provide evidence of the facts and the prejudice
7 suffered.”
8 * Page 20 line 19:
9 “Thank you.” is added.
10 INFORMATION REPORT
11 Pursuant to Pre-Trial Chamber I's instructions, dated 11 October 2011, additional
12 redactions have been implemented into the transcript.