# ICC, The Prosecutor v. Lubanga

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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.

## Document A: Case Information Sheet

## Situation in Democratic Republic of the Congo: *The Prosecutor v. Thomas Lubanga Dyilo*

[**Source**: Case Information Sheet, International Criminal Court, ICC-PIDS-CIS-DRC-01-010/12_Eng, Updated: 13 September 2012; available at http://www.icc-cpi.int]

[…]

Trial Chamber I concluded that:

The Union des Patriotes Congolais ("UPC") was created on 15 September 2000; Thomas Lubanga was one of the UPC's founding members and its President from the outset. The UPC and its military wing, the Force Patriotique pour la Libération du Congo ("FPLC"), took power in Ituri in September 2002. The UPC/FPLC, as an organised armed group, was involved in an internal armed conflict against the Armée Populaire Congolaise ("APC") and other Lendu militias, including the Force de Résistance Patriotique en Ituri ("FRPI"), between September 2002 and 13 August 2003.

Between 1 September 2002 and 13 August 2003, the armed wing of the UPC/FPLC was responsible for the widespread recruitment of young people, including children under the age of 15, on an enforced as well as a "voluntary" basis.

[…]

## Document B: Trial Chamber I Judgment

## SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO IN THE CASE OF THE PROSECUTOR v. THOMAS LUBANGA DYILO

[**Source**: The Prosecutor v. Thomas Lubanga Dyilo, International Criminal Court, Trial Chamber I, Public Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06, 14 March 2012; footnotes partially reproduced; available at http://www.icc-cpi.int]

[…]

## IX. THE ARMED CONFLICT AND ITS NATURE

[…]

### A. INTRODUCTION

503. It is necessary to determine whether there was a relevant armed conflict, and if so, whether it was international or non-international in character.

504. The existence of an armed conflict, be it international or non-international, is a fundamental requirement of the charges under Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute, which provide, *inter alia*:

2. For the purpose of this Statute, "war crimes" means:

[…]

b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of

international law […]

c) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, […]

It follows that if the prosecution has failed to prove the existence of a relevant armed conflict in Ituri from early September 2002 until 13 August2003, it will have failed to prove the charges against the accused.

[…]

## C. THE CHAMBERS'S CONCLUSIONS

### 1. The law

#### Characterisation of the armed conflict (international armed conflict vs. non-international armed conflict)

523. In the Decision on the confirmation of charges, the Pre-Trial Chamber, having considered the evidence as to Rwanda's involvement in the armed conflict, concluded there was insufficient evidence to establish substantial grounds to believe that Rwanda played a role that could be described as direct or indirect intervention in the armed conflict in Ituri.

524. In its final analysis, the Pre-Trial Chamber held:

On the evidence admitted for the purpose of the confirmation hearing, the Chamber considers that there is sufficient evidence to establish substantial grounds to believe that, as a result of the presence of the Republic of Uganda as an occupying Power, the armed conflict which occurred in Ituri can be characterised as an armed conflict of an international character from July 2002 to 2 June 2003, the date of the effective withdrawal of the Ugandan army.

[…]

525. In determining that the relevant conflict was international between September 2002 and 2 June 2003 and non-international between 2 June 2003 and 13 August 2003, the Pre-Trial Chamber confirmed the charges against the accused on the basis of Articles 8(2)(b)(xxvi) and8(2)(e)(vii) of the Statute, although the prosecution had only charged the accused with the conscription and enlistment of children under the age of fifteen years, and their use to participate actively in hostilities, within the context of a non-international armed conflict under Article8(2)(e)(vii) of the Statute.

[…]

#### Definition of armed conflict

531. The relevant Elements of Crimes require that the alleged criminal conduct "took place in the context of and was associated with an [...] armed conflict". There is no definition of armed conflict in the Statute or in the Elements of Crimes. The introduction to the Elements of Crimes sets out that:

The elements for war crimes under article 8, paragraph 2, of the Statute shall be interpreted within the established framework of the international law of armed conflict [...]

532. As with the Rome Statute, neither the Geneva Conventions nor their Additional Protocols explicitly define 'armed conflict.'

533. The definition of this concept has been considered by other international tribunals and the Chamber has derived assistance from the jurisprudence of the ICTY:

70. [...] an armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

#### Armed conflict not of an international character

534. As to the definition of an armed conflict not of an international character, Article 8(2)(f) of the Statute provides:

Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental

authorities and organized armed groups or between such groups.

535. Relying on Additional Protocol II to the Geneva Conventions and the ICTY Tadić Interlocutory Appeal Decision cited above, Pre-Trial Chamber I determined that "the involvement of armed groups with some degree of organisation and the ability to plan and carry out sustained military operations would allow for the conflict to be characterised as an armed conflict not of an international character."

536. The Trial Chamber agrees with this approach, and notes that Article 8(2)(f) of the Statute only requires the existence of a "protracted" conflict between "organised armed groups". It does not include the requirement in Additional Protocol II that the armed groups need to "exercise such control over a part of [the] territory as to enable them to carry out sustained and concerted military operations". It is therefore unnecessary for the prosecution to establish that the relevant armed groups exercised control over part of the territory of the State. Furthermore, Article 8(2)(f) does not incorporate the requirement that the organised armed groups were "under responsible command", as set out in Article 1(1) of Additional Protocol II. Instead, the "organized armed groups" must have a sufficient degree of organisation, in order to enable them to carry out protracted armed violence.

537. When deciding if a body was an organised armed group (for the purpose of determining whether an armed conflict was not of an international character), the following non-exhaustive list of factors is potentially relevant: the force or group's internal hierarchy; the command structure and rules; the extent to which military equipment, including firearms, are available; the force or group's ability to plan military operations and put them into effect; and the extent, seriousness, and intensity of any military involvement. None of these factors are individually determinative. The test, along with these criteria, should be applied flexibly when the Chamber is deciding whether a body was an organised armed group, given the limited requirement in Article 8(2)(f) of the Statute that the armed group was "organized".

538. The intensity of the conflict is relevant for the purpose of determining whether an armed conflict that is not of an international character existed, because under Article 8(2)(f) the violence must be more than sporadic or isolated. The ICTY has held that the intensity of the conflict should be "used solely as a way to distinguish an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law." In order to assess the intensity of a potential conflict, the ICTY has indicated a Chamber should take into account, *inter alia*, "the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in the number of government forces, the mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, if so, whether any resolutions on the matter have been passed." The Chamber is of the view that this is an appropriate approach.

#### The distinction between international and non-international armed conflicts

[…]

540. The Appeals Chamber of the ICTY has recognised that, depending on the particular actors involved, conflicts taking place on a single territory at the same time may be of a different nature. The Chamber endorses this view and accepts that international and non-international conflicts may coexist.

#### International armed conflict

541. The Rome Statute framework does not define an "international armed conflict". Relying on Common Article 2 of the Geneva Conventions, the International Committee of the Red Cross ("ICRC") Commentary thereto, and the ICTY Tadić Appeals Judgment, Pre-Trial Chamber I determined that an armed conflict is international:

if it takes place between two or more States; this extends to the partial or total occupation of the territory of another State, whether or not the said occupation meets with armed resistance. In addition an internal armed conflict that breaks out on the territory of a State may become international – or depending upon the circumstances, be international in character alongside an internal armed conflict – if (i) another State intervenes in that conflict through its troops (direct intervention), or if (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention).

It is widely accepted that when a State enters into conflict with a non-governmental armed group located in the territory of a neighbouring State and the armed group is acting under the control of its own State, "the fighting falls within the definition of an international armed conflict between the two States". However, if the armed group is not acting on behalf of a government, in the absence of two States opposing each other, there is no international armed conflict. Pre-Trial Chamber II, when considering this issue, concluded that "an international armed conflict exists in case of armed hostilities between States through their respective armed forces or other actors acting on behalf of the State." As regards the necessary degree of control of another State over an armed group acting on its behalf, the Trial Chamber has concluded that the "overall control" test is the correct approach. This will determine whether an armed conflict not of an international character may have become internationalised due to the involvement of armed forces acting on behalf of another State. A State may exercise the required degree of control when it "has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group." Pre-Trial Chamber I adopted this approach.

[…]

**2. The facts**

543. The evidence in the case demonstrates beyond reasonable doubt that during the entirety of the period covered by the charges there were a number of simultaneous armed conflicts in Ituri and in surrounding areas within the DRC, involving various different groups. Some of these armed conflicts, which included the UPC, involved protracted violence. The military wing of the UPC, known as the FPLC, was established by September 2002. […F]rom the beginning of September 2002 at the latest, the UPC/FPLC as a political and military organisation was in control of Bunia. The takeover of Bunia by the UPC/FPLC marked the turning point in the Ituri conflict. From then onwards, the "rapidity of the alliance switches", the "multi-directionality" of the fighting and the nature of the violence against the civilian population reached unprecedented extremes. The UPC/FPLC was organised with a leadership structure that was capable of training troops as well as imposing discipline, and it carried out sustained military operations in Ituri during the relevant timeframe.

544. In addition to the FPLC, there were a number of significant political and military groups in operation in Ituri in 2002. The RCD-ML, whose army was the APC, was defeated in August 2002 in Bunia and thereafter it supported the Lendu militias and engaged in fighting against the UPC/FPLC. As set out above, the Lendu formed a group called the FNI and the Ngiti created the FRPI. Other significant militias at the time included, *inter alia*, PUSIC, headed by Chief Kahwa Panga Mandro after his departure from the UPC/FPLC near the end of 2002, and Jérôme Kakwavu's FAPC.

545. On the basis of the evidence presented in this case, it has been established that the APC, the armed wing of the RCD-ML, was an organised armed group capable of carrying out prolonged hostilities within the period of the charges. During this time, the RCD-ML/APC also supported various Lendu armed militias, including the FRPI, in combat against the UPC/FPLC.

546. From March 2003, at the latest, the FRPI was an organised armed group as it had a sufficient leadership and command structure, participated in the Ituri Pacification Commission, carried out basic training of soldiers and engaged in prolonged hostilities, including the battles in Bogoro and Bunia (between March and May 2003).

547. Extensive evidence has been given during the trial concerning the UPC/FPLC's involvement in the fighting involving rebel militias (namely the RCD-ML and Lendu militias, including the FRPI) that took place in Ituri between September 2002 and August 2003. The Chamber heard evidence that the UPC/FPLC, assisted by the UPDF ["Uganda People's Defence Force", the armed forces of Uganda; note of the author], fought the RCD-ML in Bunia in August 2002. In November 2002, the UPC/FPLC fought Lendu combatants and the APC in Mongbwalu. The UPC/FPLC fought the APC and Lendu militias in Bogoro (March 2003), and it was in conflict with Lendu militias in Lipri, Bambu and Kobu (in February and March 2003), Mandro (March 2003), and Mahagi, among other areas. In early March 2003, fighting between the UPC/FPLC and the UPDF and several Lendu militias, including the FRPI, ended in the withdrawal of the UPC/FPLC from Bunia. However, in May 2003 the UPC/FPLC army returned to Bunia where it clashed with Lendu militias, again including the FRPI, resulting in a number of casualties.

548. Although Ugandan forces withdrew from Bunia in May 2003, the evidence indicates that there was no "peaceful settlement" prior to 13 August 2003. Documentary evidence establishes that in June 2003, the Hema village of Katoto was attacked twice by Lendu militia members, resulting in many casualties. In addition, Lendu militia and APC soldiers attacked Tchomia in July 2003, killing up to eleven civilians. Scores more civilians were killed in July 2003, when Lendu combatants carried out attacks on Fataki. During the summer of 2003, the UN Security Council authorised the deployment to Ituri of a European Union led Interim Emergency Multinational Force (Operation Artemis) in order to restore security in the area, and on 28 July 2003 MONUC was given a Chapter VII mandate authorising it to take the necessary measures to protect civilians. Despite these and other efforts, the evidence clearly indicates that during the period between the end of May 2003 and 13 August 2003, a peaceful settlement had not been reached in Ituri.

549. Although the defence submits that between September 2002 and late May 2003 there was an international armed conflict taking place in Ituri, it is argued that there is insufficient evidence to establish the existence of any armed conflict between late May 2003 and 13 August 2003.

550. However, the Chamber finds that the evidence on this issue leaves no reasonable doubt that the UPC/FPLC, as an armed force or group, participated in protracted hostilities and was associated with an armed conflict throughout the relevant timeframe of the charges.

551. In situations where conflicts of a different nature take place on a single territory, it is necessary to consider whether the criminal acts under consideration were committed as part of an international or a non-international conflict. In these circumstances, the question arises as to whether the military involvement by one or more of the DRC's neighbours on its territory internationalised the relevant conflict or conflicts.

552. In accordance with the test set out above, to determine whether the UPC/FPLC was a party to an international armed conflict in Ituri, the relevant inquiry is whether between September 2002 and 13 August 2003, the UPC/FPLC, the APC and the FRPI were used as agents or "proxies" for fighting between two or more states (namely Uganda, Rwanda, or the DRC).

553. As to the role of the DRC, there is some evidence that Kinshasa sent trainers and weapons to the APC. The UN Special Report on the events in Ituri contains allegations that in the last three months of 2002, “some military supplies may have also been sent directly to the Lendu militia” in Rethy, within the Djugu territory. However, the limited support provided by the Congolese government to the RCD-ML and potentially to Lendu militias during this time is insufficient to establish the DRC government’s overall control over these armed groups. Critically, there is no sustainable suggestion that the DRC had a role in organising, coordinating or planning the military actions of the UPC/FPLC during the period relevant to the charges.

554. Regarding the role of Rwanda, there is ample evidence it provided support to the UPC/FPLC. There is evidence that Rwanda supplied uniforms and weapons to the UPC/FPLC, including dropping weapons by air to Mandro, and it provided training to UPC/FPLC soldiers, in the DRC and in Rwanda. P-0017, a former UPC/FPLC member, testified that he went to Rwanda with a group of soldiers to receive heavy-weapons training in late 2002. Around January 2003, the UPC/FPLC reportedly signed an agreement with the RCD-G, which was supported by Kigali. Documentary evidence establishes that after the UPDF expelled the UPC/FPLC from Bunia in March 2003, Thomas Lubanga and others were evacuated to Rwanda.

555. P-0055 testified that he had been told, with regard to the UPC/FPLC’s objective of taking military control of the town of Mongbwalu, “they had received orders from Rwanda” and Rwanda had indicated “if they took the town of Mongbwalu it would be a good thing and they were going to receive everything they needed. And so the objective of taking Mongbwalu was to obey an order issued by Rwanda, and in order to receive assistance from Rwanda as a result.” As discussed below, there is no corroboration of this statement.

556. Furthermore, there is no evidence that Rwanda supported either the APC or the FRPI. Therefore, it is unnecessary for the Chamber to consider this issue further.

557. There is considerable material regarding the presence of Ugandan troops in Ituri between September 2002 and 13 August 2003, although the overall number involved was decreasing during the period covered by the charges. For instance, Gérard Prunier (P-0360) indicated that although the UPDF once deployed 13,000 troops in the DRC, at the time the all-inclusive peace agreement was signed on 17 December 2002, 10,000 had been withdrawn. Similarly, reports from the UN set out that between 10 September 2002 and 18 October 2002, 2,287 UPDF troops withdrew from Ituri, leaving a reinforced battalion in Bunia and troops patrolling the Ruwenzori Mountains. Notwithstanding that reduction, there was, on occasion, substantial activity on the part of Ugandan forces: for instance, the UPDF was in occupation of areas in Bunia, such as the airport, for considerable periods of time (in the latter case, from 1 September 2002 until 6 May 2003).

558. Additionally, there is evidence of Ugandan support for UPC/FPLC troops in the form of training and providing weapons.

559. Documentary evidence demonstrates the FRPI was supported by individual UPDF commanders, and the FRPI (and other militias) assisted in removing the UPC/FPLC from Bunia in March 2003.

560. Gérard Prunier (P-360) testified that the DRC, Uganda, and Rwanda fought through “proxies,” and at one point in his evidence, he asserted that a proxy war between Kinshasa and Uganda continued until the final departure of Ugandan troops (which he suggested was in 2004). However, as discussed above, the evidence in this case concerning the DRC’s role in the relevant conflict has essentially been limited to the way it provided support to the APC. As to Uganda’s involvement, according to Gérard Prunier (P-0360), the UPDF initially had supported “the Hemas against the Lendu” before switching sides and lending assistance to the Lendu. As to Uganda’s control over the FRPI and other militias, Mr Prunier (P-0360) testified that the Ugandans were “unable to control their agents on the ground”. In his report to the Chamber, Mr Prunier (P-0360) asserted “[a]fter August 2002 the UPDF obviously lost control of its proxies”. He also suggested that at some point Kampala may not even have had control of its own forces in the DRC.

561. During the period relevant to the charges (September 2002 to 13 August 2003), the UPC/FPLC was primarily engaged in conflict with the RCD-ML/APC (which received support from the DRC) and Lendu militias, including the FRPI (which were sometimes assisted by individual UPDF commanders), though the UPC/FPLC also fought against Ugandan forces, in particular in Bunia in March 2003. The Chamber has not heard any evidence that Uganda had a role in organising, coordinating or planning UPC/FPLC military operations. With regard to Rwanda, although P-0055 gave evidence that the UPC/FPLC wanted to take the town of Mongbwalu because it had been directed to do so by Rwanda, this statement has not been corroborated by other evidence and it is insufficient, taken alone or together with the other evidence above, to prove that Rwanda had overall control of the UPC/FPLC and the latter acted as its agent or proxy. Thus, there is insufficient evidence to establish (even on a prima facie basis) that either Rwanda or Uganda exercised overall control over the UPC/FPLC.

562. There is no evidence of direct intervention by Rwanda in Ituri during this time. Therefore, it is unnecessary for the Chamber to consider this issue further.

563. Similarly, although there is evidence of direct intervention on the part of Uganda, this intervention would only have internationalised the conflict between the two states concerned (*viz.* the DRC and Uganda). Since the conflict to which the UPC/FPLC was a party was not “a difference arising between two states” but rather protracted violence carried out by multiple non-state armed groups, it remained a non-international conflict notwithstanding any concurrent international armed conflict between Uganda and the DRC.

564. As discussed above, there is evidence that during the relevant timeframe the UPDF occupied certain areas of Bunia, such as the airport. However, it is unnecessary to analyse whether territory came under the authority of the Ugandan forces, thereby amounting to a military occupation, because the relevant conflict or conflicts concern the UPC and other armed groups.

565. Focussing solely on the parties and the conflict relevant to the charges in this case, the Ugandan military occupation of Bunia airport does not change the legal nature of the conflict between the UPC/FPLC, RCD-ML/APC and FRPI rebel groups since this conflict, as analysed above, did not result in two states opposing each other, whether directly or indirectly, during the time period relevant to the charges. In any event, the existence of a possible conflict that was "international in character" between the DRC and Uganda does not affect the legal characterisation of the UPC/FPLC's concurrent non-international armed conflict with the APC and FRPI militias, which formed part of the internal armed conflict between the rebel groups.

566. For these reasons and applying Regulation 55 of the Regulations of the Court, the Chamber changes the legal characterisation of the facts to the extent that the armed conflict relevant to the charges was non-international in character.

567. The Trial Chamber therefore finds that the armed conflict between the UPC/FPLC and other armed groups between September 2002 and 13 August 2003 was non-international in nature.

[…]

## X. CONSCRIPTION AND ENLISTMENT OF CHILDREN UNDER THE AGE OF 15 OR USING THEM TO PARTICIPATE ACTIVELY IN HOSTILITIES (ARTICLE 8(2)(e)(vii) OF THE STATUTE)

### A. THE LAW

[…]

569. Article 8(2)(e)(vii) of the Statute, the first treaty to include these offences as war crimes, provides:

2. […]

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

[…]

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

[…]

The corresponding Elements of Crimes read as follows:

The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities.

Such person or persons were under the age of 15 years.

The perpetrator knew or should have known that such person or persons were under the age of 15 years.

The conduct took place in the context of and was associated with an armed conflict not of an international character.

The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

570. The Chamber's conclusions on Elements 3 and 5 are addressed separately in the context of Section XI(A)(5). The Chamber has also discussed the definition of an "[organised] armed group" elsewhere in this judgment.

571. The Elements of Crimes require that the relevant "conduct took place in the context of and was associated with an armed conflict not of an international character". Given the plain and ordinary meaning of this provision, it is unnecessary to discuss its interpretation in detail: it is sufficient to show that there was a connection between the conscription, enlistment or use of children under 15 and an armed conflict that was not international in character. The remaining Elements and the relevant applicable law are analysed below.

[…]

#### 1. Submissions

### a) Prosecution submissions

#### Enlistment and conscription

572. The prosecution adopts the approach of the Pre-Trial Chamber, in defining conscription as forcible recruitment and enlistment as voluntary recruitment. It is argued that the prohibition against both forms of recruitment of children is "well established in customary international law", and that a child's consent does not constitute a valid defence. […]

[…]

#### Use of children to participate actively in hostilities

[…]

575. The prosecution supports the Pre-Trial Chamber's approach that "active participation in hostilities" includes direct participation in combat, as well as combat-related activities such as scouting, spying, sabotage and the use of children at military checkpoints or as decoys and couriers. In addition, it is argued the term includes the use of children to guard military objectives or to act as the bodyguards of military commanders. The prosecution accepts the Pre-Trial Chamber's ruling that activities that are clearly unrelated to hostilities, such as delivering food to an airbase and working as domestic staff in the officers' quarters, are excluded.

[…]

578. In summary, the prosecution submits that the Chamber ought to adopt a broad interpretation of the expression "direct support function", "in order to afford wider protection to child soldiers and to prevent any use of children in activities closely related to hostilities.

[…]

### b) Defence submissions

#### Enlistment and conscription

579. The defence observes that the Pre-Trial Chamber and the Rome Statute framework have left the concept of enlistment undefined. It is suggested that the broad approach taken in various international instruments, which were designed to afford children the widest possible protection, should not be imported into criminal proceedings before the ICC because tightly-defined criteria are to be applied. In this regard, the defence relies on Articles 22(1) and (2) of the Statute.

580. It is, therefore, argued that the various international instruments governing the protection of children in this area, particularly when terms such as "children associated with armed forces and groups" are used, include children who, on account of their role, should not be treated as soldiers for the purposes of the criminal law. The defence refers in this context to the Paris Principles [and Guidelines on Children Associated with Armed Forces and Armed Groups, 2007, online: http://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf].

581. Additionally, the defence relies on jurisprudence from the European Court of Human Rights to the effect that a criminal offence must be clearly defined in the relevant laws, and the criminal law should not be broadly interpreted to an accused's detriment. Against this background and in light of a possible lengthy sentence under Article 77 of the Statute, it is suggested that a stricter definition of the concept of military enlistment is necessary. The defence supports the following approach, namely the "[…] integration of a person as a soldier, within the context of an armed conflict, for the purposes of participating actively in the hostilities on behalf of the group", and it relies on commentary from the ICRC for this suggested approach.

582. The critical distinction suggested by the defence is between those children who are integrated into an armed group as soldiers and who undertake military functions, and those who do not perform a military role and are not assigned any functions connected with the hostilities (although they are within the armed group). The latter, it is submitted, should not be treated as having been enlisted. The defence relies on the Dissenting Opinion of Justice Robertson at the SCSL:

[…] forcible recruitment is always wrong, but enlistment of child volunteers might be excused if they are accepted into the force only for non-combatant tasks, behind the front lines.

#### Use of children to participate actively in hostilities

583. The defence criticises the Pre-Trial Chamber's interpretation of the concept of "actively participating in hostilities" because it only excludes those activities that are "clearly unrelated to hostilities", whilst including couriers, guards at military sites and the bodyguards of military commanders. It is argued that this interpretation is excessively broad and violates Article 22(2) of the Statute.

584. The defence suggests, particularly by reference to the jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda ("ICTR"), that the concept of "actively participating in hostilities" should be interpreted as being synonymous with "direct participation" which, it is argued, equates to "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."

585. The defence relies on the three cumulative criteria [footnote 1741: ICRC, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law', 90 International Review of the Red Cross (2008), pages 995 – 996: "1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm); 2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); 3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)"…] for defining direct participation in hostilities as identified by the ICRC, and it argues that those who act as bodyguards or guard military installations (or similar), do not fulfil these criteria and should not be treated as having participated actively in the hostilities.

586. The defence submits that the broad interpretation applied by the Pre-Trial Chamber diminishes the meaning of the adjective "active" and its utility for distinguishing between direct and indirect forms of participation in hostilities (the latter, it is suggested, is not proscribed by the Statute). In addition, it is argued that the Pre-Trial Chamber's interpretation does not allow for a distinction between child soldiers based on whether they participated in the hostilities. It is contended this is objectionable because the intention was to focus on children below the age of 15 who "actively participate in hostilities", so as to punish those who endanger them.

587. The defence suggests that a footnote to the draft Statute of the Court provides a wholly insufficient basis for extending the concept of "actively participating" to cover all activities other than fighting with an indirect link to the hostilities. By reference to the principle of legality, the defence argues that the decisions of the SCSL, delivered after the relevant events, should not be used in support of a broad interpretation and it suggests that at the time of the events which are the subject of the present charges, international criminal law only addressed the use of children to participate in military operations within fighting units.

[…]

**b) Victims Submissions**

[…]

598. It is submitted that active participation in hostilities covers both direct and indirect participation and there should be no distinction "between the participation of child combatants and that of child non combatants in hostilities." The OPCV relies on the submissions of Ms Coomaraswamy (CHM-0003), the Cape Town Principles, the Paris Principles and the African Union's Solemn Declaration on Gender Equality in Africa as support for the proposition that the expression to "participate actively" should be interpreted so as to protect girls recruited into the armed forces for sexual purposes. It is submitted this is usually the primary reason for their recruitment. Moreover, the legal representative suggests this interpretation is fully supported by Ms Coomaraswamy (CHM-0003) in her criticism of Pre-Trial Chamber I's ruling excluding activities that were manifestly unrelated to hostilities:

[t]he Court should deliberately include any sexual acts perpetrated, in particular against girls, within its understanding of the "using" [children in hostilities] crime [and] that during war, the use of girl children in particular includes sexual violence.

599. It is said to be unnecessary for the Court to determine whether girls subjected to sexual abuse within the armed forces were used to participate actively in hostilities. The fact they were recruited when under the age of fifteen years is sufficient proof of enlistment, conscription or use under the Statute. The legal representative cites with approval a Decision of the Trial Chamber:

[i]t is not necessary […] for the Chamber to engage in the critical question that otherwise arises in this application as to whether the 'use' of children for sexual purposes alone, and including forced marriage, can be regarded as conscription or enlistment into an armed force, or the use of that person to participate actively in the hostilities, in accordance with Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii) of the Rome Statute. As just set out, the applicant has presented enough evidence to conclude, prima facie, that she was abducted in the broad context of the systematic conscription of children under the age of 15 into the military forces of the UPC.

**2. The Chamber's Analysis and Conclusions**

[…]

603. The jurisprudence of the SCSL has been considered by the Trial Chamber. Although the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute, the wording of the provision

criminalising the conscription, enlistment and use of children under the age of 15 within the Statute of the SCSL is identical to Article 8(e)(vii) of the Rome Statute, and they were self-evidently directed at the same objective. The SCSL's case law therefore potentially assists in the interpretation of the relevant provisions of the Rome Statute.

604. Article 4(3)(c) of Additional Protocol II to the 1949 Geneva Conventions includes an absolute prohibition against the recruitment and use of children under the age of 15 in hostilities (in the context of an armed conflict not of an international character):

children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

In addition, the Convention on the Rights of the Child, a widely ratified human rights treaty, requires the State Parties to "take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities", and to "refrain from recruiting any person who has not attained the age of fifteen years into their armed forces" in all types of armed conflicts ("armed conflicts which are relevant to the child").

605. These provisions recognise the fact that "children are particularly vulnerable [and] require privileged treatment in comparison with the rest of the civilian population" [footnote 1771: ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987), page 1377 at marginal note 4544 (…)]. The principal objective underlying these prohibitions historically is to protect children under the age of 15 from the risks that are associated with armed conflict, and first and foremost they are directed at securing their physical and psychological well-being. This includes not only protection from violence and fatal or non-fatal injuries during fighting, but also the potentially serious trauma that can accompany recruitment (including separating children from their families, interrupting or disrupting their schooling and exposing them to an environment of violence and fear).

606. It is to be noted that the potentially broad concept of "children associated with armed conflict" was referred to throughout the trial. This expression does not form part of the wording of any of the charges the accused faces, but instead – as submitted by the defence – it is clearly designed to afford children with the greatest possible protection. Although it is to be stressed that the Chamber has applied the provisions of the Statute as opposed to this more general concept, Ms Coomaraswamy gave relevant background evidence that children in this context frequently undertake a wide range of tasks that do not necessarily come within the traditional definition of warfare. As a result, they are exposed to various risks that include rape, sexual enslavement and other forms of sexual violence, cruel and inhumane treatment, as well as further kinds of hardship that are incompatible with their fundamental rights.

**a) Enlistment and conscription**

607. The Chamber accepts the approach adopted by the Pre-Trial Chamber that "conscription" and "enlistment" are both forms of recruitment, in that they refer to the incorporation of a boy or a girl under the age of 15 into an armed group, whether coercively (conscription) or voluntarily (enlistment). The word "recruiting", which is used in the Additional Protocols and in the Convention on the Rights of the Child, was replaced by "conscripting" and "enlisting" in the Statute. Whether a prohibition against voluntary enrolment is included in the concept of "recruitment" is irrelevant to this case, because it is proscribed by Article 8.

608. This interpretation gives the relevant provisions of the Statute their plain and ordinary meaning. It is to be noted that "enlisting" is defined as "to enrol on the list of a military body" and "conscripting" is defined as "to enlist compulsorily". Therefore, the distinguishing element is that for conscription there is the added element of compulsion. Whether this distinction is of relevance in this case is considered below.

609. Bearing in mind the use of the word "or" in Article 8(2)(e)(vii), in the Chamber's view the three alternatives (*viz.* conscription, enlistment and use) are separate offences. It follows that the status of a child under 15 who has been enlisted or conscripted is independent of any later period when he or she may have been "used" to participate actively in hostilities, particularly given the variety of tasks that he or she may subsequently be required to undertake. Although it may often be the case that the purpose behind conscription and enlistment is to use children in hostilities, this is not a requirement of the Rome Statute. If Article 8(2)(e)(vii) is taken on its own, the position is potentially ambiguous, given it reads "*[c]onscripting or enlisting* children under the age of fifteen years into armed forces or groups *or using them to participate actively in hostilities*" (emphasis added). However, the Elements of Crimes clarify the issue by requiring "1. The perpetrator *conscripted or enlisted one or more persons* into an armed force or group *or used one or more persons to participate actively in hostilities*" (emphasis added). The Chamber therefore rejects the defence contention that "the act of enlistment consists in the integration of a person as a soldier, within the context of an armed conflict, for the purposes of participating actively in hostilities on behalf of the group."

610. The expert witness, Elisabeth Schauer (CHM-0001), suggested in her report and during her evidence before the Chamber that from a psychological point of view children cannot give "informed" consent when joining an armed group, because they have limited understanding of the consequences of their choices; they do not control or fully comprehend the structures and forces they are dealing with; and they have inadequate knowledge and understanding of the short- and long-term consequences of their actions. Ms Schauer (CHM-0001) concluded that children lack the capacity to determine their best interests in this

particular context.

611. In her written submissions, Ms Coomaraswamy (CHM-0003) notes that it can be difficult to differentiate between a conscripted and an enlisted child:

The recruitment and enlisting of children in [the] DRC is not always based on abduction and the brute use of force. It also takes place in the context of poverty, ethnic rivalry and ideological motivation. Many children, especially orphans, join armed groups for survival to put food in their stomachs. Others do so to defend their ethnic group or tribe and still others because armed militia leaders are the only seemingly glamorous role models they know. They are sometimes encouraged by parents and elders and are seen as defenders of their family and community.

[…]

Children who "voluntarily" join armed groups mostly come from families who were victims of killing and have lost some or all of their family or community protection during the armed conflict.

612. The Special Representative (CHM-0003) further suggests that "the line between voluntary and forced recruitment is therefore not only legally irrelevant but practically superficial in the context of children in armed conflict".

613. The Chamber endorses the conclusions of the expert witnesses, in the sense that it will frequently be the case that girls and boys under the age of 15 will be unable to give genuine and informed consent when enlisting in an armed group or force.

614. Against that background, the Chamber addresses the issue of whether the valid and informed consent of a child under 15 years of age provides the accused with a defence in these circumstances.

615. In Ms Coomaraswamy's expert testimony before the Chamber she suggested that since children under the age of 15 cannot reasonably give consent, the accused should not be able to rely on the voluntary nature of their enlistment into an armed force or group as a defence.

616. The Pre-Trial Chamber in the present case adopted this approach, when it determined that a child's consent does not provide a valid defence to enlistment. It is of note that the Appeals Chamber of the SCSL opined that "where a child under the age of 15 years is allowed to voluntarily join an armed force or group, his or her consent is not a valid defence." In addition, the SCSL's Trial Chamber in the case of *the Prosecutor v. Fofana and Kondewa* […] concluded:

[T]he distinction between [voluntary enlistment and forced enlistment] is somewhat contrived. Attributing voluntary enlistment in the armed forces to a child under the age of 15 years, particularly in a conflict setting where human rights abuses are rife, is [...] of questionable merit.

617. In all the circumstances, the Chamber is persuaded that the Statute in this regard is aimed at protecting vulnerable children, including when they lack information or alternatives. The manner in which a child was recruited, and whether it involved compulsion or was "voluntary", are circumstances which may be taken into consideration by the Chamber at the sentencing or reparations phase, as appropriate. However, the consent of a child to his or her recruitment does not provide an accused with a valid defence.

618. Therefore, the Chamber agrees with the Pre-Trial Chamber that under the provisions set out above, the offences of conscripting and enlisting are committed at the moment a child under the age of 15 is enrolled into or joins an armed force or group, with or without compulsion. In the circumstances of this case, conscription and enlistment are dealt with together, notwithstanding the Chamber's earlier conclusion that they constitute separate offences. These offences are continuous in nature. They end only when the child reaches 15 years of age or leaves the force or group.

**b) Using children under the age of 15 to participate actively in hostilities**

619. As with "conscripting" and "enlisting" children under the age of 15 into armed forces or groups, the prohibition against "using them to participate actively in hostilities" is generally intended to protect children from the risks that are associated with armed conflict, for the reasons described above.

[…]

621. The Elements of the Crimes require that "the conduct took place in the context of and was associated with an armed conflict". The *travaux préparatoires* of the Statute suggest that although direct participation is not necessary, a link with combat is nonetheless required. The Preparatory Committee's draft Statute had postulated a broader interpretation in one of the footnotes:

The words "using" and "participate" have been adopted in order to cover both direct participation in combat and also active participation in military activities *linked* to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover *activities clearly unrelated to the hostilities* such as food deliveries to an airbase or

the use of domestic staff in an officer's married accommodation. However, use of children in a *direct support function* such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology. (emphasis added)

622. The Pre-Trial Chamber, by reference to the approach of the Preparatory Committee, decided that a child does not actively participate in hostilities if the activity in question was "clearly unrelated to hostilities." The Pre-Trial Chamber distinguished between two categories of participation, first:

"Active participation" in hostilities means not only direct participation in hostilities, combat in other words, but also covers active participation in combat-related activities such as scouting, spying, sabotage and the use of children as decoys, couriers or at military check-points.

In the Pre-Trial Chamber's formulation, guarding military objectives or acting as a bodyguard were also activities related to hostilities, *inter alia*, when "they have a direct impact on the level of logistic resources and on the organisation of operations required by the other party to the conflict".

623. Second, the Pre-Trial Chamber considered that children who were engaged in activities "clearly unrelated to hostilities" and carry out tasks such as "food deliveries to an airbase or the use of domestic staff in married officer's quarters" do not actively participate in hostilities.

624. As indicated above, the SCSL has examined the scope of active participation in hostilities in a number of decisions when applying Article 4(c) of its Statute, which is identical to Article 8(e)(vii) of the Rome Statute. In the AFRC case, ostensibly relying on the approach of the Preparatory Committee, the SCSL determined that the use of children to participate actively in hostilities is not restricted to children directly involved in combat, noting:

An armed force requires logistical support to maintain its operations. Any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation. Hence carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields are some examples of active participation as much as actual fighting and combat. [footnote 1798: SCSL, *AFRC Trial Judgment*, para. 737.]

625. The SCSL therefore held that the concept of "using" children to participate actively in hostilities encompasses the use of children in functions other than as front line troops (participation in combat), including support roles within military operations.

626. The Special Representative (CHM-0003) suggested that the Trial Chamber should focus "in each case […] [on] whether the child's participation served an essential support function to the armed force" and she referred to the SCSL jurisprudence in the *AFRC Trial Judgment* set out above. The Trial Chamber in that case held that:

'Using' children to "participate actively in the hostilities" encompasses putting their lives directly at risk in combat. [footnote 1800: SCSL, *AFRC Trial Judgment*, para. 736.]

627. The use of the expression "to participate actively in hostilities", as opposed to the expression "direct participation" (as found in Additional Protocol I to the Geneva Conventions) was clearly intended to import a wide interpretation to the activities and roles that are covered by the offence of using children under the age of 15 actively to participate in hostilities. It is noted in this regard that Article 4(3)(c) of Additional Protocol II does not include the word "direct".

628. The extent of the potential danger faced by a child soldier will often be unrelated to the precise nature of the role he or she is given. Those who participate actively in hostilities include a wide range of individuals, from those on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants. All of these activities, which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target. The decisive factor, therefore, in deciding if an "indirect" role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target. In the judgment of the Chamber these combined factors – the child's support and this level of consequential risk – mean that although absent from the immediate scene of the hostilities, the individual was nonetheless actively involved in them. Given the different types of roles that may be performed by children used by armed groups, the Chamber's determination of whether a particular activity constitutes "active participation" can only be made on a case-by-case basis.

629. Notwithstanding the conclusions set out above, and given the submissions made at various stages of the proceedings, the Chamber needs finally to address how the issue of sexual violence is to be treated in the context of Article 8(2)(e)(vii) of the Statute. It is to be noted that although the prosecution referred to sexual violence in its opening and closing submissions, it has not requested any relevant amendment to the charges. During the trial the legal representatives of victims requested the Chamber to include this conduct in its consideration of the charges, and their joint request led to Decisions on the issue by the Trial Chamber and the Appeals Chamber (*viz.* whether it was permissible the change the legal characterisation of the facts to include crimes associated with sexual violence). Not only did the prosecution fail to apply to include rape and sexual enslavement at the relevant procedural stages, in essence it opposed this step. It submitted that it would cause unfairness to the accused if he was tried and convicted on this basis.

630. In accordance with the jurisprudence of the Appeals Chamber, the Trial Chamber's Article 74 Decision shall not exceed the facts and circumstances (*i.e.* the factual allegations) described in the charges and any amendments to them. The Trial Chamber has earlier pointed out that "[f]actual allegations potentially supporting sexual slavery are simply not referred to at any stage in the Decision on the Confirmation of Charges". Regardless of whether sexual violence may properly be included within the scope of "using [children under the age of 15] to participate actively in hostilities" as a matter of law, because facts relating to sexual violence were not included in the Decision on the Confirmation of Charges, it would be impermissible for the Chamber to base its Decision pursuant to Article 74(2) on the evidence introduced during the trial that is relevant to this issue.

631. In due course, the Chamber will consider whether these matters ought to be taken into account for the purposes of sentencing and reparations.

[…]

**B. THE FACTS**

[…]

**6. Overall Conclusions as regards conscription, enlistment and use of children under the age of 15 within the UPC/FPLC**

909. It is alleged that the accused conscripted and enlisted children under the age of 15 years into the armed forces of the UPC/FPLC and that he used them to participate actively in hostilities between 1 September 2002 and 13 August 2003.

910. The Chamber has already set out its conclusion that the UPC/FPLC was an armed group.

**a) Conscription and enlistment in the UPC/FPLC**

911. The Chamber finds that between 1 September 2002 and 13 August 2003, the armed wing of the UPC/FPLC was responsible for the widespread recruitment of young people, including children under the age of 15, on an enforced as well as a "voluntary" basis. The evidence of witnesses P-00055, P-0014 and P-0017, coupled with the documentary evidence establishes that during this period certain UPC/FPLC leaders, including Thomas Lubanga, Chief Kahwa, and Bosco Ntaganda, and Hema elders such as Eloy Mafuta, were particularly active in the mobilisation drives and recruitment campaigns that were directed at persuading Hema families to send their children to serve in the UPC/FPLC army.

912. P-0014, P-0016, P-0017, P-0024, P-0030, P-0038, P-0041, P-0046 and P-0055 testified credibly and reliably that children under 15 were "voluntarily" or forcibly recruited into the UPC/FPLC and sent to either the headquarters of the UPC/FPLC in Bunia or its training camps, including at Rwampara, Mandro, and Mongbwalu. Video evidence introduced during the testimony of P-0030 clearly shows recruits under the age of 15 in the camp at Rwampara. The letter of 12 February 2003, (EVD-OTP-00518) further corroborates other evidence that there were children under the age of 15 within the ranks of the UPC.

913. The evidence of P-0016, P-0014 and P-0017 demonstrates that children in the camps endured a harsh training regime and they were subjected to a variety of severe punishments. The evidence of P-0055, P-0017 and P-0038 establishes that children, mainly girls, were used for domestic work for the UPC commanders. The Chamber heard evidence from witnesses P-0046, P-0016, P-0055 and P-0038 that girl soldiers were subjected to sexual violence and rape. P-0046 and P-0038 specifically referred to girls under the age of 15 who were subjected to sexual violence by UPC commanders. As discussed above, in the view of the Majority, sexual violence does not form part of the charges against the accused, and the Chamber has not made any findings of fact on the issue, particularly as to whether responsibility is to be attributed to the accused.

914. In all the circumstances, the evidence has established beyond reasonable doubt that children under the age of 15 were conscripted and enlisted into the UPC/FPLC forces between 1 September 2002 and 13 August 2003.

**b) Use of children under 15 to participate actively in hostilities**

915. The testimony of P-0002, P-0016, P-0017, P-0024, P-0030, P-0038, P-0046, P-0055, D-0019 and D-0037 and the documentary evidence has demonstrated that children under the age of 15 were within the ranks of the UPC/FPLC between 1 September 2002 and 13 August 2003. The evidence of P-0038, P-0016, P-0012, P-0046, P-0014, D-0019 and D-0037 proves that children were deployed as soldiers in Bunia, Tchomia, Kasenyi, Bogoro and elsewhere, and they took part in fighting, including at Kobu, Songolo and Mongbwalu. The evidence of witnesses P-0016 and P-0024 establishes that the UPC used children under the age of 15 as military guards. The evidence of P-0017 reveals that a special "Kadogo Unit" was formed, which was comprised principally of children under the age of 15. The evidence of P-0014, P-0017, D-0019, P-0038 and P-041, as well as the video footage EVD-OTP-00572, demonstrates that commanders in the UPC/FPLC frequently used children under the age of 15 as bodyguards. The accounts of P-0030, P-0055, P-0016 and P-0041, along with the video evidence, clearly prove that children under the age of 15 acted as bodyguards or served within the presidential guard of Mr Lubanga.

916. In all the circumstances, the evidence has established beyond reasonable doubt that children under the age of 15 were conscripted, enlisted and used by the UPC/FPLC to participate actively in hostilities between 1 September 2002 and 13 August 2003.

[…]

## XII. DISPOSITION

1358. For the foregoing reasons and on the basis of the evidence submitted and discussed before the Chamber at trial, and the entire proceedings, pursuant to Article 74(2) of the Statute, the Chamber finds Mr Thomas Lubanga Dyilo:

GUILTY of the crimes of conscripting and enlisting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of Articles 8(2)(e)(vii) and 25(3)(a) of the Statute from early September 2002 to 13 August 2003.

1359. Pursuant to Regulation 55 of the Regulations of the Court, the Chamber modifies the legal characterisation of the facts to the extent that the armed conflict relevant to the charges was non-international in character from early September 2002 to 13 August 2003.

[…]

1364. Judges Fulford and Odio Benito append separate and dissenting opinions to this Judgment on particular discrete issues.

## Discussion

### I. Classification of the situation

1. (*Doccument B, para. 524*) How does the Trial Chamber classify the situation in Ituri between the UPC/FPLC and the APC and FPRI? Which time periods does it distinguish and why?

2. a. (*Document B, paras 536-537*) Which elements are required for an armed conflict to be classified as non-international under the Rome Statute? (*See* **Case Study**, The International Criminal Court, Art. 8(2)(f)) Is the definition of a non-international armed conflict under the Rome Statute similar to that enshrined in the Geneva Conventions and Protocol II? What significance do the criteria of Article 1(1) of Protocol II have for the definition under the Rome Statute? (CG I-IV, Art. 3; P II, Art. 1)b. Which international court inspired the definition of non-international armed conflicts enshrined in the Rome Statute?c. (*Document B, paras 536 and 538*) How should the requirement of “protracted armed conflict” be interpreted? Why?

3. (*Document B, paras 533, 548-550*)a. When does an armed conflict end? Is there a difference between international and non-international armed conflicts in this regard? (P I, Art. 3(b) and P II, Art. 2(2))b. Why does the defence hold that the conflict in Ituri ended in late May 2003? What is the Court’s argumentation? Does it qualify the conflict in order to come to this conclusion?

4. (*Document B, paras 541 and 552*)a. What conditions have to be met in order to consider that the UPC/FPLC was party to an international armed conflict? According to the Court, when does a conflict between a state and an armed group or between two armed groups become an international armed conflict? Does IHL say anything about this? Which criterion should be applied to determine whether an armed group is acting “on behalf of the State”? (GC I, Art. 2 and P I, Art. 2)b. According to the Court, is an armed conflict in which a state fights an armed group on the territory of another state which does not consent not an international armed conflict if the territorial state does not control the armed group? Is it necessary for IHL of international armed conflicts to apply that the armed forces of two states or armed groups controlled by two different states fight against each other? Do you agree with the Trial Chamber?

5. (*Document B, paras 552-553*) Why does the Court examine the influence of the Democratic Republic of the Congo on the RCD-ML/APC? Leaving aside the involvement of other states, could an armed conflict between the RCD-ML/APC acting on behalf of the DRC and the UPC/FPLC be qualified as an international armed conflict? Would any additional condition have to be met?

6. (*Document B, paras 554-556, 561-562*) Why does the Court find that Rwanda did not exercise overall control over the UPC/FPLC?

7. a. (*Document B, paras 557-565*) What is the Court’s conclusion concerning Uganda’s control over the UPC/FPLC? Why was Uganda’s potential intervention in the conflict of no importance in the present case?b. (*Document B, paras 563-565*) Under which conditions could there be an international armed conflict between Uganda and the DRC? (*Document B, para. 540*) May there be an international and a non-international armed conflict going on at the same time on a single territory? (*Document B, paras 524-525*) Could the conflict between the DRC and Uganda internationalise the entire conflict, converting the UPC/FPLC into a party to an international armed conflict? Which arguments can be made in favour and against such an internationalisation? c. (*Document B, para. 560*) A witness suggests that “at some point Kampala may not even have had control of its own forces in

the DRC". What would be the consequence of such a conclusion? Could Uganda still be considered a party to an international armed conflict in these conditions? How would you qualify the relationship between the DRC and the uncontrolled Ugandan forces?

8. Why is the classification of the conflict important in the present case? Does the Rome Statute distinguish between international and non-international armed conflicts in relation to the conscription and enlistment of children under the age of 15? Does the term "national armed force" refer only to government forces or does it also include armed groups? (Rome Statute, Arts 8(2)(b)(xxvi) and 8(2)(e)(vii); see also P II, Art. 4(3)(c))

**II. Enlistment and conscription of children**

9. a. (*Document B, para. 607)* What is the difference between enlistment and conscription?b. (*Document B, paras 579-582*) How does the defence interpret the term "enlistment"? Why does it argue that the concept of "enlistment" under international criminal law should be more restrictive than under various other international instruments? (Rome Statute, Arts 22(1) and (2))c. (*Document B, paras 607-618*) How does the Court reason in this matter? Why does it hold that enlistment of children and their use to participate actively in hostilities are separate offences?d. Why is it difficult to draw a distinction between voluntary and compulsory enrolment as far as children are concerned?

**III. Using children to participate actively in hostilities**

10. a. Which different wordings are used to describe the prohibition of using children in an armed conflict under the Additional Protocols of the Geneva Conventions and under the Rome Statute? (P I, Art. 77(2); P II, Art. 4(3)(c); Rome Statute, Art. 8(2)(e)(vii))b. (*Document B, paras 584-587*) Can the expressions "take a direct part in hostilities" in Article 77(2) of Protocol I, "take part in hostilities" in Article 4(3)(c) of Protocol II and "participate actively in hostilities" in Article 8(2)(e)(vii) of the Rome Statute be used as synonyms of the expression "take a direct part in hostilities" in Article 51(3) of Protocol I? How does the defence argue in favour of such an interpretation?c. Is Article 51(3) of Protocol I applicable in non-international armed conflicts (CIHL, Rule 6)? Which behaviour qualifies as direct participation in hostilities under this article? Do you think this definition is also applicable in the context of other provisions of IHL, such as the recruitment of child soldiers? (*see* ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities)d. (*Document B, para. 575*) Would guarding a military objective or acting as a bodyguard of a military commander constitute direct participation in hostilities? Which other activities listed in para. 575 constitute direct participation? Which of these activities should constitute active participation for which children should not be used? (*see* ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities)e. May a child become a legitimate target under IHL? Under what conditions?

11. a. Should the notions of "direct participation" and "active participation" be distinguished? Why or why not?b. (*Document B, paras 619-628*) How does the Court interpret the notion of "active participation"? Is it considered as a synonym of "direct participation"? According to the Court, how can a distinction between active and non-active participation be drawn? What factors are relevant from the perspective of the armed group (*Document B, paras 621-622, 624 and 626*)? From the perspective of the child (*Document B, paras 626 and 628*)? c. (*Document B, para. 579-587*) Do you agree with the defence when it argues that "the broad interpretation applied by the Pre-Trial Chamber diminishes the meaning of the adjective 'active' and its utility for distinguishing between direct and indirect forms of participation in hostilities"? Why?d. Does the Court's interpretation of active participation diminish the meaning of the adjective "active"? According to this interpretation, who would not be actively participating?e. (*Document B, para. 628*) If the purpose of the prohibition of "using children under the age of 15 to participate actively in hostilities" is to protect them from the potential risk of hostilities, is every party to an armed conflict "using children to participate actively in hostilities" when it tolerates their presence where it fights or where its enemy may fight against it?

12. Do you think Lubanga could have reasonably known that using children as couriers, guards at military sights or bodyguards would be punished as a war crime under Article 8(2)(e)(vii) of the Rome Statute based on the wording of the provision? Why is this important? Does the interpretation of the Court respect Article 22(2) of the Rome Statute?

**IV. The protection of children from sexual violence and inhumane treatment in armed groups**

13. a. (*Document B, paras 598 and 629-631*) Does the Court decide whether using children for sexual purposes falls under the notion of "using children under the age of 15 to participate actively in hostilities"? Why do the OPCV and Ms Coomaraswamy criticize the exclusion of activities that are manifestly unrelated to hostilities from the notion of "active participation"?b. (*Document B, para. 599*) Does IHL contain any provisions on the protection of girls and gender equality (GC IV, Art. 27(2); P I, Art. 76; P II, Arts 2(1) and 4(2)(e); GC III, Art. 14; see also Rome Statute, Art. 21(3))? Would it be against the purpose of the law to protect boys fighting in combat or participating as couriers or military guards but not girls used for sexual purposes or subject to forced marriage? Why are those girls nevertheless protected in the present case?c. Is a girl who is subjected to sexual violence participating actively in hostilities?d. Would girls not be protected against sexual violence if such violence was not considered as a form of "using children under the age of 15 to participate actively in hostilities"?

14. (*Document B, paras 605-606, 619, 628 and 913*) According to the Court, does the prohibition of enlisting or conscripting children or using them to participate actively in hostilities also contain an implicit protection of these children against cruel and

inhumane treatment by their own superiors, such as harsh training regimes and severe punishments?

15. Does IHL traditionally protect fighters against acts committed by their own party? What arguments could be put forward in favour of an extension of the protection of IHL to intra-party relations? Are the provisions of IHL requiring the protection of children restricted to children belonging to the adverse party? (P II, Art. 4(3)(c); CIHL, Rule 135)

16. Is the protection of children against recruitment granted by the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts the same as that under IHL?

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