

**CONCERNING THE PROOF OF THE FACTS:**

From investigation of the case, it can be said, without any doubt, regarding facts that are a matter of public knowledge, that the eastern part of the Democratic Republic of the Congo has been invaded by the presence of armed groups that have generally set themselves up either in forests or within local communities, and also often at mining sites, including well before the events of the present case occurred, but above all from 1996 onwards – a period that saw the gestation of and the start of intense activity by an armed group called the AFDL (Alliance of Democratic Forces for the Liberation of Congo), which was a vast mix of both domestic and foreign armed groups coming together to pursue interests consisting either in the uncontrolled mining of ground and underground natural resources, particularly mines, flora and fauna, or in the hope of controlling, if not definitively appropriating, targeted areas of the national territory.

But over the two decades that followed these alliances, a series of all sorts of break-ups and alliances occurred as the political face of the Democratic Republic gradually changed.

Nevertheless, the Court notes that, despite all of the political and military activity carried out by the political powers, other small groups have emerged or continue to emerge, with the same purposes and practices as the original ones.

These armed groups sow terror within communities through various barbaric acts against the civilian population, with the worst attacks being those against people's physical and mental integrity, such as rape, murder, abduction, torture and other forms of abuse, including the seizure or destruction of private property through pillaging or extortion, etc.

Similarly, it is also public knowledge that these armed groups, which are each as barbaric as one another, are regularly, and almost permanently, engaged in battles both among themselves and against the government forces, which are essentially the army, namely the Armed Forces of the Democratic Republic of the Congo (FARDC) and the national police force, which is the Congolese National Police (PNC).

But in the case in question, it should be noted that, in addition to these government forces fighting these armed groups, there are also the armies, known as ecoguards, tasked with protecting the national parks – in this case, the ecoguards of KAHUZI-BIEGA National Park

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(PNKB), working for the aforementioned ICCN [Congolese Institute for Nature Conservation], a legal person civil party to the case.

The spawning of these armed groups and the spread of hotbeds of unrest across the country, at a vertiginous speed, has been such that, in the end, no part or portion of the national territory has been spared, from East to West and North to South, to such an extent that the FARDC, which at the start was deployed across the territory in what were referred to as Military Regions, was instead organised into three zones known as Defence Zones, which in turn are subdivided into the same number of Operational Sectors – a strategy that was implemented to confront these armed groups, which were equally as organised in terms of general staff, weapons, means of communication, troops, etc.



It was in this context that, in 2019, the defendant C. escaped the hierarchical control of the Armed Forces of the Democratic Republic of the Congo to form an armed group that he called C Group.

One of the armed groups that already existed was commanded by a certain D. and had enjoyed the support of local chiefs from the outset.

Based on this Court's investigation and the documents in the case file, it appears that, despite his strong yet clumsy and even crude denials of the crimes of sexual violence that he has been charged with, namely rape, the defendant, Captain C., fully or partially confesses to almost all of the charges laid against him.

Concerning in particular the crime of desertion with which he is charged, he confesses, declaring sometimes, and in no uncertain terms, that he had gone to the aid of the pygmy people known as the BAMBUTI, who according to him were the victims of killings committed by the FARDC, other armed groups and the ecoguards of the PNKB, and sometimes that he himself was captured by the old armed groups, which forced him to stay to protect his BAMBUTI people before he took command of his armed group himself.

Concerning the crime of bringing weapons and ammunition into the PNKB and building huts within the park that served as living quarters and staff headquarters, he strongly states that these were lands bequeathed to them by their ancestors and that it was simply a case of returning home, because the BABUMBUTI [sic: BAMBUTI], he says, had nowhere else to go in order to survive. On this matter, besides the confessions, there are the items seized during and at the place of his arrest, which have all been acknowledged by the defendant as belonging to him, serving as pieces of evidence, which are the AK-47 weapon bearing the number 1146 and an empty magazine, one pineapple-type offensive grenade, one Motorola walkie-talkie, one crowbar, one Tecno-brand laptop, four axes, one machete, one crowbar, two giant saws and one bag of charcoal.

Concerning the enlistment of children into his armed group, he descends into ramblings, sometimes seeking to deny their age, sometimes saying that they were simply children legitimately fighting for their land with a view to gaining a social status equal to that of non-pygmy Congolese.

However, eight birth certificates lie in the case file clearly indicating that the victims referred to in the referral decision were minors, not now, but at least and the time of the

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events, when three victims were under the age of 15 and five under the age of 18.

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Likewise, the case file contains two discharge certificates of a child leaving the armed forces or group, relating to the children P. and S., as well as a document entitled A QUI DE DROIT [TO WHOM IT MAY CONCERN] drawn up by the non-profit VOLONTAIRES DU TIERS-MONDE intended for the South Kivu Provincial Division of Social Affairs indicating that the child P., aged [REDACTED] years, had been referred to the Transit and Orientation Centre for children separated from their families.

It also contains, on this same matter of using, conscripting and enlisting children into armed forces or groups, a psychological expert witness report indicating that the psychological state of seven of these eight children mentioned in the referral decision, who were the only ones to have been examined, shows signs of serious psychological damage which merited appropriate, effective psychotherapeutic treatment.

Concerning the attacks against the ecoguards in particular, the defendant C. ended up stating that this was a legitimate response against those who sought to remove them from BIEGA, which is their natural home, as well as that he had nothing to answer for because, according to him, it amounted to clashes between children following provocation by the ecoguards.

Defending himself before the Court against the crimes of rape, the defendant C. declared in general that these were set-ups using fake victims. But when sufficiently damning statements contrary to his version of events were put to him at the hearing, he declared both that he was not aware of them, and that it was a matter only for the individuals who had committed these rapes.

It was the same, and with the same answers as above, the Court notes, when the interrogation turned to the underground cell known as ANDAKI and which almost all of the victims mentioned, as well as the practice of abducting people, placing them in this hole and only releasing them upon payment of a large sum of money, goats and cases of beer.

In terms of witness statements, they are numerous and run throughout the investigation, being made essentially by parties who are both victims and witnesses owing to the fact that they not only suffered mentally and physically from the acts committed by the defendant C., but also experienced the harm that the other victims suffered at the same time.

By way of example:

In nos 91–93, the uncoded victim K. states that, on 26/01/2020, he was abducted by Colonel C. and his men and kept in [REDACTED] for 26 days in an underground cell. He states that C. himself was there and that he can recognise him. He also states that, being [REDACTED] from [REDACTED] like C., his colleague had used Mr C. to abduct him and that his life was saved because he was [REDACTED] and not [REDACTED] or [REDACTED]; that the latter two tribes had betrayed them by abandoning the insurrection movement, according to Mr C. He clarifies that it was C. himself who had shot one of his colleagues, M.; that he was accompanied by around 26 people during his abduction; and that he was armed but C. had taken his weapon. The victim notes that, in order to be released, Mr C. demanded a ransom of USD 5 000, which he gradually reduced to USD 3 000 and then USD 1 500. That on 27/01/2020, following an alleged threat of an attack that was planned to release him, C. had ordered that the victim be flogged to death and his entire body swelled up. One day, when C. was arguing with his chief of staff at 11 p.m. and their men, owing to this argument, had stopped watching the cell, the victim took the opportunity to escape.

In addition, concerning this same chapter of the evidence, the investigation has shown that, from July 2019, Captain C. and his armed group already controlled the villages of KABUSHWA, MABINGU and KAHUNGU, which share a boundary with the PNKB (see nos 202 to 206 of the case file), and set about plaguing the civilian population, seizing, at will and by armed force, the poultry belonging to the civilian population, getting his armed men to move through the village at night and taking the inhabitants' property at gunpoint, being escorted sometimes by three armed men, sometimes by five armed men, and taking advantage of the absence of security services (see nos 202–206, 207–210 and 252–254 of the case file).

On 28, 29 and 30 April 2020, several confrontations took place between Mr D.'s and Mr C.'s armed groups, resulting in homes being set on fire, murders, child enlistments and the pillaging of the civilian population's property (see nos 252–254) as well as other attacks against the civilian population (see nos 91–93, 19–21, 49–51, 84–87, 106–111, 147–148).

The defendant C. set up six encampments, namely: NGEDJE (opposite CHIBATI), LWAKUBA (on the left bank of the River NYAWEZA), LUSHASHA (on the right bank of the River

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NYAWEZA), BATANGA 1 (where his headquarters was located), an HQ of armed men located on MUKENGE hill, close to the village of SIRHEMBO (see nos 143–145), BATANGA II (on the banks of the River KALANGO) and MABINGU (the only encampment located outside the park, in the village of MABINGU opposite MABINGU Primary School) (see 94–99, 101–103).

That beyond these encampments, he established three bases – one in MUKENGE, a second in KABUSHWA and the last in CHIREHE NYABATAGA – with MUKENGE under the supervision of Mr S., who was also the deputy of Mr C. and that the defendant C himself lived in Chirehe (nos 143–145) and they gave reports to their superior, Mr C (nos 152–154).

That the defendant C adds that his battalion commanders made their reports to the Administration and Logistics Second-in-Command who, in turn, sent them to the Operations and Intelligence Second-in-Command, and it was the latter who then sent him all the reports (report of interrogation of C.) (see nos 69–73).

That as if that were not enough, Mr C. and his men engaged in the production of charcoal, sawing planks and the mining of ore (gold), in conjunction with certain villagers (see nos 101–103, 103–105, 202–206, 207–210, 211–213, 252–254) and sold these products in KAHUNGU and MABINGU, two villages within the IRHAMBI KATANA grouping, around 5 km from the centre of KABAMBA (see nos 252–254).

The defendant C., in his confessions, stated that the Chief M. had around 20 people who made charcoal for him and that the latter had lent him 10 people who made charcoal, which was used to buy ammunition.

Likewise, a witness (see nos 94–99 of the case file) stated that this armed group organised people to mine for gold, saw planks and produce charcoal. This witness precisely and coherently names the following as collaborators of the defendant C.:

for sawing planks: the [REDACTED] C. from [REDACTED], Mr C from [REDACTED], Mr [REDACTED] and Mr F from [REDACTED], the [REDACTED] and the [REDACTED]; for the charcoal: Mr L, Mrs N, F; and for the mining of gold: Mr M and Mr S, who were arrested and found themselves [REDACTED].

The examination of the case shows that these people, who were members of communities

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in the IRHAMBI-KATANA grouping, were abducted by the defendant C. and his group from either their village, home, fields or workplace and brought to the encampments of C.'s armed group, some of them tied up and others not, beaten, and thrown into an underground hole filled with wastewater, and their release was conditional on them paying a ransom (see nos 19–20, 111–112, 117–118, 119–120, 125–127, 128–130, 143–145, 155–158).

Members of the communities in the IRHAMBI-KATANA grouping who were going about their activities in the fields or at the market or elsewhere in the bush were forced by C.'s men to submit to sexual acts after having been stripped of their belongings.

Children who were coming from or going to school and who were going to herd their flocks were taken by force by the defendant Captain C. or his men and brought to BATANGA, finding themselves separated from their families and schools, which is the case for victims E5 GKA (nos 78–80) and E4 SBK (nos 93–94), who were abducted and taken into [REDACTED] forest where they helped the armed group by carrying out domestic chores and, in addition, the aforementioned C. sent them into the mining quarries.

The uncoded witness (nos 94–99) states that the defendant C. worked with collaborators who helped him with all of these activities; that for the sawing of planks, there was the [REDACTED] C. from [REDACTED], Mr C. from [REDACTED], the [REDACTED] sector [REDACTED]; that the [REDACTED] C. had set up a chainsaw which he used to produce planks that he stored in a warehouse in KATANA [REDACTED]; Mr T. had set up two chainsaws and the products were kept in a warehouse in BIDABANGA; that the [REDACTED] owned two chainsaws and her warehouse was in [REDACTED].

For the production of charcoal, the defendant C. used the following accomplices: L. in [REDACTED], Mr S. at [REDACTED], Mrs N. at [REDACTED], Mr F. at [REDACTED].

For the mining of gold, there was Mr L.

The victim coded E2 REN states that he likes herding goats and that he is [REDACTED] years old but does not know his date of birth. He says that there are [REDACTED] children in his family and that he is the [REDACTED]. He says that he was born in [REDACTED] and lives in the village of [REDACTED]. He says that he studied a little at [REDACTED] and in

[REDACTED] before dropping out of school. He says that on one occasion, when he was going to herd goats, C.'s armed group, of which S. was also a part, abducted him and took him to the [REDACTED] camp, one of C.'s Staff [REDACTED], where the latter put him in charge of [REDACTED] to protect himself and his fighters.

This victim states that, when they fought, he [REDACTED]. He states that the goats that were extorted or obtained as a ransom were kept in BULINDI, not far from [REDACTED].

He also states that Captain C.'s group had to fight against other armed groups and against government troops. He notes that he also took part in these fights and that C. had a weapon, and that he had taught him how to use it. He claims that he was a soldier as well as being [REDACTED], and that this armed group had fought the park's rangers at the ICCN-PNKB base in CIBATI, as well as D.'s armed group in BUHOYI and the FARDC in BULINDI. He states that he spent [REDACTED] months in the forest with General C. and that it was C. who was the group's leader along with his collaborators, including one named S., the Sector Commander named J., Major B. and one named S. The victim also states that, during the fight with the park's rangers, two of the latter were disarmed and his group captured one park ranger, whom they brought with them to [REDACTED]. He also claims that General C. participated in this fight and that the captured park rangers were kept in 'ANDAKI', an underground cell in [REDACTED]. He notes that he was happy to stay alongside C. because he ate properly and they obtained goats and cases of beer from the people they arrested. He nevertheless notes that he experienced bad things such as Douze's attack. The victim states that he was also sent to arrest people, including in KABAMBA, MANTU, CANYENA and CIREHE, and that after the victims were arrested, they were taken to [REDACTED] to be put into ANDAKI. The victim notes that it was impossible for him to leave the group because he was always close to Mr C. He states that there were other children with him, including T., who left with S., G., who fled home, and P., who stayed with them, all of whom were soldiers. The victim notes that he left the group on the day that the defendant C. was arrested.

In nos 58–60, the uncoded victim states that, on 19/05/2020, at around 9 p.m., C. and his elements arrived in the victim's village ([REDACTED] village). They entered the house and pillaged: 1 goat, 1 phone belonging to her father, boots and money, then they took the victim to their base in [REDACTED], where one of them, named R., deflowered her.

The victim states that, after being raped, she was abandoned on the floor by her attacker. After waking up in pain, she dragged herself to her parents' who, after hearing her account of what had happened, took her to a health centre.

The witness coded V53MBC (nos 211–213) states that he knew Mr C. as a [REDACTED]. He also states that C. had destroyed the park, mined for ore in the park, used child soldiers in his armed group and used physical violence against its peaceful citizens. He says that he can name people who were the victims of physical violence perpetrated by Mr C. The victim also gives a list of children who were used in Mr C.'s armed group and who were recruited by C.

The victim coded V30MMM (nos 26–28) states that, on 10/03/2020, at around 2 a.m., Mr C., accompanied by 10 of his elements, came into [REDACTED] village. They broke down the door of the victim's house and arrested him on the pretext that he had threatened to kill C. because he was [REDACTED]. The victim was taken to their encampment where he was subjected to several acts of torture, including 80 lashes administered by C. himself, before being thrown into a hole (underground cell) full of dirty water and urine. He paid FC 300 000 in ransom for his release, which his wife brought.

The victim codenamed V32 MML (nos 32–34) [REDACTED]. His statements are paraphrased below: 'C. came to buy phone credit from the victim. After being served, he asked him to come to their encampment to get his money. The next morning, he went to the encampment, but unfortunately C. told him he had no right to demand money from him and he ordered him to be arrested and whipped. The next morning, members of his family paid 1 crate of Primus and 1 goat for his release. He adds that, in these circumstances, he lost 2 telephones, which contained 2 SIM cards, and other belongings.'

As regards the alleged role of the defendant Major B., no additional evidence beyond that provided by the Public Prosecutor was provided at the hearing. Ever since the pre-trial phase, the defendant B. has completely rejected the comments made by his co-defendant, C., during the investigation conducted by the prosecutor, by which C. alleged that he had seen Major B. coming to supply arms to the Colonel in his hideout. At the hearing, the defendant C. showed a change of heart and completely cleared Major B.'s name.

The defendant C., far from being content with exonerating Major B. in a simple game of noughts and crosses, states that he has never spoken of B.

According to him, the Colonel who came to supply arms was accompanied by a certain Major B., as he has not hesitated to declare since the pre-trial phase, when he was in pre-trial detention. He reproached the Public Prosecutor for never having brought him face to face with the defendant Major B, even though the latter, who was not in custody, called in at the military prosecutor's office multiple times for hearings, and the same for the much-talked-about Colonel, who was never arrested even though he regularly presented himself at the prosecutor's office. The defendant C. claims that had this meeting occurred he would have been able to state that the B. he had been talking about was nothing to do with the defendant Major B.

These are the facts of the case, which have been classified by the prosecutor as the crimes listed above.

## **IN LAW**

### **ANALYSIS OF THE CHARGES OF CRIMES AGAINST HUMANITY LAID AGAINST MAJOR B. AND CAPTAIN C.**

#### **THE CONTEXT OF CRIMES AGAINST HUMANITY**

The contextual elements of crimes against humanity are defined in Article 7 of the Rome Statute and Article 222(8) of the Ordinary Penal Code as follows: “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack ....’

An examination of the aforementioned provisions shows that, for a crime against humanity to exist, the following elements must be present:

- a widespread or systematic attack;
- an attack directed against any civilian population;
- knowledge of this attack and an intention to participate in it;
- the pursuit of the organisation’s policy.

These elements are common to all types of offence constituting a crime against humanity, in this case the crimes of torture, deprivation of liberty, murder, rape and other inhumane acts. These common elements describe the context in which these acts were committed and thus make it possible to classify them as crimes against humanity.

#### **A WIDESPREAD OR SYSTEMATIC ATTACK**

Under Article 7(2)(a) of the Rome Statute, ‘attack’ means a campaign or operation ‘directed against any civilian population’. The commission of the acts referred to in Article 7(1) of the Statute constitutes the ‘attack’ itself and, beside the commission of the acts, no additional requirement for the existence of an ‘attack’ should be proven. (ICTR, *The Prosecutor v. AKAYESU*, judgment of 2 September 1998, para. 581). On the other hand, the term ‘attack’ need not be part of an armed conflict: ‘[it] is not limited to the use of armed force; it encompasses any mistreatment of the civilian population’. (ICTY, *Prosecutor v. Kunarac*, judgment of the Appeals Chamber, 12 June 2002, para. 86).

Under Article 7, in order for the crimes to be categorised as crimes against humanity, this attack must be either widespread or systematic. There is no need for both of these characteristics to be met; just one characteristic is enough.

According to the ICTR, ‘the concept of “widespread” may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims’ (ICTR, AKAYESU, para. 581).

As regards the systematic nature of the attack, the case-law has identified certain factors that may help in classifying the organisation and planning of the attack. For example, the precise identification of targets by the attackers is indicative of the planned and systematic nature of the violence (ICC, MUTAHURA, KENYATTA and ALI, Decision on the Confirmation of Charges, ICC-01/09-02/11, 23 January 2012, para. 176). In addition, according to the ICC, the adjective ‘systematic’ denotes the organised nature of the acts of violence and the improbability of their being unplanned; therefore, deliberate and regular repetition of similar criminal behaviour.

The ‘systematic’ nature has been defined by the ICTR as: (i) thoroughly organised; (ii) following a regular pattern; (iii) on the basis of a common policy; and (iv) involving substantial public or private resources (ICTR, AKAYESU, para. 580), and by the ICTY as requiring, in order to be established (among other criteria): (i) the existence of a political objective or a plan and (ii) the perpetration of criminal acts, linked to one another, on a very large scale or continuously (ICTY, The Prosecutor v. BLASKIC, case no IT-95-14-T, judgment, 3 March 2000, para. 203).

In the case in question, it should be noted that the attack carried out by the group, of which the defendant C. was the commander, against several villages in KALEHE territory should be considered widespread owing to the multiplicity of victims who were attacked and systematic owing to its organised nature and the deliberate and regular repetition of similar criminal conduct that was continuous and on a large scale and with the same modus operandi.

In effect, as regards the mass nature of the attack and the multiplicity of victims and violence, a total of 87 victims have been recorded (see referral decision and list of victims), over a period of less than one year, from July 2019 to May 2020. This demonstrates a

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considerable frequency and intensity. In addition, these people were victims of several abuses at the same time.

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In the present case, it is important to note the existence of the specific elements that give the attacks carried out by the defendants their mass nature by taking into account the following data that arose from the investigation:

- 54 victims suffered severe deprivation of physical liberty;
- 56 victims suffered other inhumane acts (including pillaging);
- 02 people were murdered;
- 12 victims suffered acts of rape;
- 51 victims suffered acts of torture;
- 08 children were enlisted in the armed group;
- 13 were victims of crimes against the environment;
- 01 was the victim of beatings and injuries.

Lastly, the multiplicity of abuses committed against the villages by C.'s armed group and the use of a similar modus operandi demonstrates the planned and systematic nature of the attack.

This modus operandi consisted in raiding the different villages, abducting people and bringing them to his headquarters in [REDACTED], where they were kept captive in an underground cell, were tortured and were only released upon payment of a ransom.

By way of example, victim V 23 SNM (nos 168–170) states that she is here to lodge a formal complaint against Mr C. for having abducted her and her two sons around midnight in January 2020, taken them to his base in [REDACTED] and kept them in an underground hole for a day, only releasing them upon payment of USD 300 and a goat. She states that Mr C. had been persuaded by some malicious people to come and arrest her husband to get some money out of him. When he did not find the victim's husband, Mr C. abducted her and her two sons.

According to victim V 30 MMM (nos 26–28), on 10/03/2020 at around 2 a.m., Mr C., accompanied by 10 of his elements, broke down the door of his house to take him to their encampment. The victim states that he suffered several acts of torture at their encampment, including 80 lashes administered by C. himself, and was thrown into a hole (underground cell) full of dirty water and urine. He notes that, during his arrest, Mr C. was accompanied by his men who were armed with firearms, whips and knives, and that his two sons had also been beaten and whipped.

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As regards victim V 3 NAF (no 137–139), she states that Mr C. and his armed men abducted her in September 2019 from her home where her parents live on the grounds that she refused to engage in sexual activity with his men and she allegedly called them rebels. She adds that, in order to be released, her father had had to come and pay USD 170 to Mr C.

Victim V10 BMA (no 128–130) states that, during December 2019, the self-proclaimed Colonel C. abducted her from her home and took her to his defensive base in [REDACTED] on the grounds that the victim had refused to have sexual intercourse with him. When the victim arrived at the base, the defendant C.'s wife recognised her as being a good friend because of having had a good relationship with her since her days in the village and interceded to stop her being raped.

The victim adds that, in spite of this, her attacker, the defendant C., put her in an underground cell with her [REDACTED]old baby and they were there for two days before being released, after her family paid the defendant C. one goat, one case of beer and the sum of USD 100 following his demands.

The investigation reveals that several people were deprived of their liberty; several people suffered inhumane acts; others were indirect victims of murder; yet others were victims of rape; others were tortured; and children under the age of 18 were forcefully enlisted in the armed group.

These acts were carried out with a similar modus operandi, which demonstrates prior planning and a systematic nature.

#### AN ATTACK DIRECTED AGAINST THE CIVILIAN POPULATION:

The concept of an attack directed against a civilian population indicates that, in the case of a crime against humanity, the civilian population must be the main target of the attack (ICTY, BLASKIC). This does not mean that the entire population of a territory must be the victim of these acts in order for them to constitute a crime against humanity. Instead, the 'population' element is intended to imply 'crimes of a collective nature and thus excludes single or isolated acts' (ICTR, BAGILISHEMA). It is therefore sufficient to demonstrate 'that enough individuals were targeted in the course of the attack' (ICTY, LIMAJ).

According to the case-law:

‘Members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed hors de combat by sickness, wounds, detention or any other cause’ (ICTR, AKAYESU);

‘Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character’ (ICTR, AKAYESU);

‘A population may qualify as “civilian” even if non-civilians are among it, as long as it is predominantly civilian’ (ICTY, LIMAJ).

In the case in question, the victims who are civil parties to the case are effectively civilian populations as required by law and defined by the above case-law. This is attested in particular by the following elements:

87 victims and civil parties consisting of women, men and children from the villages. None of these populations in the attacked villages had any weapons and they put up no military resistance to the defendants. They were all civilians going about their ordinary activities: agriculture, small businesses, craftspeople, etc. The case documents demonstrate that all of the victims of abuse committed by the defendants were civilians.

By way of example, victims E7 HAB, AND and E2 REN are [REDACTED], V08 MBI and V50 BRE are [REDACTED], while V12 FCE [REDACTED] and V49 SMU [REDACTED].

The Court notes that, throughout the investigation, the defendant C. has easily recognised almost all of the victims as well as their respective history or past, despite the protective measures.

All of these victims, the Court notes, are natural persons who are part of the civilian population and have never carried weapons or been part of a regular army or armed group. This is the case for all of the victims in the case file.

**KNOWLEDGE OF THIS ATTACK AND AN INTENTION TO PARTICIPATE IN IT:**

According to the ICC, ‘the perpetrator must knowingly commit crimes against humanity in

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the sense that he must understand the overall context of his act [...] the accused must have acted with knowledge of the broader context of the attack [...] Part of what transforms an individual's act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct [...] An accused should be aware of this greater dimension in order to be culpable thereof. Accordingly, actual or constructive knowledge of the broader context of the attack [...] is necessary to satisfy the requisite mens rea element of the accused.' (ICC, KAYISHEMA and RUZINDANA, para. 133–134).

This is the moral element that is necessary to prove the contextual elements relating to crimes against humanity. Nevertheless, 'the accused need not share the purpose or goal behind the attack. It is also irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim. It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof' (ICTY, Prosecutor v. KORDIC and CERKEZ, judgment of the Appeals Chamber, 17 December 2014, para. 99–100).

In the present case, the statements of the victims corroborate one another, attesting that the members of the armed group had knowledge of the acts that they were committing in the different villages that were attacked, and of the consequences of these acts on the civilian population;

That in effect, both during the pre-trial investigation and before this Court, the defendant C. claimed that he had organised an armed group to control BIEGA forest;

The statements of the different victims heard both by the investigating judge and during the judicial investigation attest that the defendant C. and his group committed several abuses against the civilian population, which took place in the presence of the defendant C. himself.

On the basis of the above, the Court concludes without doubt that the defendant C. had full knowledge of the acts that he was committing.

Below are several statements from victims confirming the defendant C.'s knowledge:

The victim E1 TEM (nos 112–116) states that he likes [REDACTED] and that he is [REDACTED] years old. When he left home, he was abducted by six rebels in the village of

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[REDACTED] and taken into the bush, to [REDACTED]. These rebels asked him whether he knew why he had been abducted and he told them 'no'. That was when they told him that lots of children did nothing in the village and did not go to school, while they were hard at work in the bush. They told him that they had abducted him so that he could fetch water and do their washing-up for them. The child states that, in [REDACTED], they spent the nights in huts (BITALA) and that, for their food, the soldiers went to demand money from the miners and used this money to buy food. It was the self-proclaimed Colonel C. who sent these soldiers.

Victim V30 MMM states that, on 10/03/2020, at around 2 a.m., Mr C., accompanied by 10 of his elements, came into [REDACTED] village. They broke down the door of the victim's house and arrested him on the pretext that he had threatened to kill C. because he was a [REDACTED]. In order to be released, he paid him the sum of FC 300 000 as a ransom, which his wife brought for this purpose.

Victim V43 CRB states that, on 05/04/2020, he went to the field, where he was surprised to be arrested on the grounds that he had not done the SALONGO – the compulsory community manual labour imposed by the defendant, C. He states that he was taken to the encampment where C. was and C. stabbed his left ankle with a spear. He was taken to hospital where he spent two weeks being treated.

Victim V59 BBJ states that, on Friday 13 March 2020, he was leading a team that was working in the [REDACTED] plantation. They saw C.'s men emerge suddenly, one of whom was carrying an AK-47 weapon and another a spear. They forced him to place the team members at their disposal to build a house at the encampment in [REDACTED]. The victim says that he objected and was then apprehended and taken to C.'s [REDACTED] in [REDACTED] and brought before C., who immediately administered 20 lashes.

#### THE PURSUIT OF THE ORGANISATION'S POLICY:

Under Article 7 of the Rome Statute of the International Criminal Court, the last criterion that is necessary to classify a crime as a crime against humanity refers to the fact that the attack directed against the civilian population must have been carried out pursuant to or in furtherance of a State or organisational policy to commit such attack. It is understood that, in order for there to be a policy, 'the State or organization [must] actively promote or

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encourage such an attack against a civilian population' (Elements of Crimes, ICC).

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‘In the context of a widespread attack, the requirement of an organisational policy ... ensures that the attack ... must still be thoroughly organised and follow a regular pattern [...] Such a policy may be made either by groups of persons who govern a specific territory or by any organisation ... The policy need not be explicitly defined by the organisational group’ (ICC, KATANGA).

In the present case, the attacks carried out by C.’s group are part of a well-defined policy which was, as C. admits, to control BIEGA forest, which he described before the investigating judge as follows: ‘According to the history of our forest, our parents were chased out of there by soldiers in 1972 and dispersed among the BASHI, the BAREGA, the BATEMO and the BAHAVU. No longer having any means of survival, many of them essentially turned to theft.

In 2017, all of the pygmies came together and decided to return to their forest, even if it meant risking their lives because, for them, only KAHUZI was part of the park, and not BIEGA, which is their forest [...] having noticed that pygmies live in MAIKO, VIRUNGA and other parks, we young pygmies decided to occupy BIEGA forest, which had been ravished’ (see report of interrogation of C., nos 63–68).

According to the civil parties to the case, the defendant C., who is not [REDACTED] but rather [REDACTED] from [REDACTED], a village located between [REDACTED] and [REDACTED] in KALEHE territory, and who came to CIREHE during 2019, when he deserted the regular army in order to set up his own armed group, claimed to have a [REDACTED] mother and a [REDACTED] father for the sole purpose of getting the support of the BAMBUTIS so that he would then be able to exploit the resources of KAHUZI-BIEGA park and violate the human rights of the civilian populations (nos 94–99 and 207–210). This is also corroborated by numerous confessions made during the hearing by C.

This group’s policy was therefore to occupy and control BIEGA forest and the surrounding villages. No method was off the table for achieving this goal, including attacking and subjugating the civilian population.

Several statements from certain victims and witnesses also corroborate C's statements, as follows:

In nos 94–99, an uncoded victim/witness states that, upon C.'s return to the village, he trained several village youngsters to be soldiers and took this armed group to support the pygmies who had invaded the park. Six months after a certain C. had set himself up in the park with his armed group, Mr C. came to join him and took on the role of second-in-command. After killing C., who was his leader and for whom he acted as second-in-command in the armed group, he proclaimed himself head of the armed group in October 2019 and, in order to get the pygmies (the BAMBUTI) to accept him, he said that his mother was [REDACTED] and his father [REDACTED].

In nos 101–103, an uncoded victim/witness states that C. came to the park in 2018; that C. panned for gold in the River NYAWEZA and he organised an armed group which he proclaimed himself 'general' of; that he thought he was the head of the BAMBUTI even though he had never been [REDACTED]; and all of this was with the goal of placing part of the PNKB under his control and exploiting its resources. According to C. himself, in the case of victory, he would have ceded part of his land to Colonel N. of the FARDC, who supplied him with weapons (report of interrogation of C., nos 63–68). To put this plan into action, several attacks were committed on the civilian population.

The elements described above arising from the actions of this armed group lead to the conclusion that the abuses committed by the defendants were part of their attempts to carry out this group's policy. This policy consisted in attacking the civilian populations to deprive them of their freedom, to rape them, to torture them, to kill them and to pillage their property, all for the purpose of subjugating them through terror and distress in order to obtain the means to continue the armed group's activities in the long term. This armed group would not have been able to act with impunity by attacking the civilian populations in the different villages over a period of several months if it had not had a policy and obtained the means to apply it.

With regard to all of this evidence, the Court finds that this element relating to the pursuit of a policy is established against the defendant C., but is not at all against the defendant B.

## THE SPECIFIC ELEMENTS OF CRIMES AGAINST HUMANITY

The Public Prosecutor is prosecuting the two defendants for crimes against humanity and/or war crimes committed during 2019 and 2020 in the villages of BATANGA, CANYENA, NYABIBWE, NGENDJA, CHIBATI and CHATONDO (for the defendant C.) and MABINGU (specifically for the defendant B.), in the KATANA/IRAMBI grouping, KABARE chiefdom, province of SOUTH KIVU, DRC.

In fact, under the terms of Article 7 of the Rome Statute of the International Criminal Court, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- a) Murder;
- b) Extermination;
- c) Enslavement;
- d) Deportation or forcible transfer of population;
- e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- f) Torture;
- g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- i) Enforced disappearance of persons;
- j) The crime of apartheid;
- k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.’

By examining this definition, it is apparent that crimes against humanity consist of three types of element that must be proven: the contextual elements, the specific elements and the modes of criminal responsibility of the defendants.

The different specific elements of crimes against humanity are discussed in more detail below in accordance with the referral and investigation decisions in this case by this Court:

### **THE CRIME AGAINST HUMANITY OF IMPRISONMENT OR OTHER SEVERE DEPRIVATION OF PHYSICAL LIBERTY**

The Public Prosecutor is prosecuting the defendants for the specific crimes of imprisonment or other severe deprivation of physical liberty constituting a crime against humanity.

In order for this crime to be established, the acts committed under the mode of criminal responsibility in question must meet the different constituent elements of this offence in accordance with Article 7(1)(e) of Elements of Crimes of the Rome Statute, which are:

The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty;

The gravity of the conduct was such that it was in violation of fundamental rules of international law;

The perpetrator was aware of the factual circumstances that established the gravity of the conduct;

The conduct was committed as part of a widespread or systematic attack directed against a civilian population;

The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

The first three paragraphs correspond to the specific elements, while the latter two concern the contextual elements and have been discussed above in a shared section.

In the present case, in the village where 'Colonel C' [REDACTED] and in its surroundings

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areas, the defendant and his fighters repeatedly abducted victims and put them in the underground cell filled with dirty water, known as 'ANDAKI', with no possibility of free movement or of going about their daily business. These arrests thus

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carried out followed by the deprivation of liberty were illegal. As reported in Annex I, which concerns the specific crime against humanity of imprisonment or other severe deprivation of physical liberty, a total of 55 people were imprisoned. This annex summarises the specific circumstances in which the defendant and his colleagues imprisoned each victim and the gravity of their conduct as described in the minutes of the victim hearings.

Victim 28 LMG (nos 19–21) states the following: ‘It was 20/04/2020, there had been a clash between two rebel groups – that of C. and that of V12. When they came back, C.’s elements came into the village of [REDACTED] where I live. I was taken to their encampment in [REDACTED] where I was put in a hole that they used as an underground cell.’ Victim V 29 AKG (nos 22–25) states that, in March 2020, his two children went into the field to search for cassava leaves and firewood. Unfortunately, these children fell into the hands of C.’s elements, who took one of them and released the other, who went to tell his parents. For this child’s release, C. demanded one cow. As the victim did not have a cow, C. ordered that his wrists and ankles be bound and had him put in the underground cell full of dirty water. He says that, in this hole, he found his son who had been captured the day before; that at [REDACTED] the next day, he was brought before an investigating officer in C’s group who fined him; and that, owing to the suffering he endured, he was forced to agree to pay the ransom for release.

These facts were reaffirmed by the victim during the judicial investigation hearing before the Court.

The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of their physical liberty.

The investigation has sufficiently demonstrated that the defendant C., who is the subject of the case in question, and his fighters imprisoned or severely harmed the liberty of 55 people: more than one victim has testified to having been placed in the underground cell known as ‘ANDAKI’.

The gravity of the conduct was such that it was in violation of fundamental rules of international law.

In order for the charge of imprisonment or deprivation of liberty to be upheld against the defendant, the second condition requires his conduct to be in violation of fundamental rules of international law as they stand or are enshrined in the different international legal instruments. For this purpose, we note that the Universal Declaration of Human Rights, the international agreement on civil and political rights, and many other international legal instruments enshrine the right to liberty and the right to freedom of movement.

The acts committed by the defendant in this case involved depriving at least 55 people of their rights to liberty and to freedom of movement, violating these fundamental rules of international law that guarantee these rights.

The perpetrator was aware of the factual circumstances that established the gravity of the conduct.

Article 7 of the Rome Statute requires the perpetrator of the crime of imprisonment or deprivation of liberty to be aware of the factual circumstances establishing the gravity of the conduct.

In the case in question, the following elements effectively demonstrate that the defendant was aware of the gravity of his conduct:

The statements made by the victims during the hearings; the number of people imprisoned (55) and the presence of the underground cell in the encampment of the armed group that C. commanded; the systematic nature of the acts of imprisonment or deprivation of liberty as one of the characteristics of the modus operandi of their attacks against the civilian population; the acts of imprisonment and deprivation of liberty were not random but part of the group's planned modus operandi.

By way of example:

The victim V47 BMJ (nos 49–53) states that, on 04/04/2020, C.'s men came to attack their village of [REDACTED] targeting their neighbour (Mr O.), that the latter had screamed and that the victim came out to see what was happening; that on this occasion these men entered his hut and forcefully took one goat and two chickens; after a discussion, they took the victim with them, and the next morning the village went to look for him; when they reached C.'s encampment, C.'s men told them that they had attacked the village because

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the population considered them to be

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rebels; they also said that they had taken Mr O. because there was a complaint against him over a debt of FC 5 000 which they had forced him to pay then and there.

Victim V32 MML (nos 32–34) states that he [REDACTED] and, ordinarily, he also provides [REDACTED]. C. came to him on the pretext of wanting to [REDACTED]. After serving him, he asked him to come to his encampment to get his money. The next morning, we went to the encampment but unfortunately C. told him that he had no right to demand money from him and he ordered him to be arrested. He was not released until the next day.

Victim V46 MMM (nos 46–48) adds that he was at the [REDACTED] with his friends where they were getting ready to play a football match when Mr C. arrived with his men: ‘There were 15 of us. C. and his armed fighters came to choose the ones that they wanted to take to their encampment. Despite begging them to let us play first, he chose me and my friend A. When we reached the camp, we were put in a well. They left us there from [REDACTED]. I have known C. since before this event, but he never came into my village.’

These various elements lead to the conclusion that the defendant C. was fully aware of the gravity of these acts. The specific circumstances in which C. and his men imprisoned each victim and the gravity of their conduct are described in the minutes of their hearing. These facts were confirmed during both the pre-trial phase (before the officer of the Public Prosecutor) and the trial phase before this Court.

#### **MURDER CONSTITUTING A CRIME AGAINST HUMANITY:**

As regards this element, both defendants are being prosecuted for having committed the crime against humanity of murder in the context of a widespread or systematic attack directed against the civilian population, with knowledge of the attack.

These crimes are provided for and punished under Article 7(1)(a) of the Rome Statute of the International Criminal Court.

In order for this element to be upheld against the defendants, the acts they committed under the mode of criminal responsibility in question must meet the different constituent elements of this offence (Article 7(1)(a) of Elements of Crimes), which are:

The perpetrator killed one or more persons;

The conduct was committed as part of a widespread or systematic attack directed against a civilian population;

The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

The first paragraph gives the specific elements, while the latter two concern the contextual elements and have been discussed above in a shared section. ‘The perpetrator killed one or more persons’: according to Elements of Crimes of the Rome Statute of the International Criminal Court, this means that the perpetrator ‘caused [the] death’ of one or more persons. In this case, two people were killed, as revealed by the investigation.

The specific circumstances are contained in the minutes of the hearings.

The defendant’s conduct was part of a widespread or systematic attack directed against a civilian population.

By way of example:

Victim 17 ONG (nos 149–151) stated: ‘C. is a rebel who was living in the park and I have come to report him for having killed my biological father, named N., on 05/08/2019 in the village of [REDACTED] in the [REDACTED] grouping with whips, spears and machetes’; ‘Mr C. came across my father in the neighbourhood while my father was on a walk. My family had never sought justice against C. because everybody was afraid of him’; but the local chief M., on behalf of L., assisted by the local chief C., on behalf of S., reported the death of his father. The victim states that, after the rebels withdrew, the population buried him on their land in [REDACTED].

The Court finds the elements of the crime against humanity of murder to be established in fact and in law and therefore finds the charges to be established against the defendant C., but not against Major B.

## THE CRIME AGAINST HUMANITY OF RAPE

In order for this offence to be established, the crimes committed by the defendants must

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meet several constituent elements of this offence, which are:

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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.

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

The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

The first two paragraphs constitute the specific elements of this crime, while the latter two are the contextual elements of it, which will be discussed together in a section below.

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.

According to Elements of Crimes of the Rome Statute, the material act of the crime of rape lies in the penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or the penetration of the anal or genital opening of the victim with any object or any other part of the body.

In the present case, this Court, in order to establish this first element, refers to the victim statements, which constitute important evidence of the sexual violence. Indeed, in the case of sexual violence, the victim's testimony is considered sufficient and there is no need for it to be corroborated by other testimonies or material or documentary evidence. The medical certificate, where applicable, constitutes additional material evidence, but the absence of a medical certificate should not prejudice the probative value of the victim's testimony, which suffices in itself.

The notion of the double status of ‘victim witness’ is justified for very obvious reasons, owing to the fact that the victim is a privileged witness as well as being the one who suffered the ordeal; she is the one who experienced the crime.

In fact, as confirmed by Laurent MUTATA LUABA: ‘exempted from the requirement to take an oath to tell the truth, the victims provide insight and help the trial judge to establish the legal truth through a coherent, detailed account’ (Laurent MUTATA LUABA, Protection du Droit à la sexualité responsable [Protection of the Right to Responsible Sexuality], page 296).

It follows that the victim’s statement is crucial because, in general, sexual violence is committed in isolated, obscure places that are inaccessible to the public, such that, if there is no witness, it is the word of the survivor against that of the defendant. The victim is therefore the main witness for this offence and their testimony may convince the judge.

In the case in question, 12 women were raped, according to the witness statements, as summarised in Annex 4.

By way of example:

Victim V 71 KAS (nos 74–77) states that they were abducted by C.’s armed elements during the night. There were six of them, including her husband N. and her son N. At this time, she had a [REDACTED]-old baby. They were taken to the park where these men had put them in an underground cell and she had been put in a straw hut. She adds that her [REDACTED]year-old daughter was raped but was not taken to hospital because they were kept in the park and she herself was raped along the way by four elements.

Victim V 66 NMU (nos 58–60) says that, on 19/05/2020 at around 9 p.m., C. and his elements came into their village ([REDACTED] village) and entered her house. These attackers took her to their base in [REDACTED] where one of them, R., deflowered her. After raping her, he left the victim on the ground and went off and she returned to the village and told her parents what had happened and they took her to the health centre.

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,

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or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

In the AKEYEZU case heard by the International Criminal Tribunal for Rwanda, as regards the existence of a coercive event in the context of the commission of a crime of sexual violence, the Tribunal ruled that ‘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 Interahamwe among refugee Tutsi women at the bureau communal’ (ICTR, AKAYEZU judgment, 2 September 1998, case no ICTR-94-4-T, para. 688).

In addition, concerning the incapacity of children to give genuine consent, the Supreme Court of Justice has ruled that where the victim of rape is a child, the lack of consent is absolute. The consent of a child victim aged under 18 and the circumstance that she had already been deflowered make it a certainty that this constitutes rape because the sexual intercourse in the case is alleged to have been committed with violence (Supreme Court of Justice, case no 17/CR, 05/04/1978, Bull. 1979, p. 57, cited by BONY CHIZUNGU).

For child victims, there is an acknowledgement of the incapacity to give genuine consent. In other words, before the age of 18, the child does not acquire the discernment needed to give genuine, informed consent to these acts. (High Court of Kinshasa Kalamu, case no 9,308, Public Prosecutor v. EVOLOKO Antoine LAY LAY JOKER, 29 January 2008, unpublished, cited by BONY CHIZUNGU, idem). There is therefore a presumption of the absence of consent from the victim.

In the case in question, the coercive environment that existed during the attacks carried out by C.’s armed group led to an absence of automatic consent. In effect, the defendant C.’s men spread terror across the region and were equipped with weapons such that the civilian population was unable to resist them. The presence of C.’s armed group was feared by all.

By way of example:

The victim V 70 NAM (nos 38–40) states that she and three friends were returning from

[REDACTED] village, where they had gone to buy cassava. On the way back, they came across 4 elements from S.'s armed group, who were all carrying weapons of war. They fled, abandoning what they were carrying. The elements chased and caught them, having threatened them, forced them to have sexual intercourse with them. The victim never managed to identify her attacker but she told her neighbour. She says that all of the other women were also made to have sexual intercourse.

As regards victim V01 NKB (nos 104–107), she states that she studied at [REDACTED] and that she is currently [REDACTED] at [REDACTED]. She has all of [REDACTED]. She states that, in [REDACTED] 2020, she was caring for her cousin, F., the wife of C., who had been hospitalised at the health centre in the village of [REDACTED], and that Mr C. had proposed that she marry one of his fighters but she had objected. Upon leaving the hospital once her cousin had recovered, she went back home to [REDACTED] village. In February 2020, she went into the bush to search for firewood with her cousins; in the bush, they encountered five of C.'s soldiers, who all raped her while her two cousins managed to flee. After this rape, she fainted and was found in this state by women who were on their way to the fields, and they carried her home on their backs. C. had been invited to speak to the family but defended himself saying that he did not know how those men had left the encampment to go and commit such an act.

## THE CRIME AGAINST HUMANITY OF OTHER INHUMANE ACTS

For this offence to apply, the following conditions are required:

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
2. Such act was of a character similar to any other act referred to in Article 7(1) of the Statute.
3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part

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of a widespread or systematic attack directed against a civilian population.

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The Court will demonstrate that the first three elements of this point have been met in the case of the defendants, with the other two elements common to all of the specific crimes constituting crimes against humanity having been discussed above.

The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.

The first condition for an inhumane act to be classified as a crime against humanity is for the perpetrator, through these acts, to have ‘inflicted great suffering, or serious injury to body or to mental or physical health’.

Consequently, interpreting this provision, the ICC does not exclude the possibility that, in theory, the loss of property could constitute crimes against humanity on the condition that the type and the intensity of the alleged mental suffering caused, in itself, by the loss of property is established. (ICC, Muthaura et al, Decision on the Confirmation of the Charges, January 2012, para. 279).

In the case under examination, the investigation shows that the reported acts that caused this great suffering were the pillaging of the property of the civilian populations in the aforementioned villages.

In effect, in each of the villages mentioned in the factual part, the defendants ‘victimised’ or caused material, financial and mental harm to a large number of people by taking their property without entitlement or right.

These pillaging crimes caused suffering as required by the law to classify them as other inhumane acts. The specific circumstances in which the defendant and his men, by pillaging the victims’ property, inflicted great suffering have been sufficiently proven at the hearing. Indeed, the victims lost a large part of their property in order to regain their freedom, under threat of being detained indefinitely and tortured if they did not pay the ransom. In addition, the families of some of them had to take on debt to be able to release their family member – a debt that they still have not paid off.

By way of example:

Victim V 26 (nos 13–15) states that, on 14/03/2020, the village was attacked by Colonel C.

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and his armed group had fired shots at her; that she was beaten to death by the elements from this group to the extent that, to this day, she still has pain all over her body. There was a barrier to the side of the victim's home erected by the armed group. All passers-by were whipped and forced to hand over money.

Victim V27 (nos 16–18) states that, around 09/01/2020, her village was attacked by C.'s rebels; that when she tried to reclaim her property that had been pillaged by these elements, she was punched, which knocked out one tooth and left another loose to this day.

The victim (nos 19–21) mentions that on 20/04/2020 there was a clash between two rebel groups – C.'s group and V12's group – that is, [REDACTED]. On their way back, C.'s elements passed through the village of [REDACTED], where she lived. She was beaten before being taken to their encampment in [REDACTED] where she was put in a hole that they used as an underground cell and which was filled with dirty water.

The facts as described during the hearings show that at least 37 victims found themselves in this hole.

Victim V 29 AKG (no 22–25) states that, in March 2020, his two children went to the field to look for cassava leaves and firewood. Unfortunately, these children fell into the hands of C.'s elements, who took one of them and released the other, who went to tell his parents. For this reason, the victim went to look for his son and, when he reached the barrier, he encountered C.'s elements, who demanded that he pay USD 100 to enter their camp. He paid USD 50 which his wife had sent him and the men escorted him to C., who was wearing a balaclava (he could not recognise him) and who demanded that the victim pay one cow and three goats as a ransom for his son's release. When the victim said that he was unable to find the cow, C. ordered that his wrists and ankles be bound and he be put in the underground cell full of dirty water, where he found his son who had been captured the day before. The next day at around 10 a.m., the victim was brought before an investigating officer from C.'s group, who held a hearing. Owing to the suffering that the victim had endured, he had to agree to pay USD 600, a sum he obtained by his wife mortgaging the family's field. He paid USD 550 to C.'s men before regaining their freedom.

The victim clarifies that, at the barrier, he had to pay twice to access C.'s camp, i.e. USD 50 and USD 20, and that during his detention, his wife and [REDACTED] K. brought him the money to pay.

He adds that he is still unable to repay this sum of USD 70 which he had borrowed from a private association called [REDACTED].

Victim V28 LMG (nos 19–21) states that, on 20/04/2020: 'there was a clash between two rebel groups – C.'s group and V12's group ([REDACTED]). C.'s elements came into the village of [REDACTED] where I live, and they abused the population. They came into my house and pillaged three goats and one foam mattress. To be freed from the underground hole where I was being kept, I had to pay a ransom of FC 200 000, which my wife borrowed from the AVEC association.'

Victim V34 KKF (nos 180–183) states that, in December 2019, he went to [REDACTED] to collect a debt of FC 100 000 from his friend B. The latter took him into [REDACTED]. While working in [REDACTED], the victim and Mr B. saw four people appear: two armed with firearms and two pygmies carrying spears. He notes that his friend B. fled and he stayed. This group demanded that he follow them because C. needed him. Once they were in the place where said colonel was, the victim says that he was thrown into an underground hole and was taken out 20 nights later.

The victim also says that, once he was in front of the said Colonel C., the latter asked whether he knew him. When he said that he did not, the colonel told the victim that he was Colonel C., the owner of the entire park.

The victim says that Colonel C. reproached him for [REDACTED] without his permission as well as suspecting him of being a scout for the FARDC.

For these charges, he threatened him with death.

The victim says that he was bound hand and foot before being thrown into the hole, where he spent three weeks.

He also says that one of his cousins called [REDACTED] heard of his capture and came to [REDACTED] and, once there, was also arrested and was released after handing over a case

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of beer and a goat. He adds that he then

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banned all other family members from coming to see him for fear that they would also be arrested.

He says that, in order for him to be released, Colonel C. demanded the sum of USD 3 000. He adds that, to meet Colonel C.'s demand, his family had to pay one cow and USD 500, which the defendant C. used to organise the 2020 New Year's festivities.

The victim also says that Colonel C. had demanded that he pay the remaining USD 2 500; that after some prevarication, he demanded USD 1 500 for a total of USD 2 000, an amount that he has not managed to get together.

Nevertheless, the aforementioned B. came with a sum of USD 600 and the victim was released. The victim also notes that, after getting into this debt, he was unable to stay in his house because he was unable to find the money to pay the owners who had helped him meet Colonel C.'s demands.

These acts, the Court notes, have a character similar to any other act referred to in Article 7(1) of the Statute.

The second condition for these acts of pillaging and destruction of property to be classified as other inhumane acts is that they have 'a character similar to any other act referred to in Article 7, paragraph 1, of the Statute'. It is understood that 'character' or 'characteristic' refers to the nature and gravity of the act. It therefore follows that, to be classified as other inhumane acts, an act of destruction of property and/or pillaging must be comparable in nature and gravity to any other act recognised by the Rome Statute as a crime against humanity.

According to the international case-law of the ICTY and the ICC, it is possible to consider the crimes of pillaging or destruction of property as acts of a comparable nature to one of these acts. For example, acts targeting property and in particular the crime of pillaging were classified, according to the case-law of the ICTY, as the crime of persecution (ICTY, Blaskic, Trial Chamber, 3 March 2000, para. 233–234). It should be remembered that, according to the case-law of the ICTY, in order to be classified as persecution, conduct, besides the discriminatory character of the act and the perpetrator's intention to discriminate, which are specific to the crime, must by its nature deny or infringe upon a

fundamental right laid down in international customary or treaty law (ICTY, Naletilic and Martinovic, Trial Chamber, 31 March 2003, para. 634). On this subject, it should be remembered that the right to property is a fundamental right enshrined in the Universal Declaration of Human Rights (Article 17).

In the case in question, the systematic acts of pillaging the civilian population's property without doubt constitute a violation of a fundamental right.

In addition, the ICC, in its analysis of the situation in the Republic of Kenya, determined that acts of arson, looting and the destruction of property were 'acts of coercion' that led to the crime of forced displacement (ICC, Muthaura et al, Decision on the Confirmation of the Charges, January 2012, para. 244 and 279).

It follows from this case-law that acts of pillaging may be classified as other acts contained in the definition of crimes against humanity, such as persecution and forced displacement, and they are therefore of a similar nature to other crimes against humanity.

It is also possible, according to the international case-law, to consider crimes of pillaging as acts of a similar gravity to any other specific crime classified as a crime against humanity.

In this respect, the ICTY held the view that, at a minimum, acts of persecution must be of an equal gravity or severity to the other acts listed as crimes against humanity (ICTY, Kupreskic et al., Trial Chamber, 14 January 2000, para. 618–619).

In addition, certain specific conditions may help to establish the seriousness of an act, in particular: the context in which it occurred; the personal circumstances of the victim including age, sex and health; the physical, mental and moral effects of the act or upon the victim; the cruelty of the acts; and the position held by the defendant. (See ICTY, Vasiljevic, Appeals Chamber, 25 February 2004, para. 165; ICTY, Galic, Trial Chamber, 5 December 2003, para. 153; ICTY, Todorovic, Trial Chamber, 31 July 2001, para. 47, 48 and 59).

In the case under analysis, the investigation has shown that the acts committed in this case are of a particular gravity given: the context of the widespread and systematic attack directed against the civilian population in which they were committed; the threats to the physical integrity of the victims; the psychological effects on the population of the loss of property; the cruelty of the acts; their mass nature; the position of command occupied by

the defendant C.; and the personal circumstances of the victims, who are particularly vulnerable civilians, including women and children.

According to the District Court of Jerusalem (Eichmann trial, 1962, para. 204), 'the plunder of property may be considered an inhuman act within the meaning of the definition of 'crime against humanity' only if it is linked to any of the other acts of violence defined by the Law as a crime against humanity'.

The Military Court of South Kivu, in the Mirenzo case (Military Court of South Kivu, case no 0101/017, transcript no 1482/KK/013/NSK/WAV/016) classified acts of pillaging and destruction of property as other inhumane acts given the suffering caused to the victims and the gravity and nature of the violence. In effect, the Court recognised that the crimes of pillaging and destruction of property caused suffering as required to classify them as other inhumane acts given that the victims lost the majority of their property and the two villages in question were burned down (pages 177 and 188). In addition, the Court held that 'the acts committed in this case are of a particular seriousness given: the context of the widespread and systematic attack directed against the civilian population in which they were committed; the psychological effects on the population of the loss of all of their property, homes and school; the cruelty of the acts; their mass nature; the position of command occupied by the defendant within the FARDC; and the personal circumstances of the victims, who are particularly vulnerable civilians, including women and children'. (Page 181).

In the case in question, during the attacks in the different villages and the arrests, the defendants committed the acts of pillaging of the civilian population's property and extortion. These acts may be classified as other inhumane acts of a similar character. They caused acute suffering to the extent that the victims lost their property. The money paid by way of ransom was borrowed, among others, from the association AVEC (Village Savings and Credit Association) and, to this day, not only are the victims of these acts unable to repay the money, but they also have no means of subsistence owing to the acts of pillaging.

The perpetrator was aware of the factual circumstances that established the character of the act.

The last element to prove is the perpetrator's awareness of the characteristics of the act.

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This element will be proven below by the participation of the perpetrators in certain acts of pillaging.

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The victim statements definitively prove that the defendant was aware of all of the acts he committed. By way of example:

Victim V 49 SMU (nos 55–57) states that, in March 2020, at around at around 4 p.m., without specifying the date, he saw C. come into [REDACTED] to [REDACTED]. He sold him [REDACTED] without any problem, but C. did not give him the money and promised to pay when he came back. C., he says, was accompanied by four armed men. Two days later, when C. came through the village again, the victim approached one of his escorts to ask for his money and he promised to tell C.

For the nth time, the victim went to demand his money from one of C.'s escorts, and the latter took him to the encampment where C. was. C. ordered the victim to be placed in the well, where he spent 2 days before his parents came to pay 1 goat, 1 case of beer and FC 200 000. He states that C. ordered his followers to deduct FC 20 000, which he gave him for the phone credit, and so his family paid FC 280 000 instead of FC 300 000.

On the basis of the above, it is apparent that the victim statements and the various witness testimonies contained in the physical case file, as well as the investigation proceedings, sufficiently prove the existence of all of the material and mental elements constituting evidence of intent to commit the crimes that C. is charged with, though there is no evidence whatsoever against the defendant Major B.

As regards the defendant Major B., nothing, except for the simple allegations of his co-defendant C., which have not been corroborated by anybody else, supports the allegation that B. supplied C.'s armed group with weapons and ammunition, whether or not he knew that these weapons were going to be used to commit crimes that fall under the jurisdiction of the International Criminal Court.

In addition, the defendant C. himself, appearing in person before this Court, ended up clearing the defendant Major B., who, along with a certain Colonel N., he had alleged from the start had supplied weapons and ammunition, claiming that it had been a mistake on his part.

From this Court's analysis of the facts, it is apparent that, in this case, there was never a Colonel N. and neither was there an unidentified Major B. as the defendant claims.

It is clear to this Court that, out of pure vindictiveness, the defendant C. came up with the spiteful idea of taking with him two of his former comrades-in-arms, that is, these two superior officers who are well known for having organised and led FARDC operations tracking C.'s armed group.

Consequently, the Court finds the offence of crimes against humanity, for all of the aforementioned acts, to be established in fact and in law against the defendant Captain C. alone and will sentence him according to the law; it finds the offence not to be established in fact or in law against the defendant Major B., and will acquit him purely and simply on lack of evidence.

## **THE CONTEXT OF WAR CRIMES**

### **EXISTENCE OF AN ARMED CONFLICT NOT OF AN INTERNATIONAL CHARACTER**

The notion of 'armed conflict of an international or not of an international character' is defined in neither the Rome Statute nor in Elements of Crimes. Rather, it has been developed by international criminal tribunals. The International Criminal Tribunal for the former Yugoslavia (ICTY) considered that 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State' (ICTY, Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, case no IT-94-1, para. 70).

As regards the definition of armed conflicts not of an international character, Article 8(2)(d) and (f) of the Rome Statute of the ICC provide that paragraphs 2(c) and (e) '[apply] to armed conflicts not of an international character and thus [do] not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. [They apply] to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.'

In order to establish the existence of an armed conflict not of an international character, two criteria have been developed: the intensity and the organisation of the parties to the conflict (ICC, The Prosecutor v. Thomas Lubanga Dyilo, judgment of 14 March 2012, case no ICC-01/04-01/06, para. 537–538). These two criteria are used solely for the purpose, as

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a minimum, of distinguishing an armed conflict from banditry, unorganised and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law (ICTY, Prosecutor v. Tadic, Opinion and Judgment, Trial Chamber, 7 May 1997, case no IT-94-1-T, para. 562). These criteria have subsequently been echoed by other international jurisdictions (ICC, The Prosecutor v. Katanga, judgment of 7 March 2014, case no ICC-01/04-01/07, para. 1173).

Criterion of intensity (clashes between the FARDC and armed groups and between the different groups):

In order to assess the criterion of intensity, the ICTY took account of the indicative factors relevant for assessing the intensity criterion, none of which are, in themselves, essential to establish that the criterion is satisfied. These indicative factors include the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict (ICTY, Prosecutor v. Haradinaj, Judgement, Trial Chamber I, 3 April 2008, case no IT-04-84-T, para. 49; ICC, The Prosecutor v. Katanga, Judgment, 7 March 2014, para. 1187). The duration of the fighting, on the other hand, plays no role (ICTY, Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo, Judgment, 16 November 1998, para. 184).

In the case-law of the Katanga case, the Trial Chamber observed that the fighting, inter alia, between the Ngiti militia and the UPC, was part of a cycle of violence that extended far beyond isolated acts falling out with international humanitarian law. ... the armed conflict was both protracted and intense owing, inter alia, to its duration and the volume of attacks perpetrated throughout the territory of Ituri from January 2002 to May 2003 (ICC, The Prosecutor v. Katanga, Judgment, 7 March 2014, para. 1216–1217). To determine whether the intensity criterion has been met, the Court considered the attacks cumulatively (within the time and geographical limits of the conflict), without untangling and assessing the level of violence of the bilateral confrontations between different groups. Beyond this, it focuses on a specified zone and period (see Jann K. Kleffner, *International Law Studies* (95) 161, 2019).

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In order for the offence to constitute a war crime, the perpetrator must have acted within a context of armed conflict which may be of an international or not of an international character.

In the case in question, the Court notes that this was a non-international armed conflict (NIAC). A NIAC is defined by the International Committee of the Red Cross (ICRC) as being 'protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State party (to the Geneva Conventions). The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation' (ICRC, Opinion Paper, March 2008).

In the case in question, the Court notes that the defendant C. acted within the context of a widespread armed conflict; that this intensity criterion has been definitively established, in that C.'s group repeatedly engaged in confrontations not only with the FARDC and the park rangers (its main adversaries) but also with other armed groups which struck these villages, including C.'s group and D.'s group. This resulted in a situation of continuous hostilities in the affected villages.

In addition, there were eight clashes involving C.'s group (see list of confrontations) against both the FARDC and other armed groups operating in the area, and they took place over a short period of time (December 2019 to May 2020), which demonstrates the intensity. Furthermore, it also led to crimes against the civilian population (see witness statement nos 19–21). In view of this situation, after several months of acts of abuse, the commander of OPS SKLII NSK section of the FARDC ordered Colonel N. to move his General Staff from Hombo to Kavumu to secure Kavumu, Katana, Kabamba and Luhihi ahead of military operations against C.'s armed group (see 'Mixed ICCN-FARDC: May 2020' map and witness statement of Colonel N. (nos 86–88)).

Lastly, C.'s armed group was in possession of weapons of war, in particular 10 guns including 8 AK-47 rifles and 2 FALO rifles, and C. himself had 7 AK-47s.

This leads to the following conclusion as regards the intensity of the conflict:

Organisation of the parties to the conflict: when it comes to deciding whether or not there

is an organised armed group, the following factual elements may be relevant (list not exhaustive): the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations.

In the present case, this Court notes that C.'s armed group was a well organised, structured group;

That in effect, in his statements before the investigating judge, the defendant C. himself explained the structure of this armed group, whose headquarters were located in Batanga and which was structured like a regiment as follows:

- Commander: C.: with the rank of colonel, with two seconds-in-command;
- An Operations and Intelligence second-in-command: J.;
- An Administration and Logistics second-in-command: S.;
- The Chief-of-Staff: N.;
- The group had two battalions:
  - 1st battalion led by S.;
  - 2nd battalion led by L.;
- These battalion commanders reported to the Administration and Logistics second-in-command who in turn transmitted the reports to the Operations and Intelligence commander, and it was the latter who brought them to C.; they had a total of 10 guns, including 8 AK-47s and 2 FALO rifles.
- This group consisted of 36 men; C. himself had 15 men and 7 AK-47 weapons.
- The group was supplied with weapons: this supply of weapons and ammunition as well as food was facilitated by the production of charcoal (Chief M. gave him 10 people responsible for the production of charcoal) and Chief N. gave him around 20 people for the production of charcoal as well as 6 people for whom he received FC 45 000 per person and per

week (see report of interrogation of C.: nos 63–79). He claimed during the pre-trial phase that a certain Major B, S3 head of 3312 regiment was one of his accomplices as well as a certain Colonel N of the same unit.

- In this respect, the Court notes that, appearing before it, and in full view of Major B., S3 head of said regiment appearing in person as his co-defendant, the defendant Captain C. expressed his surprise, stating that this was not the Major that he had been referring to, and that the Major he was referring to was another from the [REDACTED] community. He reproached the Public Prosecutor for not having brought him face to face with this Major and Colonel N. [before] today in [REDACTED]. This confrontation, he added, would have enabled him to exonerate Major B. before the Public Prosecutor and ask Colonel N to provide the identity of the Major B. who transported the five or three weapons he supplied him with.
- That Mr C. set up six encampments, namely: NGEDJE (opposite CHIBATI), LWAKUBA (on the left bank of the River NYAWEZA), LUSHASHA (on the right bank of the River NYAWEZA), BATANGA I (where his headquarters was located), an HQ of armed men located on MUKENGE hill, close to the village of SIRHEMBO (nos 143–145), BATANGA II (on the banks of the River KALANGO) and MABINGU (the only encampment located outside the park, in the village of MABINGU opposite MABINGU Primary School) (nos 94–99, 101–103).
- That beyond these encampments, he established three bases – one in MUKENGE, a second in KABUSHWA and the last in CHIREHE – with MUKENGE under the supervision of Mr S., who was also the deputy of Mr C. and that the defendant C. himself [REDACTED] (nos 143–145) and who gave reports to their superior, Mr C. (nos 152–154).
- To recruit elements, the group raided the different villages and abducted children, who were trained at the headquarters in BATANGA.
- As regards the FARDC and the park rangers, it should be noted that the State authorities are ‘presumed to have security forces fulfilling this

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**THE VICTIM WAS A PROTECTED PERSON OR PROPERTY:**

Although the Rome Statute and Elements of Crimes are quiet on the subject, it can be demonstrated by reference to international humanitarian law that the victims were protected persons. There seems to be no difficulty in admitting the capacity of these persons. In order to admit this capacity, it is advisable to refer to the details of each specific crime.

In the case in question, the victims are protected persons: they are principally children who were forced to abandon their studies and their families in order to be forcefully enlisted in C.'s armed group. Examples of this include the children E1 TEM, E2 REN, E4 SBK, E5 GKA, E6 AND, E7 HAB, E8 PSK and E9 OMM.

These conflicts took place in a natural environment which is not only civil property but also protected property, namely Kahuzi-Biega park.

Having regard to the above, this element is established against the defendant C., but not against Major B.

**THE CONDUCT TOOK PLACE IN THE CONTEXT OF AND WAS ASSOCIATED WITH AN ARMED CONFLICT NOT OF AN INTERNATIONAL CHARACTER:**

In order to constitute war crimes, the alleged crimes must have been committed 'in the context of and ... associated with an armed conflict not of an international character'.

In the Katanga case, the Chamber indicated that, 'the conduct must have been closely linked to the hostilities taking place in any part of the territories controlled by the parties to the conflict. The armed conflict alone need not be considered to be the root of the conduct of the perpetrator and the conduct need not have taken place in the midst of battle. Nonetheless, the armed conflict must play a major part in the perpetrator's decision, in his or her ability to commit the crime or the manner in which the crime was ultimately committed'.

To determine whether the crimes have a sufficient link with the armed conflict, different factors may be taken into consideration: the status of the perpetrator and the victim, the fact that the act may be considered to serve the ultimate objective of a military campaign

and the fact that the commission of the crime was part of the perpetrator's official functions or part of their context. The Chamber also specifies that an alleged crime may be committed 'in the context' of an armed conflict, regardless of whether or not it takes place at the same time or in the same place as intense fighting.

Indeed, in the case in question, is it obvious that the attacks directed against the villages by C.'s group as described in the referral decisions took place in the context of armed conflicts not of an international character; that this group had to attack other armed groups it encountered in the forest, including C.'s group and D.'s group, even before it clashed with the FARDC.

Based on the investigation, it can be seen that C.'s group was a well-organised group with soldiers that included forcefully enlisted children. This group had an operational structure that enabled it to confront other groups. C. himself has stated the number of men as well as the number of weapons his group had.

The child victims themselves state that some of them were assigned to escort C.; that they accompanied him wherever he went and that C. sent them into the mining quarries, while others were responsible for cooking for C.'s men; that one of them (also a child) was in charge of looking after the lucky charms and tattooed the soldiers before battles.

By way of example:

Victim E4 SBK (nos 93–94) states that, in [REDACTED] 2019, he was abducted by C. from his home in [REDACTED]. The victim says that he was [REDACTED] years old at this time and that he was with the armed group for [REDACTED] months. When he was there, he fetched water to help C.'s wife, who was the daughter of his maternal uncle. There were other children there with him. While the victim was in the armed group, there was a clash between C. and D., which the victim was not involved in. The child states that he did not shoot, but fled and sought refuge in the hills. The child left C.'s group [REDACTED] before the FARDC's attack.

Victim E2 REN (nos 88–92), accompanied by his father, states that he is [REDACTED] years old but does not know his date of birth. He says that he studied at [REDACTED] and the [REDACTED] before dropping out of school, and that C.'s group (including S.) abducted him

and took him to the [REDACTED] encampment where C. was so that he could look after C.'s [REDACTED]. The victim says that, when they fought, [REDACTED]. He states that the goats were kept in BULINDI, not far from [REDACTED]. The victim also says that C.'s group fought three battles. They fought the park rangers, Douze's group and the government. He was also involved in these fights and he had a weapon, and General C. was the one who had taught him how to handle this weapon. He was a soldier as well as being [REDACTED]. He spent [REDACTED] months in the forest with General C. The victim states that he was also sent to arrest people, including in KABAMBA, MANTU, CANYENA and CIREHE, and that after the victims were arrested, they were taken to [REDACTED] to be put into ANDAKI. The victim notes that it was impossible for him to leave the group because he was always close to C. He mentions that there were other children there with him. The victim notes that he left the group on the day that C. was arrested.

As regards the defendant C. himself, he says that the armed group exploited the park to get hold of food. He clarifies that, to keep the group supplied, Chief L., who had around 20 people who made charcoal, had given him 10 people whose production was used to buy ammunition, while Chief N. had around 40 people for charcoal and 3 mining quarries – namely BINWIRE quarry, CHIRENZI quarry and CHIKENZI-mère quarry – and gave him 20 people to manufacture charcoal.

He also claimed during the pre-trial phase that Colonel N. and Major B. had once offered him five AK-47-type weapons in exchange for the promise to grant them land to mine in the PNKB.

On the other hand, he claimed before this Court that there had been a mistake regarding Major B., stating that it was the fault of the Public Prosecutor for not having let them meet and that he had lost his mobile phone when it was seized by the military prosecutor, as attested to in the seizure-of-property report, arguing that the man in question was another B. who was travelling around with Colonel N. at the time of the facts, and not this Major B.

Regarding the mining activity, he had granted him six people, which gave him FC 45 000 per person per week (see report of interrogation of C., nos 63–79).

Nevertheless, as regards the defendant Major B. and the aforementioned Colonel N., the investigation reveals that the defendant wanted to rely on the tu quoque defence for the sole purpose of taking the opportunity to settle scores against these two officers who had harassed him with attacks.

In addition, on the same subject, the Court noted the shameless retraction by the defendant who, ultimately, ended up exonerating Major B. by claiming that there had been a mistake, or a misunderstanding, and saying that the B. he had seen bringing him sometimes three or sometimes five weapons was not this B.

This mistake, the Court notes, is supported by the fact that not only the Public Prosecutor, during the pre-trial investigation, failed to arrange a meeting between the defendant Captain C. and the defendant Major B., as well as with Colonel N. at the same time, but in addition, the Public Prosecutor also misplaced the defendant C.'s mobile phone, which both the defendant and the Prosecutor say could have enabled them to access telephone exchanges that were crucial for establishing certain other criminal involvement, including as regards the defendant Major B. Given all of these shortcomings during the pre-trial phase, there are no longer any charges against the aforementioned Major B.

#### **THE PERPETRATOR WAS AWARE OF THE FACTUAL CIRCUMSTANCES THAT ESTABLISHED THE EXISTENCE OF AN ARMED CONFLICT.**

According to Elements of Crimes, the fact that 'the perpetrator was aware of the factual circumstances that established the existence of an armed conflict' constitutes another common element of war crimes. In this respect, the introduction of Article 8 of Elements of Crimes provides the following clarification:

- a) there is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;
- b) there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international;
- c) there is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms 'took place in the context of and was associated with'.

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In the case in question, the defendants cannot claim that they did not know that their acts were taking place in the context of an armed conflict.

Concerning C., he planned the attacks against C.'s group and D.'s group and he attacked the park rangers and the FARDC. It therefore cannot be said that he was unaware of the existence of an armed conflict, as he himself states in his interrogation report.

In addition, the statements of certain victims establish without any doubt the existence of armed conflicts and C.'s awareness of this:

Victim V28 LMG (nos 19–21) says that, on 20/04/2020, there had been a clash between two rebel groups – that of C. and that of V12. When they came back, C.'s men came into the village of [REDACTED] where the victim lives and abused (tortured) the population.

The Court notes that the existence of an armed conflict within the meaning of Article 3 cannot be ignored if the hostile action, directed against a legal government, has a collective character and a minimum of organisation. In this respect and without these circumstances being necessarily cumulative, one should take into account such factors as the length of the conflict, the number and framework of the rebel groups, their installation or action on a part of the territory, the degree of insecurity, the existence of victims, the methods employed by the legal government to re-establish order, etc. (**see Humanitarian aid to the victims of internal conflicts. Meeting of a Commission of Experts in Geneva, Rapporteur R. Pinto, International Review of the Red Cross, 1963, in particular p. 78–79**).

In order for there to be an 'armed conflict', Article 3 common to the Geneva Conventions requires the situation to have reached a level that distinguishes it from other forms of violence to which international humanitarian law does not apply, such as 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.'

Practice, in particular that of the International Criminal Tribunal for the former Yugoslavia, shows that this threshold is reached whenever the situation can be classified as '*protracted armed violence*' (**ICTY, Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70**).

This Court notes that the legal doctrine is unanimous in saying that this situation should be assessed in the light of two main criteria: (a) the intensity of the violence and (b) the

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organisation of the parties. These two elements should not be considered *in abstracto* but *in concreto* as appropriate.

For this purpose, several indicators may be applied. **As regards the intensity**, the indicators may be the collective character of the hostilities or the fact that the State is forced to resort to its army, its police forces no longer being able to cope with the situation by themselves, the length of the conflict, the frequency of acts of violence and military operations, the nature of the weapons used, the displacement of civilian populations, the territorial control exercised by the opposition forces, the number of victims (dead, injured, displaced, etc.) **(see J. Pictet (ed.), Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva: ICRC, 1952, p. 34; R. Kolb, *Ius in bello, Le droit international des conflits armés [The International law of armed conflicts]*, Bâle/Bruxelles, Helbing & Lichtenhahn/Bruylant, 2003, p. 72 et seq.)**

In this case, the investigation has shown that SOUTH KIVU is an operational area and the place where the park is located is an operational sector in which the Armed Forces of the Democratic Republic of the Congo (FARDC) regularly clash with the armed groups that prosper in the area.

From the investigation and the case documents, it can be seen that the last confrontations took place on 4 April 2020 where, at around 1.30 a.m., the Raia Mutomboki (RM) militiamen from C.'s branch made an incursion into the villages of Chifunzi (Kelonge grouping) and Katasomwa (Mubuku grouping) located in the Buhavu chieftdom in Kalehe territory in the province of South Kivu and, during this incursion, positions belonging to the loyalist FARDC forces were attacked. During the course of the attacks, two (2) FARDC soldiers, including one superior officer (colonel) from the FARDC, were shot and killed in Chifunzi-Kalonge at 11.30 a.m. after another FARDC soldier was shot and injured during the attack by loyalist forces in the village of Katasomwa-Mubuku. These attacks by the RM militiamen led to the displacement of civilian populations. Several households from Katasomwa, Chifunzi and other villages (Chitebeka, Chirimiro, Mirenzo, Mushunguti, Chigoma) abandoned their homes to seek shelter near the centre of Karasi in the Mubuku grouping.

The investigation has shown that 'SOUTH KIVU has, for more than 10 years, been in a state of armed conflict involving the FARDC, FDLR and RAIYA MUTOMBOKI, a period that has

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seen multiple serious violations of human rights committed in a planned, concerted manner by different negative forces against the civilian population.’

In the light of the above, it appears that the case in question can be characterised as a situation meeting the intensity requirement to be classified as a NIAC, especially as the ICRC does not require a *minimum level of intensity*.



The other criterion characterising a NIAC relates to the minimum level of organisation of the forces involved. As regards the FARDC, this level is presumed to have been reached since the force in question is a governmental force.

As for the armed groups, the indicative factors to be taken into account include, for example, the existence of an organisational chart showing a command structure, the power to launch operations by coordinating different units, the capacity to recruit and train new fighters or the existence of internal regulations. (For a full list of the indicative factors taken into account by the ICTY in its case-law, see *Boskoski*, Judgement of 10 July 2008, note 25 above, para. 199–203. See also ICTY, *Limaj* case, Judgement of 30 November 2005, note 23 above, para. 94–134; *Haradinaj* case, Judgement of 3 April 2008, note 25 above, para. 60).

As regards C.'s armed group, the statements of R., S. and A. bear witness to the existence of a pyramid structure, at the top of which sits C., accompanied by officers such as Colonel N., Major J., Battalion S.

The statements made by L. (V28 LMG), K. ([REDACTED]) report that they moved around with at least 10 of C.'s men, with this number sometimes reaching 26, and that these men carried out his orders.

Moreover, it has been established that his men were subordinate to him through the statements of M (V08 MBI), who says, 'his men arrested me in my field and reported to him. He told them to bring me to his encampment in [REDACTED]'. As for A (V14 ACD), he explains that, 'C. ordered his men to torture me. I received 50 lashes and I was tied up'. N. stated that she was arrested by C.'s men and taken to the latter, who immediately set a price for her release. The statements of V57BBC are in the same vein, with him claiming that C.'s men took him to their encampment in the bush, where he was kept in an underground hole, as follows: 'When their chief, Mr C., arrived, they took me out of this hole and presented me to Mr C., who ordered them to whip me before returning me to the hole.'

Other witnesses report on his elements, who committed different abuses against the population on his orders and in his presence. The existence of a cell for holding abducted persons and the demand for ransoms paid in food and money to meet the armed group's needs show an organisation, including in terms of the elements needed to sustain the group. It is understood that

C. was at the head of this organisation which he governed, that this organisation was structured and its members reported their activity to C.

It appears, from the investigation, that the defendant C. had three bases, according to the statements of **B. (V18BFB)**. The latter says that C. had deputies named **A.** and **B.** and claims that, 'C. was at the Batanga base. **A.** and **B.** took me to the Kandagwe base where they were in charge. The third base was that of M., supervised by a certain **M.**'.

All of these statements clearly show the *minimum of organisation required* by the ICRC, in addition to the confessions of the defendant who, plainly proud of his capabilities as a commander, has not held back from demonstrating to this Court that his armed group was organised according to the model of the FARDC, which he voluntarily deserted. In fact, he states that he had a General Staff consisting of all the traditional services, namely Office 1, 2, 3 and 4 at least. He states that his men formed a brigade consisting of battalions equipped with weapons of war, ammunition, food supplies, Motorola communications equipment and telephones.

### **SPECIFIC CRIMES CONSTITUTING WAR CRIMES**

Given that the crimes that the defendant C. is charged with are provided for in Article 8(2)(e)(vii) of Elements of Crimes of the Rome Statute;

That Article 223(3)(g) of Law No 15/022 of 31 December 2015 amending and supplementing the Decree of 30 January 1940, the Penal Code, should be considered, in that the aforementioned law transposed a rule of international law and specified it.

The crimes for which the defendant C. is being prosecuted date from 2019–2020 and Law No 15/022 of 31 December 2015 applies to crimes committed 30 days after its publication in the official journal, i.e. from 01 February 2016.

### **A. ELEMENTS CONSTITUTING THE WAR CRIME OF ENLISTING CHILDREN**

The war crime of enlisting children presumes that the perpetrator enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities; that such persons were under the age of 15 years and that the perpetrator knew or should have known that such persons were under the age of 15 years.

### **CONCERNING THE AGE OF THE CHILDREN**

Ever since **the Thomas Lubanga case**, it has been settled case-law that the age of the children may be established by witness accounts. The statements of the parents **M., N. and**

S. establish that their children were under the age of 15 years at the time of the facts.

In addition, on the basis of request for information No 001RTE/AMS/SK/2021 made by the prosecutor-general to the headteacher of [REDACTED] Primary School, which the children T., H., A., S., N. and G. attended, it emerges that **H. was born on [REDACTED] ([REDACTED] years old) and S. on [REDACTED] ([REDACTED] years old).**

Request for information No 002RTE/AMS/SK/2021 made by the prosecutor-general to the headteacher of [REDACTED] Primary School, which the child R. attended, reveals that the latter was **born in [REDACTED] ([REDACTED] years old).**

On the basis of the above, it is established that at least three children forcefully recruited by C. were under the age of 15 years at the time of their enlistment.

### **C. KNEW OR SHOULD HAVE KNOWN THAT THE CHILDREN WERE UNDER THE AGE OF 15 YEARS**

C., who took these children from the villages where their parents lived, could have performed basic due diligence by enquiring among this community, which had welcomed him from the start, about the different children's ages. Having failed to do so, he cannot hide behind the argument that he could not have known the children's ages or even that he thought they were adults, since he had the opportunity to meet their parents, having even held some of them prisoner (for example, V19 NMF was held in the cell after C. forcefully recruited his son, A.).

### **C. KNEW THAT CHILDREN ARE PROTECTED PERSONS**

Children have special protection as illustrated by **Article 41 of the Congolese Constitution of 12 February 2006**, which declares, among other things, that 'the authorities are obliged to protect children in a difficult situation and to bring the perpetrators and accomplices of acts of violence towards children to justice. All other forms of child exploitation shall be punished by the law.'

The strong constitutional statement on the protection granted to children is supported by **Law No 09/001 of 10 JANUARY 2009 on child protection.**

**In addition, Additional Protocol II to the Geneva Conventions**, which sets the rules applicable to the protection of victims and the basic rules for the methods of conducting hostilities applicable by states and the armed groups involved in internal armed conflicts, provides in Article 4(3)(c) that

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

Nobody is supposed to be ignorant of the law, such that C. cannot reasonably argue that he was unaware of the legal provisions that grant additional protection to children, whether that be in the Constitution or the law on child protection, or even in conventions duly ratified by the DRC such as the Geneva Conventions, whose primacy over domestic law is established by Article 215 of the Congolese Constitution.

Furthermore, C. is a deserter officer from the FARDC who was trained in international humanitarian law and international human rights law.

On the basis of the above, it is clear that the conduct of the defendant Captain C. falls within the provisions of Article 8(2)(b)(xxvi) of the Rome Statute of the International Criminal Court governing the **WAR CRIME OF ENLISTING CHILDREN UNDER THE AGE OF 15 YEARS**, the CONSTITUENT ELEMENTS of which are:

- The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.
- Such person or persons were under the age of 18 years.  
The perpetrator knew or should have known that such person or persons were under the age of 18 years.
- The conduct took place in the context of and was associated with an armed conflict not of an international character.  
The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The first three paragraphs give the specific elements, while the latter two concern the contextual elements and have been discussed above in a shared section.

The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.

In the case in question, eight children were forced to join C.'s armed group without their consent. The circumstances in which these children were recruited by C have been described sufficiently during the hearing.

By way of example:

Child E5GKA (nos 78–80) states that he was forcefully enlisted into C.'s movement. He was coming back from school and came across C. along the way, and the latter forced him to carry sugar cane to [REDACTED]. When he reached [REDACTED], C. refused to let him return home. His mother wrote to C. that her son should return to school. C. went to meet his mother to ask whether she had the ransom to pay to release her son. As his mother was unable to pay, the child was kept at [REDACTED] for [REDACTED] months. During his stay in [REDACTED], one of C.'s men, a certain K., taught him to handle weapons, but he did not participate in any operations; he only helped out. In [REDACTED], he collected water and prepared food for the soldiers. He managed to leave the movement when the government attacked the group.

Victim E7HAB states that, when he was coming home from school, C. forced him to go with him to [REDACTED] in the park by threatening to kill him if he refused. He spent many days in [REDACTED] until April 2020, before the attack launched by the FARDC against C.'s armed group. C. used him to escort him to the mining quarry to collect fees from the miners, and then he would return to sleep in [REDACTED]. He learned how to handle weapons from C. himself. In [REDACTED], there were three children and he was [REDACTED] years old.

Such person or persons were under the age of 18 years; the birth certificates of all these children show clearly that they were all under the age of 18 years at the time of the facts.

The perpetrator knew or should have known that such person or persons were under the age of 18 years.

The children's statements show that the defendant C. was indeed aware that he was enlisting children under the age of 18, for example, by enrolling children who were at school.

Likewise, child E6 AND (nos 81–83 and 159–161) states that he studied at the [REDACTED] and that he abandoned his studies against his will. One day, he was coming home from school and he had a small telephone. Along the way, they came across some Bambuti who thought that the victim and his friends were looking down on them. These Bambuti took the victim's phone and left. The victim states that, in the evening, a group of Bambuti came to his house saying that he was keeping three weapons

left their by their namesake C. He did not recognise these accusations. The Bambuti then captured him and took him to [REDACTED], where he was badly tortured to give them back the three weapons he supposedly held. The victim notes that his parents had followed him to obtain his freedom and they had been asked to give four goats and two cases of beer, but they refused to release him. He stayed in [REDACTED] until the day the government launched the attack on the armed group. He had escaped before, but Colonel C. had sent his men to recapture him and had badly beaten him. C., who was already a colonel and who sought to proclaim himself General, had told him that he could be a colonel under his command and had asked him to stay in their group to defend the rank of his namesake, who was deceased (Mr C.). The victim states that the children in [REDACTED] swelled the ranks of C.'s group. He does not want to see C. face to face as he does not want to relive the past, because he is stigmatised in his village and no longer goes to school.

Child E2 REN (nos 88–92), victim, accompanied by his father, states that he is [REDACTED] years old but does not know his date of birth. He says that he studied at [REDACTED] and [REDACTED] before dropping out of school and that C.'s group (including S.) had abducted him and taken him to the [REDACTED] encampment where C. was so that he could look after C.'s [REDACTED]. The victim says that, when they fought, [REDACTED]. He states that the goats were kept in Bulindi, not far from [REDACTED]. The victim also says that C.'s group fought three battles. They fought the park rangers, Douze's group and the government. He was also involved in these fights and he had a weapon and it was General C. who had taught him how to handle this weapon. He was a soldier as well as [REDACTED]. He spent [REDACTED] months in the forest with General C. The victim states that he was also sent to arrest people, including in Kabamba, Mantu, Canyena and Cirehe, and that after the victims were arrested, they were taken to [REDACTED] to be put into Andaki. The victim notes that it was impossible for him to leave the group because he was always close to C. He mentions that there were other children there with him, including T., G. and P., who were all soldiers. The victim notes that he left the group on the day that C. was arrested.

#### **ANALYSIS OF THE CRIMINAL RESPONSIBILITY OF THE DEFENDANT C. AND MAJOR B.**

A full analysis of Article 25 of the Rome Statute of the International Criminal Court regarding individual criminal responsibility provides as follows: 'The Court shall have jurisdiction over natural persons pursuant to this Statute.

A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or,

Be made in the knowledge of the intention of the group to commit the crime;

In respect of the crime of genocide, directly and publicly incites others to commit genocide;

Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

[...] No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.'

It is understood, without any confusion, that Article 25(3)(a) of the Rome Statute of the International Criminal Court enshrines individual criminal responsibility in the case of co-perpetration or coercion.

That the defendant C. shall be held responsible by virtue of Article 25(3)(a).

As regards Major B., he is excluded from this responsibility owing to a lack of evidence against him.

As regards the above, the case-law of the International Criminal Court, in the Lubanga case, defined the conditions to be proven to establish co-perpetration as follows:

- there was an agreement or common plan between the accused and at least one other co-perpetrator that, once implemented, will result in the commission of the relevant crime in the ordinary course of events;
  - the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime;
  - the accused meant to conscript, enlist or use children under the age of 15 to participate actively in hostilities (this means that the defendant meant to commit the crime) or he was aware that by implementing the common plan these consequences 'will occur in the ordinary course of events';
- the accused was aware that he provided an essential contribution to the implementation of the common plan (ICC, the Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber I, Judgment of 14.03.2012, No ICC-01/04-01/06, para. 1018).

## THE COMMON PLAN OR AGREEMENT

According to the International Criminal Court, in the Lubanga case, 'co-perpetration does not require that the agreement or the common plan is explicit in order for the individual conduct of each co-perpetrator to be connected [and] although direct evidence of the plan is likely to assist in demonstrating its existence, this is not a legal requirement. The agreement can be inferred from circumstantial evidence.' (para. 988). In addition, the common plan may encompass a more general goal of a political or military character, and need not be intrinsically criminal. The condition judged by the ICC as being essential to proving co-perpetration lies rather in the presence of an element of criminality. It is not necessary that the plan specifically aim to commit a crime, but it must at least carry a risk

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The ICC concluded that, from an objective point of view, ‘this means that the agreement on a common plan leads to co-perpetration if its implementation embodies a sufficient risk that, in the ordinary course of events, a crime will be committed’ (ICC, LUBANGA, para. 987). In this same case, the Court ruled that, ‘Thomas LUBANGA, the President of the UPC/FPLC, had entered into an agreement, and thereafter participated in a common plan, with his co-perpetrators to build an effective army in order to ensure the UPC/FPLC’s political and military control over Ituri. This plan resulted in the conscription, enlistment and use of children under the age of 15 to participate actively in hostilities, a consequence which occurred in the ordinary course of events. This conclusion satisfies the common-plan requirement under Article 25(3)(a)’ (ICC, LUBANGA, para. 1136).

In the case in question, this Court notes that the defendant C. did indeed contribute to implementing a common plan which consisted in creating an armed group in order to control KAHUZI-BIEGA park, which led to several crimes being committed against the civilian population, as well as the enlistment of children and the use of these children in the attacks against the different villages cited in the referral decision and the exploitation of the park.

In effect, it is clear that the defendant C. entered into an agreement with his fighters to create the armed group for the sole purpose of committing the crimes with which he is charged in the referral decision; that this arises from his own statements contained in the report of his interrogation (nos 63–69) in which he explains the structure of the group, in particular Commander: C.: with the rank of colonel, with two seconds-in-command, J.: commander responsible for operations and intelligence, and S.: commander responsible for administration and logistics, and N., Chief of Staff.

It was with these men and others that Mr C. organised his movement to control KAHUZI-BIEGA park and commit the offences.

In his statements of 23/05/2020 (nos 63–68) before the Public Prosecutor and this Court, the defendant C. acknowledged having been involved in creating the armed group and in planning the attacks when he acknowledged having created an armed group to control the forest.

In addition, the statements of the victims are eloquent as to this group's policy. For example:

The uncoded witness (nos 94–99) says in his statements that he knows Mr C. and explains that he was trained by Tutsi soldiers who were members of C.'s armed group from 2018 onwards; that he was a soldier and had been trained by Tutsi soldiers during the advent of the AFDL in 1997 and that he was regularly demobilised; that upon his return to the village, after his demobilisation, he trained several youngsters in handling weapons and went with this group to support the pygmies who had invaded the park six months after Mr C. set himself up in the park with his armed group. Mr C. had come to join him and he acted as second-in-command in this group;

He states that he knows C. perfectly and adds that he is [REDACTED] from [REDACTED] between the villages of [REDACTED] and [REDACTED] in KALEHE territory; that after having killed his leader C., in October 2019, he declared himself leader of this armed group and in order to be accepted by the pygmies, he said that his mother was [REDACTED] and his father [REDACTED] ; that once at the head of this group, he created six encampments in the middle of the park, namely NGEDJE (opposite CHIBATI), LWAKUBA (on the left bank of the River NYAWEZA), LUSHASHA (on the right bank of the same river), BATANGA I (where his headquarters was located), BATANGA II (on the banks of the River KALANGO) and MABINGU (the only encampment located outside the park, in the village of MABINGU opposite MABINGU Primary School); that the base in NGEDJE was under the command of Mr S., the base in LWANKUBA was also under his command and as regards the bases in LUSHASHA and BATANGA, they were under the command of Mr M., a former FARDC captain, and finally S. controlled the MABINGU base; that this group organised people to mine for gold, to saw planks and to manufacture charcoal.

The statements of a witness go so far as to list C.'s accomplices, notably: for sawing planks: the [REDACTED] C. from [REDACTED], Mr C. from [REDACTED], Mr S. and Mr F. from

[REDACTED], the [REDACTED] and the [REDACTED]; as regards C.'s collaborators for producing charcoal: Mr L., Mrs N., F.; and for the mining of gold: Mr M. and Mr S., who were arrested and found themselves [REDACTED].

The statements of one witness also report that C. had enlisted children into his group, including young M. and young K.

As regards the workforce of C.'s group, the statements by this same witness cite, among others: 8 pygmies from Chief C. in [REDACTED], 7 pygmies from Chief [REDACTED] in C., 5 pygmies from Chief L. in [REDACTED], 1 [REDACTED] from [REDACTED] who acted as C.'s secretary.

As regards C.'s collaborators, this witness' statements accuse an otherwise-unidentified Major N., assigned to KAVUMU airport, of supplying new magazines and ammunition in exchange for gold and acting as an informant. The last delivery was on 26/02/2020. The statements also accuse a PNC (Congolesse National Police) commander from KATANA deputy commissioner's office of acting as an informant, as well as [REDACTED], R from [REDACTED].

These same statements indicate that C. levied a tax of FC 5 000 on behalf of the chief of the KATANA grouping, Mr B. from [REDACTED], and that he himself charged anyone going into the field without doing the SALONGO FC 500; that anybody who breached this rule had to pay C. a fine of FC 50 000; in addition, these attacks had a similar modus operandi, leading to the conclusion that there was prior planning, with the aim of pillaging the population's property, arresting civilians, raping them, torturing them and depriving them of their liberty. The policy of C.'s armed group consisted in the systematic exploitation of the park to feed his group, into which he also forcefully recruited children, and to maintain control of the forest and surrounding villages by hassling the villagers, all according to the same modus operandi (abductions, torture/rape and ransom payments). These crimes allowed him to subjugate and intimidate the civilian population.

In addition, the victims stated that C.'s armed group used the same modus operandi in the different offences.

The constitutes proof of prior planning.

Victim V 18, BFB, states that he is a [REDACTED] and that when he was coming back from the field, he was arrested by B. and A., who took him to their [REDACTED], whence they had come on their way to the village of [REDACTED], the victim's village, around February of this year (2020).

The victim states that, when he arrived at their base in [REDACTED], he was badly whipped before being thrown into their underground cell, where he spent one day.

The victim also notes that, when his wife F. came to visit him, she was also beaten despite being pregnant.

He adds that, in order to obtain his freedom, they had to hand over 3 goats, 3 chickens and 10 guinea pigs.

The victim says that, when he was abused, Mr C. was at the [REDACTED] base and B. and A. had taken him to the KANDAGWE base where these two deputies of Major C. were the superior officers and they reported to Major C.

The victim adds that the third base was in MUKENGE, supervised by a certain M.

Victim V 12 FCE (nos 134–136), a female, says that, in February 2020, Mr C. bought 4 five-litre containers from her on credit, each filled with milk (yoghurt). During April, the victim says that she met the gentleman with his men in the village of [REDACTED]. He demanded another 8 containers of milk for his men on the grounds that they were tired, and demanded that the victim come to his base in [REDACTED] to be paid and at the same time collect the empty containers.

She adds that when she went to [REDACTED], Colonel C. arrested her and placed her in an underground hole called 'ANDAKI' on the grounds that she had supposedly brought a rebel to his base; she observes that, after several hours of detention, she was brought out of the hole by Colonel C. who demanded that she either

pay USD 100 or have sex with him in order to obtain her freedom. As the victim did not obey, she was put back in detention in the same hole.

According to this victim, when the chief of the grouping was informed of her arrest, he sent Mr C. and Mr M. to Mr C. to plead her case. The victim indicates that Mr D. was also in their company and that, after negotiating, he paid FC 100 000.

The victim adds that they also took her Itel mobile phone and Mr C. threatened to kill her if news of her arrest ever reached the village. The victim notes that, following these threats, she never spent another night in her home.

In nos 22–25, the victim states that he was taken to the encampment and put in an underground cell. His son had been abducted and was in the same cell. He was released after paying a ransom.

In nos 93–94, the victim (a child) says that he was abducted by C. and his elements and taken to [REDACTED]. He spent [REDACTED] months in the armed group.

In nos 159–161, the victim adds that he, a child, was abducted by C. and his elements and tortured in [REDACTED]. The day after being abducted, his mother and one of his older brothers brought property to C. to obtain his release, but his torturers refused to release him.

As regards the aim of the plan, C. himself has said that it was to regain and control Biega forest (nos 63–68).

## **THE DEFENDANT'S ESSENTIAL CONTRIBUTION TO THE COMMISSION OF THE AFOREMENTIONED CRIMES**

The second essential element to be proven in order to establish the accused's responsibility as a co-perpetrator involves the degree of his contribution to the common plan. According to the case-law of the ICC, it is necessary to demonstrate that the defendant made one or more contributions of an essential nature to the implementation of the plan.

In this respect, the ICC deemed it to not be necessary to demonstrate that the defendant's contribution in itself caused the crime, but rather that the responsibility

of the co-perpetrators for the crimes committed in the context of the common plan arises from the contribution that each co-perpetrator made to the implementation of the plan.

‘The determination as to whether the particular contribution of the accused results in liability as a co-perpetrator is to be based on an analysis of the common plan and the role that was assigned to, or was assumed by the co-perpetrator, according to the division of tasks. [...] what is decisive is whether the co-perpetrator performs an essential role in accordance with the common plan, and it is in this sense that his contribution, as it relates to the exercise of the role and functions assigned to him, must be essential’ (ICC, LUBANGA, para. 1000). In effect, the ICC has ruled that, ‘Those who commit a crime jointly include, inter alia, those who assist in formulating the relevant strategy or plan, become involved in directing or controlling other participants or determine the roles of those involved in the offence. This conclusion makes it unnecessary for the prosecution to establish a direct or physical link between the accused’s contribution and the commission of the crimes’ (ICC, LUBANGA, para. 1004).

In this same case, the ICC concluded that the evidence at its disposal was sufficient to conclude ‘that Thomas LUBANGA was well-informed on military matters and he endorsed the recruitment initiatives’ (para. 1266) and that LUBANGA’s contribution to implementing the common plan was essential for several reasons. In particular, it found that, ‘the role of the accused within the UPC/FPLC and the hierarchical relationship with the other co-perpetrators, viewed in combination with the activities he carried out personally in support of the common plan, as demonstrated by the rallies and visits to recruits and troops, lead to the conclusion that the implementation of the common plan would not have been possible without his contribution [...] Viewed in its entirety, the evidence demonstrates that the accused and his alleged co-perpetrators, including particularly Floribert Kisembo, Chief KAHWA and Bosco NTAGANDA, worked together and each of them made an essential contribution to the common plan that resulted in the enlistment, conscription and use of children under the age of 15 to participate actively in hostilities’ (para. 1270–1271).

In conclusion, the elements to be taken into account to prove the defendant’s contribution are (among others):

- The defendant's role in conceiving and planning the attack;

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- The fact that he gave orders;

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- The fact that he decided on which roles to assign to those involved in committing the offence;
- The personal involvement of the defendant and the conduct of the attack;
- The defendant's communication with the troops.

In the case in question, almost all of the aforementioned elements apply in the case of the defendant C.; the Court notes that he personally participated in the attacks carried out by his group (see statements of victims V30 MMM (nos 26–28) and V04 BMJ (nos 110–112).

Furthermore, the majority of victims recognised C. and saw him in BATANGA giving orders to commit the crimes. Others also recognised him as a direct perpetrator.

For example, the victims stated that they had seen the defendant C. either in BATANGA or in their respective villages during the attacks and in certain cases C. himself had committed the crimes or had ordered his elements to commit them. C. also held a position of military leader within the group.

Victim V30MMM (nos 26–28) stated that, on 10/03/2020, at around 2 a.m., Mr C., accompanied by 10 of his elements, came into [REDACTED] village; they broke down the door of the victim's house and arrested him on the pretext that he had promised to kill C. because he was a [REDACTED].

The victim was taken to their encampment where he was subjected to several acts of torture, including 80 lashes administered by C. himself, before being thrown into a hole (underground cell) full of dirty water and urine.

He paid FC 300 000 in ransom for his release, which his wife brought.

Victim V32 MML (nos 2–34) [REDACTED].

C. came to [REDACTED] from the victim. After being served, he asked him to come to their encampment to get his money. The next morning, he went to the encampment, but unfortunately C. told him he had no right to demand money from him and he ordered him to be arrested and whipped. The next morning, members of his family paid 1 crate of Primus and 1 goat for his release.

Victim V14 ACD (nos 140–142) states that, 28 December 2019 at around 7 p.m., she learned that her older brother had been captured by Mr C. and held at his base in [REDACTED] and that they were planning to kill him. The next day, the victim went to that base accompanied by a lady called N., who [REDACTED].

They were announced and brought before C. by a fighter, then Mr C. had the brother brought out so that the victim could see him.

The victim states that, after she had hugged her brother, Mr C. sent her brother back to work and immediately arrested her on the grounds that she had fired at him during the attack against Mr C., after he had killed the rebel chief C.

The victim adds that she was placed in an underground hole called 'ANDAKI' and that she was there from 11 a.m. until 6 p.m. before being released so that she could go and fetch FC 60 000 for Mr C. by way of a fine.

The victim adds that, on her way back home, she was captured again by Mr C.'s armed men who were going back to the village, and they accused her of adultery with the lady who [REDACTED]. The victim claims that, this time, Mr C. ordered his men to torture her and that she received 50 lashes before being tightly bound and thrown into the 'ANDAKI' hole, where she was close to death; that the defendant C. demanded one goat, one case of beer and the sum of USD 200 for her release, which was done.

Victim V 27 NMP (nos 16–18) states that C., accompanied by his men, attacked her village of [REDACTED]. Victim V 30 MMM (nos 26–28) adds that on 10/03/2020 at around 2 a.m. Mr C., accompanied by 10 of his elements, arrived in the village of [REDACTED]. The victim was taken to their encampment. Victim V31 (nos 29–31) states that on 15/02/2020 he came across three of C.'s men, two of whom were armed with guns. They took him to their encampment where Colonel C. was. Victim V45 (nos 44–45) adds that, in March 2020, the victim was in the field with his brother M. C. and his men wanted to take them by force. His brother fled but he was taken to their encampment. Victim V 02 MBJ (nos 61–62) also highlights that, upon the denunciation of Ms M.

(his son M.'s partner), Mr C. sent his men to his house where he was found with his son . at around [REDACTED] and they were both abducted and taken to the base in [REDACTED], where they arrived at around [REDACTED].

### THE MENTAL ELEMENTS:

In order to prove the defendant's co-perpetration or responsibility as a co-perpetrator, it is necessary and sufficient, in addition to the objective elements of this mode of responsibility (the common plan and the essential contribution) to prove the mental elements.

In the LUBANGA case, the ICC, as regards the mental element, concluded that, 'the accused and at least one other perpetrator meant to conscript, enlist or use children under the age of 15 to participate actively in hostilities or they were aware that in implementing their common plan this consequence "will occur in the ordinary course of events"; and the accused was aware that he provided an essential contribution to the implementation of the common plan'.

The ICC thus established that the first mental element required to prove co-perpetration is the intention to commit the crime by implementing the plan, or at least the awareness of the risk that, in the ordinary course of events, the crime would be committed. 'The suspect and the other co-perpetrators must all be mutually aware of the risk that implementing their common plan may result in the realisation of the objective elements of the crime ... [This] awareness and acceptance of this result justifies that the contributions made by the others may be attributed to each of them ... and that they be held criminally responsible as principals to the whole crime.' Also, 'if the risk of bringing about the objective elements of the crime is substantial ... the fact that the suspect accepts the idea of bringing about the objective elements of the crime can be inferred from the awareness by the suspect of the substantial likelihood that his or her actions or omissions would result in the realisation of the objective elements of the crime; and the decision by the suspect to carry out his or her actions or omissions despite such awareness.'

In the present case, the defendant C., as leader of the armed group, was aware of the common plan and the elements of criminality that it involved, given that, as proven in the

above testimonies, he was present during the majority of the crimes, giving orders, and was the leader of his armed group.

In addition, several victims recognised him during the attacks, which proves his awareness.

Of these victims, it is worth mentioning:

- K. (nos 91–93): this victim states that, on 26/01/2020, he was abducted by Colonel C. and his men and kept in [REDACTED] for 26 days in an underground cell. He adds that C. himself was there and it was the latter himself who shot one of his colleagues, M.; that C. was accompanied by about 26 people.
- Victim V 04 BMJ (nos 111–112) states that, on a Tuesday in April 2020, Mr C. and his men came to his home in [REDACTED] at night and took his goats, before immobilising him and tying him up, in the presence of C., who himself beat him before taking his back to his defensive base in [REDACTED], where he placed him in an underground cell called 'ANDAKI'.
- Victim V 10 BMA (nos 128–130) states that Colonel C. set himself up in the [REDACTED] neighbourhood in July 2019 on the grounds that he was there to protect the population. During December 2019, Colonel C. took her to his base in [REDACTED] on the grounds that the victim had refused to engage in sexual intercourse with him. The victim adds that, despite this, her tormentor, Colonel C., put her in an underground cell with her [REDACTED]-old baby.
- On the basis of the above, it is apparent that the victim statements and the various witness testimonies contained in the physical case file, as well as the investigation proceedings, sufficiently prove the existence of all of the material and mental elements constituting evidence of intent to commit the crimes that C. is charged with, though there is no evidence whatsoever against the defendant Major B.

- Consequently, the Court finds the offence of war crimes through the use or enlistment of children under the age of 15 to be established in fact and in law against the defendant Captain C. alone and shall sentence him according to the law; it finds the offence not to be established in fact or in law against the defendant Major B., and shall acquit him purely and simply.

**ENLISTING OR USING CHILDREN UNDER THE AGE OF 18 YEARS IN ARMED FORCES OR GROUPS, WITH WHICH THE DEFENDANT C. ALONE IS CHARGED:**

Article 187 of Law No 009/001 of 10 January 2009 on child protection provides that whoever contravenes the provisions of this law on the worst forms of child labour shall be punished with 1 to 3 years of penal servitude and a fine of FC 100 000 to 200 000; nevertheless, enlisting or using children under the age of 18 in armed forces and groups and the police shall be punished with 10 to 20 years of penal servitude.

It follows from this provision that this charge applies when the following constituent elements are met:

The enlistment or use of children;  
The proscribed age for the enlistment or use;  
The mental element.

- 1) Enlisting or using children: this act is forbidden by the aforementioned article. However, in the case in question, as can be seen from the facts listed above, the defendant C. enlisted these protected persons.
- 2) The proscribed age for the enlistment and use of children: there were five such persons enlisted by C., as proven in the facts and their analysis, who were under the age of 18 but over the age of 15.
- 3) The mental element: if he was at all unsure, the defendant should have sought confirmation. He took the risk of his own free will.
- 4) Consequently, the Court finds this charge against him to have been established in fact and in law and shall sentence him according to the law.

**SIMPLE DESERTION Article 44 of the Military Penal Code WITH WHICH THE DEFENDANT C.**

**ALONE IS CHARGED:** for this offence to have been committed, the following constituent elements must be present:

- The perpetrator's status as a soldier
- The definitive severance of his ties with the army: legal presumption, arising from

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- The criminal intent: the intent here lies in the decision to break his ties with the army. It concerns a free, conscious act.

In the case in question, the defendant, Captain C., is a soldier; in addition to the existence in the case file of a desertion report drawn up by his unit, it can be seen that the defendant was absent from his unit for more than two years without authorisation from his superiors. This suggests his intention to definitively evade his military duties. He freely decided to leave the army to place himself at the service of his [REDACTED] community, according to his own statements. Consequently, the Court finds this charge against him to have been established in fact and in law and shall sentence him according to the law.

**THE VIOLATION OF STRICT NATURE RESERVES, National Parks and biosphere reserves provided for and punished under Article 71 of Law No 14/003 of 11 February 2014 on Nature Conservation, WITH WHICH THE DEFENDANT C. ALONE IS CHARGED:**

For this offence to have been committed, the following constituent elements must be present:

- A. THE MATERIAL ELEMENTS
- B. THE MENTAL ELEMENT

**THE MATERIAL ELEMENTS:**

- The existence of either a nature reserve, a national park or a biosphere reserve.
- **This provision punishes** the crime of:
  - bringing firearms and other hunting equipment into the park or reserve;
  - capturing or transporting species of wild, living flora and fauna, their skins or other hides;
  - intentionally introducing an exotic species that is likely to threaten the park or reserve's ecosystems, habitats or species;
  - carrying out an activity of any nature;
  - taking or destroying eggs and/or nests;
  - destroying, by any means whatsoever, biotopes, species of wild flora and fauna, or other natural biological or genetic resources;
  - moving, and breaking or removing the boundary markers of

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the protected area;  
directly or indirectly polluting the lakes, rivers and  
watercourses.

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In the case in question, the defendant Captain C., during the years 2019 and 2020, within the PNKB – specifically, in BATANGA, NKENDJE, CHIBATI and CHATONDO –

- brought AK-47 and RPG-7 weapons of war into KAHUZI-BIEGA National Park for his insurrection movement,
- destroyed the wild flora by authorising the inhabitants of the surrounding villages to cut down trees in order to saw planks and make charcoal under his protection against the ecoguards and
- polluted the waters of the River NYAWEZA with the gold mining operation.

**THE MENTAL ELEMENT:**

The perpetrator must have acted freely and consciously, that is, in full awareness of what they were doing. In this case, the defendant freely entered the PNKB with weapons of war, which are still in the park, on the grounds that it was located on the lands of his ancestors. However, he knew that it was forbidden to bring them into the PNKB and to carry out any activity.

Consequently, the Court finds the charge against him to have been established in fact and in law and shall sentence him according to the law.

**PROSPECTING, FORESTRY OR MINING ACTIVITIES IN A PROTECTED AREA, WHICH ARE PROVIDED FOR AND PUNISHED UNDER ARTICLE 77 OF LAW NO 14/003 OF 11 FEBRUARY 2014 ON NATURE CONSERVATION, WITH WHICH THE DEFENDANT C. ALONE IS CHARGED:**

For this offence to have been committed, the following constituent elements must be present:

- A. THE MATERIAL ELEMENTS
- B. THE MENTAL ELEMENT

**THE MATERIAL ELEMENTS:**

This provision punishes the crime of:

- Either carrying out works that are not permitted under the development plan and which are likely to change mineralogical and palaeontological sites, archaeological remains, the countryside, the

relief, the drainage and purity of the waters, the vegetation, and the wild fauna and flora;

- Or removing herbaceous litter and vegetation or using fertilisers and biocides;
- Or building a house, farm or barn, unless it is exclusively for the purpose of managing the protected area.

In the present case, the defendant Captain C., in BATANGA, NGENDJE, CHATONDO, LWANKUBA and LUSHASHA – which are located within KAHUZI-BIEGA National Park – constructed small houses to house the General Staff of his insurrection movement and to house his fighters.

#### **THE MENTAL ELEMENT:**

The perpetrator must act freely and consciously. In this case, there is no element in the case file to attest that the defendant C. was physically or mentally forced to erect the houses in the PNKB. He therefore acted freely and consciously.

Consequently, the Court finds the charge against him to have been established in fact and in law and shall sentence him according to the law.

#### **THE ADMISSIBILITY AND GROUNDS FOR THE ACTIONS BROUGHT BY THE CIVIL PARTIES:**

##### **THE ADMISSIBILITY OF THE CIVIL PARTIES' ACTIONS:**

This Court shall admit the civil actions brought by the 87 natural person civil parties since they meet the conditions set by Congolese substantive law.

The victims have brought an action as civil parties by submitting a declaration to the court registry and paying the registration fees in accordance with Articles 7 and 226 of the Military Judicial Code and Article 69 of the Code of Criminal Procedure. The registration documents for each of the civil parties are present in the case file.

##### **THE RESPONSIBILITY OF THE DEFENDANTS FOR THE REPARATIONS OWED TO THE VICTIMS OF THEIR CRIMES**

The defendant Captain C. carried out the acts constituting the crimes against humanity of murder, rape, deprivation of liberty, torture and other inhumane acts and the war crime

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of enlisting children, for which he has been prosecuted before this court and for which his criminal responsibility has been demonstrated above.

These crimes were perpetrated in particular against **87** persons, **who are victims and civil parties** to the present case, who have suffered physically, mentally and in terms of their property from the consequences of the barbaric acts described above constituting material, physical and mental damage as shown during the hearing.

The following specific types of harm were found to have been caused to the victims of the crimes carried out by the defendants in this case:

a) ***In terms of economic harm owing to the pillaging and destruction of their property:***

- The loss of cash in dollars and/or Congolese francs;
- The loss of small livestock: chickens, goats, rabbits, turkeys;
- The loss of funds from their businesses and commercial merchandise;
- The costs incurred for medical care for the victims of rape, torture and other inhumane acts;
- The deterioration of their economic situation owing to the loss of their property.

b) ***In terms of physical harm, these victims suffered:***

- For the victims of rape: physical trauma to their bodies owing to the sexual acts forced upon them, including with several partners, and sexually transmitted diseases;
- For the direct victims of murder, the loss of their lives.
- For the victims of torture: physical harm and pain owing to the acts they suffered.

c) ***In terms of mental harm, these victims endured and, for some, are still enduring:***

- Various frustrations linked to the deterioration in their standard of living: since the economic situation of the populations in the villages attacked by the defendants was already not easy, the acts carried out led to excessive impoverishment of the victims;
- For the victims of rape:

- Different traumas caused by the non-consensual sexual acts;
  - The lost chance of marriage for the child victims;
  - The stigmatisation of themselves and their families;
  - The shame of what happened to them.
- For the victims of imprisonment or other forms of severe deprivation of physical liberty:
- Different traumas relating to the acts they suffered: Fear for their lives, weakening, etc.
- For the indirect victims of murder, they suffered:
- The loss of a loved one, depriving them of their presence and affection;
  - The loss of the care of the direct victim and the different consequences that arose in terms of economic and social costs.
- For the victims of other inhumane acts (Pillaging and destruction of property):
- The loss of all of their property, which resulted in acute suffering, a sense of frustration, fear for the future, etc.
  - Certain victims got into debt in order to pay C. the money for their release or had to sell their properties, which caused a feeling of distress, isolation and loneliness as they feel responsible for the deterioration in their living conditions;
  - For the victims of child enlistment: emotional harm, distress, fear, trauma linked to the fact that they were abducted from their families, forced to stay with an armed group which clashed with other parties to the conflict, in fear of losing their lives, forced to leave school, their families and friends, post-traumatic stress and feelings of isolation from the community.

Lastly, in terms of the impact of the crimes committed by C.'s armed group against the community, and above all through the systematic exploitation of an area of the park:

- For the victims of the village of CIREHE, the deforestation of the park had an impact on climate change, which had a negative impact on the growth of agricultural products;
- As regards the pollution of the rivers, this was the result of mining for ore. Each time ore was mined,

the populations in the surrounding villages suffered water pollution; the population was forced to go and seek water from villages that were further away, which exposed them to several risks.

As such, the defendant Captain C. is civilly responsible because certain harm was suffered by his victims, as described above, and this harm would never have occurred had it not been for his criminal acts. In effect, all harm suffered by the civil parties results from the criminal behaviour of the defendants as described by each of the civil parties.

**As regards the legal basis for this civil responsibility, it lies in Article 258 of the Decree of 30 July 1888 on contracts and contractual obligations and in Article 75 of the Rome Statute of the International Criminal Court.** On this matter, these two articles provide as follows:

Article 258 of the aforementioned Decree: *'Any human act whatsoever that causes harm to another person shall oblige the person at fault to remedy the harm.'*

And Article 75(1) and (2) of the Rome Statute of the International Criminal Court provides:

- 'The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.'*
- 'The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.'*

By applying Article 258 of the aforementioned Decree to the facts of the present case, it is clear that the acts committed by the defendant C. constitute the crimes against humanity of murder, rape, torture, deprivation of liberty and other inhumane acts, the enlistment of children under the age of 18 into the armed group and the destruction of property, and caused physical, material and mental harm to the civil parties to the case, which the defendant C. is consequently required to remedy.

By 'victim', the court means persons who, individually or collectively, suffered harm ... through acts or omissions that constitute gross violations.

Where appropriate, and in accordance with domestic law, the term 'victim' also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.

A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim (**Principle V of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law**).

The case-law establishes that *the status of person who may claim to be entitled to reparations for harm caused by a crime is granted to all those who have suffered harm caused directly by that crime* (**AXE WEIL and François TERRE, cited by the Military High Court in the case of General Prosecutor, Public Prosecutor v. Col. Judge ALAMBA, 2004, p. 176, and Elis, 14 August 1964, Legal Review of the Congo, 1964, number 3**).

In addition, international standards and the international case law on human rights recognise that the family members of direct victims of gross violations of international human rights law may be considered to be victims of inhuman or degrading treatment owing, among other things, to the attitude of the authorities towards their situation of acute suffering.

Consequently, the Court shall apply these definitions when examining the status of the civil parties who should receive reparations owing to the aforementioned crimes alleged to have been committed by the defendants and the members of C.'s armed group.

All of the crimes committed by the aforementioned defendant led to serious, huge and indescribable harm for the victims, with repercussions that are felt to this day for a large number of the victims.

All of these elements fully demonstrate the link between the offences committed by the defendant and the harm suffered by the victims. It therefore follows that this court shall order him to remedy all of this harm.

Furthermore, this Court shall also sentence the Congolese State *in solidum* with the defendant Captain C. for having failed to guarantee the safety and protection of the victims. It is therefore appropriate to examine the responsibility of the Congolese State for the harm caused to the victims in the present case.

As regards Major B., since he has not been demonstrated to be at fault, he shall not be held civilly responsible, in any form whatsoever, in this case.

## THE CIVIL RESPONSIBILITY OF THE DEMOCRATIC REPUBLIC OF THE CONGO

It is at the request of all of the natural person civil parties that the Congolese State has been cited as a civilly responsible person.

### **The state's responsibility regarding the crimes committed by its agent, Captain C.:**

Article 260 of Book III of the Congolese Civil Code establishes the principle of the responsibility of the state, as master or principal, when it states that, 'One is responsible not only for the harm caused by oneself, but also for the harm caused by persons for whom one has responsibility or by things under one's care';

The case-law and the legal theory, in the interpretation of this provision, consider two scenarios in particular: that of the State as principal and that of the presumption of fault in the exercise of its sovereign functions relating to the safety of persons and property.

It is in this sense that the legal doctrine and the case-law hold that 'the principal may only be held responsible for the fault of the agent if there is an effective and direct relationship of subordination between him and his agent at the time or in the place where the harm occurred'.

‘When the organ of the State acts and commits a fault when carrying out its functions, the entire State is responsible for this fault’ (Kalongo Mbikayi, *Responsabilité et socialisation des risques en droit zaïrois*, PUZ, Kinshasa, 1974, p. 158).

In carrying out their functions, soldiers are organs of the State whose mission is to ensure the safety of people and their property (Court of First Instance of L’shi, 15/06/1959).

To establish this responsibility, four conditions laid down in the aforementioned article must be met, namely:

**The existence of a principal–agent relationship:** in the case in question, this condition poses no problem, as the Congolese State is the principal of the defendant C. in that it is that state that is his employer through its public organs and institutions, namely the army, which malfunctioned, and that he is paid by the Congolese State.

Interpreting Article 260 of Book III of the Civil Code, it appears that, ‘the State or an individual may be held civilly responsible or for its own actions or for those of its employees or, rather, persons placed under its authority and even under its care’.

**The harm must have been caused by the agent:** both the pre-trial investigation and the examination of the case before the court have shown that the facts of the present case were committed by the defendant, Captain C.

In addition, the defendant removed himself from hierarchical control and entered the forest with the weapon of the Congolese State, yet the State did nothing to recover this weapon, which was used to commit the crimes attributed to the two defendants.

**The harm must occur in the exercise of the functions for which the agent was employed** at the time of the facts: the defendant was in effect in the service of the State at the time of the facts – he was a soldier working for the FARDC.

**Lastly, the harm must have been caused to other persons or a third party:** in specie, the statements of the victims appearing before this Court, as well as the written statements of those who were not able to appear, bear witness to the harm and treatment they suffered at the hands of the defendant C.

**Secondly, it is a constitutional duty** of the State to ensure peace and security across the entire national territory for its people and its property and to eradicate any act of an insurrectional nature; this is laid down, respectively, in the spirit of Article 52 of the Constitution of the Democratic Republic of the Congo and Article 259 of Book III of the Congolese [Civil] Code.

### **The general obligation of the State to protect the population**

Article 52 of the Constitution provides that, ‘All Congolese have the right to peace and security, both nationally and internationally. No individual or group of individuals may use a portion of the national territory as a base for subversive or terrorist activities against the Congolese State or any other state’.

Article 259 of Book III of the Civil Code provides that, ‘Everyone is responsible for the harm they have caused, not only through their acts, but also through negligence or carelessness’.

It is the responsibility of the State, both under Congolese law and under international law, to protect its civilian population from any grave violations of their human rights. This obligation of protection originates in international human rights law, which imposes a general and positive obligation on States to protect their populations from any grave human rights violations.

‘International and regional human rights standards expressly require States to regulate the conduct of non-state actors containing explicit obligations for States to take effective measures to prevent private violations of human rights’ (Zimbabwe Human Rights NGO Forum / Zimbabwe, Communication 245/02, para. 147).

Article 1 of the African Charter on Human and Peoples’ Rights, to which the DRC is a party, has been interpreted as imposing a responsibility on the State for violation of its obligation to protect the rights of individuals against illegal acts by non-state actors:

‘[...] the Commission ruled that the negligence of a State to guarantee the protection of the rights of the Charter having given rise to a violation of the said rights constitutes a violation of the rights of the Charter which would be attributable to this State, even where it is established that the State itself or its officials are not directly responsible for such violations but have been perpetrated by private individuals.

According to the permanent jurisprudence of the Commission, Article 1 imposes restrictions on the authority of the State Institutions in relation to the recognised rights. This Article places on the

State Parties the positive obligation of preventing and punishing the violation by private individuals of the rights prescribed by the Charter.

Thus any illegal act carried out by an individual against the rights guaranteed and not directly attributable to the State can constitute ... a cause of international responsibility of the State ... because it has failed to exercise the conscientiousness required to prevent it from happening and for not having been able to take the appropriate measures to pay compensation for the prejudice suffered by the victims.' (Association of Victims of Post Electoral Violence & INTERIGHTS / Cameroon, para. 88 and 89).

'Based on the foregoing reasons, the African Commission Decides that: 1. The provisions of Article 1 of the African Charter impose on States Parties an obligation of Result; 2. The State of Cameroon failed in its general obligation as set forth and sanctioned under Article 1 of the African Charter and consequently the State of Cameroon has an obligation of Result; 3. Due to its obvious lack of diligence, the State of Cameroon is held responsible for the violation of Articles 2, 4, and 14 of the African Charter; and therefore, the State of Cameroon is responsible for the acts of violence which took place on its territory which gave rise to human rights violations, whether these acts had been committed by the State of Cameroon itself or by people other than the State.' (Association of Victims of Post Electoral Violence & INTERIGHTS / Cameroon, para. 137).

The responsibility to protect can be analysed as a duty to protect its population 'from genocide, war crimes, ethnic cleansing and crimes against humanity' (Resolution of the United Nations Security Council, 2016).

It is therefore legitimate to question the possibility that these beneficiaries would have to turn to the State by invoking its responsibility to protect in order to obtain reparations following the commission of the crimes under international law of which they were the victims.

The responsibility of individuals, first of all, does not exclude that of States. It is true that the commission of crimes under international law makes the individual perpetrator of the

offence criminally responsible. However, this individual responsibility does not exonerate the State, on the territory on which the crime was committed, from its own obligations under international law.

It follows that any victim of a crime under international law should be entitled to reparations. And, if the compensation for victims is established in law, it should have an obligation as corollary. Nevertheless, does the State of the perpetrators of the crimes owe reparations by virtue of its responsibility to protect?



When a crime under international law is committed by an individual, the State is considered to have seriously failed in its duty to protect, thus giving rise to an obligation to compensate the victims. This lies in the fact that the responsibility to protect imposes on the State an obligation of result and envisages the reparations in this sense as a means of punishment for the State's failure in its responsibility to protect its population from crimes under international law.

It follows that the State or an individual may be held civilly responsible either for its own actions or for those of its agents or, rather, persons placed under its authority and even the things under its care. It is, in addition, a constitutional duty of the State to ensure peace and security across the entire national territory for its people and their property, both nationally and internationally, and to eradicate any act of an insurrectional nature, as per the spirit of Article 52 of the Constitution of the Democratic Republic of the Congo. [...]

It has been found that, 'when on duty, the soldier must at all times be under the control and supervision of his superiors in order to effectively carry out the mission assigned to the army. If one of the soldiers becomes a free agent owing to the negligence or with the blessing of these same military superiors, going on to commit crimes including rape ... the State may in this case be held civilly responsible.' (Ruffin Lukoo Musubao, *Jurisprudence congolaises en droit pénal*, Tome II, 2eme partie : Les violences sexuelles au Kivu et en Ituri [Congolese criminal case-law, Vol. II, Part 2: Sexual violence in Kivu and Ituri], édition On s'en sortira, p. 28).

In the case in question, through negligence, the Congolese State no longer exercised effective control over part of its territory which the defendant C. occupied. By way of example, C. levied a tax of FC 5 000 on behalf of the chief of the Katana grouping, Mr B. from Katana, and himself charged anyone wanting to go into the field without doing the salongo – compulsory community labour – FC 500, while anybody who breached this rule had to pay C. a fine of FC 50 000 (cf. nos 94-99).

It follows that C. was carrying out functions that are the responsibility of the state, owing to a lack of state presence and protection in the area.

In addition, there is no shadow of a doubt that the Congolese State excelled in its negligence to the extent that it intervened more than nine months after the armed group

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had set itself up in the area even though it knew that this group was attacking the civilian population of these villages.

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In addition, the Congolese State did not post any FARDC or PNC personnel to the villages and, where soldiers were indeed posted, they were not posted in sufficient numbers to confront the defendant C.'s armed group.

The civil parties argue that the Congolese State is responsible for having failed to implement dialogue initiatives (from 2014 to 2019) between the PNKB and the Batwa communities to seek a solution to the problems and the marginalisation that this community had experienced since it was expelled from the PNKB (see CAMV report, *Terres et communautés : Parc National de Kahuzi-Biega [Land and communities: Kahuzi-Biega National Park]*, March 2021). These problems meant that armed groups took advantage of the demands of members of the Batwa community to cover for their illegal mining of ores and other natural resources (see RDC : *deux pygmées et six miliciens tués au parc de Kahozi-Biega [DRC: two pygmies and six militiamen killed in Kahuzi-Biega park]*, AfricaNews.FR). This had the result not only of further weakening this community, which was also a victim of these crimes, but also of increasing the general insecurity in the park, which allowed C.'s armed group to establish itself and attack the civilian population, in the absence of State protection.

Consequently, the Court finds the Democratic Republic of the CONGO responsible for failing in its mission to protect its population.

### THE REPARATIONS REQUESTED BY THE VICTIMS

According to the legal doctrine, *'the judge must respect the two aspects of this principle. The harm suffered must be totally remedied: it is the responsibility of the lower courts to remedy, within the limits of the submissions of the parties, the harm whose principle they recognise, and to investigate its extent by exercising their sovereign power of assessment'* (Y. LAMBERT FAIVRE and S. PORCHY-SIMON, *Droit de dommage corporel : système d'indemnisation [Personal injury law: compensation system]*, Dalloz, 6th edition, Paris, p. 170).

Article 75 of the Rome Statute of the International Criminal Court lists different means and forms of reparation, including ***restitution, compensation and rehabilitation***, to be awarded to victims of international crimes.

These forms of reparation can be understood according to their definitions in international

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law as follows (see *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 60/147, Resolution adopted by the General Assembly on 16 December 2005*):

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- i. Restitution, which should restore the victim to the original situation before the harm occurred;
- ii. Compensation, calculated on the basis of an economic assessment of the harm suffered. It should take into account the physical or mental harm; lost opportunities (including education); material damage; moral damage; and costs required for legal or expert assistance, medicine and medical services, and psychological and social services;
- iii. Rehabilitation should include medical and psychological care as well as legal and social services;
- iv. Satisfaction should include effective measures aimed at the cessation of continuing violations;
- v. And guarantees of non-repetition.

In the Lubanga case, according to the Office of Public Counsel for Victims, 'collective reparations can be given a broad and a narrow interpretation. A narrow approach would include measures that cater for existing groups who are linked by cultural, ethnic, social, cultural or spiritual factors. Applying a broad interpretation, collective reparations would address the position of individual victims who are part of a community or other group, and the awards would complement any individual reparations measures.'

On the basis of the above, the natural person civil parties to the case in question base their claim on the individual harm suffered by each of them and request the following reparations:

- Financial compensation, determined on the basis of the extent of the harm suffered by each of the victims.

Rehabilitation measures, in particular medical and psychological care for the victims of rape and child enlistment.

- The aforementioned civil parties request that the Court also order the State to build a community reintegration centre for all children enlisted into C.'s armed group, and to take concrete measures to reintegrate and support each of them based on their current situation, including measures to ensure that they receive appropriate schooling. In effect, they conclude, enlisting a child and making them participate in an armed group deprives them of a normal childhood and prevents them from developing optimally

from a psychological, emotional, educational, socioeconomic, etc. point of view.

That as such, the Court also finds the Congolese state to be civilly responsible, as it was under the obligation to protect its victims and their property in the areas invaded by the defendant and the FARDC soldiers under his control.

That in the case in question, the DRC shall compensate the victims, in solidum with the defendant, for the harm suffered.

**THE COURT, REGARDING THE ACTION BROUGHT BY THE ICCN, a legal person civil party,**

**THE ADMISSIBILITY OF THE ACTIONS OF ITS ACTION**

As a legal person, the ICCN is governed by Decree No 10/15 of 10 April 2010 establishing the statutes of an institution called the Congolese Institute for Nature Conservation (ICCN) published in the Official Journal on 1 June 2010 (document numbered and initialled 1 to 5). The ICCN has lawfully joined as a civil party by paying the applicable fees.

Its counsels, having represented the ICCN as a legal person, have entered a special power of attorney into the case file permitting them to represent the ICCN in court (document numbered and initialled 6).

**IN LAW**

The Public Prosecutor brought the defendant C. before this court regarding the legal person ICCN for having carried out prospecting, forestry, mining and construction activities in a protected area and having destroyed the flora and fauna of the PNKB in violation of Articles 71 and 77 of Law No 14/003 of 11 February 2014 on nature conservation.

The prosecutor is bringing the case against the defendant for having, among other things, committed the following offences as perpetrator, co-perpetrator or accomplice, according to one of the modes of criminal liability, as provided for in Articles 5 and 6 of the Military Penal Code and Article 23 of Book I of the Ordinary Penal Code, in strict nature reserves, national parks and biosphere reserves:

- 1) Brought firearms and other hunting equipment into the park or reserve;
- 2) Captured or transported species of wild, living flora and fauna, their skins or other hides;

- 3) Intentionally introduced an exotic species that is likely to threaten the park or reserve's ecosystems, habitats or species;
- 4) Carried out fishing activities of any kind;
- 5) Took or destroyed eggs and/or nests;
- 6) Destroyed, by any means whatsoever, biotopes, species of wild flora and fauna, or other natural biological or genetic resources;
- 7) Moved, broke or removed the boundary markers of the protected area;
- 8) Directly or indirectly polluted the lakes, rivers and watercourses.'

In the case in question, for having, in BATANGA, NKENDJE, CHIBATI and CHANTONDO, in the IRAMBI/KATANA grouping in the Democratic Republic of the Congo, without prejudice to certain dates, but during the years 2019 and 2020, a period not yet covered by the legal limitation period, through his direct involvement in carrying out the offence, brought into KAHUZI-BIEGA National Park AK-47, PKM and RPG-7 weapons of war for his insurrection movement, destroyed the wild flora by authorising the residents of the surrounding villages to cut down trees for sawing planks and making charcoal under his protection against the ecoguards and polluted the waters of the NYAWEZA River with the gold mining operation.

These crimes are provided for and punished under Article 71 of Law No 14/003 of 11 February on nature conservation.

This Court notes that the defendant Captain C., at the public hearing of 14 September 2021, claimed that his armed group occupied the BIEGA part on the sole ground that it was wrong that Order No 75-238 of 22 July 1975 amending the boundaries of Kahuzi-Biega National Park had incorporated the lands of his ancestors into the PNKB to the detriment of the pygmy community he claimed to belong to.

The statements of the defendant C. differ from the reality of the existence of this protected area, which was established in 1937 as the Kahuzi Biega strict reserve covering an area of 75 000 ha, then in 1970, with Order No 70/316 of 30 November 1970 establishing Kahuzi-Biega National Park, was brought down to 60 000 ha, with 15 000 ha returned to the people residing in the park.

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Since 1980, the PNKB has been a World Heritage Site which, owing to wars and poaching, was placed on the List of World Heritage in Danger in 1997.

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It follows that the criminal activities of the defendant C. constitute threats to the PNKB which mean that it continues to be on UNESCO's blacklist, which harms the ICCN.

It should be noted that, contrary to the statements of the defendant C., that, as regards the geographical situation of the PNKB, it occupies an area covering just 10% of the territories of Kabare, Kalehe and Walungu, while the majority of the park – 90% of this protected area – lies in the territory of SHABUNDA, ITEBERO in the territory of Walikale, Kasese and Nzovu in the province of Maniema.

That it is clear from the investigation of this case that the defendant C. did indeed establish the Staff headquarters of his armed group inside the PNKB protected area, in the villages of BATANGA, NKENDJE, CHATONDO and CHIBATI, in the IRAMBI/KATANA grouping, Kabare chiefdom, Kabare territory.

Answering the Court's questions about his troops' weapons, the defendant C. acknowledged not only the weapon that was taken from his hands inside the park but also the weapons held by his men inside the same park.

On the basis of the above, it appears evident that the defendant Captain C. failed to comply with the provisions of the aforementioned law, which were violated.

In addition, the defendant C. constructed houses in the park to house his General Staff, and removed plant litter and vegetation from the spaces he occupied.

The defendant is also being prosecuted for having unfairly attacked the ecoguards, who are employees of the civil party ICCN, on [REDACTED] at their patrol station in [REDACTED], Irambi/Katana grouping, Kabare chiefdom in Kabare territory, and on this occasion injured an [REDACTED] called B. and imprisoned [REDACTED], K., for 26 days in an underground prison (see indictment of the Public Prosecutor and arguments of the civil parties).

That, as if that were not enough, in the same place and at the same time, the defendant C. and his armed group took from the party filing the complaint two AK-47 weapons, five solar panels, a communications kit consisting of a radio, and the ecoguards' food supply consisting of beans, sardines, tomatoes, etc. That this Court shall rule that the conduct of the defendant C. and his armed group caused serious harm to the civil party ICCN.

And without prejudice to certain dates but during 2019 the ICCN was also the victim of attacks followed by vandalism and pillaging of the [REDACTED] patrol station where the defendant not only killed an employee of the civil party ICCN, [REDACTED], but on this occasion also pillaged all of the property from the patrol station, including the communications kit, the food supplies and the solar panels, ...

For the civil party ICCN, the alleged acts which caused great suffering are the pillaging of property from the civil party during the attacks organised by the defendant C and his armed group on the ecoguards' station in [REDACTED], where they took two AK-47 weapons belonging to the ICCN, five solar panels, a communications kit consisting of Motorola radios, the ecoguards' food supply consisting of beans, sardines, tomatoes, etc. as well as other ecoguard stations according to the statement of the victim B. at the public hearing of 16 September 2021, which was not disputed by the defendant, who simply claimed that the PNKB is his community's number one enemy, going so far as to say that the ecoguards are serpents in the home of the pygmies and must be destroyed, words that are not disputed by the defendant C., who declared that he came to attack and/or pillage the ecoguards' stations solely with a view to defending the pygmy peoples who had also been killed by these ecoguards.

### THE ORDER FOR THE DEFENDANTS TO PAY DAMAGES

Article 258 of Book III of the Congolese Civil Code provides that: 'Any human act whatsoever that causes harm to another person shall oblige the person at fault to remedy the harm.'

In the present case, the defendant C. becomes civilly responsible under Article 258 of Book III of the Civil Code when the following three conditions are met:

- there must be the existence of fault, the harm caused to the other person and the link of causality between the fault and the harm. Fault may be defined as the violation of a pre-existing obligation, or as the infringement of a right, that is, a legally protected legitimate interest (Prof. MUHINDO MALONGA, T., in DROIT ADMINISTRATIF ET INSTITUTIONS ADMINISTRATIVES [Administrative Law and Administrative Institutions], Butembo, 2004, p. 1263). The fault of the defendant C. consists of the fact that he brought AK-47, PKM and RPG-7 weapons of war for his insurrection movement into the PNKB, destroyed the flora and fauna by authorising

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the inhabitants of the surrounding villages to cut down trees for sawing planks and making charcoal under his protection against the ecoguards, and polluted the waters of the River NYAWEZA with the gold mining operation. He also constructed small houses to house the General Staff of his insurrection movement and to house his fighters.

- The investigation of the present case has revealed that the defendant C. intentionally entered the PNKB with a view to destroying the flora and fauna for the sole purpose of occupying the BIEGA part.

Owing to the crimes committed by the defendant C., the civil party was deprived of its flora and fauna, and owing to the presence of the defendant C.'s armed group, several tourists, fearing for their safety, cancelled visits to the PNKB during 2019 and 2020, which led to a loss of earnings for the park.

As a result of this conduct by the defendant C., the civil party ICCN had to bear the costs of legal proceedings, lawyers' and court fees, etc., because justice is costly even though it aims to be free.

Given that all of this harm is the direct and inevitable consequence of the fault of the defendant C., as demonstrated above, hence the link of cause and effect connecting the fault to the harm suffered by the claimant;

Given that the link of cause and effect between the different acts of the defendant C. and the harm suffered by the civil party has been demonstrated;

That the link of causality arises from the fact that trees belonging to the civil party were cut down and animals were killed in the PNKB's protected areas, which has caused and continues to cause enormous harm to the civil party ICCN, which requests that the Court order the defendant to pay the equivalent in Congolese francs of USD 100 000 by way of damages and to restore the ecosystem, or the damaged and polluted sites, and to destroy the houses that were illegally constructed in the PNKB's protected areas at the defendant's own cost.

Nevertheless, this Court, considering that the ICCN, by demanding both damages worth USD 100 000 as well as the restoration by the defendant of the ecosystem or damaged sites,

Having regard to all of the above, the Court shall find admissible but partially founded all of the civil actions, and shall set the amount of the damages based on fairness, owing to a lack of objective assessment criteria.

## **FOR THESE REASONS**

The Military Court of South Kivu;

Ruling publicly and after adversarial proceedings;

By majority vote of its members in a secret ballot;

Having heard the Public Prosecutor;

Having regard to Article 149 et seq. of the Constitution of the Democratic Republic of the Congo;

Having regard to Articles 13, 27, 214 and 266 of the Judicial Code;

Having regard to Articles 31 and 44 of the Military Penal Code;

Having regard to Articles 21a(1), 22a(1) and 222(1), (5), (8) and (12) of Law No 15/022 of 31 December 2015 amending and supplementing the Decree of 30 January 1940, the Penal Code;

Having regard to Article 8(2)(e)(vii) and Article 77 of the Rome Statute of the International Criminal Court;

Having regard to Article 187 of Law No 009/001 of 10 January 2009 on child protection;

Having regard to Law No 14/003 of 11 February 2014 on nature conservation;

Having regard to Law No 011/2002 of 29 August 2002, the DR Congo Forestry Code;

## **DECIDES AS FOLLOWS**

### **RULING ON THE CRIMINAL PROCEEDINGS**

- **All of the charges against the defendant Captain C.** are found to have been established in fact and in law;
- Consequently, he is sentenced as follows, with no mitigating circumstances being admitted:
  1. To penal servitude for life for the crime against humanity of **imprisonment** or other severe deprivation of liberty (Articles

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- 21a(1) and 222(5) of Law No 15/022 of 31 December 2015 amending and supplementing the Decree of 30 January 1940, the Penal Code);
2. To **penal servitude for life** for the crime against humanity of **murder** (Articles 21a(1) and 222(1) of Law No 15/022 of 31 December 2015 amending and supplementing the Decree of 30 January 1940, the Penal Code);
  3. To **penal servitude for life** for the crime against humanity of **other inhumane acts** of a similar character (Articles 21a(1) and 222(12) of Law No 15/022 of 31 December 2015 amending and supplementing the Decree of 30 January 1940, the Penal Code);
  4. To **penal servitude for life** for the crime against humanity of **rape** (Articles 21a(1) and 222(8) of Law No 15/022 of 31 December 2015 amending and supplementing the Decree of 30 January 1940, the Penal Code);
  5. To **penal servitude for life** for the **war crime** of **using**, conscripting or enlisting children (Article 8(2)(e)(vii) of the Rome Statute of the International Criminal Court);
  6. To 20 years of **penal servitude** for **enlisting and using** children in armed forces or groups and the police;
  7. To 5 years for **simple desertion** in peacetime;
  8. To 3 years of **penal servitude** for the violation of strict **nature reserves**, national parks and biosphere reserves;
  9. To 12 months of **penal servitude** for the **construction** of a house and a barn in a protected area;
  10. In accordance with **Article 7 of the Military Penal Code**, a single punishment – the harshest, namely, **penal servitude for life** – is imposed;
  11. His detention is confirmed;
  12. In accordance with Article 31 of the Military Penal Code, he is dismissed from the Armed Forces of the Democratic Republic of the Congo;
  13. Further orders him to pay court fees to be determined by the registrar, which must be paid within eight days, failing which he is liable to 3 months of civil imprisonment;
- The charges **against the defendant Major B.** are found not to have been established in fact or in law as regards the crime against humanity and the war crime by providing help or any form of assistance to the commission or attempted commission of this crime, including by providing the means with which to commit it, with a view

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- such a crime on the basis of Articles 21a (3) and 222(1), (5), (8) and (12) of the Decree of 30 January 1940, the Penal Code, as amended and supplemented by the Law of 31 December 2015;
- consequently, he is purely and simply acquitted on the grounds of doubt;
- he is removed from the proceedings;
- pursuant to Article 266 of the Military Judicial Code, his immediate release is ordered;

**RULING ON THE VARIOUS CIVIL ACTIONS:**

**RULING FIRSTLY ON THE CIVIL ACTION BROUGHT BY THE CONGOLESE INSTITUTE FOR NATURE CONSERVATION (ICCN) CIVIL PARTY:**

Said action is found to be admissible and partially founded,

Consequently,

The defendant C., alone, is sentenced to pay the ICCN damages assessed ex aequo et bono of the equivalent of USD 50 000 payable in Congolese francs;

**RULING SECONDLY ON EACH OF THE CIVIL ACTIONS BROUGHT BY EACH OF THE EIGHTY-SEVEN NATURAL PERSON CIVIL PARTIES NAMED BELOW:**

Said action is found to be admissible and partially founded,

Consequently,

The defendant C., IN SOLIDUM with the Congolese State, that is, the Democratic Republic of the Congo, a civilly responsible person, is sentenced to pay as follows, to each of the civil parties, the damages assessed ex aequo et bono of the equivalent of the amount listed next to their name in USD, payable in Congolese francs;

N.	Civil Party Direct victim	Indirect victim	Murder	Severe deprivation of physical liberty and other	Rape	Enlisting children	Damages payable in francs equivalent to



<b>N.</b>	<b>Civil Party Direct victim</b>	<b>Indirect victim</b>	<b>Murder</b>	<b>Severe deprivatio n of physical liberty and other inhumane acts</b>	<b>Rape</b>	<b>Enlisting children</b>	<b>Damages payable in francs equivalent to</b>
1.	(V 26CBF)			<b>Severe deprivatio n of physical liberty and other inhumane acts</b>			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
2.	(V27 NMP)			<b>Severe deprivatio n of physical liberty and other inhumane acts</b>			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
3.	(V28 LMG)			<b>Severe deprivatio n of physical liberty and other inhumane acts</b>			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
4.	(V29 AKG)	The child of the victim – Not otherwise identified, victim of deprivation of liberty		<b>Severe deprivatio n of physical liberty and other inhumane acts</b>			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
5.	(V30 MMG)			<b>Severe deprivatio n of physical liberty and other inhumane acts</b>			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo

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<b>N.</b>	<b>Civil Party Direct victim</b>	<b>Indirect victim</b>	<b>Murder</b>	<b>Severe deprivatio n of physical liberty and other inhumane acts</b>	<b>Rape</b>	<b>Enlisting children</b>	<b>Damages payable in francs equivalent to</b>
6.	(V3I CBM)			<b>Severe deprivatio n of physical liberty and other inhumane acts</b>			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
7.	(V32 MML)			<b>Severe deprivatio n of physical liberty and other inhumane acts</b>			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
8.	(V42 OCM)			<b>Severe deprivatio n of physical liberty and other inhumane acts</b>			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
9.	(V43 H RG)			<b>Severe deprivatio n of physical liberty and other inhumane acts</b>			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo

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N.	Civil Party Direct victim	Indirect victim	Murder	Severe deprivation of physical liberty and other inhumane acts	Rape	Enlisting children	Damages payable in francs equivalent to
10.	(V44CRB)			Severe deprivation of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
11.	(V45 CK R)			Severe deprivation of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
12.	(V46 MMM)	Aimeso (friend of the civil party also arrested under the same circumstances)		Severe deprivation of physical liberty and other inhumane acts			USD 5 000 IN SOLIDUM with the Democratic Republic of the Congo
13.	(V 47 BMJ)	Ombeni Eustache Lugerere arrested by C.'s men for a debt owed by Mr Mugisho Nyangabànya		Severe deprivation of physical liberty			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo

N.	Civil Party Direct victim	Indirect victim	Murder	Severe deprivation of physical liberty and other inhumane acts	Rape	Enlisting children	Damages payable in francs equivalent to
14.	(V48 BKE)			Severe deprivation of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
15.	(V49 SMU)			Severe deprivation of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
16.	(V50 BRE)			Severe deprivation of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
17.	Vob 2 MBJ. H.	The son of the victim Pascal – victim of deprivation of liberty		Severe deprivation of physical liberty and other inhumane acts			USD 5 000 IN SOLIDUM with the Democratic Republic of the Congo

N.	Civil Party Direct victim	Indirect victim	Murder	Severe deprivation of physical liberty and other inhumane acts	Rape	Enlisting children	Damages payable in francs equivalent to
18.	B.		Attempted murder				USD 5 000 IN SOLIDUM with the Democratic Republic of the Congo
19.	K.			Severe deprivation of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
20.	(V01 NKB) E 3 NSR			Severe deprivation of physical liberty	Rape		USD 5 000 IN SOLIDUM with the Democratic Republic of the Congo
21.	(V 02 MBJ)			Severe deprivation of physical liberty			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
22.	(V 03 AKP)			Severe deprivation of physical liberty and other inhumane			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo

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N.	Civil Party Direct victim	Indirect victim	Murder	Severe deprivation of physical liberty and other inhumane acts	Rape	Enlisting children	Damages payable in francs equivalent to
				acts			
23.	(V 04 BMJ)			Severe deprivation of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
24.	(V 05 CSD)			Severe deprivation of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
25.	(V 06 BNP)	Father, not otherwise identified, victim of torture and deprivation of liberty		Severe deprivation of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo

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26.	(V07 TRI)			Severe deprivation of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
27.	VOS MBI			Severe deprivation of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
28.	(V09 BNJ)			Severe deprivation of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
29.	(V10 BMA)			Severe deprivation of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo

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N.	Civil Party Direct victim	Indirect victim	Murder	Severe deprivation of physical liberty and other inhumane acts	Rape	Enlisting children	Damages payable in francs equivalent to
30.	(V11 NNC)			Severe deprivation of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
31.	(V12 FCE)			Severe deprivation of physical liberty and other inhumane acts	Rape		USD 6 000 IN SOLIDUM with the Democratic Republic of the Congo
32.	V13 NAV/			Severe deprivation of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
33.	(V14 Acd)	his brother was also a victim of deprivation of liberty		Severe deprivation of physical liberty and other inhumane acts			USD 5 000 IN SOLIDUM with the Democratic Republic of the Congo

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N.	Civil Party Direct victim	Indirect victim	Murder	Severe deprivation of physical liberty and other inhumane acts	Rape	Enlisting children	Damages payable in francs equivalent to
34.	(VI5 OHE)	his brother S. was also a victim of torture and deprivation of liberty		Severe deprivation of physical liberty and other inhumane acts			USD 5 000 IN SOLIDUM with the Democratic Republic of the Congo
35.	(VI6 BKP)			Severe deprivation of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
36.	(V17 Onj)		<b>Murder</b>				USD 10 000 IN SOLIDUM with the Democratic Republic of the Congo
37.	(V18 BFB)			Severe deprivation of physical liberty and other inhumane acts			USD 7 000 IN SOLIDUM with the Democratic Republic of the Congo

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N.	Civil Party Direct victim	Indirect victim	Murder	Severe deprivatio n of physical liberty and other inhumane acts	Rape	Enlisting children	Damages payable in francs equivalent to
38.	(VI9NMF)			Severe deprivatio n of physical liberty and other inhumane acts			USD 5 000 IN SOLIDUM with the Democratic Republic of the Congo
39.	(V20 And) E6 AND			Severe deprivatio n of physical liberty and other inhumane acts		<b>Enlisting children</b>	USD 5 000 IN SOLIDUM with the Democratic Republic of the Congo
40.	(V2I FCJ)			Severe deprivatio n of physical liberty and other inhumane acts	<b>Rape</b>		USD 5 000 IN SOLIDUM with the Democratic Republic of the Congo
41.	(V22 MBM)			Severe deprivatio n of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo

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N.	Civil Party Direct victim	Indirect victim	Murder	Severe deprivation of physical liberty and other inhumane acts	Rape	Enlisting children	Damages payable in francs equivalent to
42.	(V23 SNM)			Severe deprivation of physical liberty and other inhumane acts (for the son)			USD 7 000 IN SOLIDUM with the Democratic Republic of the Congo
43.	(V24 N KF)			Severe deprivation of physical liberty and other inhumane acts			USD 5 000 IN SOLIDUM with the Democratic Republic of the Congo
44.	(V25 NAT)	Her husband was a victim of torture		FOR HER HUSBAND : Severe deprivation of physical liberty and other inhumane acts			USD 5 000 IN SOLIDUM with the Democratic Republic of the Congo
45.	(V33 AMS)			Severe deprivation of physical liberty and other inhumane			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo

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N.	Civil Party Direct victim	Indirect victim	Murder	Severe deprivation of physical liberty and other inhumane acts	Rape	Enlisting children	Damages payable in francs equivalent to
				acts			
46.	(V34 KKF)			Severe deprivation of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
47.	(V 35 ENJ)			Severe deprivation of physical liberty and other inhumane acts			USD 6 000 IN SOLIDUM with the Democratic Republic of the Congo
48.	(V 36 SMM)	Her husband was a victim of deprivation of liberty		other inhumane acts			USD 5 000 IN SOLIDUM with the Democratic Republic of the Congo
49.	(V37 BMB)			Severe deprivation of physical liberty and other inhumane			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo

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N.	Civil Party Direct victim	Indirect victim	Murder	Severe deprivation of physical liberty and other inhumane acts	Rape	Enlisting children	Damages payable in francs equivalent to
				acts			
50.	(V38 BBC)			Severe deprivation of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
51.	(V39 BBJ)			Severe deprivation of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
52.	(V 40 SNJ)			Severe deprivation of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo

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N.	Civil Party Direct victim	Indirect victim	Murder	Severe deprivation of physical liberty and other inhumane acts	Rape	Enlisting children	Damages payable in francs equivalent to
53.	(V52 MDd)			Severe deprivation of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
54.	(V 56 NCF)			Severe deprivation of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
55.	V57 BBC			Severe deprivation of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
56.	(V58 OGD)			Severe deprivation of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo

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N.	Civil Party Direct victim	Indirect victim	Murder	Severe deprivation of physical liberty and other inhumane acts	Rape	Enlisting children	Damages payable in francs equivalent to
57.	(V59 BBJ)			Severe deprivation of physical liberty and other inhumane acts			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
58.	(V60 KBE)	Mr N.		Severe deprivation of physical liberty			2 000 IN SOLIDUM with the Democratic Republic of the Congo
59.	S.				Rape		USD 5 000 IN SOLIDUM with the Democratic Republic of the Congo
60.	V70 NAM			Severe deprivation of physical liberty	Rape		USD 6 000 IN SOLIDUM with the Democratic Republic of the Congo
61.	H. E 7 HAB					Enlisting children	USD 5 000 IN SOLIDUM with the Democratic Republic of the Congo
62.	V 62 FMU				Rape		USD 5 000 IN SOLIDUM with the Democratic Republic of the Congo

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<b>N.</b>	<b>Civil Party Direct victim</b>	<b>Indirect victim</b>	<b>Murder</b>	<b>Severe deprivation of physical liberty and other inhumane acts</b>	<b>Rape</b>	<b>Enlisting children</b>	<b>Damages payable in francs equivalent to</b>
63.	V 61 FNE			Severe deprivation of physical liberty	Rape		USD 6 000 IN SOLIDUM with the Democratic Republic of the Congo
64.	V 63 VMW			Severe deprivation of physical liberty	Rape		USD 6 000 IN SOLIDUM with the Democratic Republic of the Congo
65.	V 64 SJE			Severe deprivation of physical liberty	Rape		USD 6 000 IN SOLIDUM with the Democratic Republic of the Congo
66.	V 65 FCI			Severe deprivation of physical liberty and other inhumane acts	Rape		USD 6 000 IN SOLIDUM with the Democratic Republic of the Congo

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<b>N.</b>	<b>Civil Party Direct victim</b>	<b>Indirect victim</b>	<b>Murder</b>	<b>Severe deprivatio n of physical liberty and other inhumane acts</b>	<b>Rape</b>	<b>Enlisting children</b>	<b>Damages payable in francs equivalent to</b>
67.	V 66 NMU			<b>Severe deprivatio n of liberty</b>	<b>Rape</b>		USD 6 000 IN SOLIDUM with the Democratic Republic of the Congo
68.	V 67NKA			<b>Severe deprivatio n of physical liberty</b>	<b>Rape</b>		USD 6 000 IN SOLIDUM with the Democratic Republic of the Congo
69.	V 68 AKA			<b>Severe deprivatio n of physical liberty and other inhumane acts</b>	<b>Rape</b>		USD 6 000 IN SOLIDUM with the Democratic Republic of the Congo
70.	V 69 BKA			<b>Severe deprivatio n of physical liberty and other inhumane acts</b>	<b>Rape</b>		USD 6 000 IN SOLIDUM with the Democratic Republic of the Congo

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N.	Civil Party Direct victim	Indirect victim	Murder	Severe deprivation of physical liberty and other inhumane acts	Rape	Enlisting children	Damages payable in francs equivalent to
71.	V 71 KAS	Her husband (deprivation of liberty), her two sons (deprivation of liberty), her daughter (rape).		Severe deprivation of physical liberty and other inhumane acts	Rape She and her [REDACTED] year-old daughter were both raped		USD 6 000 IN SOLIDUM with the Democratic Republic of the Congo
72.	E 5 GKA			Severe deprivation of physical liberty		Enlisting children	USD 6 000 IN SOLIDUM with the Democratic Republic of the Congo
73.	E2 R EN			Severe deprivation of physical liberty		Enlisting children	USD 6 000 IN SOLIDUM with the Democratic Republic of the Congo
74.	E4 SBK			Severe deprivation of physical liberty		Enlisting children	USD 5 000 IN SOLIDUM with the Democratic Republic of the Congo
75.	N.	Wife raped and father-in-law of uncle killed		Severe deprivation of physical liberty and other	Rape of his wife		USD 6 000 IN SOLIDUM with the Democratic Republic of the Congo

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N.	Civil Party Direct victim	Indirect victim	Murder	Severe deprivation of physical liberty and other inhumane acts	Rape	Enlisting children	Damages payable in francs equivalent to
				inhumane acts			
76.	E1 TEM			Severe deprivation of physical liberty		<b>Enlisting children</b>	USD 5 000 IN SOLIDUM with the Democratic Republic of the Congo
77.	B.			Severe deprivation of physical liberty			USD 3 000 IN SOLIDUM with the Democratic Republic of the Congo
78.	N.					<b>Enlisting children</b>	USD 5 000 IN SOLIDUM with the Democratic Republic of the Congo
79.	S.					<b>Enlisting children</b>	USD 5 000 IN SOLIDUM with the Democratic Republic of the Congo

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N.	Civil Party Direct victim	Indirect victim	Murder	Severe deprivation of physical liberty and other inhumane acts	Rape	Enlisting children	Damages payable in francs equivalent to
80.	M.					Enlisting children	USD 5 000 IN SOLIDUM with the Democratic Republic of the Congo
81.	M.					Enlisting children	USD 5 000 IN SOLIDUM with the Democratic Republic of the Congo
82.	O.				Rape	Enlisting children	USD 6 000 IN SOLIDUM with the Democratic Republic of the Congo

N.	Civil Party Direct victim	Indirect victim	Murder	Severe deprivation of physical liberty and other inhumane acts	Rape	Enlisting children	Damages payable in francs equivalent to
83.	K.						USD 5 000 IN SOLIDUM with the Democratic Republic of the Congo
84.	K.		Murder				USD 10 000 IN SOLIDUM with the Democratic Republic of the Congo
85.	A.					<b>Enlisting children</b>	USD 5 000 IN SOLIDUM with the Democratic Republic of the Congo

N.	Civil Party Direct victim	Indirect victim	Murder	Severe deprivation of physical liberty and other inhumane acts	Rape	Enlisting children	Damages payable in francs equivalent to
86.	B.					<b>Enlisting children</b>	USD 5 000 IN SOLIDUM with the Democratic Republic of the Congo
87.	N.			FOR herself and her child  <b>Severe deprivation of physical liberty and other inhumane acts</b>		<b>Enlisting children</b>	USD 6 000 IN SOLIDUM with the Democratic Republic of the Congo

Orders the confiscation and destruction of all seized items.

Informs the defendant, who appears in person assisted by his counsels, that he has the right to lodge an appeal within five clear days of the date of this ruling.

The Military Court of South Kivu thus passed judgment in KATANA, at the public hearing of 21 September 2021, with a judicial panel consisting of Colonel Magistrate M., Senior Presiding Judge, Lieutenant-Colonel Magistrate N., Judge, Colonel K., Lieutenant-Colonel S., Member, Chief Inspector K., Member, with the assistance of the Public Prosecutor, represented by Colonel Magistrate M.,

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Military Prosecutor-General, and with the assistance of Lieutenant-Colonel B.,  
the Court registrar;

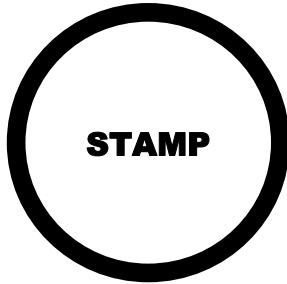
**The Registrar  
Judge**

**The Senior Presiding**

**Certified true copy of the original**

Bukavu, on

The Chief Registrar of the Military Court of South Kivu



**B.**

Lieutenant-Colonel

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