

## ICC, The Prosecutor v. Bosco Ntaganda

**INTRODUCTORY TEXT:** *This judgment of an ICC Trial Chamber analyses the individual criminal responsibility for alleged war crimes of Mr. Bosco NTAGANDA, a former high-ranking official of the Union of Congolese Patriots (UPC) group during the Ituri conflict in the Democratic Republic of the Congo (DRC). Ntaganda held the position of Deputy Chief of Staff of the UPC's military wing. The case discussion focuses on select issues of IHL, in particular relating to sexual violence and its passive personal scope of application, raised by the judgment, rather than the individual criminal responsibility of Mr. Ntaganda.*

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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.

[**Source:** ICC, The Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06, Judgment, 8 July 2019, available at: [https://www.icc-cpi.int/CourtRecords/CR2019\\_03568.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_03568.PDF) (Footnotes omitted)]

### TRIAL CHAMBER VI

Date: 8 July 2019

[...]

### SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

## IN THE CASE OF

## THE PROSECUTOR v. BOSCO NTAGANDA

[...]

### Judgement

[...]

### I. BACKGROUND

1. This case is concerned with alleged conduct by Mr Bosco Ntaganda in the events that took place in Ituri in the DRC. Mr Ntaganda is of Tutsi ethnicity, born in Rwanda on 5 November 1973, and raised in Masisi locality, North Kivu, in the DRC.

[...]

25. In January 2001, the then president of the DRC, Laurent-Désiré Kabila, was assassinated, and succeeded by his son, Joseph Kabila. By this time, there were at least ten conflicts within the country involving nine national armies and nineteen irregular armed forces. Six of these conflicts took place either in Orientale Province or specifically in Ituri. [...] [T]he RCD-K/ML regained control of Ituri [...].

26. A lengthy dispute ensued between leaders of the RCD-K/ML, which developed into a situation of confrontation between the newly-created Hema forces and the RCD-K/ML/APC. [...]

27. Following a peace meeting in Bunia in 2001, at the initiative of the government of the DRC, the Sun City accords were signed in April 2002 by two of the three major rebel movements. During the Sun City peace negotiations, [...] [the] President of the RCD-K/ML, shifted his allegiance to the Kinshasa government and decided to create an integrated Hema-Lendu army for the RCD-K/ML.

28. Thereafter, certain individuals decided to abandon the RCD-K/ML and a number of new militias were organised. The creation of the UPC/FPLC is further analysed below in this context.

[...]

30. At the beginning of August 2002, Bunia was geographically divided along ethnic lines, with the Hema population inhabiting the northern part of the city, and the Lendu population and other groups inhabiting the south.

31. The UPDF maintained an armed presence in Bunia. [...]

32. It is in this context that the UPC/FPLC implemented its military strategy. The acts and conduct of Mr Ntaganda, who held the position of Deputy Chief of Staff in charge of Operations and Organisation in the UPC/FPLC between 2 or 3 September 2002 and December 2003, are analysed in the present Judgment, in the context of the events that took place between on or about 6 August 2002 and on or about 31 December 2003.

## **II. SCOPE OF THE CHARGES**

[...]

## **III. EVIDENTIARY CONSIDERATIONS[...]**

## **IV. FACTUAL FINDINGS**

### **A. The UPC/FPLC**

[...]

290. In June 2002, the political leaders of the emerging UPC/FPLC, headed by Thomas Lubanga, attended a meeting with Ugandan authorities in Kampala. In this context, they prepared a number of documents calling for RCD-K/ML to be chased out of Ituri.

291. [...] The RCD-K/ML and the APC are accused of siding with the Lendu combatants, notably by providing them weapons and support, 'hunting' the Hema on their behalf, and favouring the Nande to the detriment of Iturians.

292. Two of these documents indicate that the RCD-K/ML should be chased out of Ituri by force. One specifically states that: (i) Bunia and its surroundings were completely enclaved and must be liberated; (ii) Ituri must be saved, including by shedding 'our' blood.

293. The meeting in Kampala aimed at discussing the reorganisation of Ituri, notably how the emerging UPC/FPLC would take control of the district. [...] Thomas Lubanga explained to his group they needed to create an organised army in order to fight against the APC, and steps were undertaken to obtain weapons from Rwanda. [...] During these exchanges, it was stated that one of the objectives of the emerging UPC/FPLC was to drive out the non-natives, also known as jajambus. The targets were defined as first, the Nande and then, the Lendu. There was a discussion that it was necessary to replace jajambus holding important positions with Iturians. In the context of side discussions, reference was also made to using the rape of enemy women as a means of waging war. One witness explained that this was meant to have a psychological impact on the enemy.

[...]

## **2. Military apparatus**

### **a) Origins of the FPLC**

309. Around the end of 1999 and the beginning of 2000, the Chui Mobile Force was created, with Mr Ntaganda as its founder and leader. [...] The members of the Chui Mobile Force were mainly Hema and Tutsi.

310. These former APC soldiers, referred to as 'mutineers', claimed that the APC sided with the Lendu and discriminated against the Hema, which is why they decided to come together to protect the interests of the Hema.

311. After some time in the bush, the members of the Chui Mobile Force started to recruit in rural areas. Some individuals joined the Chui Mobile Force voluntarily. Parents were also asked to provide their children for participation in military training, which some of them did.

312. Subsequently, the members of the Chui Mobile Force underwent military training in Tchankwanzi, Uganda. The training was carried out by the Ugandan military authorities. The number of Chui Mobile Force members increased from about 150 to 200 to between 750 and 900 recruits. At the beginning of the training, Mr Ntaganda visited Tchankwanzi, encouraging the recruits. Around the same time, Mr Ntaganda [...] and others underwent officer training in Jinja, Uganda. [...]

[...]

314. [...] From August 2002, the emerging UPC/FPLC controlled Bunia.

315. In early September 2002, this military group was formally established as the FPLC by UPC President Thomas Lubanga, to act as the armed wing of the UPC.

### **b) Leadership and General Staff**

[...]

320. The FPLC General Staff was based in Bunia between its formal establishment in September 2002, and the moment the UPDF forced the UPC to retreat from Bunia, and the FPLC leadership left the city. The FPLC returned to Bunia and its leadership re-established itself there in June 2003. Following the deployment of the Artémis force in June 2003, the FPLC withdrew from Bunia again.

[...]

#### **e) Hema civilian supporters**

333. During military operations, including some directly relevant to the charges, the UPC/FPLC relied on Hema civilians who were not formally part of it to carry out tasks such as transportation of weapons and ammunition, transportation of looted goods, and burying the dead. In specific cases, these civilians also engaged in acts of violence, along with the FPLC. Hema civilians participated in such operations under the direction of the FPLC military commanders. They were mobilised specifically for the purpose of assisting during FPLC operations.

#### **f) Weapons, ammunition, and other material**

334. [...] The UPC/FPLC also had anti-personnel and anti-tank mines in its possession.

[...]

336. [...] From mid-2002 onwards, many of its weapons were provided by Rwanda. Airplanes, referred to as being Rwandan, dropped ammunition at or near Mandro, and later, after Mongbwalu had come under UPC/FPLC control and the airstrip near Mongbwalu was secured, weapon and ammunition supplies were delivered there. Mr Ntaganda was informed by Rwanda when the weapon deliveries would take place. [...]

[...]

339. Initially, the armed members of the emerging UPC/FPLC did not wear full camouflage ('tache tache') uniforms, but shortly after the UPC was formally established, and around the time the FPLC was formed, in September 2002, uniforms were supplied by Rwanda. The Chamber heard evidence about financial assistance and general supplies being provided to the emerging UPC/FPLC.

340. At the training centres, recruits were instructed in the use of both light and heavy weapons; with regard to heavy weapons, recruits and soldiers of the UPC/FPLC also received training in Rwanda. [...]

[...]

### **3. Recruitment, training and assignment of UPC/FPLC soldiers**

#### **a) Recruitment**

347. In June 2002, during the meeting held in Kampala, the political leaders of the emerging UPC/FPLC gave a clear message that each person present at the meeting should mobilise the children in their community in order to join the UPC. [...] [T]he UPC/FPLC extensively recruited individuals of all ages, in particular 'young people', including individuals under the age of 15, in various locations [...].

348. The UPC/FPLC used several forms of recruitment. The UPC/FPLC organised awareness raising campaigns and rallies in different villages and communities, except Lendu ones. Members of the UPC/FPLC communicated with elders, community leaders, and other individuals of influence in Ituri in order to mobilise 'children' and 'young people', for recruitment into the ranks of the UPC/FPLC, so that they could defend their villages.

349. The UPC/FPLC also imposed an obligation on families to provide one or several 'children' to the UPC/FPLC for military service, including by threatening them. Some parents paid a fee or otherwise contributed to the UPC/FPLC in order to exempt their children from having to join the UPC/FPLC.

350. As a result of these different forms of recruitment, some individuals joined the UPC/FPLC voluntarily, and others were recruited forcibly. The motives of those who joined voluntarily included the loss of their parents and the need to seek refuge for lack of other options, as well as a desire to avenge family members' deaths.

[...]

355. Community leaders and parents were told that the UPC/FPLC needed 'children' to join in order to protect their communities. While Mr Ntaganda denied having attended recruitment drives or campaigns, the evidence shows that he was involved in the recruitment process.

[...]

## **b) Training**

[...]

361. On arrival at a training location, recruits were screened based on their physical ability, and age as such was not a bar for them to receive training.

362. Many young recruits, including individuals under the age of 15 years [...] were trained in UPC/FPLC training camps, notably in Mandro, Rwampara, and Bule. Individuals under the age of 15 undertook military training jointly with recruits over the age of 15 years.

[...]

## **(2) Contents of the training**

[...]

373. Songs were taught to recruits as part of their training. This included 'revolutionary songs' which were sung to boost morale. Other songs incited soldiers to attack or kill the Lendu, and others disparaged [...]

President Kabila or the Ugandans, including President Museveni. The lyrics in another song suggested that soldiers would 'get' everything, including women, 'for free' in the UPC/FPLC. During their training, recruits were taught that the Lendu and the Ngiti were the enemy.

### **(3) Conditions, rules, and discipline**

374. Recruits wore civilian clothing. [...]

[...]

### **(4) Completion of training**

[...]

379. At the completion of their training, recruits were issued with weapons and uniforms. [...]

[...]

### **d) Treatment of female recruits and soldiers**

406. Female members within the UPC/FPLC ranks were referred to as PMF, 'personnel militaire féminin'. They were recruited, trained, and fought in battle in the same manner as male recruits, and certain female recruits were selected to serve as bodyguards to UPC/FPLC commanders; to this extent, there was no difference in treatment between the various soldiers of the UPC/FPLC on the basis of gender.

407. Female members of the UPC/FPLC were regularly raped and subjected to sexual violence [...] by male UPC/FPLC soldiers and commanders [...] and, in relation to his female bodyguards, by Mr Ntaganda himself. This common practice was generally known and discussed within the UPC/FPLC. A number of these female members of the UPC/FPLC became pregnant during their time in the UPC/FPLC.

408. As set out with more specificity in the cases discussed below, PMFs who suffered acts of sexual violence as just described included girls under 15 years of age.

[...]

### **e) Participation in military operations**

414. [...] There was no age threshold for deployment, and kadogos, including individuals under the age of 15, were deployed as any other soldiers in various UPC/FPLC units.

415. During deployment, the expression 'kupiga na kuchaji' was commonly used by UPC/FPLC commanders and soldiers. Several insider witnesses indicated that this was an order which meant to attack and to loot. The Chamber observes that several insiders also explained that this expression was understood

to mean taking possession of the opponent's belongings, but also any kind of property, including that belonging to 'civilians'. In addition, two key insiders, considered by the Chamber as fully credible and reliable, explained that this order was understood to mean also get rid of everyone and everything, referring to all the Lendu, including civilians and their possessions. [...]

416. Kadogos, including individuals under the age of 15, participated in military operations [...]. In the context of an operation, kadogos were told to kill the enemy, namely the Lendu, regardless of their sex, age, and of whether they were soldiers or civilians. Kadogos, including individuals under the age of 15, used their weapons, sometimes killing people. Some got shot at, were injured, or died on the battlefield. [...]

[...]

## **B. THE OPERATIONS INVOLVING THE UPC/FPLC**

### **1. Relevant politico-military groups**

433. In addition to international forces, such as Artemis and MONUC, respectively authorised and set up by the United Nations Security Council, other armed actors were present in Ituri. The Ugandan armed forces, the UPDF, maintained a presence in Ituri during the relevant time period. Initially, in 2002, the UPC/FPLC and the UDFP fought alongside each other, but in March 2003 they fought each other for the control of Bunia.

434. As already indicated, the RCD-K/ML's military wing was the APC. The APC comprised a large number of soldiers, who wore uniforms. It was divided into units, including companies and brigades. The APC had headquarters in different locations and geographical operational zones. It also operated training facilities. Many witnesses referred to Lendu 'combatants', fighters, or 'militia', without specifying which group or organisation they belonged to. These Lendu fighters were sometimes referred to as wearing APC uniforms, and were often mentioned in the context of fighting involving the APC. [...] These two groups, whether or not they were formally aligned or constituted two separate entities, were considered as the military opponents of the UPC/FPLC during the time period of the charges in the present case. The RCD-K/ML was involved in several political negotiations and signed agreements.

[...]

### **7. First Operation: Assaults on a number of villages in the Banyali-Kilo collectivité in November/December 2002**

#### **a) Situation in the area prior to November 2002**

[...]

472. The Lendu fighters did not have a common military uniform; some of the fighters wore APC uniforms, some wore clothing which included animal skins and banana leaves around their hips and necks, as well as

fetishes, and some switched to wearing UPC/FLPC uniforms which they recuperated during the fighting. The fact that they were not uniformly dressed made some of the Lendu fighters difficult to identify.

[...]

#### **d) Unfolding of the First Operation**

##### **(1) Assault on Mongbwalu**

[...]

##### **(b) The advance of the troops towards Mongbwalu**

[...]

493. Once the Kilo-Moto offices and the Mongbwalu airstrip had been taken over by the UPC/FPLC, Mr Ntaganda met the commanders involved in the assault [...]. Mr Ntaganda gave orders to take over the whole of Mongbwalu. Mr Ntaganda also ordered to attack 'the Lendu' who were in Mongbwalu, without making a difference between 'Lendu civilians' and the militia. [...]

494. The UPC/FPLC faced resistance in the attack on the town of Mongbwalu from the APC, as well as Lendu fighters, both male and female, who took up arms, including arrows, knives, machetes, as well as firearms obtained from the APC, and fought. The UPC/FPLC soldiers fired at everyone in Mongbwalu, including the 'civilian population'.

495. The UPC/FPLC killed some individuals during the assault, including children and the elderly. Some people were killed by shelling. [...]

[...]

##### **(2) Assault on Sayo**

[...]

504. [...] The bodies of some of those killed did not have weapons or fetishes on them, and some belonged to women, children, and the elderly. Some people were also killed by shelling during the assault.

[...]

506. The UPC/FPLC soldiers advanced from the church towards the health centre in Sayo, and fired projectiles at the health centre. [...] Three seriously injured men, as well as a Lendu woman and her child – who was approximately two years old and whom the woman had brought to the health centre for treatment – were left behind at the centre. The woman, who was wearing rags and was unarmed at the time she came to the health centre, was killed by the UPC/FPLC during the assault. [...]

[...]

#### **(4) Involvement of persons under the age of 15**

511. Persons under the age of 15 participated in the assaults forming part of the First Operation. Some of them wore military uniforms which were too big for them and which they therefore had to roll up, and they had firearms.

#### **(5) Aftermath of the assault**

##### **(a) Mongbwalu**

##### **(i) Ratissage operation**

512. In the immediate aftermath of the takeover of Mongbwalu, members of the UPC/FPLC and Hema 'civilians' conducted a ratissage operation during which they searched from house to house for items to loot, abducting, intimidating, and killing people who resisted. [...]

[...]

514. During the ratissage operation, looted goods included household items such as chairs, beds, mattresses, radio and television sets, clothing, food items, as well as gold. Vehicles were also looted. There was no limit on what could be looted and the members of the UPC/FPLC took anything that they wanted. The UPC/FPLC soldiers also looted medical equipment from the Mongbwalu hospital. Some UPC/FPLC members and Hema 'civilians' took over abandoned houses whose owners had fled Mongbwalu during and/or after the UPC/FPLC assault.

515. Within the UPC/FPLC, looted items which were considered of high quality or value were usually given to the commanders [...] under threat of punishment, while the soldiers could keep other goods. Other items that the UPC/FPLC soldiers looted were either sold off for money or used by the soldiers themselves.

[...]

##### **(iii) Placing of anti-personnel landmines in Mongbwalu**

524. After Mongbwalu was taken over, Mr Ntaganda ordered anti-personnel mines to be placed at the entry and exit points of the town that were not guarded by the UPC/FPLC soldiers. [...]

[...]

#### **8. Second Operation: Assaults on a number of villages in the Walendu-Djatsi collectivité in February 2003**

[...]

##### **c) Unfolding of the Second Operation**

[...]

## **(5) 'Pacification meeting'**

### **(a) Invitation to the 'pacification meeting'**

590. On or about 22 February 2003, UPC/FPLC soldiers gave a letter inviting the Lendu community to a 'pacification meeting' in Sangi to a Nyali man [...], a former APC soldier who had been previously captured by the UPC/FPLC. The letter was written in Swahili and signed by Salumu Mulenda UPC/FPLC soldiers also came to Sangi telling the local population that they were not looking to fight any further, but wanted to carry out peace negotiations. [...]

591. The message about the 'pacification meeting' was conveyed to the Lendu in Buli and passed on to various locations where Lendu people were [...]. Some Lendu community leaders responded to Salumu Mulenda's letter, asking him to withdraw his soldiers from the Lendu villages and requesting that a 'pacification meeting' be held in Sangi with all community leaders of Ituri along with government representatives.

592. The Lendu people accepted the invitation to the 'pacification meeting' as living in the bush without access to food, clothes, and medicine was difficult to bear for those who had been displaced.

### **(b) Motorola intercepts**

593. Sometime prior to the 'pacification meeting', a device referred to as a 'Motorola', which had been lost by the UPC/FPLC [...] was set up in the Gutsi primary school by Lendu people. With this device, they managed to intercept UPC/FPLC communications in which UPC/FPLC commanders exchanged details indicating that the 'pacification meeting' was meant to be a trap aimed at capturing the Lendu. [...]

594. A few days prior to the 'pacification meeting', some Lendu community leaders met to consult about the possibility of going to the 'pacification meeting' and wrote a letter to people in Buli warning them about it being a trap. People from Gutsi did not attend the 'pacification meeting'. Some Lendu in other locations also realised or learnt from others that the meeting was meant to be a trap and did not attend.

### **(c) 'Pacification meeting' in Sangi**

595. On or about 25 February 2003, following the invitation, unarmed Lendu dignitaries, community leaders, young people, and women from various locations attended the 'pacification meeting' in Sangi. [...]

596. At the meeting, Salumu Mulenda, accompanied by a large number of UPC/FPLC soldiers, addressed those present. He allowed at least one Lendu man to leave the meeting so as to retrieve the saba saba weapon – the return of which the UPC/FPLC was demanding – from the Lendu.

597. In the meantime, armed UPC/FPLC soldiers began capturing the Lendu people and those who were outside tried to flee; others were locked and tied up inside the building, while the UPC/FPLC soldiers began

beating and injuring them with, inter alia, rifles, bayonets, and machetes. The UPC/FPLC soldiers also chased people down Sangi Hill and into the bush.

598. Only few people managed to escape, while others were captured, tied up, and later taken to Kobu by the UPC/FPLC. Most people who went to Sangi for this 'pacification meeting' were either never seen again or their corpses were later found in Kobu.

[...]

602. Sometime after the 'pacification meeting', the UPC/FPLC burned down houses in or around Sangi.

[...]

## **V. LEGAL FINDINGS**

[...]

### **A. Contextual elements**

[...]

#### **2. Contextual elements of war crimes**

[...]

##### **a) Existence of an armed conflict not of an international character**

701. Although paragraphs (2)(d) and (f) of Article 8 provide some guidance, the Court's legal framework does not define the term 'armed conflict not of an international character' as referred to in paragraphs (2)(c) and (e). However, noting that paragraph 2(e) and the Elements of Crimes explicitly refers to 'the established framework of the international law of armed conflict', the Chamber adopts the definition of 'armed conflict not of an international character' introduced by the ICTY Appeals Chamber in 1995, which has since been accepted by States as authoritative and has become part of State practice. It will therefore consider that such a conflict exists in case of 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.

[...]

703. In order to distinguish situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, or other acts of a similar nature from a non-international armed conflict, (i) at least

two organised armed groups need to have been involved in (ii) armed violence of a certain intensity.

### **(1) Organisation requirement**

704. In assessing whether the parties involved qualify as organised armed groups, the Chamber shall consider the characteristics of the groups concerned, including, inter alia, the following factors and indicators: (i) the existence of a command structure, the existence of headquarters, the issuing of political statements, and the use of official spokespersons; (ii) the military (operational) capacity of the armed group, which may be shown by, for example, the ability to define a unified military strategy, the use of military tactics, the ability to carry out (large scale or coordinated) operations, the control of territory, and having a territorial division into zones of responsibility; (iii) the logistical capacity of the armed group, indicated, among others, by the existence of a supply chain for military equipment, as well as by the group's ability to move troops around and to recruit and train personnel; (iv) the existence of an internal disciplinary system and the ability to implement IHL; and (v) the group's ability to speak with one voice, indicated, for example, by the capacity of the leadership to act on behalf of its members in political negotiations and to conclude agreements, such as cease-fire or peace agreements. These factors and indicators are not individually determinative, and a group may be sufficiently organised if only some of them are present.

705. The UPC/FPLC had headquarters in Bunia and a formal military structure, including a number of individuals appointed to serve specific functions in its General Staff. From at least June 2002, the UPC/FPLC recruited new members in various locations throughout Ituri. Approximately 1800 recruits were based in Mandro at the time, where training was provided. Besides Mandro, the UPC/FPLC had other training camps where recruits were trained in a structured manner, including in military skills.

706. While UPC/FPLC members were not paid, the UPC/FPLC had formalised ranks from May 2003 onwards, and its structure followed that of a conventional army. Although the number of persons within the various units, and therefore the size was different from most conventional armies, the names and order of the units matched those of a conventional army, and the units had identifiable commanders.

707. The UPC/FPLC divided its operation units over three geographical sectors. The assault on Mongbwalu at the end of November 2002, whereby troops approached Mongbwalu from two sides in order to jointly attack, is indicative of the group's ability to devise a military strategy and carry out a coordinated operation. The UPC/FPLC made use of various means of communication, including radio networks, with trained radio operators, and satellite communication.

708. The UPC/FPLC possessed heavy weapons, such as artillery and heavy machine guns, which were stored, together with ammunition, in weapons depots at various locations, and transported from there to the units that required them. Several of its members were trained in the use of heavy weapons, and subsequently placed in special heavy weapon units.

709. The UPC/FPLC did not only operate as a well-structured armed force, it also externally acted as such. As President of the UPC, Thomas Lubanga regularly issued decrees on appointments and other matters related to its internal structure, and press releases and communiques. The UPC even entered into agreements with private companies on the exploitation of natural resources in the area under its control.

710. On the basis of the foregoing, the Chamber finds that the UPC/FPLC constituted an organised armed group during the relevant period.

711. The UPC/FPLC was opposed by several armed actors, which formed alliances that changed over time. Moreover, while the emerging UPC/FPLC was initially assisted by the Uganda, and fought alongside the UPDF in Bunia in August 2002, it fought against the UPDF in March 2003. The UPDF, which consisted of uniformed soldiers, inter alia, possessed tanks and heavy weapons. Furthermore, as the official armed forces of Uganda, it must be considered as sufficiently organised for the purpose of the present enquiry.

712. As to the 'Lendu fighters' against whom the UPC/FPLC fought during the temporal scope of the charges, the evidence presented often merely refers to 'Lendu fighters', without it being clear whether these fighters belonged to a single unified entity. However, the Chamber notes that these fighters were able to fend off assaults by the UPC/FPLC, despite the latter being, as determined above, well-organised and in possession of heavy weapons. Moreover, on several occasions, these fighters were able to temporarily defeat the UPC/FPLC and regain control over towns or villages. While the Chamber is not in a position to conclude that they constituted an organised armed group, the Chamber notes that they often fought alongside other opponents of the UPC/FPLC, whose organisation is discussed next.

713. The APC, the military wing of the RCD-K/ML, consisted of a large number of soldiers, who wore uniforms. It was divided into units, such as companies and brigades, had headquarters in different locations and geographical operational zones. The APC had military camps in several villages or towns in Ituri, had training facilities, controlled various locations for prolonged periods of time, and was able to successfully resist or, on occasion, defeat the UPC/FPLC in battle. The RCD-K/ML was involved in the political negotiations and signed ceasefire agreements. On the basis of these facts, the Chamber considers the APC, as the armed wing of the RCD-K/ML, to have been an organised armed group for the purpose of the present assessment.

[...]

715. The Chamber therefore concludes that at all times during the relevant period at least one of the UPC/FPLC's opponents, namely the UPDF, the APC, [...] was sufficiently organised to constitute an organised armed group.

## **(2) Intensity requirement**

716. In considering whether the intensity requirement has been met, the Chamber may take note of: (i) the seriousness and frequency of attacks and armed clashes; (ii) the spread of clashes over territory and the group's ability to control territory over a period of time; (iii) whether any ceasefire orders had been issued or ceasefires agreed to; (iv) the type and number of armed forces deployed, including any involvement of the government; (v) the type of weapons used; (vi) whether the situation had attracted the attention of the UN Security Council, or involvement of other international organisations; (vii) whether those fighting considered themselves bound by IHL; and (viii) the effects of the violence on the civilian population, including the extent to which civilians left the relevant area, the extent of destruction, and the number of persons killed.

717. The Chamber further recalls that exercise of control over a part of the territory is not required for a group to meet the minimum level of organisation, but in the absence of active hostilities, it may be a determinative factor in assessing whether the intensity threshold is fulfilled.

718. The Chamber first notes that Ituri was faced with unrest and fighting in the years prior to the temporal scope of the charges. For the present case, it is relevant whether any armed conflict involving the UPC/FPLC had started prior to, or at the start of the temporal scope of the charges, and continued throughout the relevant time, or was replaced by another conflict involving the UPC/FPLC.

719. It is established that the UPC/FPLC launched a number of military operations during which its troops engaged in combat with the above-mentioned armed groups. In early August 2002, troops of the emerging UPC/FPLC led by Mr Ntaganda fought alongside the UPDF in Bunia against the APC and Lendu fighters. At the end of August 2002, they also launched an assault in Songolo, where APC soldiers had fled and were reorganising their troops. In October 2002, the UPC/FPLC troops conducted a military operation targeting the village of Zumbe, a base for Lendu fighters where APC soldiers had retreated after the combats in Bunia. In November 2002, the UPC/FPLC fought against the APC, Ngiti, and Mai Mai fighters in Komanda, and only '[a]fter intense fighting', it managed to take over this village. Discussed at length above are also the two prolonged military operations on the Banyali-Kilo and Walendu-Djatsi collectivités, namely the First Operation and the Second Operation, during which several armed clashes took place and assaults were launched on at several towns and villages.

720. In addition, it is also established that, between July 2002 and January 2003, the UPC/FPLC and the APC fought each other in other areas, most notably along the Beni-Komanda-Bunia road.

721. During several moments of the temporal scope of the charges, no active hostilities took place. However, there appears not to have been any lasting absence of armed confrontations between the UPC/FPLC and its opponents. Moreover, throughout this period, the UPC/FPLC was controlling significant parts of the territory of Ituri. As noted above, in the absence of any direct clashes during certain periods, control by an organised armed group such as the UPC/FPLC, thereby indicating that the DRC government and any groups opposing the UPC/FPLC were either unable or unwilling to challenge the UPC/FPLC's

control over the areas concerned, is a relevant factor to assess whether the intensity requirement was fulfilled.

722. The fighting severely impacted the civilian population in the area, which – in addition to individual civilians being killed – was forced to leave its houses in large numbers and flee to the bush, where it had to stay for prolonged periods.

723. The Chamber further recalls that, in relation to the hostilities at stake, the various parties and the international community considered it necessary to engage in peace negotiations, as part of which ceasefire agreements were signed. Even if these agreements were not effective in practice, the Chamber has considered the signing of ceasefire agreements as an indication that the situation being addressed by the agreements was of a significant intensity.

724. The impact of the fighting is further shown by the interest of international community, more specifically the United Nations and the European Union. It expressed its concern with the situation in Ituri by setting up peacekeeping forces, and renewing their mandate throughout 2003.

725. On the basis of the foregoing, the Chamber concludes beyond reasonable doubt that the fighting between the UPC/FPLC and UPDF, as well as the fighting between the UPC/FPLC and the opposing organised armed groups, specifically the APC and its allies, [...] the Lendu fighters, met the relevant intensity requirement. Accordingly, the Chamber finds beyond reasonable doubt that the UPC/FPLC was, at all times during the relevant period, namely between on or about 6 August 2002 and 31 December 2003, involved in at least one non- international armed conflict with an opposing party.

## **b) Whether the non-international armed conflict was instead international in nature**

726. A situation that starts out as a non-international armed conflict may become international, if another State intervenes in the conflict directly, through its troops, or indirectly, when some of the groups involved act on behalf of that other State. The intervention must be to assist a non-State armed group that is engaged in an armed conflict with the government of a State. In case of an intervention by a third State in support of an armed group fighting on the government's side or with the consent of the host State, the conflict remains non-international. However, intervention by a third State without the consent of the host State may constitute an international armed conflict, because when an organised armed group that is involved in fighting with other non-State entities controls a certain portion of territory, and thereby effectively dispossesses the State authorities of its power, the State where the conflict takes place, albeit not directly involved with its troops, must nevertheless be considered as being opposed by the armed group concerned.

727. To assess whether an international armed conflict exists as a result of such indirect participation of a State, the Chamber must appraise the degree of control exerted by that State over the armed groups in question. In doing so, the Chamber will rely on the 'overall control' test, whereby it must be established that

the State had 'a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group'. An international armed conflict therefore exists if a degree of control is exercised by the intervening third State over a non-State actor fighting in opposition to, or without the consent of, the government, that goes 'beyond the mere financing and equipping' of the armed group and also involves 'participation in the planning and supervision of military operations'. It does not require, however, 'that such control [...] extend to the issuance of specific orders or instructions relating to single military actions'.

728. As the fighting took place on the territory of the DRC, the State of the DRC was affected by the conflict. The evidence also indicates that Uganda and Rwanda were to some degree involved in the conflict. The UPC/FPLC initially received material support from Uganda and fought alongside the UPC/FPLC in August 2002. The UPC/FPLC subsequently fought against the UPDF, notably in March 2003. On one side, by virtue of its presence as an occupying force in Ituri, and as it was fighting in the DRC's territory without its consent, the UPDF was engaged in an international armed conflict with the DRC. On the other side, with regard to the clashes between the UPDF and the UPC/FPLC, the Chamber finds that, without evidence to the effect that the UPC/FPLC was fighting under the overall control or on behalf of a State, and given that it cannot be established that said fighting took place within the area of the DRC under effective control of the UPDF, the fighting constituted a non-international armed conflict. In any event, had the fighting taken place within the area considered as occupied by the UPDF, the law of occupation would only apply to the UPDF, and not to the UPC/FPLC.

729. The Chamber recalls that first the Ugandan armed forces, and afterwards the Rwanda armed forces, provided military training for members of the UPC/FPLC and materially supported the group, inter alia, with weapons, ammunition, and uniforms. As to the second element of overall control, the Chamber observes that the UPC/FPLC's contact with the Rwandan armed forces went beyond mere training, and Rwanda reportedly pressured the UPC/FPLC to fight the UPDF, and indeed the UPC/FPLC expected to receive assistance from Rwandan forces during the attempt to oust the UPDF from Bunia in March 2003. The Chamber also received evidence from a witness about Floribert Kisembo having been appointed Chief of Staff to avoid the UPC being perceived as a 'Rwandan movement', and that Rwanda had indicated that Mongbwalu ought to be taken over. However, with regard to the latter, no information is available about the reasons or context of this indication. In the witness's understanding, Rwanda desired access to the goldmines and other minerals in the Mongbwalu area. While this may have been considered a form of repayment for the weapons supplied, the Chamber recalls that Mongbwalu was also of significant strategic importance, because of its location, as well as its airstrip. Control of the Mongbwalu airstrip would assist the UPC/FPLC in receiving military supplies, so controlling Mongbwalu was important for the UPC/FPLC's objectives.

730. The Chamber therefore finds that despite it being established that a third State, namely Rwanda, assisted the UPC/FPLC and was involved in its activities to a certain level, on the basis of the evidence on the record, the Chamber cannot conclude beyond reasonable doubt that the involvement of Rwanda with the

UPC/FPLC rose to the level of overall control. As such, the fighting that the UPC/FPLC was engaged in during the temporal scope of the charges must be classified as a non-international armed conflict.

[...]

### **C. COMMISSION ‘JOINTLY WITH ANOTHER’ AND ‘THROUGH ANOTHER’ (INDIRECT CO-PERPETRATION)**

[...]

#### **3. Findings of the Chamber on indirect co-perpetration**

##### **a) Common plan**

[...]

##### **(3) The UPC/FPLC military leaders made arrangements for the recruitment and use of individuals under 15**

[...]

792. In addition to these conditions, its young female recruits and soldiers were additionally subjected to a continuous exposure to the risk of sexual abuses, including rape, accompanied by severe physical violence. The Chamber found that female members of the UPC/FPLC, including those under 15 years of age, were regularly raped or subjected to sexual violence by male members of the UPC/FPLC. These crimes were left largely unpunished and the Chamber considers that no effective measures were taken by Mr Ntaganda or Floribert Kisembo to restrain or prevent this practice within their respective groups of escorts. Moreover, some of the UPC/FPLC commanders themselves subjected some members of the UPC/FPLC to sexual violence. The Chamber finds that this practice could occur due to the circumstances in which these vulnerable young girls were kept, notably not being able to leave. In this regard, the Chamber emphasises the fact that the military leaders did not create the necessary conditions to ensure a safe environment for the female members of the UPC/FPLC, in which they would not be sexually abused by other members of the group.

[...]

##### **b) Execution of the elements of the crimes through other persons**

[...]

## **(1) Organisation**

[...]

## **(2) Hema civilian supporters**

820. The Chamber found that Hema civilian supporters also participated in the commission of certain crimes: [...]

821. With regard to Mongbwalu, in addition to the UPC/FPLC soldiers, the Hema civilians also executed the material elements of crimes found to have been committed, namely murder as a crime against humanity and as a war crime (Counts 1 and 2) and pillage as a war crime (Count 11).

822. [...] In this regard, the Chamber is of the view that, in Mongbwalu, the Hema civilians engaged in the relevant acts in the context of the general coercive circumstances resulting from the presence of armed UPC/FPLC soldiers, who were themselves committing crimes in Mongbwalu at the same time. In addition, the conduct of these civilians followed orders of the UPC/FPLC leadership.

[...]

## **4. Findings of the Chamber on the crimes charged**

### **a) Murder and attempted murder as a crime against humanity and as a war crime (Counts 1 and 2)**

[...]

## **(2) Findings of the Chamber**

[...]

### **(b) Material findings**

[...]

### **(iv) Status of victims**

883. [...] Article 50(1) of Additional Protocol I further provides, in relation to the expected conduct of a member of the military, that '[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian'. This general presumption of protection under IHL also applies during non-international armed conflicts. However, in the context of a criminal trial, the burden is on the Prosecution to establish the status of

the victim as someone taking no active part in the hostilities. Pursuant to the Elements of Crimes, the killing of civilians only qualifies as murder so long as they are taking no active part in hostilities at the relevant time. Under IHL, civilians are protected and they lose that protection only through active participation in hostilities and for such time they participate. The Chamber notes that the Statute, treaty law, and the principles and rules of international law, including the established principles of the international law of armed conflict do not define 'active participation in hostilities'. However, the Commentary on Article 13(3) of Additional Protocol II puts forward the following definition: 'acts of war that by their nature or purpose str[ike] at the personnel and "matériel" of enemy armed forces'.

884. In determining whether victims were taking an active part in hostilities at the time of their alleged murder, the Chamber may consider the relevant facts and specific situation of the victims at the relevant time, including the location of the alleged murders, whether the victims were carrying any weapons at the time they were killed, and their clothing, age, and gender.

[...]

### **c) Rape as a crime against humanity and as a war crime (Counts 4 and 5)**

#### **(1) Applicable law**

930. The crime against humanity of rape is laid down in Article 7(1)(g) of the Statute. The war crime of rape is laid down in Article 8(2)(e)(vi) of the Statute.

[...]

932. The legal elements of the war crime of rape are:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

5. The perpetrator's conduct was deliberate and the perpetrator: (i) meant to cause the consequence; or (ii) was aware that it would occur in the ordinary course of events.

933. The concept of 'invasion' is intended to be broad enough to be gender-neutral'. Accordingly, 'invasion', in the Court's legal framework, includes same-sex penetration, and encompasses both male and/or female perpetrators and victims.

934. Save for the very specific situation of a person whose 'incapacity' was 'tak[en] advantage of', the Elements of Crimes do not refer to the victim's lack of consent, and therefore this need not be proven. The Elements of Crimes clearly seek to punish any act of penetration where committed under threat of force or coercion, such as that caused by the threat of violence, duress, detention, psychological pressure or abuse of power or, more generally, any act of penetration taking advantage of a coercive environment. The establishment of at least one of the coercive circumstances or conditions set out in the second element is therefore sufficient alone for penetration to amount to rape within the meaning of Articles 7(1)(g) and 8(2)(e) (vi) of the Statute.

935. Coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion, and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict' or the military presence of hostile forces amongst the civilian population. Several factors may contribute to creating a coercive environment, such as, for instance, the number of people involved in the commission of the crime, or whether the rape is committed during or immediately following a combat situation, or is committed together with other crimes. In addition, in relation to the requirement of the existence of a 'coercive environment', it must be proven that the perpetrator's conduct involved 'taking advantage' of such a coercive environment.

## **(2) Findings of the Chamber**

[...]

### **(b) Material elements**

[...]

#### **(iv) Use of force, threat of force or coercion, or taking advantage of a coercive environment**

943. Turning to the second legal element of rape, the Chamber notes that, in many instances, the perpetrators used force against the victims or other individuals present, both before and during the invasion of their body. [...]

944. In addition, the Chamber finds that UPC/FPLC soldiers used implicit threats of force when carrying their arms in front of their victims, thereby intimidating these persons, or, in some instances, took out their weapons to show them to the victims, apparently to scare them. Other UPC/FPLC soldiers also plainly told their victims that they would be killed if they cried out or refused to cooperate. After the ‘pacification meeting’, when the soldiers were taking women to the bush to rape them, they carried out their threats and killed at least two individuals in front of some of the victims, notably killing one woman who had tried to defend herself.

945. Finally, the Chamber notes that the UPC/FPLC soldiers engaged in the conduct described above in the immediate aftermath of the group’s takeover of, respectively, Mongbwalu and Kilo, or in the context of its military assaults on villages in the Walendu-Djatsi collectivité. In these circumstances, the perpetrators’ status as UPC/FPLC soldiers placed them in a position of authority vis-à-vis the local population, particularly considering the young age of many of the victims, as well as the fact that the rapes coincided with the commission of other crimes by UPC/FPLC soldiers against the inhabitants of these villages. For this reason, even for the incidents where the use of violence or threats was not established, notably when soldiers were calling girls from the road in front of their camp in Kilo, the Chamber considers that the UPC/FPLC soldiers abused their power and took advantage of a coercive environment to have sexual intercourse with girls or women.

[...]

#### **e) Rape as a war crime and sexual slavery as a war crime (Counts 6 and 9)**

##### **(1) Applicable law**

[...]

965. The Chamber further recalls its ‘Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9’ in which the Chamber found that, provided there is a nexus to the armed conflict, rape and sexual slavery against any person is prohibited, and that therefore members of the same armed force are not per se excluded as potential victims of the war crimes of rape and sexual slavery under Article 8(2)(e)(vi), which was upheld by the Appeals Chamber. The Chamber further recalls its indication, and the Appeals Chamber’s finding in this regard, that for a proper delineation between war crimes and ordinary crimes, the nexus between the conduct in question and the armed conflict must be satisfied.

##### **(2) Findings of the Chamber**

[...]

## **(b) Material elements**

[...]

### **(iii) Penetration/acts of a sexual nature**

975. [...] Having found that the three abovementioned victims were raped, the Chamber is also satisfied that the second material element of the war crime of sexual slavery is met, that is that the perpetrator caused the victim to engage in one or more acts of a sexual nature.

### **(iv) Use of force, threat of force or coercion, or taking advantage of a coercive environment/exercise of any or all of the powers attaching to the right of ownership**

[...]

978. On the basis of the above circumstances, and particularly as she was kept captive in a state of extreme vulnerability, her situation was such that her personal liberty was denied. Accordingly, the evidence establishes that, by imposing on P-0883 a deprivation of liberty similar to the other circumstances listed under Article 8(2)(e)(vi) of the Statute, members of the UPC/FPLC in Camp Bule collectively exerted powers over her attaching to the right of ownership. Similarly, in relation to the second element of rape, the Chamber concludes that the conduct of the UPC/FPLC soldiers who subjected P-0883 to sexual violence was committed by threat of force or coercion.

979. With regard to the second incident listed above, the Chamber notes that Mave was under 15 years of age at the time and that she was raped by many different UPC/FPLC soldiers on a regular basis. The Chamber further considers the fact that Floribert Kisembo had to personally intervene to stop UPC/FPLC soldiers from further raping Mave and that this prohibition was only put in place after she developed serious health problems as a result of the repeated rapes. In addition, P-0887's direct observations attest of Mave's unhealthy and troubled condition at the time. Having considered cumulatively the above circumstances, the Chamber finds that the only reasonable conclusion is that the UPC/FPLC male soldiers who raped this young escort took advantage of the coercive environment in which she found herself at the time. Accordingly, the Chamber concludes that the second legal element of the war crime of rape is met in relation to this conduct.

980. Turning to the first element of sexual slavery, the Chamber, having had particular regard to her state of mind at the time, as reported by P-0877, considers that the only reasonable conclusion is that, although Mave was not necessarily physically confined, she was unable to leave her position as Floribert Kisembo's escort. [...] Accordingly, the Chamber finds that Floribert Kisembo exercised some of the powers attaching to the right of ownership over her. In the circumstances, since she was raped by many different UPC/FPLC soldiers on a regular basis, the only reasonable conclusion is that Floribert Kisembo allowed these rapes to

happen, and as such placed her at the disposal of those who raped her. Noting that the commission of the present crime may involve more than one perpetrator, and the sexual acts need not have been perpetrated by the one who exercised the rights attaching to ownership, the Chamber considers that the first element of sexual slavery is also fulfilled.

[...]

### **(c) Contextual elements**

[...]

984. The Chamber notes the Defence's submissions that 'sexual abuse [is] widespread in armed forces around the world', but emphasises that it is not generally pronouncing on whether such sexual abuse, while criminal, constitutes a war crime. Sexual abuse within armed forces may or may not take place at a time that the relevant armed force is a party to an armed conflict, and may or may not take place in the context of or be associated with such an armed conflict. The facts before the Chamber concern the two victims referred to above. The rapes and sexual slavery of these girls took place during training at one of the UPC/FPLC camps and during the assignment as an escort to a UPC/FPLC commander, respectively, during a period in which the UPC/FPLC was actively engaged in military operations and fought opposing armed actors. The UPC/FPLC's recruitment campaign at the relevant time was aimed at building up its military strength – which was required to achieve the desired control over Ituri.

985. The Chamber further recalls the link between the recruitment campaign of soldiers and the related recruitment of individuals under the age of 15, as a result of the absence of measures to exclude such persons and the UPC/FPLC's acceptance that individuals under the age of 15 would therefore become part of the UPC/FPLC, and the UPC/FPLC's engagement in the non-international armed conflict in Ituri.

986. The Chamber is therefore satisfied that the conduct discussed above, and amounting to the rape and/or sexual slavery of individuals under the age of 15, was associated with a non-international armed conflict and therefore fulfils the requisite nexus requirement.

[...]

### **j) Conscription, enlistment and use of children under 15 as a war crime (Counts 14, 15 and 16)**

#### **(1) Applicable law**

1102. The war crime of conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities is laid down in Article 8(2)(e)(vii) of the Statute.

1103. The legal elements of this war crime are:

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.
2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.
6. The perpetrator's conduct was deliberate and the perpetrator: (i) meant to cause the consequence; or (ii) was aware that it would occur in the ordinary course of events.

1104. Conscription or enlistment alone are sufficient and it is therefore not required that a child under 15 years of age who has been conscripted or enlisted also be 'used' to participate actively in hostilities. Conscription and enlistment is a continuing crime, for which the commission occurs for as long as the child remains part of or is associated with the armed force or group and until the child reaches 15 years of age.

1105. Both conscription and enlistment are forms of recruitment that result in the incorporation of a person into an armed force or group, whether by compulsion (conscription) or on an alleged voluntary basis (enlistment).

[...]

## **(2) Findings of the Chamber**

[...]

### **(b) Material elements**

[...]

**(iii) The perpetrator enlisted or conscripted one or more persons under the age of 15 years into an armed force or group**

[...]

1123. Recalling that a child's consent does not constitute a legitimate defence to a charge of enlistment, the Chamber is satisfied that the recruitment of individuals under the age of 15 into the UPC/FPLC constituted enlistment into an armed group for the purpose of Article 8(2)(e)(vii) of the Statute. The Chamber notes that, while the individuals undergoing training were referred to as 'recruits', this fact has no bearing on the Chamber's finding that, by being brought for training, such individuals were enlisted into the UPC/FPLC. In this regard, the Chamber notes that the recruits had to remain in the camp, received their food from the UPC/FPLC, had to obey orders, and were taught military skills and military discipline. That on occasion, they could be deployed to the battlefield before the end of their training indicates that the completion of the training did not constitute a pre-condition for becoming a UPC/FPLC 'member'. It further supports the Chamber's findings that, during their training, the recruits already formed part of the UPC/FPLC.

[...]

**(iv) The perpetrator used one or more persons under the age of 15 years to participate actively in hostilities**

[...]

1128. In relation to the above, the Chamber is satisfied that the participation of individuals under the age of 15 in the First Operation and in the UPC/FPLC assault on Bunia in May 2003 constituted active participation in hostilities for the purpose of Article 8(2)(e)(vii) of the Statute.

1129. As to the use of individuals under the age of 15 as bodyguards, the Chamber notes that these individuals were tasked with providing protection to UPC/FPLC commanders, the UPC/FPLC Chief of Staff and Deputy Chief of Staff, and the UPC President at a time in which the UPC/FPLC was actively engaged in the non- international armed conflict in Ituri and when the aforementioned persons – whom the individuals under the age of 15 were protecting – constituted legitimate military targets. Under these circumstances, the Chamber is satisfied that providing these persons with protection under the aforementioned circumstances constituted active participation in hostilities.

[...]

**VI. CUMULATIVE CONVICTIONS**

[...]

**VII. DISPOSITION**

[...]

# DISCUSSION

## I. Classification of the conflict and applicable law

1. (*Paras 701-730*) How would you describe the situation in the DRC in 2002 and 2003? Was there an armed conflict? If so, was it international (IAC) or non-international (NIAC) in character? Who were the parties to the conflict? What was the applicable law? Could there have been even more than one concurrent armed conflict? (GC I-IV, Common Arts 2 and 3)
  - a. Was the UPC/FPLC sufficiently organised to be involved in an armed conflict?
  - b. Was the APC sufficiently organised to be involved in an armed conflict?
  - c. (*Paras 12-19, 293, 336-340 and 701-730*) What is the nature of the Rwandan intervention in the conflict? Does it change the nature of the armed conflict? Does the role of Rwanda amount to *overall* or *effective* control over the UPC/FPLC? (ICRC Commentary, Common Art. 2, para. 262)
  - d. (*Paras 12-19, 312, 433 and 701-730*) What is the nature of the Ugandan intervention in the conflict? Does it change the nature of the armed conflict? Does the role of Rwanda amount to *overall* or *effective* control over the UPC/FPLC? (ICRC Commentary, Common Art. 2, par. 262)
  - i. (*Paras 12, 433 and 701-730*) Does the fact that the UPDF controls Bunia, at least for some time, change the nature of the conflict?
  - e. (*Paras 701-730*) What is the role of the DRC in this conflict? Is the DRC, between 2002 and 2003, involved in an armed conflict with the UPC/FPLC? Is it involved – as to the facts related in this case – in other armed conflicts in the time period? If so, what is the character of this conflict and its applicable law?
  - f. What is the role of the international forces (Artemis, MONUC) in this conflict? Are they involved in an armed conflict? If so, what is the character of this conflict and its applicable law?
2. Does the fact that the UPC/FPLC took provisional control over the places they attacked make these villages occupied territory? Specifically, what about Bunia, where they had their base for a long time? Can a non-state armed group occupy territory in the sense of IHL?

## II. Classification of persons

3. In the present case, there are various categories of individuals involved. How would you classify the

members of the UPC/FPLC? Are they combatants? Fighters?

a. (*Paras 333 and 820-822*) What about the Hema civilians, who are called 'Hema civilian supporters'? Are they actively participating in hostilities? (See ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities, p. 46-64)

b. (*Paras 333 and 820-822*) May people who are 'forced labourers' be described as directly participating in hostilities?

4. Does the ethnicity or the tribal affiliation of civilians affect their status or treatment under IHL in an armed conflict with a strong inter-ethnic component?

5. Are members of the APC fighting faction combatants? Are they fighters? Do they have any privileges attached to their status?

6. (*Paras 434 and 472*) What about the so-called Lendu fighters? Do they have a continuous combat function? Are they to be considered civilians directly participating in hostilities? What if they are acting in self-defence?

### **III. War crimes**

7. (*Paras 506, 569 and 602*) What attacks against protected persons or protected objects did you identify in the present case (if any)? (P II, Arts 14, 16; CIHL, Rules 27 and 38; P I, Arts 52, 53, 54)

8. (*Paras 883-884*) Does the prohibition of murder under Common Article 3 (1) (a) also cover the conduct of hostilities? Why does the ICC refer here to murder as a war crime with reference to Article 50 (1) of the Additional Protocol I? (GC I-IV, Art. 3; P I, Art. 50)

### **IV. Children in armed conflict**

9. The war crime of conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities is explicitly defined in the Rome Statute. Is there a difference between their conscription and the enlistment? If children join the armed group on a voluntary basis (e.g. 'to avenge their family'), is it still a war crime to allow them to participate in hostilities? Is conscription or enlistment sufficient, or does the child have to actively participate in hostilities? What if the child joins the armed forced / organised armed group to perform non-combat roles? (Rome Statute, Art. 8 (2) (b) (xxvi) and 8 (2) (e) (vii); CIHL, Rules 136 and 137).

10. Do the children under the age of 15 years become legitimate targets if they participate directly in hostilities? Does the fact that they wear uniforms of the UPC/FPLC or of another armed group make them

legitimate targets?

11. The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, which was ratified by the DRC and entered into force on the 12 February 2002, disposes that armed groups should not recruit or use in hostilities persons under the age of 18 years. Why did the ICC not consider the threshold of 18 years in determining the existence of war crimes? Is it problematic, that non-state armed groups may not use children under 18 years at all, whereas state forces can recruit them if they volunteer, but not use them in hostilities? What could be some practical risks specific to non-state armed groups? Is it consistent with the principle of equality of belligerents? (OPAC, Art. 4; P II, Art. 4; P I, Art. 77; CIHL, Rules 136 and 137; Rome Statute, Art. 8 (2) (b) (xxvi) and 8 (2) (e) (vii))

## **V. Sexual crimes**

12. Do the rapes in the present case constitute war crimes? Is the fact that some rapes are committed on young children an aggravating factor? (P II, Art. 4; PI, Arts 76, 77; CIHL, Rule 94)

13. Does IHL protect only individuals belonging to the enemy? Is your answer different in case of IAC and in case of NIAC?

14. (*Paras 965-986*) The ICC finds, that 'provided there is a nexus to the armed conflict, rape and sexual slavery against any person is prohibited, and that therefore members of the same armed force are not per se excluded as potential victims of the war crimes of rape and sexual slavery'. What do you think of this observation? Are members of an armed group protected against war crimes committed by members of that same group? Does the fact that the victims were forcibly recruited have a bearing on your answer?

## **VI. Means and methods of warfare**

15. (*Paras 590-602*) What is the legal significance of the 'pacification meeting' for IHL? Does IHL permit this type of attack against the enemy? Is it an admissible ruse of war? (CIHL, Rules 64, 65; P I, Art. 37; HR, Art. 23)

16. (*Paras 512-524*) How would you qualify the different 'ratissage' operations? Are such operations admissible under IHL? If so, were the operations in the present case admissible? When and under what conditions can property be seized by armed forces? Were these conditions met in the present case? (HR, Arts 23 (g), 46, 47; CIHL, Rules 50, 52; GC-IV, Art. 53)

17. (*Paras 334-340, 495, 504 and 524*) What do you think of the numerous weapons used by the UPC/FPLC? Are any of these prohibited by IHL? (CIHL, Rules 70, 71, 81; P I, Art. 35; CCW Protocol II, Arts 3, 4; Ottawa Treaty, Art. 1)

