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**UNIVERSITIES NETWORK FOR CHILDREN IN ARMED CONFLICT
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INTERNATIONAL CRIMINAL JURISDICTION INVOLVING CHILDREN IN ARMED
CONFLICT
Procedural and deontological profiles concerning the role of lawyers
June 8th, 2022 - October 20th, 2022**

**ANALYSIS OF ICC CASE LAW
5 October 2022**

*The below material is provided to prepare for the session.
Please review said material and focus on the questions which will be discussed during the session.*



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1. The first ICC conviction for the crimes of enlistment, recruitment and use of children under the age of 15 in hostilities

The Prosecutor v. Thomas Lubanga Dyilo



Summary of the case

The armed conflict in the Democratic Republic of the Congo opposed numerous tribes of different ethnicities in their struggle to gain power and territory, particularly over the Ituri province in the north-eastern part of the DRC, an area rich in natural resources such as gold and diamonds. One such group, the *Union Patriotique des Congolais*, was established in 2000 and appointed as its chairman, Mr Thomas Lubanga Dyilo who was also the commander in chief of the armed wing of the UPC, the *Force Patriotique pour la Libération du Congo*.

In March 2004, the then President of the Democratic Republic of the Congo (DRC) referred the situation in the country to the then Prosecutor of the ICC.

On 10 February 2006, Pre-Trial Chamber I issued an arrest warrant for Mr Lubanga for committing, as co-perpetrator, the war crime of enlisting and conscripting children under the age of 15 and using them to participate in hostilities as members of the armed group, the *Force Patriotique pour la Libération du Congo*.

On 16 March 2006, Mr Lubanga was transferred to the ICC. The charges against him were confirmed on 29 January 2007 and the trial commenced on 26 January 2009.



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Trial Chamber I delivered its [judgment](#) on 14 March 2012.

Trial Chamber I found Mr Lubanga guilty – as co-perpetrator - of the war crimes of enlisting and conscripting children under the age of 15 years into the *Force Patriotique pour la Libération du Congo* (FPLC) and using them to participate actively in hostilities in the context of an armed conflict not of an international character from 1 September 2002 to 13 August 2003 (punishable under article e 8(2)(e)(vii) of the Rome Statute).

The Trial Chamber concluded that:

- ✓ The *Union des Patriotes Congolais* (“UPC”) was created on 15 September 2000; Mr. 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. Multiple witnesses testified credibly and reliably that children under 15 were recruited into the UPC/FPLC and sent to either the headquarters of the UPC/FPLC in Bunia or its military training camps, including at Rwampara, Mandro, and Mongbwalu. Video evidence clearly showed recruits under the age of 15 in the Rwampara camp. The evidence demonstrated that children in the military camps endured harsh training regimes and were subjected to a variety of severe punishments.
- ✓ 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 UPC/FPLC used children under the age of 15 as military guards. A special “Kadogo Unit” was formed, which was comprised principally of children under the age of 15.
- ✓ The accused and his co-perpetrators agreed to, and participated in, a common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri. As a result of the implementation of this common plan, boys and girls under the age of 15 were conscripted and enlisted into the UPC/FPLC between 1 September 2002 and 13 August 2003.
- ✓ The UPC/FPLC used children under the age of 15 to participate actively in hostilities including during battles. They were used, during the relevant period, as soldiers and as bodyguards for senior officials including the accused.
- ✓ Mr. Lubanga was the President of the UPC/FPLC, and simultaneously the Commander-in-Chief of the army and its political leader. He exercised an overall coordinating role as regards the activities of the UPC/FPLC. He was informed, on a substantive and continuous basis, of the operations of the FPLC. He was involved in



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the planning of military operations, and he played a critical role in providing logistical support, including providing weapons, ammunition, food, uniforms, military rations and other general supplies to the FPLC troops. He was closely involved in making decisions on recruitment policy and he actively supported recruitment initiatives, for instance by giving speeches to the local population and the recruits. In his speech at the Rwampara military camp, he encouraged children including those under the age of 15 years, to join the army and to provide security for the populace once deployed in the field after their military training. Furthermore, he personally used children below the age of 15 amongst his bodyguards and he regularly saw guards of other UPC/FPLC staff members who were below the age of 15.

See also the [Separate and Dissenting Opinion of Judge Odio Benito](#).

On 10 July 2012, Mr Lubanga was [sentenced](#) to 14 years' imprisonment with credit for the 6 years he served whilst in detention in the Hague (NL).

On 1 December 2014, the Appeals Chamber confirmed the [verdict](#) and the [sentence](#).

See the *Case Information Sheet/Fiche d'information sur l'affaire* available in [EN](#) and [FR](#).

Legal questions¹

1. *Nature of the conflict in Ituri*
 - Does the classification of the conflict as international or non-international matter?
 - 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?
2. *The question of the age of the children (below 15)*
 - How the Chamber assessed this element of the crimes?
3. *Different modes of conduct*
 - What is the difference between enlistment and conscription?
 - Why is it difficult to draw a distinction between voluntary and compulsory enrolment as far as children are concerned?

¹ Read the Trial Judgment and the Separate Opinion of Judge Odio Benito to answer the questions.



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- Why does the Chamber hold that enlistment of children and their use to participate actively in hostilities are separate offences?
- 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?
- Would guarding a military objective or acting as a bodyguard of a military commander constitute direct participation in hostilities? Which other activities listed in the judgement constitute direct participation? Which of these activities should constitute active participation for which children should not be used?
- According to the Chamber, 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?
- Concerning the use of children, the Chamber recognised that child soldiers were deployed on the battlefield at different times during the Hema-Lendu conflict. More problematic were other forms of 'use'. Is the use of children as guards of military objects, bodyguards for commanders, couriers, spies etc. covered by this notion?

4. *Sexual and gender based crimes*

Relevant background information: The DRC had one of the highest rates of sexual violence in the world, and there was significant evidence, gathered by local and international organisations of rape and other forms of sexual violence in the Ituri region in eastern DRC. In a number of statements prior to and at the time of the opening of an investigation in the DRC situation, the then ICC Prosecutor made multiple references to the commission of gender-based crimes by militia groups under the command of Mr. Lubanga. Nonetheless, the arrest warrant did not include charges for gender-based crimes. No charges of SGBC were brought at the confirmation stage of the proceedings.

Despite the absence of charges of gender-based crimes, extensive evidence was heard throughout the trial proceedings concerning sexual violence committed against child soldiers by the UPC.

On the basis of the testimony presented by Prosecution witnesses, the Legal Representatives of Victims made an additional attempt to have gender-based crimes considered. In May 2009, they filed a [joint submission](#) requesting the Trial Chamber to trigger the procedure for legal characterisation of facts pursuant to Regulation 55 of the Regulations of the Court. They pleaded that the facts of the case showed that crimes of inhumane treatment and sexual slavery were committed in the context of the charges confirmed. While the majority of the Judges found that Regulation 55 permitted the Trial Chamber to modify the legal characterisation of facts to include facts and circumstances not originally contained in the charges (see [the decision](#)), the Appeals Chamber reversed this decision on procedural grounds (see the [judgment](#)).



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- Was the Chamber precluded from taking allegations of sexual and gender-based crimes into the judgment?
- [In her testimony as expert before the Chamber UNSRSG Ms Coomaraswamy](#) suggested that the use for sexual exploitation of boys and girls by armed forces or groups constitutes an “essential support function”. Do you agree?
- In her Separate and Dissenting Opinion, Judge Odio Benito dissented from the majority’s findings on several issues, including on sexual violence as it related to the concept of enlistment, conscription and use of child soldiers. What is Judge’s Benito reasoning?
- Do you see any implication for victims in the fact that the Chamber did not decide whether using children for sexual purposes falls under the notion of “using children under the age of 15 to participate actively in hostilities”?

Further analysis

- K. Ambos, ‘[The First Judgment of the International Criminal Court \(Prosecutor v. Lubanga\): A Comprehensive Analysis of Legal Issues](#)’, *International Criminal Law Review*, 2012, Vol. 12, pp. 115 *et seq.*;
- N. Hayes, ‘[Sisyphus West: Prosecuting Sexual Violence at the International Criminal Court](#)’ in N. Hayes, Y. McDermott and W. Schabas (Eds.), *Ashgate Research Companion to International Criminal Law: Critical Perspectives*, 2012.
- M. E. Kurth, ‘[The Lubanga Case of the International Criminal Court: A Critical Analysis of the Trial Chamber’s Findings on Issues of Active Use, Age, and Gravity](#)’, *Goettingen Journal of International Law* 5 (2013) 2, 431-453.



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2. The ICC recognises jurisdiction over intra-party sexual crimes against child soldiers as war crimes

The Prosecutor v. Bosco Ntaganda



Summary of the case

On 22 August 2006, Pre-Trial Chamber I issued an arrest warrant against Mr Ntaganda, as the Deputy Chief of General Staff for Military Operations of the FPLC, for the war crimes of enlisting, conscripting, and using children under the age of fifteen to participate actively in hostilities. On 13 July 2012, the Pre-Trial Chamber issued a broader arrest warrant against Mr. Ntaganda as an indirect co-perpetrator for crimes against humanity of murder, rape, sexual slavery, and persecution and war crimes of murder, rape and sexual slavery, pillaging, and attacks against the civilian population committed in Ituri from September 2002 to September 2003.

On 18 March 2013, Ntaganda surrendered himself at the U.S. embassy in Kigali (Rwanda) and asked to be transferred to the ICC in The Hague. Ntaganda's surrender to the court was the first time a defendant facing an active arrest warrant voluntarily submitted himself to the ICC.

The charges against him were confirmed on 9 June 2014. The trial started on 2 September 2015.

Trial Chamber VI delivered its [judgment](#) on 8 July 2019. The Chamber found Mr Ntaganda guilty of the of crimes against humanity (murder and attempted murder, rape, sexual slavery,



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persecution, forcible transfer and deportation) and war crimes (murder and attempted murder, intentionally directing attacks against civilians, rape, sexual slavery, ordering the displacement of the civilian population, conscripting and enlisting children under the age of 15 years into an armed group and using them to participate actively in hostilities, intentionally directing attacks against protected objects, and destroying the adversary's property). While the evidence did not sustain all incidents indicated by the Prosecutor, it did demonstrate that in relation to each of the 18 counts at least part of the charges were proven beyond any reasonable doubt. Mr. Ntaganda was convicted as direct perpetrator for some the charges and as an indirect perpetrator for the others.

The Trial Chamber concluded that:

- ✓ The UPC, the group that Mr Ntaganda was a member of, was formalised in September 2002, but existed as a political entity before that time. The group's activities were initially limited, because some of its key leaders were still members of other movements, most notably the RCD-K/ML. Following a split from the RCD-K/ML in April 2002, the group became active under the name FRP. Thomas Lubanga, who would become the President of the UPC, was one of the FRP leaders. The leaders of the FRP became the political leaders of the UPC/FPLC, upon its formal creation in September 2002.
- ✓ At the end of 1999 and beginning of 2000, Mr Ntaganda founded an armed group called the Chui Mobile Force, mostly consisting of dissidents of the military wing of the RCD-K/ML, called the APC. Besides Mr Ntaganda, who was the group's leader, the Chui Mobile Force included persons who were later members of the FPLC, which became the military wing of the UPC, such as Floribert Kisembo and Nduru Tchaligonza. The members of the Chui Mobile Force were mainly of Hema and Tutsi ethnicity. They had left the APC, because they claimed that this armed group sided with the Lendu and discriminated against the Hema.
- ✓ Around May 2002, the FPLC began to actively recruit individuals and train recruits at a training facility in Mandro. In July 2002 it obtained enough weapons, which were brought by air from Rwanda, to arm all of the 1800 to 2000 recruits present at that time at Mandro. In early September 2002, UPC President Lubanga formally established the FPLC as the armed wing of the UPC. Lubanga himself was the FPLC's Commander-in-Chief. He appointed Floribert Kisembo to the position of 'Chief of General Staff', and Ntaganda to the position immediately below this, the one of 'Deputy Chief of Staff in charge of Operations and Organisation'. The accused held this position until 8 December 2003, when Lubanga removed Kisembo as Chief of Staff and appointed Ntaganda to that role.
- ✓ The FPLC organisational structure was similar to that of a conventional army. At the training centres, UPC/FPLC recruits were instructed in the use of both light and heavy weapons. With regards to heavy weapons, recruits and soldiers of the UPC/FPLC also



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received training in Rwanda. At the end of their training, recruits were provided with a personal weapon.

- ✓ During the relevant period, the UPC/FPLC was involved in fighting with several armed actors, which – like the UPC/FPLC – were sufficiently organised to be considered organised armed groups. The time between August 2002 to the summer of 2003 included periods of intense fighting and even the calmer periods did not see a lasting absence of armed clashes. For the purposes of the contextual elements of war crimes under Article 8(2)(c) and (e) of the Statute, the UPC/FPLC throughout the temporal scope of the charges was at all times involved in at least one non-international armed conflict with an opposing party.
- ✓ In relation to the contextual elements of crimes against humanity, the Chamber found that UPC/FPLC's conduct against the civilian population was not the result of an uncoordinated and spontaneous decision of individual soldiers on the ground, but was the intended outcome of a preconceived strategy, as part of which the Lendu population was specifically targeted. Mr Ntaganda and his co-perpetrators wanted to destroy and disintegrate the Lendu community and ensure that the Lendu could not return to the villages that were attacked. This involved the targeting of civilian individuals by way of acts of killing and raping, as well as the targeting of their public and private properties, through acts of appropriation and destruction.
- ✓ Mr Ntaganda gave direct orders to target and kill civilians, and endorsed criminal conduct of his soldiers by way of his own conduct.
- ✓ As of June 2002, Mr Ntaganda was involved in large-scale recruitment. Between August 2002 and June 2003, the UPC/FPLC recruited, trained, and deployed children under the age of 15. The soldiers of the UPC/FPLC were treated the same. Those under 15 were threatened, punished, and suffered physical violence, as other recruits and soldiers. It was common practice for female members of the UPC/FPLC to be raped and be subjected to other forms of sexual violence during their service.
- ✓ On 9 August 2002 the UPC/FPLC attacked the city of Bunia, took its control and then attacked the villages of Songolo, Zumbe, and Komanda. Killing and looting took place during these assaults, and their aftermath.
- ✓ In November 2002, Mongbwalu was taken and then Sayo and Nzebi. In February 2003, the UPC/FPLC launched a coordinated series of assaults at several villages in the Walendu-Djatsi collectivité, and took control of the villages of Lipri, Tsili, Kobu, Bambu, Buli, Gola, Jitchu, and Nyangaray, as well as some surrounding places.
- ✓ After each attack, the UPC/FPLC soldiers conducted house-to-house searches during which persons were abducted, intimidated, and on several occasions killed. UPC/FPLC soldiers destroyed houses. Some of the women captured by UPC/FPLC soldiers were raped by them. Some of them were killed, either when they attempted to resist or after they were raped. In the aftermath of the assault on Kilo, the UPC/FPLC went after the Lendu in the village, searching their homes, and killing some of them. The bodies of those killed were thrown into graves, some of which had been dug by those whose bodies were thrown in afterwards.



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- ✓ UPC/FPLC commanders, including Mr Ntaganda ordered their troops to engage in conduct that resulted in the displacement of a significant part of the civilian population. The population was shot at while trying to flee.

On 7 November 2019, Mr Ntaganda was [sentenced](#) to 30 years' imprisonment with credit for the almost 6 years he served whilst in detention in the Hague (NL).

On 30 May 2021, the Appeals Chamber confirmed the [verdict](#) and the [sentence](#).

See the *Case Information Sheet/Fiche d'information sur l'affaire* available in [EN](#) and [FR](#).

Legal questions²

1. *Children in armed conflict*

- Did the Chamber adopt the same approach as the Trial Chamber in the *Lubanga* case in defining the crimes of enlistment and conscription?
- What was the approach of the Chamber in relation to the age element (below 15)?
- What was the Chamber's approach for the determination of what can be considered 'active participation in hostilities' ?

2. *Sexual and gender-based crimes*

- How the Chamber defined "rape"?

Relevant background information for questions below: The Defence argued that Counts 6 and 9 (war crimes of rape and sexual slavery of child soldiers) do not fall within the subject matter jurisdiction of the Court considering that, according to Article 3 common to the Geneva Conventions of 1949, war crimes may not be committed by members of an armed force against members of the same armed force. Trial Chamber VI had initially [ruled](#) that the Defence's challenge did not constitute a jurisdictional matter and that it would address this question in the judgment. However, upon appeal by the Defence, the Appeals Chamber [decided](#) that the challenge was jurisdictional in nature and remanded the matter to Trial Chamber VI, which allowed the parties to make updated submissions.

- What the Defence argued ? See the [Consolidated submissions challenging jurisdiction of the Court in respect of Counts 6 and 9 of the Updated Document containing the charges](#).

² Read the Trial Judgment to answer the questions.



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- What the legal representative of victims argued ? See the [Former child soldiers' Response to the "Consolidated submissions challenging jurisdiction of the Court in respect of Counts 6 and 9 of the Updated Document containing the charges](#)
- What was the finding of the Trial Chamber on the jurisdiction of the Court in respect of Counts 6 and 9? See the [Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9](#). See also the Appeals Chamber [Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9"](#).

In the Trial Judgment, 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"* (paras. 965-986).

- What do you think of this finding? 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?

Further analysis

- R. Grey, '[Sexual Violence against Child Soldiers. The limits and potential of International Criminal Law](#)', International Feminist Journal of Politics, 2014 Vol. 16, No. 4, 601–621, h
- Y. Arai-Takahashi '[War Crimes relating to child soldiers and other children that are otherwise associated with armed groups in situations of non-international armed conflict. An incremental step toward a coherent legal framework?](#)', QIL, Zoom-in 60 (2019) 25-48
- L.P. Rossetti, '[Intra-party sexual crimes against child soldiers as war crime in Ntaganda. 'Tadić moment' or unwarranted exercise of judicial activism?](#)', QIL, Zoom-in 60 (2019), 49-68.