

ICC, The Prosecutor v. Germain Katanga

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N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

A . Judgment : ICC Trial Chamber II

[**Source** : The Prosecutor v. Germain Katanga, International Criminal Court, Trial Chamber II's Judgement pursuant to article 74 f the Statute, ICC-01/04-01/07, 7 March 2014, available online <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-01/07-3436> (Footnotes omitted, Original: French)]

[...]

a) Existence and nature of the armed conflict

i. Military occupation (1999-2003)

1198. The Chamber notes at the outset that the parties are in agreement on certain facts: firstly, that Uganda established and exercised authority in Ituri as an occupying power until June 2003; and secondly, that the Ugandan authorities played a direct role in the administrative and political changes in that district from 1998 to 2003 by stimulating the creation of new political parties and new militias there.

1199. Ugandan military forces (the UPDF) were stationed on DRC territory from 1999. Documentary and testimonial evidence placed before the Chamber attests to the extent to which Ugandan military authorities and troops were present in eastern DRC and Ituri in particular. The Chamber has also noted that, contrary to the various agreements that were signed, Ugandan troops did not withdraw definitively from Ituri until July 2003.

1200. Further, it appears that the UPDF exerted control over the territory of Ituri, and the ICJ judgment describes in detail the forms such control took. In this regard, it is useful to recall a fact undisputed by the parties: in June 1999, General Kazini, Chief of Staff of the Ugandan national army, unilaterally decreed Ituri a “province” by the name of “Kibali-Ituri”. Ituri was thus elevated from the status of a mere “district” of Orientale province, acquiring greater administrative autonomy. UPDF forces in Ituri were also commanded by General Kazini during that period. He quickly established himself as the key authority in the region and was involved in the conflicts described in the section of the present judgment on the general background to the case. It was also General Kazini who appointed Adèle Lotsove as first Governor of Ituri in June 1999.

1201. Moreover, at no point during the period under consideration was the DRC able to exercise fully its sovereignty over Ituri. Both central and regional governmental authorities proved incapable of functioning publicly and performing their role on that part of its territory, even though they engaged in a counter-offensive in November 2002.

1202. In the Chamber’s view, the decisions taken at that time and the resultant findings show that Uganda not only deployed and stationed its military forces in Ituri but also established and wielded its authority over that territory as an occupying power.

1203. The Chamber considers that the various agreements concluded, in particular between the DRC and Uganda with a view to, inter alia, managing the withdrawal of the Ugandan troops from Congolese territory, do not in any way suggest that the DRC had agreed to the deployment of Ugandan forces on its territory. As the ICJ has stated with regard to the aforementioned Lusaka Agreement, the various agreements took the situation on the ground as their starting point without, however, recognising the legality of the Ugandan troop presence in Ituri. In the Chamber’s view, a similar approach prevailed when all the other agreements after the Lusaka Agreement were concluded.

1204. Lastly, the Chamber considers that the tactical rapprochement observed in the instant case between the DRC and Uganda, when the two States formed an alliance to expel the UPC from Ituri district in January 2003, does not prove that the DRC agreed to the occupation of a part of its territory by Ugandan troops. That alliance of convenience by no means equated to authorisation to deploy the UPDF as an occupying power on the territory of Ituri from 1999 to July 2003.

1205. For all of these reasons, the Chamber finds that Uganda occupied Ituri during the time frame defined by the Pre-Trial Chamber – August 2002 to May 2003.

1206. Having held that both the law of international armed conflict and of non-international armed conflict applied to the various actors in hostilities occurring on occupied territory, the Chamber now considers it necessary to determine the nature of the armed conflict which encompassed the attack on Bogoro.

ii. Presence of organised armed groups in Ituri

1207. In the light of the evidence on record, it is apparent to the Chamber that the UPC was a group with a hierarchical structure and internal discipline that occupied various military positions and had training facilities for its troops. Weapons were available to the group and it had the ability to conduct military operations. Further, the UPC had adopted a political programme and had official spokespeople.

1208. Furthermore, the APC, the armed wing of the RCD-ML, also constituted a group with a leadership and internal command structure; supplies and equipment were available to it; and it had the ability to plan military operations and put them into effect.

1209. Lastly, as regards the Ngiti militia, known at times from late 2002 as the FRPI, the Chamber will refer to the body of its findings of fact regarding the organisation of the militia before February 2003: its constituent troops were spread among several camps placed under the authority of various commanders; they had various means of communication and weapons and ammunition were available to them. Lastly, the members of that militia pursued common objectives and conducted joint military operations over a protracted period.

1210. The Chamber further observes that the various groups took part in the ongoing political process and, in particular, in a series of inter-Congolese negotiations which were being held at the time.

1211. From these various exhibits, the Chamber is in a position to find that in January 2003, if not before, each of those groups, namely, the UPC, the APC and the Ngiti militia, were armed and had a sufficient degree of organisation, as demonstrated by their structure, modus operandi and participation in military operations and, as the case may be, the political processes then set in motion.

iii. Indirect intervention of other States

1212. The Chamber must now determine whether, between August 2002 and May 2003, and specifically after January 2003, those local armed groups acted on behalf of a State, i.e. as intermediaries of Uganda, Rwanda or the DRC, during the hostilities.

1213. As regards control, if any, exercised by Uganda over the UPC, the evidence shows that from the time of the founding of the UPC until late 2002, Uganda was directly involved in establishing the UPC and in training and arming its militias. Nevertheless, the evidence before the Chamber establishes that Uganda stopped supporting the UPC several months before the attack on Bogoro and even engaged in hostilities against that armed group. The Chamber takes the view that, although some evidence does suggest that after December 2002, Uganda equipped other local armed groups in cooperation with the DRC,²⁸⁰⁴ none of that evidence proves that Uganda had a role in organising, coordinating or planning military operations undertaken by the Ngiti militia or, much less, the UPC, at the material time.

1214. As regards Rwanda's role, the Chamber recalls that it has already stated that in the eyes of the Ngiti combatants, the UPC was a Hema militia allied to Rwanda that sought to establish a Hima-Tutsi empire in Ituri. Furthermore, several exhibits demonstrate that Rwanda did provide logistical support to the UPC from December 2002. In particular, it helped by supplying weapons and ammunition and training some of its combatants. Some evidence suggests that Rwanda intervened in matters concerning the UPC's internal command structure. However, save for the testimony of Witness P-12, such material is too general to enable the Chamber to truly assess the nature, modalities and development of the cooperation between the Rwandan military authorities and the persons that they allegedly appointed within the UPC. The Chamber considers that it cannot rely on P-12's testimony alone to find beyond reasonable doubt that the Rwandan State played a role in the coordination, planning or organisation of certain military actions undertaken by the UPC at the material time. Hence, the Chamber is not in a position to find that Rwanda exerted overall control over the UPC from late 2002.

1215. Moreover, and inasmuch as one of the parties to the conflict, namely the UPC, did not act under the control of a State, specifically Rwanda, the Chamber considers that it need not rule on the issue of whether the DRC did or did not exert overall control over the Ngiti militia after January 2003. It must be further noted that Uganda took part in the fighting alongside the organised armed groups confronting the UPC at the material time, as the Chamber will discuss below.

iv. Intensity of the conflict

1216. The Chamber observes that the existence of an armed conflict in Ituri at the time of the attack on Bogoro is not disputed by the parties. Similarly, they accepted that the fighting, *inter alia*, between the Ngiti militia and the UPC, was part of a cycle of violence that extended far beyond isolated acts falling outwith international humanitarian law.

1217. With specific reference to its foregoing review of the attacks that followed assault on Bogoro, the Chamber finds that the armed conflict was both protracted and intense owing, *inter alia*, to its duration and the volume of attacks perpetrated throughout the territory of Ituri from January 2002 to May 2003. Thus, in the Chamber's view, the evidence before it suffices to fulfil the intensity of the conflict requirement. It further notes that the United Nations Security Council recognised the existence of this armed conflict and adopted numerous resolutions on the matter.

1218. The armed conflict between the aforementioned groups was, as noted immediately above, a protracted armed conflict between organised armed groups and therefore fully meets the criteria of a non-international armed conflict.

v. UPDF intervention in the hostilities

1219. The Chamber must now determine whether Uganda's direct military intervention on the territory of the DRC that it occupied and in hostilities that mainly pitted the APC and Ngiti and Lendu militias against the UPC internationalised the conflict under its consideration.

1220. Evidence on record suggests that in late 2002, a tactical rapprochement occurred between the DRC and Uganda for the purpose of putting in place a strategy to reconquer Ituri, then under UPC control.

1221. The Chamber considers it useful to recall the details provided by D02-236 as to the circumstances in which this tactical rapprochement between the DRC and Uganda was decided. He stated that an informal meeting took place on the sidelines of a meeting about the establishment of the Ituri Pacification Commission held in Dar es Salaam and attended by Presidents Kabila and Museveni. According to D02-236, President Kabila used this meeting to request that a delegation made up of, among others, the witness himself and Chief Kahwa (PUSIC) meet with him in Kinshasa for discussions of a more general nature on the "[TRANSLATION] mechanism" to be put in place to expel the UPC from Ituri. The witness stated that he was accompanied on this visit to the DRC by a Ugandan officer, General Salim Saleh's aide-de-camp. D02-236 further reported that the Congolese President thus ensured that additional weapons would be provided and officers sent to wrest Ituri back from the UPC; the President also allegedly stated that he had come to an agreement with the Ugandan President to such end. In the Chamber's opinion, the testimony of D02-236, who was present in person when President Kabila spoke those words, shows that the President's prime objective was to secure Ugandan help to see through his campaign against UPC forces in Ituri.

1222. The Chamber also notes that the rapprochement described by D02-236 crystallised with the signature of a formal agreement by the supreme authorities of the two States and which made provision for a mechanism for cooperation in defence and security matters. The rapprochement was also reflected in the UPDF's involvement in certain operations against the UPC after the 24 February 2003 attack on Bogoro.

1223. The Chamber recalls that it is not in a position to find beyond reasonable doubt that there was a UPDF presence during the attack on Bogoro on 24 February 2003. However, it must determine the nature of the armed conflict as a whole and it is on the basis of the course of the hostilities between January 2003, when the split between the UPC and Uganda became official, and May 2003 that it will make a ruling.

1224. In addition to the 24 February 2003 attack, the Chamber notes that Mandro, where the UPC had a sizeable training centre, was attacked on 4 March 2003 by the UPDF and Ngiti and Lendu forces. Germain Katanga allegedly took part in that attack. The UPDF, supported by Lendu combatants, also fought the UPC at the battle of Bunia on 6 March 2003.

1225. The Chamber is of the view that the evidence on record proves that the DRC consented to the various military actions undertaken on its territory by Ugandan armed forces against the UPC as of January 2003.

1226. The Chamber considers that the law of occupation continues to apply to the UPDF, the armed force of the occupying power, and that the conflict pitting the UPDF against the DRC and the resistance forces mobilised against the occupation must be considered international. In contrast, the hostilities that commenced in January 2003, that is, from the time of the rapprochement between Uganda and the DRC with the aim of fighting the UPC forces newly allied to Rwanda, must be considered as a non-international conflict.

1227. Indeed, UPDF intervention in the armed conflict pitting the Ngiti and Lendu militias against the UPC, of which the attack on Bogoro village formed one episode, must be set apart from the contemporaneous international armed conflict resulting from the Ugandan occupation. These hostilities must be so distinguished, specifically on account of the change in Uganda's military strategy from late 2002 and in the relationship of the occupying force with both the occupied State and with groups representing that State on occupied territory. It must be recalled in this connection that, although the UPDF fought alongside the UPC against, *inter alia*, the Lendu and Ngiti militias until mid-2002 at least, the UPDF decided to engage the UPC, its erstwhile ally, and to support the Ngiti and Lendu militias in their battles.

1228. Accordingly, the Chamber finds that the DRC's consent to the various military operations undertaken on its territory by the Ugandan armed forces against the UPC from January 2003 onwards entails the application of the law of non-international armed conflict to those hostilities.

vi. Conclusion

1229. The Chamber thus finds that during the material period, and specifically between January and May 2003, the law of non-international armed conflict is applicable to the hostilities that took place in Ituri between armed groups that included the Ngiti militia and the UPC. It further finds that the attack on Bogoro formed an integral part of that armed conflict.

1230. Lastly, the Chamber considers that the recharacterisation of the nature of the armed conflict as determined by the Pre-Trial Chamber in its Decision on the confirmation of charges does not in this case violate the rights of the Accused. It refers in this regard to the analysis in the section concerning regulation 55 and underscores that the new characterisation of the armed conflict does not prompt it to modify the legal elements of the alleged crimes in substance. It further notes that the same facts and circumstances are clearly at issue.

b) Nexus between the crimes and the non-international armed conflict

1231. With regard to the war crimes of murder and attack against a civilian population proscribed by article 8(2)(c)(i) and 8(2)(e)(i) of the Statute, the Chamber notes that civilians were targeted by the combatants and, moreover, that the crimes were committed in Bogoro on 24 February 2003 during a series of clashes between two parties to the conflict. Therefrom, it concludes that the acts were closely linked to the ongoing armed conflict and that the perpetrators, some of whom were Ngiti combatants, in so acting, were aware of

the factual circumstances that established its existence. Indeed, the Chamber observes that, given the breadth of the conflict and its impact across the region, it is difficult to imagine, in the particular context of the case, that anyone could be oblivious to the factual circumstances establishing the existence of an armed conflict.

1232. The Chamber finds beyond reasonable doubt that the same holds true for the acts of pillaging and destruction under articles 8(2)(e)(v) and 8(2)(e)(xii) of the Statute.

1233. Turning to the acts of rape, the Chamber notes that the victims were raped by combatants and, moreover, that the crimes took place when the two sides to the conflict clashed or immediately thereafter. It further observes that Witnesses P-249, P-353 and P-132 were brought by the combatants who had taken them prisoner to one of the Ngiti commanders in Bogoro. Furthermore, the Chamber considers that the presence, use and threat of weapons heightened the coercive nature of the environment in which the victims found themselves, aggravating the threats of death they received. In the Chamber's opinion, those offences were therefore connected to the ongoing hostilities, and the perpetrators of those rapes, who took an active part in that armed conflict, in so acting, were aware of the factual circumstances establishing the existence of the conflict.

1234. As to the war crime of sexual slavery under article 8(2)(e)(vi) of the Statute, the Chamber considers that the sexual enslavement of Witnesses P-132, P-249 and P-353 by Ngiti combatants who had attacked Bogoro or by men living in military camps took place, as did the crimes of rape, in the context of and was associated with the armed conflict. It observes that the three women were made sexual slaves in military camps and that their abduction was closely linked to the fighting. In the Chamber's opinion, those offences were therefore connected to the ongoing hostilities, and the perpetrators of those rapes, who took an active part in that armed conflict, in so acting, were aware of the factual circumstances establishing the existence of the conflict.

[...]

Discussion

I. Armed conflict

1. (*Paras 1198-1206; 1212-1218*) What elements does the Chamber take into account to determine if there is an armed conflict?
2. Is the situation under discussion best characterized as one armed conflict, or several? What does the Chamber say about this? What kind(s) of conflict(s) is/are involved? How many actors are involved in the conflict(s) in Ituri?
3. What criteria does the Chamber rely on to determine whether the different armed groups are parties to the conflict(s)?

4. To which aspects of the situation does the IHL of international armed conflict (IAC) apply and to which does the IHL of non-international armed conflict (NIAC) apply?
5. (*Para. 1223*) Must the attack on Bogoro be classified separately, or must the entire armed conflict, of which the attack was part, be classified as one? In which cases could the attack be subject to the law of IAC even if no foreign troops participated?
6. (*Paras 1198-1206*) What criteria does the Chamber rely on to arrive at the conclusion that Ituri was occupied by Uganda? Does this finding preclude the applicability of IHL of NIAC to the events the Chamber had to judge?
7. (*Paras 1212-1215 and 1219-1228*) What could have made the fighting between different armed groups in the DR Congo subject to the IHL of IACs? Why did IHL of IACs apply to certain aspects according to the Chamber? Why did it not apply to the attack on Bogoro?
8. Why do you think is it important for the Chamber to establish exactly what legal framework is applicable to the attack of Bogoro?

II. War Crimes

9. What is the difference between an IHL violation and a war crime? (CIHL, Rule 156)
10. (*Para. 1231-1234*) When does a murder/an act of pillage/a rape constitute a war crime? Are all such offences committed during armed conflict necessarily war crimes? (CIHL, Rule 156)