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JOINT OHCHR/MONUC HUMAN RIGHTS OFFICE IN THE DRC

**CONSOLIDATED REPORT ON INVESTIGATIONS CONDUCTED BY THE
UNITED NATIONS JOINT HUMAN RIGHTS OFFICE (UNJHRO) INTO
GRAVE HUMAN RIGHTS ABUSES COMMITTED IN KIWANJA,
NORTH KIVU, IN NOVEMBER 2008**

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1. Executive summary

1. The investigation conducted by the United Nations Joint Human Rights Office (UNJHRO) from November 2008 to the beginning of January 2009 into the Kiwanja killings of 5 November 2008, indicates that after the intense fighting between Mayi Mayi combatants and the *Congrès National pour la Défense du Peuple* (CNDP) had ended and the Mayi Mayi had retreated from Kiwanja, CNDP elements conducted targeted and reprisal killings of the villagers, mainly young men whom they suspected of being either members or collaborators of the Mayi Mayi. At the time of writing, the UNJHRO had confirmed 67 arbitrary executions perpetrated by the CNDP. However, unconfirmed allegations received by UNJHRO human rights officers (HROs) suggest that the number of victims could be much higher.

2. The CNDP took control of Rutshuru and Kiwanja on 28-29 October 2008, facing no resistance from the FARDC or the Mayi Mayi. On 4 November, Mayi Mayi fighters entered Kiwanja and heavy clashes erupted during the morning. The fighting first occurred in Buturande, where the Mayi Mayi kidnapped a Belgian journalist and his two Congolese colleagues as well as several prominent CNDP figures. The combat then shifted to other parts of the town, and the Mayi Mayi successfully forced the CNDP into retreat behind Kamulima hill, allegedly killing at least two CNDP officers.¹ On the morning of 5 November, the CNDP, reorganised and reinforced by troops arriving from nearby Rutshuru, re-entered the town and pushed the Mayi Mayi back. The Mayi Mayi retreated from Kiwanja and the CNDP then proceeded to conduct search operations, targeted and reprisal killings and other violations of human rights.

3. At the time of the incidents, MONUC had around 120 military personnel stationed in Kiwanja, in a military camp (COB) situated around 3 kilometres from the areas hit hardest by the fighting. Several patrols and missions to evacuate humanitarian personnel were launched on 5 November. In the aftermath of the Kiwanja killings, MONUC was strongly criticized for not having protected the civilian population, a task explicitly stated in its mandate and international law. The need for peacekeeping missions to operationalize protection is relatively new, and implementation methods are still very much in the developmental stages. Further training of military personnel in peacekeeping operations would be required. Further, the formulation of clearer criteria for exactly when peacekeepers are to intervene in order to protect civilians must take into account both the need for peacekeepers to possess *knowledge* of the dangers faced by civilians in a given situation, and the *capacity* of peacekeepers to make a positive difference in that situation. Evidence gathered during the UNJHRO investigation suggests that the military personnel who were present in Kiwanja at the time of the killings were not aware of the nature or magnitude of the situation, due to language and cultural barriers or lack of effective communication with civil society leaders in Kiwanja; these factors complicated the information flow between the former and peacekeepers, and contributed to the ensuing knowledge or information deficit. A greater communication-flow between the population and peacekeepers, as well as an enhanced understanding of the patterns of human rights violations, could have resulted in a more vigorous response from the peacekeepers vis-à-vis the protection needs of the civilian population. However, it is unclear whether any such response would have had the necessary dissuasive impact with regards to the CNDP. Given the proximity in time and place of most of the executions to the actual combat and the fact that the combat was urban in nature, it is doubtful that MONUC would have had the *capacity* to protect those civilians who were arbitrarily or summarily executed by the CNDP.

4. In response to lessons learned from the 5 November Kiwanja incidents and the outcome of the initial multidisciplinary investigation and fact-finding mission of 7 and 13 November 2008, MONUC

¹ It is difficult to confirm how many CNDP soldiers were actually killed during the fighting. Reportedly, some CNDP soldiers were either injured or killed in Mabungu area and near the Kiwanja roundabout. Mayi Mayi fighters told the local population that they had killed two high-ranking CNDP officers, but the victims' identity could not be properly verified.

decided that substantive sections, namely the UNJHRO, Civil Affairs (CAS) and Child Protection, should have a multidisciplinary team or a Joint Protection Team deployed in Kiwanja. The main objective is to allow for greater communication with the local population and increased understanding and trust between the community/civil society/authorities and MONUC military. It also creates a means to develop a human rights analysis of the situation, which could be integrated into future protection related activities of MONUC military. Once patterns of human rights violations emerge, more effective protection strategies can be developed and implemented. There is agreement throughout MONUC and the humanitarian community in general that this development has contributed to improved effectiveness in the area of protection. The Security Council recently provided an additional 3,000 uniformed personnel for MONUC, but no additional civilian resources to sustain and expand this effort. To fully operationalize Joint Protection Teams will require additional civilian staff, additional sub-offices and greater training of both civilian and military personnel involved in protection.

Regarding the 4-5 November events

5. Over 60 witnesses interviewed by the team identified 67 victims of targeted killings committed by the CNDP. The witnesses stated that after the Mayi Mayi had retreated on 5 November from Kiwanja, CNDP fighters proceeded to systematically execute mainly adult males, whom they accused of belonging to, or supporting, the Mayi Mayi. The UNJHRO team received as of yet unconfirmed allegations that a higher number of targeted killings had taken place. The CNDP has consistently rejected the allegations that its fighters carried out arbitrary executions of civilians in Kiwanja, claiming that those killed there were Mayi Mayi fighters who died in the context of the fighting.

6. In addition to the targeted executions carried out by the CNDP, the UNJHRO also received testimonies of civilian casualties which occurred during combat (two confirmed deaths and over 50 persons injured by gunshot).

7. The UNJHRO has also received allegations of the killing of at least one civilian and several abductions committed by the Mayi Mayi.

8. During the fighting on 4 November, a hotel, a number of private homes in the Buturande neighbourhood, and the Police Nationale Congolaise (PNC) station in Kiwanja were set afire by the CNDP.

After the 4-5 November events

9. During its missions to Kiwanja, the UNJHRO documented new cases of arbitrary executions and other serious human rights violations committed by the CNDP (two cases of arbitrary executions and three cases of violation of physical integrity, including one case of rape) and the FDLR (the execution of seven people and the rape of four women) during the period following the 4-5 November events.

10. The UNJHRO received reports of 10 cases of arbitrary arrest and detention carried out by the CNDP, involving at least eight young men and boys. Following UNJHRO intervention, the CNDP-appointed authorities in Kiwanja indicated that they had released all of the detainees.²

11. The UNJHRO also documented cases of abductions by the CNDP of at least 23 young men and boys. In two of these cases, escapees and witnesses testified that CNDP fighters had abducted the young men in an attempt to forcibly recruit them. The motivations for the other abductions are as of yet unknown.

² Human Rights Officers (HROs) of the UNJHRO have confirmed the release of four of the victims.

12. HROs observed that the camps for internally displaced persons (IDPs) in and around the city centres of Kiwanja and Rutshuru - with the exception of the IDP-site spontaneously created around the MONUC camp – were dismantled. Consistent witness testimonies stated that this occurred following instructions issued by CNDP officials after the group’s takeover of the local administration.

2. Methodology

13. Since the incidents of 5 November 2008, HROs have participated in six multidisciplinary field missions to Kiwanja:

- 7 November 2008: A multidisciplinary team led by the MONUC Head of Office of North Kivu.
- 13 November 2008: A fact-finding mission led by the MONUC Deputy Special Representative of the Secretary General (DSRSG).
- Multidisciplinary teams deployed from 14-19 November 2008, 19-24 November 2008, 24-28 November 2008 and 29-30 December 2008.

14. HROs from the UNJHRO were deployed in Kiwanja from 14 November until end-December when, due to staffing difficulties, their deployment was discontinued.³ The HROs in Kiwanja carried out at least one patrol in and around Kiwanja and Rutshuru daily, observing the security and human rights situation. During the team's numerous *in-situ* visits, in-depth interviews with victims and eyewitnesses were carried out in such a fashion as to avoid exposing victims and witnesses to reprisals or retaliation. The HROs carried out only limited and short conversations with the local population during the patrols, to minimize risk to those willing to give testimony.

15. The HROs communicated with their network in the area in order to cross-check information. The HROs revisited all the grave sites seen by the initial multidisciplinary investigation and have discovered new graves. Pictures were taken and a GPS was used to determine the exact location of each grave or burial site or dumping ground. In addition, the UNJHRO conducted investigations in Goma and Kibati in connection with the Kiwanja events. It is important to note that, in order to consider a particular incident as corroborated, the investigators went through a series of steps (e.g., interview with eyewitnesses, cross-checking of information with independent sources, on-site visit of grave or crime-scene). The figures provided in this report reflect the cases for which the investigators were able to satisfy all these requirements. Serious and credible allegations received by the team suggest a higher toll of victims but could not be verified in the conditions stated above (mainly due to security constraints) and therefore are not taken into account in the compilation of figures. When a particular allegation cannot be confirmed entirely but is nevertheless considered as worth mentioning in the report, it is clearly stated in the text that it has not been verified in its entirety.⁴

16. The aim of this report is to focus on the human rights abuses that took place during the month of November 2008 in the town of Kiwanja. Other abuses continued occurring in the area during the weeks that followed the take over of the town. In relation to cases of arbitrary arrest,⁵ the UNJHRO had opened a channel of communication with the CNDP. HROs interacted with the CNDP-appointed

³ The UNJHRO brought in additional staff from other provinces limiting ongoing work there. Temporary deployments to military camps are a hardship to civilian staff, much more so than opening a sub-office and transferring staff there. Temporary deployments also put a significant and unsustainable strain on the budget and create additional administrative demands. While an important development, additional resources and the change of various practices will be needed to sustain such temporary deployments.

⁴ This is particularly relevant regarding a series of alleged killings in areas close to CNDP positions where the investigators were not allowed to approach.

⁵ It is important to note that the CNDP legally cannot arrest individuals as it is not a state entity, even though they had been exercising state functions in the area under their control. Thus, these cases could be considered as abductions. But as both relate to the same underlying human rights, e.g. liberty and security of person, and the actions are closer in nature to an arrest than to an abduction, arbitrary arrest is used in this report to characterize these kind of arrest-like abductions where the arrest is an end in itself. The term abduction is still used in the report to define a situation closer to kidnapping where there is a further purpose to the detention (e.g., recruitment, ransom).

authorities in Rutshuru centre in order to obtain the release of numerous individuals who had been detained by the CNDP. HROs have advocated for the CNDP to end human rights violations. The first meeting with these authorities was held on 21 November 2008 in the Building of the Territorial Administration. The HROs met the person appointed by CNDP in charge of Justice, Human Rights, Traditional Affairs, NGOs and Social Affairs.

17. Cases of child recruitment have been brought to the attention of the relevant authorities and passed on to the Child Protection Section in MONUC (CPS) specifically charged with issues concerning minors. During the joint missions to Kiwanja, CPS investigated and documented several violations against children, including recruitment.

3. Context and overview of the events

3.1 Context

18. The town of Kiwanja is situated five kilometres north of Rutshuru (Territory of Rutshuru, Sector Bwisha, and Province of Nord Kivu). Rutshuru (72 km north of Goma) is an important urban centre (population around 70,000) in a strategic location on the crossroads between the main road linking the provincial capital Goma with the Grand Nord⁶ and the road heading to the Ugandan border crossing at Bunagana.

19. The Kiwanja incident occurred in the context of generalized fighting in North Kivu between the Congolese Tutsi-led rebel group CNDP and the Congolese National Armed Forces (FARDC - *Forces Armées de la République Démocratique du Congo*) supported by other forces such as different local defence militias called Mayi Mayi and the Rwandan-Hutu militia FDLR and, in retrospect, may well have occurred in the context of a power struggle within the CNDP.

20. The ceasefire established by the Goma Peace Agreement of 23 January 2008 was violated on 28 August 2008 when hostilities involving CNDP, the FARDC and other groups (PARECO,⁷ Mayi Mayi and FDLR⁸) resumed.

21. The main violations presented in this report took place after intense fighting on 4 and 5 November. CNDP took control of Rutshuru and Kiwanja on 28-29 October 2008, facing no resistance from the FARDC or the Mayi Mayi. On 4 November, Mayi Mayi fighters entered Kiwanja through the Buturande neighbourhood and heavy clashes erupted in the morning. The fighting first occurred in Buturande, where the Mayi Mayi kidnapped a Belgian journalist and his two Congolese colleagues and several prominent CNDP figures, near Grefamu hotel.⁹ The combat then shifted to Mabungu neighbourhood, where the Mayi Mayi pushed the CNDP into a coffee plantation behind Kamulima hill and allegedly killed at least two CNDP officers. The fighting continued during the afternoon. On the morning of 5 November, the CNDP, reorganised and reinforced by troops coming from nearby Rutshuru, re-entered the town via Kamulima hill and pushed the Mayi Mayi back. The Mayi Mayi then retreated from Kiwanja, again through Buturande neighbourhood and Mabungu. The CNDP then proceeded to conduct search operations, targeted and reprisal killings and other violations of human rights.

⁶ North Kivu Province is commonly divided into two areas, the *Grand Nord* (Territories of Beni and Lubero) to the North and the *Petit Nord* (Territories of Walikale, Masisi, Rutshuru, Nyiragongo and the city of Goma) to the South.

⁷ See section below, on the composition of these groups.

⁸ See section below, on the composition of these groups.

⁹ See below for more information regarding this incident.

22. The CNDP has thus far rejected the allegations of arbitrary executions of civilians of Kiwanja by its soldiers claiming that only Mayi Mayi combatants had been killed in the context of the fighting. The CNDP issued public statements and organized public meetings in Kiwanja rejecting any involvement in the 5 November killings. An official communiqué of the movement accused the Mayi Mayi of perpetrating the killings.¹⁰

23. In Kahunga (9 km from Kiwanja), a group of six men presenting themselves as FDLR were involved in killings and rapes committed after the events of 4-5 November (*see details below*). It seems unlikely that they belonged to the main FDLR group (as it had no known presence in the immediate vicinity) but it is possible that they are part of any of the multiple splinter groups operating in the area (FOCA, RUDI and SOKI).

3.2 Composition of forces and chain of command

CNDP

24. The CNDP (*Congrès National pour la Défense du Peuple* – National Congress for the Defence of the People) is a Congolese politico-military movement. At the time of the events described in this report, CNDP was led by General¹¹ Laurent Nkunda and his military Chief of Staff (CoS) was General Bosco Ntaganda.¹² CNDP claims to protect the interests of the Congolese-Tutsi minority and other Rwandophones in the Kivus that it sees as threatened by the presence of FDLR militias in Congolese territory.

25. CNDP had an estimated 4,000 to 6,000 soldiers that had effective control over roughly a third¹³ of Masisi and Rutshuru territories in North Kivu Province. There are no clear indications on the exact number of CNDP soldiers who participated in the Kiwanja operations and specifically in the fighting on 4 and 5 November. According to MONUC military sources, CNDP's combined strength in Kiwanja and Rutshuru in early November was probably around 300 troops. However, witnesses explained that CNDP presence in Kiwanja on the 4 November was relatively small as the majority of the troops were concentrated in Rutshuru (a distance of around 5 km). The Kiwanja HQ for the CNDP was situated in Kamulima hill¹⁴ and they retreated towards the coffee plantations and Rutshuru after the Mayi Mayi attack on 4 November. On 5 November, CNDP re-entered Kiwanja from Rutshuru road reinforced with troops and artillery previously stationed in Rutshuru.

¹⁰ The communiqué, in French, claims that Nande Mayi Mayi killed the civilian population of Hutu origin because they had betrayed them in favor of their Rwandophone brothers. It reads as follows (excerpt) : “Après des enquêtes préliminaires, le Mouvement réfute catégoriquement les crimes qui lui sont injustement imputés dans le dossier de KIWANJA. [...] Habillés en civil, des miliciens chassés trois jours plus tôt de la Cité y reentraient en force pour prêter main forte à leurs amis de l’intérieur et s’en rendaient totalement maîtres sans effort, le CNDP n’ayant laissé sur place qu’une poignée de soldats pour des patrouilles très relâchées. [...] Selon des témoignages recueillis, en effet, des consignes avaient été données aux miliciens Nande de liquider les Hutu, sous prétexte que ces derniers auraient trahi la cause en livrant KIWANJA à « leurs frères rwandophones ».”

¹¹ Former RPF (*Rwandan Patriotic Front*) and RCD-Goma officer, Laurent Nkunda was integrated into the FARDC with the rank of General but was later dismissed from the army in early September 2005 by the Government in Kinshasa. The ranks attributed to him and other officers in this report are self-appointments that reflect their current position in the rebel movement and not their past or present status *vis-à-vis* the FARDC.

¹² Bosco Ntaganda is wanted by the International Criminal Court (ICC) for war crimes committed in the region of Ituri, Orientale Province in 2002-2003 when he was the military commander of a different militia group (the FPLC or *Forces Patriotiques pour la libération du Congo*, the military wing of the UPC or *Union des Patriotes Congolais*). A sealed warrant of arrest against him was issued in August 2006 and made public on April 2008.

¹³ In December 2008.

¹⁴ A hill abuts Kiwanja town on one side and a coffee plantation and the road towards Rutshuru on the other. Reportedly the CNDP HQ was established in a residence belonging to the former governor of North Kivu, Mr. Eugene Serufuli that they had forcibly occupied.

26. The military structure of CNDP was organized into several operational sectors. Until October 2008, the area of Rutshuru and Kiwanja was under the operational responsibility of Colonel Sultani Makenga whose base was in Bunagana. However, credible sources informed the UNJHRO that before the attack on Kiwanja there had been a shift between the respective areas of responsibility of commanders Bosco and Makenga resulting in the move of Makenga to Masisi territory and the deployment of Bosco Ntaganda to Rutshuru Territory. On 5 November, General Bosco Ntaganda was the commander with responsibility over the operations in Kiwanja, not only due to his overall position as CNDP Chief of Staff but also in his capacity as regional commander of CNDP in Rutshuru territory. His deputy for these operations was Lieutenant-Colonel Mulomba Bahati, and the officer reportedly directly in charge of the operation of Kiwanja, was Lieutenant-Colonel Innocent Zimulinda. Other CNDP officers identified by witnesses as participants in the operation and present in Kiwanja are Major Castro, Major Murenze, Major Kipanga,¹⁵ Major Mupenzi and Captain Seku.¹⁶

27. In addition, after the occupation of Kiwanja, the CNDP appointed a civilian administrator, or *Chef de Cité*, Nzaba Mataru, who held the position until mid-November when he was replaced by another CNDP-appointed official Jean Nkulu.

28. Since the events of November 2008, several important developments have affected the general context. In January 2009, as a result of an internal struggle within the CNDP, CoS Bosco Ntaganda took over the command from Laurent Nkunda. The new leadership of CNDP then declared an end to hostilities on 16 January 2009. Nkunda was arrested by the Rwandan Government on 22 January 2009 and at the time of drafting of this report, is being held in custody in Rwanda. Following Nkunda's arrest, the Governments of Rwanda and DRC launched a joint military operation against FDLR in North Kivu. In March 2009, CNDP began a process of rapid integration into or merger with the FARDC.

Mayi Mayi

29. The generic term Mayi Mayi is used to describe traditional local defence militias that operated in the Kivus, Province Orientale, Maniema and Katanga often with a strong mystic component. In the context of the current North Kivu crisis, the main Mayi Mayi groups of the region are integrated into the alliance called PARECO (*Coalition of Patriotic Congolese Resistance*). The military leader of PARECO is Colonel Kakule Sikula La Fontaine.¹⁷ However, other independent Mayi Mayi groups continue to operate (standing alone or in coalition with FDLR, PARECO or FARDC) and it is difficult to establish clear lines of command. In times of relative peace, the term Mayi Mayi has been used to refer to clearly identified groups of combatants choosing to remain in the forest organized as guerrilla groups.¹⁸ However, in the context of generalized fighting, the Mayi Mayi may include any civilian, often untrained and poorly armed, willing to join the combat to protect his village/territory.

¹⁵ Major Ndayambaje Semakwengeri aka Kipanga is known to the UNJHRO for his problematic human rights record when he was a FARDC Captain and 2IC of the 813th Battalion FARDC/ex-RCD-G in Masisi before he joined CNDP.

¹⁶ Reportedly Captain Seku (or Nseku) has family ties with CNDP Commander General Nkunda, being either his brother or cousin. He was identified by some witnesses as main CNDP commander for Kiwanja although other witnesses give him a more political/ideological role. He participated alongside civilian CNDP-appointed authorities in a rally on Kiwanja's main round-about after CNDP first took control of Rutshuru and Kiwanja.

¹⁷ However, in the Grand Nord there are several Mayi Mayi groups that used to be (and may still be) under the command of La Fontaine but operate independently from PARECO. Apart from conflicts of leadership, one line of division is ethnic as in the homogenous Grand Nord the majority of Mayi Mayi groups are Nande. Lafontaine was one of the main leaders of the Nande Mayi Mayi movement (along with Vita Kitambala, James Matabishi, Jackson and Ndelemba with whom he maintained a lethal leadership struggle). PARECO on the contrary is formed mainly by Hutus, Hunde, Nande and Kovo from Rutshuru and Walikale (Petit Nord).

¹⁸ Either for mystical or training purposes, for gaining control over natural resources or for hunting or robberies.

30. In the case of Kiwanja it seems that the Mayi Mayi elements who fought the CNDP were a coalition of local youth and warriors from different Mayi Mayi groups. Mayi Mayi from the groups of “*Jeremie*” (based in Vitshumbi), the group of “*Complet*” (based in Nyamilima) and PARECO (“*Rocket brigade*” and Group of Pascal Kasereka), predominantly of Nande ethnic origin, are all present in the vicinity of Kiwanja. However, it is still unclear whether all these groups actually participated in the operation that took Kiwanja on 4 November. It is most likely that the action was carried out by the group “*Jeremie*” (the closest in location) with support from the local youth and isolated members from other Mayi Mayi groups (from Nyamilima and Kiyandoni). They probably operated in small autonomous groups without a clear structure or overall command.¹⁹ Reportedly, the attack on 4 November was led by a small group of 20-30 Mayi Mayi a few of whom had AK-47 assault rifles and hand grenades, spears, machetes and stones. It cannot be ruled out that this initial attack was later supported by the local population and other groups. There were unconfirmed reports of PARECO and even FDLR²⁰ joining the attack. According to MONUC military sources in Kiwanja, the total Mayi Mayi strength during the attack may have amounted to 200 individuals.

FDLR

31. The FDLR (*Forces Démocratiques de Libération du Rwanda*) is a politico-military movement that originates from the remnants of the ex-FAR (*Forces Armées Rwandaises*) and ex-*Interahamwe* militias and Hutu civilians who fled from Rwanda in 1994, some of whom were involved in the Rwandan genocide. The FDLR has an estimated strength of 6,000-7,000 combatants, divided into three brigades. Their military commander is General Sylvestre Mudacumura. In addition to the main FDLR, there are several smaller splinter groups.

3.3 MONUC presence in Kiwanja

32. At the time of the incidents MONUC had a military camp (COB) in Kiwanja with around 120 military personnel stationed there. The COB was situated around 3 km from Quartier Mabungo (the neighbourhood most affected by the fighting). A proportion of these troops were conducting patrols or specific missions during the day and this implies that the total effective of the camp at any given time was much smaller than 120. For instance, the COB launched a total of 13 missions between the 5 and 6 November to perform several civilian protection tasks such as the extraction of a group of nuns and 15 NGOs from Kiwanja city and their subsequent evacuation to Rugari (35 km south of Kiwanja) and the patrol sent to Kinyandoni (15-20 km north of Kiwanja) in search of the kidnapped journalists. In addition to these missions, the COB also launched foot patrols around the 4 to 5,000 IDPs that had gathered around the camp. The day of the Kiwanja incident, MONUC militaries stopped the CNDP from sending back the IDPs into town.

¹⁹ During the negotiations leading to the release of the Belgian journalist held hostage by the Mayi Mayi MONUC had to deal with 4 or 5 different Mayi Mayi groups operating in the same area. It has been reported that the Mayi Mayi were under the command of Colonel Pascal Kasereka but some of them contested his authority. A man known as Willy from Vitshumbi has also been identified as one of the Mayi Mayi who commanded the operation. Some witnesses have identified local businessmen as leaders of the local Mayi Mayi of Kiwanja.

²⁰ In particular, references have been made to FDLR support to the Mayi Mayi along the road Kinyandoni-Nyongera, outside Kiwanja.

33. In the aftermath of the Kiwanja killings, MONUC was criticized for not having protected the civilian population, a task explicitly stated in its mandate²¹ and international law. MONUC had around 120 military personnel based in Kiwanja, who were tasked with protecting the civilians in several villages located in their vast area of operations (areas located between 20 and 60 km from Kiwanja) with a population of over 100,000 people. The need for peacekeeping operations to operationalize protection is relatively new, and implementation methods are still very much in the developmental stage. Military peacekeeping personnel are normally trained for offensive or defensive operations; the protection of civilians in a conflict not directly involving the peacekeepers offensively or defensively requires the adoption of new methods, specific training and clarity from troop contributing countries, that this is in fact the role of peacekeepers. Criteria for when to intervene to protect must take into account the need for peacekeepers to possess knowledge of the dangers faced by civilians in a given situation, and of the peacekeepers capacity to make a difference in that situation. The criteria are also underdeveloped and not fully inculcated into the work of peacekeepers.

34. There was certainly a knowledge deficit in Kiwanja. The communications flow between MONUC military personnel and civil society leaders in Kiwanja was not overly effective, due in part to language and cultural barriers. Evidence gathered during the investigation suggests that the military personnel who were present in Kiwanja at the time of the killings were not fully aware of the nature or magnitude of the situation. Importantly, there was also a problem of capacity. As most of the arbitrary executions that were confirmed by the JHRO took place shortly after fighting between the CNDP and the Mayi Mayi, it is uncertain whether capacity to intervene existed in real time. It is difficult for any military or police action to prevent or stop shooting in an urban area. As the MONUC camp reported hearing shooting into the afternoon of 5 November, and noticed many people coming to the camp for safety, they were unable to distinguish between the fighting and the executions, which, for the most part, were committed around midday. Apparently, MONUC military personnel believed that fighting was ongoing. A greater degree of contact with the local population, as well as a greater understanding of local patterns of human rights violations, may have improved knowledge sufficiently for MONUC to patrol during the killings, but given the proximity in time and place of most of the executions to the actual combat, it is still not clear whether the peacekeepers would have realized at exactly what stage actual fighting ceased and the arbitrary killings and summary executions begun, and how and when to intervene. MONUC military personnel did patrol in the relevant area in the afternoon, and found a number of corpses. In light of the above, Kiwanja illustrates the need to confront the challenges of protection of civilians in the context of peacekeeping missions in areas where complex armed conflicts occur. There is a need for specific goals to be defined to improve the UN's understanding of this issue and its capacity to maximize the organization's ability to effectively carry out protection work.

²¹ Previous United Nations Security Council resolutions had already made reference to the protection of civilians under imminent threat of physical violence, including resolutions 1265 (1999), 1291 (2000), 1296 (2000), 1674 (2006), and 1738 (2006). Security Council Resolution 1856 of 22 December 2008 makes the concept a priority and conceptualizes the responsibilities. Before United Nations Security Council Resolution 1856 of 22 December 2008 clarifying that the protection of civilians is MONUC's top priority, there were MONUC staff that believed protection of civilians was only one of the 50 tasks they had to perform.

4. Human rights violations

4.1 Human Rights abuses committed by CNDP on 5 November 2008

Killings and/or arbitrary executions

35. During its missions in Kiwanja, the team gathered detailed testimonies from over 60 individual witnesses of the killings. It held numerous discussions with other witnesses of the events. The collected testimonies indicate that the killings occurred after the CNDP regained control of Kiwanja on 5 November following a Mayi Mayi attack on the CNDP in Kiwanja on 4 November.

36. The team gathered consistent witness testimonies indicating that after the Mayi Mayi retreated from Kiwanja, in the morning of 5 November, the CNDP began killing civilians in a systematic fashion in several areas of the town including *quartiers* Mabungu, Buturande and Buhunda. These attacks, later referred to by the population as “*opération ratissage*”, were likely carried out as a reprisal for the alleged support of the population for the Mayi Mayi or because the individuals were suspected of being Mayi Mayi.²² The fact that the combat broke out suddenly in Buturande and spread to the Mbungo area and the fact that most Mayi Mayi combatants do not wear military uniforms, may have given the impression that the Mayi Mayi either were from this part of town or were hiding in the town. This could be a reason why the CNDP particularly targeted houses in this part of Kiwanja. In addition to the 67 victims killed in the immediate aftermath of the fighting, sporadic shooting continued to be heard during the rest of the afternoon and evening.

37. The witness testimonies collected by the team identified 67 victims who were wilfully killed or arbitrarily executed on 5 November. Reportedly, all the victims were Hutu or Nande²³ and were mostly young males, accused by the CNDP of belonging to, or collaborating with, the Mayi Mayi. In several cases, the assailants asked for money and other valuables and killed those who could not provide what they were asking for. Among the victims were also two women, eight children and three elderly men.

38. Witnesses stated that on 5 November, starting around 10:30 a.m. and continuing until around 12:00 noon CNDP fighters broke into private homes and summarily executed the victims inside or near their homes. During its field visits, the UNJHRO carefully inspected the outside walls of some houses in which corpses were found and could not see any bullet impact, which corroborates consistent witness statements that assailants opened the doors or broke into the houses to execute the victims.²⁴ According to witness statements, several victims were killed with knives, machetes, hoes or similar objects, a fact that supports the idea that they were executed when already under the control of the perpetrators rather than in the context of fighting.

39. According to local sources, a total of 68 identified and 32 unidentified corpses were recovered at various locations within Kiwanja and buried in individual or mass graves. The UNJHRO team visited 29 of the burial sites located in *quartiers* Mabungu and Buturande that reportedly contain 54 of the victims. The HRO team could not visit the other graves because of security concerns. In addition to the grave sites, the team was shown four latrines in *quartier* Mabungu II and on Kamulima hill,

²² Reportedly CNDP officials had said in public meetings with the population of Kiwanja, both before and after 5 November that the Mayi Mayi were “*the sons of the population of Kiwanja*” and that people of Kiwanja should sensitize the Mayi Mayi to stop combating the CNDP or else all the population of Kiwanja would be considered Mayi Mayi accomplices. This supports the idea that the “*opération ratissage*” was a retaliatory action.

²³ Hutu victims significantly outnumber Nande victims.

²⁴ CNDP in its response to a letter from the SRSG on the killings in Kiwanja indicated that those who died in Kiwanja died in combat or in crossfire. The physical evaluation of the area corroborates testimonies indicating that arbitrary executions were committed.

quartier Mabungu I, in which CNDP elements reportedly dumped the bodies of 9 persons after killing them. The emanation of a strong odour in those sites was a clear indication of the presence of decomposing bodies. Consistent witness testimonies indicated that a large number of killings occurred on the Kamulima hill, situated in *quartier* Mabungu,²⁵ where the CNDP had established its position. Survivors declared that on 5 November, CNDP elements broke the doors of the houses, took the people to their position or to the coffee plantation and killed them. Bodies were reportedly dumped in toilets and garbage piles near the CNDP position and in the coffee plantation. After November 5, the CNDP had forbidden access to that area. After receiving allegations that dead bodies could be found in the coffee plantation, the HROs tried to go to the spot but were threatened by a group of CNDP soldiers who ordered them not to advance any further. Consequently, only a small proportion of the allegations concerning this area could be effectively verified. On 20 November, when CNDP advanced toward Ishasa, villagers were able to go back to Kamulima. They reportedly found bodies already in an advanced state of decomposition and therefore hard to identify. On 25 November, the UNJHRO went to Kamulima hill and was shown several individual and mass graves and a dead body in a field near the hill.

40. All the testimonies gathered describe the authors of the executions as soldiers of Tutsi ethnicity or as “Rwandan” soldiers,²⁶ dressed in camouflage military uniforms and speaking Kinyarwanda. Many witnesses explicitly identified them as CNDP soldiers and declared that at that very moment, there were no other soldiers in the area, as the Mayi Mayi had retreated and there was no FARDC or FDLR presence in Kiwanja at that moment. Examples of testimonies follow:

41. A 58-year-old man, who witnessed the killings while hiding in a neighbouring house, declared: « *On Wednesday [5 November], my two sons, their two cousins and a friend had hidden in the house. Five CNDP elements came and asked the boys to open the door because they knew that Mayi Mayi combatants were hiding in that house. They said: “open the door, otherwise we will kill you.” The boys opened the door. They killed one of them inside the house and took the others outside and killed them near the house. They used guns and knives. I was hiding in a house nearby and could hear the boys screaming when they were being killed. My neighbours who watched the scene through their windows confirmed that the assailants were CNDP soldiers*».

42. A 14-year-old boy who witnessed the events reported: « *It was Wednesday, around 12 o'clock. We were locked in the house and we could hear gunshots all around. My mother was cooking and my father was sitting near the door. Two men in camouflage uniforms and carrying guns entered the compound. Without saying anything they shot my mother in her belly. She fell on the fire and died. They shot my daddy in the ribs and he died on the spot. I wanted to tell the man to kill me as well, but the other children prevented me from doing so*».

43. A widow who also witnessed the incidents stated: « *On Wednesday around 12 o'clock, I was in the house with the children. After the shooting had stopped, my husband went from the house to the (outside) kitchen and was approached by two armed men who spoke in Kinyarwanda. One of them told the other “kill him, kill him. I heard a gunshot. One of the men said « thank you » and they left* ».

44. A 58-year-old woman declared: « *On Wednesday, after the Rwandans came from the hill and chased the Mayi Mayi, four such soldiers entered the house at 11 o'clock and killed my daughter. They spoke Kinyarwanda and one of them said “kill them” and another soldier immediately fired two*

²⁵ Locals from Kiwanja reported that during public rallies held in the town before the events, CNDP authorities accused prominent Nande figures from the Buturande areas of sustaining the Mayi Mayi and warned the population against an uprising. It should be noted that there was a high concentration of killings in the Hutu-populated Mabungu area.

²⁶ The term Rwandan is commonly used by non-Tutsi local population to describe people of Tutsi/Hutu ethnicity speaking Kinyarwanda and it does not imply that they are Rwandan citizens.

gunshots in the woman's belly. The same bullets had also hit my four year old grand-son who was being carried by my daughter on her back. He died on the spot».

45. Another man stated: *« They entered the house and took my two brothers to the neighbour's compound, where they asked them to lie on the ground. The neighbour reported that he had heard the victims praying and that they had been shot dead with a bullet in their neck. After killing my brothers, they returned to the house to kill their children, but when they heard that there were only girls, they left».*

46. A young girl from Kamulima hill stated: *« On 5 November, at 8 o'clock in the morning, a first group of three Tutsi soldiers came to intimidate my family and asked for money. We gave them money. Later on, a second group of soldiers came and asked for money. We gave them money as well. A third group came and asked for money. We gave again. A fourth group had also asked for money and we gave. The fifth group came and asked for nothing, but took away my father, killed him with a knife and dumped him in the neighbour's toilet. The seventh group took me to their position and obliged me to lie on the dead bodies of two young men. They told me that they would kill me starting from the belly, continuing with the head and ending with the feet. Their commander told them to stop, because it was bad luck to kill a young girl. Next group wanted to launch a grenade on our house, but the commander told them again "it is bad luck; you should find another way of killing them". They looted everything instead. A last group told us to go, because otherwise we would all be killed».*

47. Although the focus of this section was the arbitrary executions that took place after the combat had ended and these executions have been identified as such through witness testimony and on-site visits, it is important to clarify that these executions do not account for the total casualty toll of the Kiwanja incident. Apart from the executions, reportedly there were other casualties in Kiwanja including belligerents who died in combat and civilians were attacked indiscriminately. At least two people were killed by mortar shells that pierced their houses during the combat. Between 5 and 7 November, 50 persons with bullet wounds sought medical care. The UNJHRO has no indication as to whether these persons were civilians or combatants and whether the victims were targeted or caught in the cross fire. All these casualties are not included in the figures given above that refer exclusively to victims of arbitrary killings and that were not (or were no longer) participants in the fighting.

4.2 Human Rights abuses committed by CNDP in the weeks following the 5 November killings

Killings/Rapes

48. After 5 November, the UNJHRO documented two cases of arbitrary killings, two violations of physical integrity and one rape committed by CNDP soldiers and received a number of allegations of arbitrary executions that could not be verified.

49. On 6 November, CNDP elements allegedly stopped a 27-year-old man of Hunde ethnicity in the Buzito area of Kiwanja city and tried to arrest him. When the young man tried to resist, the perpetrators shot him in the leg and attack him several times in the chest with a knife. The victim survived, but was in a critical shape and had to be admitted to a hospital for medical treatment.

50. In the afternoon of 15 November 2008, a 21-year-old Hutu man, who was visiting his family in the Mabungu area, was called by a group of 12 heavily armed CNDP elements who asked him to guide them on their way to their position on Kamulima hill. The man walked with them in the direction of the hill. According to a witness who had been abducted by the same CNDP group, the intention of the CNDP elements was to abduct the young man along with 6 other young men in the Mabungu area that day (perhaps to forcibly recruit them). When the young man tried to escape, he was shot by one CNDP element. The witness managed to escape later. The UNJHRO was patrolling in the area when the

incident occurred. Alerted by the local population, the HROs went immediately to the site of the crime and saw the dead body of the victim and CNDP soldiers still present on the spot.

51. Also on 15 November around 7:00 pm, a 40-year-old Nande man was shot dead by two CNDP elements near his house in *quartier* Buzito in Kiwanja. The victim was well known in Kiwanja, as he was an evangelist of the CBCA protestant Church and a commentator at Radio RTDH.

52. During the night of 20-21 November, around 11:00 p.m., a 34-year-old woman was raped by a CNDP soldier in an abandoned school occupied by IDPs, 80 meters away from the MONUC base. According to eyewitnesses, while one of the soldiers was raping the victim, three others were actively beating-up and looting personal effects of the IDPs. Before leaving the place, the soldiers allegedly arrested one young man accusing him of being a Mayi Mayi and forced him to follow them. The victim reported that while he was following these CNDP soldiers towards Rutshuru, they threatened to kill him. He told them time and again that he was not Mayi Mayi. He called for their mercy by asking: *“Isn’t it enough that you’ve raped my wife? Do you really have to kill me?”* Following this conversation, the soldiers beat him up and released him.

53. On 17 November, around 6:30 p.m., a 24-year-old man was chased along the main road of Kiwanja, *quartier* Buzito, by an undetermined number of CNDP elements who wanted to arrest him. When they saw that they could not catch him, they shot him. The victim was injured in the leg. A team composed of two HRO and members of MONUC military contingent was patrolling in Buzito at that time and heard the gunshot.

54. At least 15 various sources reported that there were dead bodies in the fields near the CNDP position situated at the Kamulima hill, Mabungo area, Kiwanja city. At this stage, it is unclear whether these people were killed on 5 November or thereafter.

Displacement of population

55. All IDP camps in and around Kiwanja and Rutshuru centre, with the exception of the IDP site spontaneously created around MONUC base which was protected by the peacekeepers, have been dismantled. Consistent witness testimonies stated that this occurred following orders given by CNDP authorities. Abuse and harassment of internally displaced persons (IDPs) by troops or civilian personnel associated with the CNDP continued in the area of Kiwanja after the events of 5 November. People who had fled their homes to take refuge near MONUC bases were instructed to go back to their residences under the threat that if they did not, their houses and land would be confiscated. Some of these houses have been padlocked. Both the initial dismantlement of IDP camps and the pressures inflicted upon newly displaced persons to return to their homes seem an intentional policy to prevent the establishment of IDP camps in CNDP-controlled territory. However, in essence it could constitute a forcible transfer of population; a practice that is a crime under international criminal law and also violates the Guiding Principles on Internal Displacement.

Arbitrary arrests, abductions and forced recruitment

56. During its missions, the UNJHRO received reports of widespread arbitrary arrests, abductions and forced recruitment of young men in Kiwanja and Rutshuru. There were often no clear indications on whether the victims were arrested or abducted for forced recruitment purposes or for other purposes. In several cases, the victims were accused of collaborating with Mayi Mayi, FDLR or FARDC. In the present report these cases are not analyzed in detail except in those cases connected to executions (*see above*).

4.3 Abuses committed by Mayi Mayi and FDLR combatants

57. On 4 November, when they first entered Kiwanja, the Mayi Mayi abducted a Belgian journalist,²⁷ Thomas Scheen, a Congolese journalist working with him and their driver while they were with a CNDP-appointed official named Theophile Mpabuka. They were taken to a house in the main avenue of Kiwanja, in front of Grefamu hotel where they were kept during that day. Among the Mayi Mayi in the house was one of their supposed commanders, Pascal Kasereka. On that day the Mayi Mayi also captured two civilians believed to be close to CNDP²⁸ and two CNDP soldiers. The whole group was later moved to the forest, towards Mabenga. In Mabenga, the Mayi Mayi and Mr. Mpabuka the commander allegedly arrived at an agreement in relation to a ransom sum to be paid for the release of the five CNDP supporters (Theophile Mpabuka, CNDP official, the two civilians and the two soldiers). On 6 November, Mr. Mpabuka was allowed to go to Kiwanja to obtain the ransom but he failed to return. The UNJHRO has received allegations that as a result of the non-payment of the ransom, one of the CNDP soldiers and one of the civilians (Sebudurumba) were executed while the other two managed to escape. However, the HROs were not able to confirm these allegations. The two journalists and their driver were moved towards Kinyandoni on 6 November and on 7 November three Mayi Mayi leaders handed them over to the FARDC 6th Integrated Brigade based in Kinyandoni at the time.

58. On 23 November 2008, a witness residing in Kiwanja reported that shortly before the 4 November attack, a Mayi Mayi group recruited a number of young men and children.²⁹ The witness mentioned that when he came home one day and was informed that his 12-year-old son had followed his friends who had been recruited by the Mayi Mayi, he managed to find the whereabouts of the children and brought his son back home and thereafter brought him to Goma where he is currently attending school. The same source described to the HROs how the Mayi Mayi had recruited a number of young men in Kiwanja and Rutshuru a few days before the capture of Rutshuru and brought them to the battle field in Rubare (10 km south of Kiwanja) in order to reinforce the FARDC who were desperately losing ground in their fighting against CNDP. According to the witness, these young men were sent to the battle field without any weapons, without any equipment for their protection and without any training whatsoever. They were told that weapons were not necessary for a Mayi Mayi and that if they grab a stone and throw it at the enemy, it will turn into explosive which will destroy them. Likewise, they were told that if they were fired at, the bullets would turn into water.

59. The UNJHRO also documented seven arbitrary executions and four rapes in Kahunga (outskirts of Kiwanja) apparently carried out by members of an FDLR group. On 26 November, a group of four males (including 12- and 15-year-old boys), and eight women (including a 16-year-old girl), who went to cultivate their fields in Kahunga, 9 km from Kiwanja, met 6 unidentified armed men who obliged them to collect the crops for them. The armed men took the 12 persons to the forest, where according to witnesses, they shot dead the four males and beat four of the female victims with sticks (three of whom died as a result of the beating) and raped the other four. They later dumped the bodies in a nearby ravine. The leader of the perpetrators presented himself as FDLR and was wearing military pants. The others were dressed in civilian clothes. Among those, the victims recognized one FARDC soldier who used to be attached to the 15th Integrated Brigade and two men from Kahunga village. The other two could not be identified. The men allegedly stated: “*We will kill you because you*

²⁷ Working for the German daily newspaper *Frankfurter Allgemeine Zeitung*.

²⁸ Called Sebuduruma and Micho.

²⁹ MONUC Child Protection Section received several allegations of systematic door to door recruitment of children by CNDP in Kiwanja and Rutshuru. According to local sources, the recruitments started when CNDP first took control of Rutshuru and Kiwanja on 28-29 October 2008. After the events of 4-5 November in Kiwanja, CNDP elements reportedly continued with the recruitment of minors. CPS documented several allegations; three cases of recruitment by CNDP elements on 17 November 2008 in Kiwanja, Kiringa and Kihuma could be verified.

are with CNDP militiamen.” The perpetrators spoke both Swahili and Kinyarwanda. The bodies of the victims were recovered later. The woman who survived the beating was later hospitalized.

5. Legal framework

60. The acts committed in Kiwanja can be categorized under different national and international instruments. Under Congolese domestic criminal law, the actions defined – for the purpose of this report – as killings or executions would be qualified as *meurtre* (murder) by the Congolese Criminal Code³⁰ (*assassinat* or premeditated murder if premeditation is proved). Under the perspective of Military Justice (generally understood to be currently competent in DRC for trying all crimes committed with weapons of war³¹), the facts could be defined as crimes against humanity according to the Congolese Military Criminal Code.³² Specifically in art. 171, the Code provides that retaliatory killings (*la mise à mort par représailles*) is equal to premeditated murder (*assassinat*) and is one of the acts included in the definition of crimes against humanity. Attacks against civilian population and *hors de combat* are also included in this definition. Art. 165 clarifies that crimes against humanity can occur without a formal declaration of war and among members of the same State (a rephrasing of the “armed conflict not of an international character” used by the Geneva Conventions).

61. From an International Humanitarian Law perspective, the facts can be defined under different instruments. First of all, many of the victims of executions were non-combatants. Common Article 3 of the Geneva Conventions applies in non-international conflicts and describes minimal protections to non-combatants, combatants who have laid down their arms and combatants who are *hors de combat*.³³ The provisions of Common Article 3 must be adhered to by all individuals within a signatory's territory during an armed conflict not of an international character and include the prohibition of violence to life and executions without judgement. Common Article 3 is applicable to the events of Kiwanja as the DRC is Party to the Geneva Conventions and this article covers not only authorities of the State Party, but all individuals acting within its territory.

³⁰ Articles 44-45 of the Congolese Criminal Code (Code Penal, Decree of 30 January 1940).

³¹ This understanding could be disputed in view of the Constitution but the discussion goes beyond the scope of this report.

³² Arts 165-172 of the Congolese Military Criminal Code (Code Penal Militaire, Law 024-2002 of 18 November 2002). It is important to note that the definition of crimes against humanity and war crimes under Congolese Domestic Law does not correspond with the meaning of both expressions under international criminal law (as crystallized in the ICC Statute).

³³ Common Article 3 Geneva Conventions: “*In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:*

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (...)
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced (...).”

62. Grave breaches of the Geneva Conventions constitute war crimes according to the Rome Statute establishing the International Criminal Court.³⁴ In addition, under the same Statute, murder constitutes a crime against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” The analysis of whether or not the so-called “umbrella requirements” (the widespread and systematic attack, etc.) were fulfilled in Kiwanja goes beyond the scope of this report. It is worth pointing out however, that the majority of victims were reportedly unarmed civilians.

63. In a situation of armed conflict, it is generally understood that International Humanitarian Law is *lex specialis* to human rights law³⁵ and therefore humanitarian law definitions (wilful killing, violence to life and person, murder as crime against humanity) are used to characterize the factual elements of the crime.

64. Although the investigation at the origin of this report was focused on the killings committed in Kiwanja, brief mention is made of the dismantlement of IDP camps. In the weeks after the Kiwanja killings, MONUC received reports of exactions and harassment of internally displaced persons (IDPs) by troops or civilian personnel associated to the CNDP. Reportedly, CNDP requested some IDPs that had taken refuge near MONUC bases to go back to their residences under the threat that if they did not, their houses and land would be confiscated. This again constitutes a violation of the Guiding Principles on Internal Displacement. Forcing IDPs -by threat or coercion- either to leave a certain area or to go back once they had departed may be considered under different perspectives. The freedom of movement within a given State is recognised by the Universal Declaration of Human Rights (art. 13) and the International Covenant of Civil and Political Rights (art. 12.1). In the complicated and ethnically sensitive situation of the Kivus, any attempt to move or incite the movement of unwilling civilians for reasons other than the protection of their own security could be open to different interpretations, some of which imply serious legal consequences. Deportation or forcible transfer of population is a crime under international humanitarian law.³⁶ Further investigations should verify allegations that the displacement was also an attempt to use these populations as shield against military attacks.

65. CNDP, Mayi Mayi and FDLR were also responsible for other actions defined as criminal both under national and international law (e.g., rape, ill treatment).

³⁴ Art. 8.2 ICC Statute: “For the purpose of this Statute “war crimes” means:

a) Grave breaches of the Geneva Conventions of 12 August 1949, namely any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) willful killing (...)

c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture

³⁵ See e.g., International Court of Justice, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons of 8 July 1996 “...In principle, the right not to arbitrarily be deprived of one’s life applies also in hostilities. The test for what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities...”

³⁶ The Statute of the International Criminal Court (art 7.d) includes deportation or forcible transfer of population among the list of acts that may constitute a crime against humanity. Deportation, illegal transfer or illegal detention are also grave violations of the Geneva Conventions of 1949 that may constitute a war crime under the terms of the ICC Statute (art 8.2.a.vii, art. 8.2.b.viii, art. 8.2.e. viii).

6. Conclusions and recommendations

6.1 Conclusions

66. After several investigation missions carried out in Kiwanja, the UNJHRO gathered evidence on the arbitrary execution of 67 persons by CNDP on 5 November. The team received numerous allegations indicating that the number of victims was higher, but it was unable to confirm this higher number due to security constraints at the time of the investigation.

67. These arbitrary executions occurred after the Mayi Mayi retreated from Kiwanja on 5 November. These followed heavy fighting when the Mayi Mayi took and then lost Kiwanja to the CNDP. There were a number of casualties due to this fighting. The evidence collected so far suggests that in addition to casualties suffered by both the Mayi Mayi and the CNDP during the fighting, two civilians were killed and several others wounded as a result of the fighting. At least 67 victims were arbitrarily executed on 5 November by CNDP soldiers probably because they were suspected of being Mayi Mayi or as a reprisal for the population's perceived support to Mayi Mayi fighters. They were not killed in crossfire, but were arbitrarily executed, often inside their houses, after fighting had stopped.

68. As the killings took place after the fighting or *hors de combat*, whether those who were arbitrarily executed were civilians or surrendered/defeated Mayi Mayi combatants, does not change the nature of the violation. Additionally, the fact that a large number of victims were asked for money or other valuables before being looted and the fact that women, children and elderly men were among the victims, suggests that the killings did not occur in a context of an armed confrontation between combatants and were not exclusively aimed to eliminate real or suspected enemies. Several killings done with sharp tools (knives or machetes) further support the conclusion that the killings were indeed executions of victims that were already under the control of the perpetrator and no longer posed a risk.

69. The fact that killings took place simultaneously in several different areas of Kiwanja and that they were preceded, days before the events, by public warnings by CNDP authorities that in case of a Mayi Mayi attack, the population would be held responsible may suggest that, at least to a certain extent, the "*opération ratissage*" was retaliatory in nature and ordered and condoned by the command of the CNDP. The exact extent of planning of the operation cannot be determined as some of the actions described by some witnesses (e.g. extortion of valuables, victims spared to avoid "bad luck") suggest that each small group of soldiers obeyed their own particular wills within the framework of some general guidelines.

70. Such acts amount to serious human rights violations and violations of international humanitarian law can be qualified as international crimes, including war crimes and crimes against humanity, for which the perpetrators should be held accountable.

71. Moreover, in the period following 5 November, CNDP continued to commit serious human rights abuses.

72. CNDP, Mayi Mayi and FDLR were involved in serious human rights violations and criminal offences under international and Congolese law.

73. MONUC troops in the Kiwanja area did not have the *understanding* of the nature and scope of the human rights violations taking place in the proximity of its camp. It is also unclear whether MONUC military personnel had the *capacity* to intervene to stop urban warfare and/or the executions. It will be critical that the UN and the international community make the needed changes and

investments to build both the *understanding* and the *capacity* to allow peacekeepers to know when fighting has mutated into executions and how and when to intervene to stop it.

74. The lack of understanding by the troops stationed in the MONUC military camp in Kiwanja of the nature and scope of what was happening around them is related principally to the following factors: protection is a relatively new role for peacekeepers and troop contributing countries have not yet fully recognized this role or adequately trained their troops for this type of activity; peacekeeping operations are structured with exponentially more military than civilian personnel, making it difficult to create military-civilian teams with the capacity to establish solid community relations and to know the patterns of human rights violations occurring in the area; the criteria for when to intervene to protect civilians are underdeveloped.

75. Even considering the numerous structural hurdles MONUC faces with regards to protection of civilians, it is clear that additional understanding of and communication with the community where it is operating is essential to maximizing its protective capacity.

76. Certain lessons have been learned by MONUC, for example, regarding the utility of joint civilian-military presences to enhance protection capacity, but the ability to put this learning into practice on a wide scale is limited by political and bureaucratic realities. For example, this learning has not yet been reflected in Security Council actions (e.g., deploying more troops and police, but no additional civilians in their November 2008 resolution).³⁷ Administrative support plans for peacekeeping operations are created years in advance; budgets and staffing tables are very difficult to change to reflect recent substantive development. Even if more civilian staff had been approved by the Security Council, it would realistically take at least six months to create the posts and recruit the necessary personnel. Learning what is needed happens much more quickly than experimenting to determine if the right formula has been found. Kiwanja should be looked at as the beginning of a more serious process – a process limited by political, historic, organizational, cultural and bureaucratic realities – but nonetheless, a process toward operationalizing the protection mandate. The challenges involved in this task are greatly underestimated at all levels.

6.2 Recommendations

6.2.1 Specific recommendations for the Kiwanja incident

77. To the Government

The Government of the DRC must take the necessary actions:

- To investigate the incidents, identify responsibilities and punish perpetrators of serious human rights violations crimes committed in Kiwanja;
- To ensure that CNDP officers and soldiers involved in the Kiwanja massacre are not in active service in the newly merged CNDP/FARDC force;
- To ensure that all alleged perpetrators, including those associated with the Mayi Mayi, are excluded from service in the FARDC;

78. To the other parties implicated in the Kiwanja incidents (the CNDP and the Mayi Mayi)

³⁷ UN Security Council Resolution 1843 of 20 November 2008.

The leadership of the different groups comprising the Mayi Mayi movement must take actions:

- To ascertain the identity of the participants in the Kiwanja battle, in particular of those who are suspected of having committed serious human rights violations and international crimes;
- To refer the perpetrators to the Congolese judiciary, and provide full cooperation to the relevant authorities to investigate and prosecute them.

While the CNDP has taken responsibility and rectified certain abuses such as arbitrary arrests, it has not taken responsibility for the arbitrary executions committed in Kiwanja. The CNDP should take immediate action:

- To cooperate with the DRC judicial authority in the investigation and prosecution of those responsible for serious human rights violations in Kiwanja;
- To cooperate with the DRC judicial authority, or with the International Criminal Court (ICC) if the DRC authority is unable or unwilling to investigate and prosecute of alleged crimes committed by CNDP soldiers in Kiwanja.

In this regard, Mayi Mayi and CNDP commanders must be aware that under international humanitarian law and international criminal law, command responsibility also derives from failing to take all necessary and reasonable measures to prevent or repress the commission of the crime or failing to submit the matter to the competent authorities for investigation and prosecution.

6.2.2 General recommendations

79. To the Government

The Government of the DRC must take the necessary actions:

- To immediately cease the deliberate attacks targeting civilians and civilian objects, and to refrain from involving civilians in the conflict, particularly the use of civilians as human shields, pillaging, forced displacement;
- To identify those elements of FDLR that are responsible for committing serious human rights violations and crimes and ensure that they be held accountable;
- To introduce appropriate vetting processes (in the context of the peace agreements between the Congolese Government and the CNDP movement, and with the accelerated integration of the CNDP troops into the FARDC and the national police).
- To immediately take necessary action to implement the recommendations of the combined report of the Special Rapporteur on violence against women, its causes and consequences, the Representative of the Secretary-General on the human rights of internally displaced persons, The Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on the situation of human rights defenders, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, in addition to the the Special Representative of the Secretary-General for Children and Armed Conflict, submitted to the Human Rights Council, under resolutions 7/20 and S-8/1 (A/HRC/10/59).

80. To all belligerent parties to the conflict

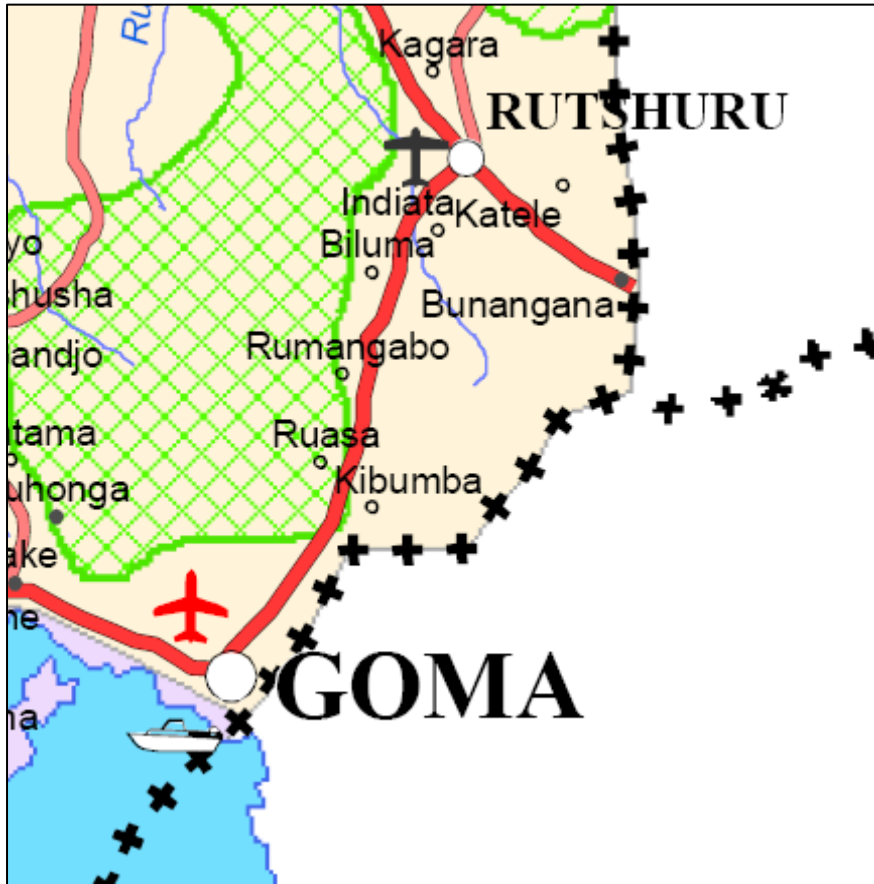
- All parties to the conflict must cease any new recruitment of children and release unconditionally all those currently associated with their forces. They must prepare, in the framework of Security Council resolution 1612 (2005), action plans to identify, release and ensure effective and sustainable reintegration of all children associated with their forces, to prevent further recruitment and to address all other grave violations against children. Reintegration strategies should be community-based and in line with the Principles and Guidelines on Children Associated with Armed Forces or Armed Groups.

81. To the International Community

- To provide all necessary technical assistance, including through legal assistance and the provision of adequate resources, to strengthen the efforts made by the Government of DRC to bring perpetrators to justice.
- To enhance its technical assistance in the efforts to professionalize the FARDC and to insist that no perpetrators of serious human rights violations become or remain in the FARDC. In this regard provide support to the establishment of a vetting mechanism which excludes from key posts in the army alleged perpetrators of serious human rights violations as requested by the Security Council (S/RES/1856 (2008)).
- To provide appropriate training to peacekeeping forces on the protection to civilian, in accordance with Security Council resolutions. Greater investment in the civilian complement to military components is needed in peacekeeping operations in order to improve both understanding and capacity to protect civilians.

8. ANNEX II

GENERAL MAP RUTSHURU-GOMA AXIS



9. ANNEX III

GENERAL SKETCH OF KIWANJA TOWN (source UNJHRO)

