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Situation Case	Democratic Republic of the Congo 01/04-01/10 The Prosecutor v. Callixte Mbarushimana	<u>Callixte Mbarushimana</u> : born in 1963, in Ndusu, in Ruhengeri; the Northern Province of Rwanda; Alleged Executive Secretary of the Force Démocratiques pour la Libération du Rwanda (FDLR).
Hearing: Chamber:	Confirmation of charges Judge Sanji Mmasenono Monageng (Presiding Judge), Judge Sylvia Steiner, Judge Cuno Tarfusser	Alleged crimes: Callixte Mbarushimana is allegedly responsible, as Executive Secretary of the FDLR "Steering Committee", of intentionally contributing to the commission of the following crimes, acting with a common purpose:
Parties:	OTP: Mr. Anton Steynberg and team; Defence: Mr. Nicolas Kaufman	<ul style="list-style-type: none"> • Crimes against humanity: Murders, tortures, rapes and inhumane acts • War crimes: Attacks against the civilian population, destruction of property, murders, tortures, rapes, inhumane treatments and persecution
Participants	132 victims represented by Legal Representatives for Victims: Mayombo Kassongo and Ghislain Mabanga	

16 September 2011

Submissions were made by the Defence. The participants then gave their opening statements. The Prosecution started to present its case against the suspect.

The proceedings commenced with the Prosecution submitting and requesting that two new charges be added to the case: pillaging and mutilation constituting war crimes.

Defence Observations:

- **Criminal Liability under article 25(3)(d) of the Rome Statute and the Definition of a "group":** The Defence submitted that a 'group' needs at least 3 members. The document containing the charges, however, only names two members and thus lacks specificity which would affect the Defence's ability to prepare for the case. The Defence therefore requested that every reference to a common purpose group be removed or the name of an extra member of the group be given.
- **The rule of specificity:** Adding two new charges at this stage infringes the rule of specificity. Pillaging is already included in the charges under the destruction of property and inhumane acts can be subsumed under torture. The Defence challenged the requested increase in charges and asked for the new charges to be set aside.

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The response of the Prosecution:

- **The Rule of specificity:** The Prosecution submitted that the charges in the original indictment do not have to be the same as those in the confirmation of charges.

Prosecution Opening Statement :

- **Planned violence:** The plan of the FDLR¹ was to intentionally attack the civilian population of the Kivu provinces, in order to compel Rwanda to allow the return of the FDLR. The objective of the FDLR was gain power in Rwanda.
- **Alleged crimes:** In 2009, the FDLR allegedly killed, tortured, raped, burned houses and pillaged villages in the Kivu Provinces, which led to a displacement of the population on a big scale. Some of these crimes had a gender dimension.
- **Role played by Mbarushimana:** Mr. Mbarushimana contributed to the decision making in the FDLR. He made a significant contribution to the daily functioning of the FDLR by orchestrating the international media campaign, by drafting numerous FDLR press releases, by denouncing the military campaign against the FDLR and announcing that the only way to stop the suffering of the population would be to start a political process with the FDLR. Mr. Mbarushimana denied the responsibility of the FDLR for the suffering of civilians, in order to maintain a façade of legitimacy which was necessary to ensure political and financial support.
- **Means of “common purpose responsibility”:** A ‘common purpose’ does not require the suspect to participate actively in the crimes; only that he contribute in some way with knowledge of the perpetration of crimes.
- **Steering Committee:** Mr. Mbarushimana made a contribution to the overall functioning of the FDLR in his position as Executive Secretary and member of the Steering Committee. Mr. Mbarushimana contributed to the commission of the crimes through a common purpose group.
- **No prior knowledge of the crimes:** The OTP does not allege that Mr. Mbarushimana had prior knowledge of the exact alleged crimes.

Opening Statement of Legal Representative of Victims (LRV),

Mr. Ghislain Mabanga submitted:

- **Collective Rapes:** The FDLR allegedly committed inhumane acts on the civilian population. Nearly all victims allegedly had their houses and property destroyed.
- **Restoring Peace:** The victims want to see the suspects brought before a trial and judged as part of the process of restoring peace.

Mr. Kassongo submitted:

- **Destruction of property and rape:** Allegedly, nearly all victims had their houses and property destroyed in 2009 and women were raped.
- **Reparation:** It was submitted that there is no reparation for victims without a trial, and there is no trial without charges being confirmed. Mr Kassongo therefore urged the case to proceed to trial.
- **Displacement:** Many victims are refugees and live in fear.

¹ FDLR : *Forces Démocratiques pour la Libération du Rwanda*, was a , a predominately Rwandan Hutu armed group that has been operating in eastern Congo under various names since 1994.

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Defence Team Opening Statements:

- **Link between Mbarushimana and the crimes is non-existent:** The Defence stated that a suspect so far removed from the alleged crimes has never been indicted for such serious charges. The link between Mr. Mbarushimana and the crimes is nonexistent.
- **No proof that FDLR committed these crimes:** The Prosecution has failed to give sufficient proof that the FDLR committed the crimes for which Mr. Mbarushimana has been charged.
- **OTP Investigations:** The Prosecution has not corroborated its sources, verified its evidence or examined exonerating evidence.
- **No criminal responsibility:** Mr. Mbarushimana may have deceived the general public and international politicians but this is not criminal.
- **No agreement to common purpose plan:** None of the communications used as evidence by the OTP show that Mr. Mbarushimana gave his agreement for the crimes to occur. For “conspiracy”, agreement is needed, but the OTP has not showed if, and how Mr. Mbarushimana gave his agreement.
- **Freedom of speech:** By calling for regime change in Rwanda, Mr. Mbarushimana was exercising his right to free speech.
- **Attempt to reduce suffering of the population:** There is actual evidence that Mr. Mbarushimana tried to reduce the suffering of the population, but the OTP has not examined this exonerating information.

The Prosecution Team submitted its case:

- **Mr. Mbarushimana’s role within the FDLR:** Mr. Mbarushimana was part of the military and political branch of the FDLR and a member of the Steering Committee and Executive Secretary.
- **Mandate of Mr. Mbarushimana:** The mandate of Mr. Mbarushimana was to react immediately to allegations of war crimes and violations committed by the FDLR against the civilian population of the Kivus and to react to everything that was said about the FDLR.
- **Campaign to create a humanitarian catastrophe:** One of the main objectives of the FDLR was allegedly the creation of a humanitarian catastrophe by use of widespread violence against the population of the Kivus. The FDLR did not have the military strength to disrupt the RDC and Rwanda alliance and hoped to force these parties to enter into dialogue with the FDLR.
- **Historical use of violence by the FDLR:** The FDLR was composed of former Rwandan alleged *genocidaires* who had fled Rwanda to the DRC, they used refugee camps to recruit and find/train new members.
- **Bipolar structure of the FDLR:** The political branch, mainly based in Europe, was in charge of representing the FDLR on an international level. The leaders were thus not directly involved in the commission of the crimes. The Military branch was based in the Kivu Provinces, DRC, under the command of Sylvestre Mudacumura.
- **Steering Committee:** The Steering Committee was the body which defined the

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policy of the FDLR, therefore Mr. Mbarushimana was in constant contact with the President of the movement. The plan of the FDLR was adopted by the Steering Committee.

- **Policy to attack civilians:** The orders to attack civilians by Mudacumura were given to discourage the civilian population of the Kivus from collaborating with the Congolese and Rwandan government. All evidence shows that the policy to attack was adopted at the highest level.
- **Existence of a non-international armed conflict:** The ongoing armed conflict in the North and South Kivu Provinces, between Rwandan forces, DRC forces supported by the UN Peacekeepers (MONUC) and the FDLR, was a non-international armed conflict.
- **Widespread character of the violence:** The widespread nature of the violence shows that the more than 300 attacks were planned and organised and the FDLR was responsible for them. The OTP will focus on 15 incidents.

19 September 2011

The Prosecution completed the submission of its case. The Defence Team commenced the submission of its case.

The Prosecution continued submitting its case:

- **Murder:** From 20th January to the 31st December 2009, the FDLR troops allegedly committed murders. The murders occurred during organised military operations as well as random events, when houses were allegedly burned and mutilation took place. The victims of these alleged crimes were civilians.
- **Destruction of Property and pillaging:** The FDLR troops had to make sure that the civilian population had no property to return to. In a Steering Committee meeting in January 2009, the looting was presented as a “mechanism of self-financing methods of FDLR soldiers”. The destruction of property was not required by military necessity.
- **Displacement:** The alleged destruction of houses led to the displacement of more than 900 000 people who fled to refugee camps.
- **Persecution:** The FDLR specifically and deliberately targeted the civilian population of the Kivus individually and collectively. Civilians were perceived as the enemy for collaborating with the Congolese and Rwandan government. This mindset was installed by the by the political branch, mainly based in Europe.
- **Attack on Busurungi:** On the 9th and 10th of May 2009, the FDLR allegedly committed the crimes of murder, pillaging, destruction of property, persecution and attacks against civilians. Mr. Mbarushimana issued a Press release denying the FDLR’s implication in Busurungi, stating officially that the FDLR was attacked and blaming the civilian casualties on the coalition forces of the DRC and Rwanda.
- **Systematic denial:** The OTP submits that there are substantial grounds to believe that Mr. Mbarushimana systematically denied the crimes allegedly committed by the FDLR and that he was “acting with a common purpose”.
- **Gender dimension of the humanitarian catastrophe:** Through the alleged commission of rape and torture, the FDLR damaged the identity of the population.

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- **Identification of the attackers:** The Prosecution witnesses have identified the FDLR perpetrators of the crimes as they personally know the members of the militia.
- **Rapes:** Allegedly, FDLR soldiers directly perpetrated rapes in order to inflict moral and physical pain, with the aim to intimidate or punish the civilian population for their collaboration with the Congolese and Rwandan government.
- **Languages spoken:** During the attack in Busurungi, the language spoken by the soldiers was Swahili² and Kinyarwanda³.
- **Role of Mr. Mbarushimana:** Mr. Mbarushimana was the only FDLR leader abroad who faced no obstacles in broadcasting information.
- **Contact with FDLR Leadership:** Mr. Mbarushimana was in constant contact with the President of the FDLR, Ignace Murwanashyaka⁴, which confirms that the FDLR leadership was extremely well coordinated. There is concrete evidence of contacts between Mr. Murwanashyaka, Mr. Mbarushimana and the commanders on the field. Mr. Mbarushimana had direct and indirect contact with other leaders, access to information on the field.
- **No Denial of Crimes:** Mr. Mbarushimana did not deny the occurrence of the crimes committed in Busurungi, but only the FDLR involvement in them.
- **Common purpose responsibility:** Contribution to a common purpose itself may be technically lawful, but nonetheless contribute to the criminal purpose. It does not require either that the contribution is essential.
- **Steering Committee:** Mbarushimana and Murwanashyaka together with Straton Musoni (1st second president) and Gaston Iyamuremye (second vice president), constituted the common purpose group.
- **Media campaign as part of the common plan:** The media campaign was part of a common plan and was essential for the FDLR
- **Knowledge of Crimes:** Mr. Mbarushimana made his contribution to the FDLR with specific knowledge and notice that the FDLR would commit crimes within the jurisdiction of the Court.

The Defence submitted its case.

- **Substantial doubts if attacks committed by FDLR:** There are substantial doubts concerning the involvement of the FDLR in attacks or whether the attacks were legal or authorised by the FDLR leaders. Mr. Mbarushimana therefore had no knowledge of the attacks.
- **Selective evidence presented by Prosecution:** The Prosecution has been selective in the presentation of its evidence and has failed to assimilate evidence as a whole. The OTP has also ignored exonerating evidence.
- **Attacks on Busurungi:** The attacks on Busurungi were planned as a defensive military campaign. The Prosecution have not proved that civilians who died were in fact killed as part of criminal actions rather than legitimate military action.

² Swahili is a Bantu language spoken in Eastern Africa.

³ Kinyarwanda is a dialect of the Rwanda-Rundi language, spoken in Rwanda and in Southern Uganda.

⁴ Ignace Murwanashyaka is the President of the High Command of the FDLR and member of the Steering Committee.

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- **Attacks on Katoyi and Kibua:** It was not the FDLR who initiated the attacks, but the RDF/FARDC⁵ in Kibua.
- **Human Rights Watch Report⁶ is not reliable:** The Defence submitted that the HRW report is based on the testimony of unidentified witnesses and contains inconsistencies.
- **Language as identification criteria:** Language cannot be used as an identifying feature for FDLR soldiers because FARDC⁷ and FDLR soldiers spoke the same language.
- **Attacks on Pinga:** The Prosecution relies on the International Crisis Group report which reports 28 rapes from January until February 2009. There is no evidence to prove that they were not all committed before 28 January 2009.
- **Attack on Kipopo:** The attacks on Kipopo were military engagements; the FDLR had been told that FARDC soldiers were based in Kipopo. There are no reliable sources on when this attack happened.

20 September 2011

The Defence Team continued its case.

The Defence continued to submit its case:

Prof. Kai AMBOS stated on liability:

- **On liability:** Common purpose responsibility requires an individual contribution which may be linked to an organisation. The Rome Statute does not criminalise mere membership of a criminal organisation. Individual contribution is crucial for criminal responsibility.
- **Common purpose group:** The Prosecution identifies 3 different 'common purpose groups'. Common purpose (1) consisting of gaining political power in Rwanda, which is not criminal; the common purpose of creating a humanitarian catastrophe and its underlying acts, including attacks against civilian population (2) and the common purpose of conducting an international media campaign, which is not criminal (3).
- **Inconsistency concerning Mr. Mbarushimana as part of the inner circle:** According to the Prosecution, Mr. Mbarushimana is part of the inner circle of the common purpose group. However, if Mr. Mbarushimana belongs to the inner circle, he cannot be responsible under under accessory liability
- **Impact of the contribution:** Mr. Mbarushimana's contribution must be of sufficient gravity, and not irrelevant.
- **Intent/intentional:** The Prosecution derived Mr. Mbarushimana's knowledge of the crimes from his position within the FDLR as Executive Secretary. But on the other hand, the Prosecution submits the knowledge standard required for command responsibility - "should have known".

Mr. Kaufman continued to submit the Defence case:

- **Attacks on Laofu and Kasiki:** The evidence does not show that the FDLR perpetrated this attack, but in fact it was perpetrated by the Rud/Urunana⁸,

⁵ The RDF/FARDC is the coalition of the Armée Patriotique Rwandaise (APR/RDF) and the Forces Armées Congolaises (FARDC)

⁶ Human Rights Watch, 'You will be punished', 13 December 2009, available at: <http://www.hrw.org/es/reports/2009/12/14/you-will-be-punished-0>.

⁷ FARDC: *Forces Armées Congolaises*, Army of the DRC.

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under the command of General Musare. Rud is a splinter group from FDLR, from 2005 onwards; the two were separate organisation with separate executive committee.

- **Myanga attack:** The Prosecution evidence relies on a witness who was not present. Furthermore, according to the Prosecutor, the fact that more soldiers were killed than civilians, shows that the motivation of the attack by the FDLR was military and not to terrorise the civilian population, but to attack the FARDC.
- **Busurungi attack in May 2009:** This attack carried out by the FDLR was a purely military attack and sexual violence had been explicitly forbidden.
- **Attack on Mangye:** There is no proof that houses were destroyed deliberately. It is possible that these houses were providing cover for army troops of the Congolese and Rwandan government and thus they would be legitimate military targets.
- **Attack on Malembe:** The targets of the attack were the MaiMai⁹ and Congolese soldiers. Only the houses of enemies were burned.
- **No Criminal purpose:** There was no criminal purpose to create a humanitarian catastrophe, Mr. Mbarushimana gave specific instructions that civilians should not be victimised.
- **No agreement prior to March 2009:** Even if there was a criminal plan, the allegedly criminal order from Ignace Murwanashyaka to Sylvestre Mudacumura which the OTP submits is evidence of a criminal plan, is dated March 2009. The OTP has therefore failed to show a criminal agreement prior to March 2009.
- **Mr. Mbarushimana had no influence on the soldiers on the field.**

The Prosecution responded to the Defence submissions:

- **Inner circle:** Article 25(3)(d) does not only apply to persons who are not members of the Common purpose group, however, it does apply to any person who makes a contribution to the common purpose plan. Being a member of the inner circle or not is irrelevant for the application of common purpose liability.
- **Type of contribution:** The Rome Statute does not place any threshold for the level of contribution to the common purpose.
- **Only one global common purpose group:** The FDLR goal was to gain political power. In order to achieve this goal, the FDLR adopted a criminal plan consisting in the commission of crimes against civilians. Each of Mr. Mbarushimana's contributions contributed directly to the common purpose.

21 September 2011

The Parties in the case submitted their closing statements.

Prosecution Closing Statement

- **No doubt about the identity of the attackers:** The witnesses and victims of the crimes are sure that it was the FDLR who killed, burned, raped, and looted, because they know and recognise their attackers.

⁸ RUD - Urunana: The *Rally for Unit and Democracy* is a faction of the *Democratic Liberation Forces of Rwanda* (FDLR)

⁹ MaiMai : Community based militia group formed to defend their local territory to resist the invasion of Rwandan force

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- **Widespread violence:** The evidence presented by the Prosecution establishes the implication of the FDLR in the attacks on Kapopo, Myanga, Malenge, Katoi and Pinga. This is sufficient to prove the widespread nature of the violence.
- **There are substantial grounds to believe that Mr. Mbarushimana knew about the ongoing crimes:** As a member of the Steering committee and Executive Secretary, he was in a position to know about the crimes being committed.
- **Knowledge of common purpose:** There are reasonable grounds to believe that Mr. Mbarushimana had knowledge of a plan to cause a humanitarian catastrophe.
- **Unlawful character of the crimes:** The alleged crimes and attacks by the FDLR were not of a military character. For example, Mangye and Malemebe were undefended places.
- **Attack on Busurungi:** The order received by the FDLR soldiers from Sylvestre Mudacumura was to attack and kill everyone, even civilians. And this evidence provides substantial grounds to believe that the attacks had been approved.

LRV Closing Statements

Mr. Mabanga presented his Closing Statement:

- **Competence of the ICC:** During the Umoja Wetu¹⁰ and Kimia II¹¹ campaigns, crimes were committed which fall within the competence of this Court.
- **Human Rights Watch Report:** The report covers all of the armed groups which participated in these operations without distinction.
- **Responsibility of the FDLR for the attacks:** The FDLR soldiers in the field were not hiding their identity. They were stating openly "We are FDLR". The FDLR had a systematic scorched-earth policy.

Mr. Kassongo stated in his Closing Statement:

- **Importance of the Great Lake Region:** It is true that the region of the Great Lakes attracts enormous attention in respect of geopolitical considerations.
- **Series of attacks with particular cruelty:** The brutality of the alleged revenge on the victims and the brutality of the words in Mr. Mbarushimana's statements, conceal actual criminal policy.
- **No collateral damage:** The expression "collateral damage" cannot excuse or conceal what actually happened on the ground.

Defence Closing Statement:

- **Serious contradictions:** The burden of proof is on the Prosecution to prove the unlawfulness of the attacks not on the Defence to prove the lawfulness of the attacks.
- **Identity of the attackers:** The fact that the attackers were Interahamwe¹², doesn't show that the attackers were FDLR and not one of the splinter groups, RUD or Rasta.

¹⁰ Umoja Wetu: Joint military campaign carried out by the coalition RDF/FARDC against the FDLR in the North Kivu from January 2009 to February 2009.

¹¹ Kimia II: The Operation Kimia II was launched in May 2009 by the government of the DRC, together with the United Nations, to fight against the rebellion of the FDLR.

¹² Interahamwe: a rebel organization in Rwanda that seeks to overthrow the government dominated by Tutsi and to institute Hutu control

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- *Membership* of a criminal group is not a criminal offense under the Rome Statute.
- **Freedom of speech:** The Prosecution has attempted to criminalise the freedom of speech.
- **No substantial grounds to believe:** The burden of proof is on the Prosecution and it has failed to show substantial grounds exist to believe that Mr. Mbarushimana committed the crimes with which he has been charged.

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