

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/07

Date: 6 July 2007

PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Anita Ušacka
Judge Sylvia Steiner

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR *v.* MATHIEU NGUDJOLO CHUI**

Under seal

URGENT

**Decision on the evidence and information provided by the Prosecution for the
issuance of a warrant of arrest for Mathieu Ngudjolo Chui**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor

Mr Eric MacDonald, Trial Lawyer

TABLE OF CONTENTS

I.	Introduction	4
A.	Background	4
II.	Whether the case against Mathieu Ngudjolo falls within the jurisdiction of the Court and is admissible	5
III.	Whether the requirements under article 58(1) of the Statute for the issuance of a warrant of arrest for Mathieu Ngudjolo are met	9
A.	Whether there are reasonable grounds to believe that at least one crime within the jurisdiction of the Court has been committed.....	11
1.	Whether there are reasonable grounds to believe that the contextual elements of at least one crime within the jurisdiction of the Court exist	12
2.	Whether there are reasonable grounds to believe that the specific elements of at least one crime within the jurisdiction of the Court exist	16
B.	Whether there are reasonable grounds to believe that Mathieu Ngudjolo is criminally responsible for the crimes above-mentioned	23
C.	Whether the arrest of Mathieu Ngudjolo appears necessary under article 58(1) of the Statute	26

PRE-TRIAL CHAMBER I of the International Criminal Court (“the Chamber” and “the Court”, respectively) issued on 6 July 2007 a warrant of arrest (“the Warrant of Arrest”) for Mathieu Ngudjolo Chui (“Mathieu Ngudjolo”) pursuant to article 58(1) of the Rome Statute (“the Statute”), and stated that the analysis of the evidence and information provided by the Prosecution in connection with its application for a warrant of arrest will be set out in a separate document. In doing so, the Chamber

UNANIMOUSLY RENDERS THIS DECISION:

I. Introduction

A. Background

1. On 14 June 2007, the Prosecution filed the “Notification to Pre-Trial Chamber I and Request for Extension of Page Limit” (“the Notification”).¹
2. On 19 June 2007, Judge Sylvia Steiner, Single Judge, held an *ex parte* hearing with the Office of the Prosecution in order to obtain the additional information in relation to the Notification.
3. On 25 June 2007, the Prosecution filed in two parts its Application for a warrant of arrest for Mathieu Ngudjolo (“the Prosecution Application”).²
4. On 25 June 2007, the Prosecution submitted supporting materials in relation to the Prosecution Application (“the Prosecution Supporting Materials”).³
5. On 26 June 2007, Judge Sylvia Steiner, Single Judge, issued the “Decision concerning Supporting Materials in relation to the Prosecution Application for Warrants of Arrest under Article 58 of the Statute” (“the Decision concerning Supporting Materials”),⁴ in which she invited the Prosecution, *inter alia*, to submit additional supporting materials.

¹ ICC-01/04-338-US-Exp.

² ICC-01/04-348-US-Exp and ICC-01/04-350-US-Exp.

³ ICC-01/04-349-US-Exp and Anx1-Anx10 and AnxA-AnxH.

⁴ ICC-01/04-352-US-Exp.

6. On 27 June 2007, the Prosecution filed its Response to the Decision concerning Supporting Materials ("the Prosecution Response"), providing additional witness statements and information.⁵
7. On 6 July 2007, the Chamber issued a Warrant of Arrest for Mathieu Ngudjolo,⁶ in which the Chamber stated that the analysis of the evidence and information provided by the Prosecution in connection with the Prosecution Application will be set out in a separate document.
8. On the same day, the Chamber issued the "*Ordonnance relative à l'exécution du mandat d'arrêt à l'encontre de Mathieu Ngudjolo Chui*".⁷

II. Whether the case against Mathieu Ngudjolo falls within the jurisdiction of the Court and is admissible

9. As this Chamber has previously stated,

[...] a case arising from the investigation of a situation will fall within the jurisdiction of the Court only if the specific crimes of the case do not exceed the territorial, temporal and possibly personal parameters defining the situation under investigation and fall within the jurisdiction of the Court.⁸

10. The situation under investigation, from which the case against Mathieu Ngudjolo arises, has been defined as encompassing the territory of the Democratic Republic of the Congo ("the DRC") since 1 July 2002.⁹ The

⁵ ICC-01/04-354-US-Exp and Anx1-Anx6 and Anx10-Anx14.

⁶ ICC-01/04-02/07-1-US.

⁷ ICC-01/04-02/07-2-US.

⁸ ICC-01/04-01/06-8-Corr, para. 21.

⁹ In this regard, the Chamber recalls that in pages 2 and 3 of the "Decision to Hold Consultation under Rule 114" (ICC-01/04-18-Conf), filed on 21 April 2004; and paragraphs 65, 68 and 84 of the "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6" (ICC-01/04-100-Conf-Exp) of 18 January 2006, the Chamber concluded:

Prosecution Application refers to a military operation which took place on or about 24 February 2003 in the village of Bogoro (located in the district of Ituri, on the territory of the DRC). According to the Prosecution, this operation took place: (i) in the context of an armed conflict not of an international character in the district of Ituri, which had already started by July 2002 and continued throughout 2003;¹⁰ and (ii) was part of a widespread or systematic attack directed against the civilian Hema population of Ituri, which started after the fall of Bunia in August 2002 and continued throughout 2003.¹¹ The Chamber therefore finds that the case against Mathieu Ngudjolo falls within the DRC situation currently under investigation.

11. As this Chamber has previously stated,

To fall within the Court's jurisdiction, a crime must meet the following three conditions: it must be one of the crimes mentioned in article 5 of the Statute, that is to say, the crime of genocide, crimes against humanity and war crimes; the crime must have been committed within the time period laid down in article 11 of the Statute; and the crime must meet one of the two alternative conditions described in article 12 of the Statute.¹²

12. With regard to the first condition, the Chamber finds that there are reasonable grounds to believe that the alleged crimes underlying the case against Mathieu Ngudjolo were committed in the context of, and in association with, an armed conflict¹³ and as part of a widespread or systematic attack directed against a civilian population.¹⁴ In addition, the Chamber observes that murder, sexual

-
- i. that the situation in the territory of the DRC since 1 July 2002 was referred to the Prosecutor on 3 March 2004 by the President of the DRC in accordance with article 13 (a) and 14 of the Statute'
 - ii. that on receiving that letter, the Prosecutor decided, on 16 June 2004, to initiate an investigation into the DRC situation;
 - iii. that the Prosecution states that it had sent letters of notification to States Parties and other States which within the terms of such provision could exercise jurisdiction over the crimes concerned; and
 - iv. that, according to the Prosecution, no information pursuant to article 18(2) of the Statute was received

¹⁰ Prosecution Application, paras. 60-68 and 99.

¹¹ Prosecution Application, paras. 95-101.

¹² ICC-01/04-100-Conf-Exp, para. 85.

¹³ See *infra* Section III.A.1.

¹⁴ See *infra* Section III.A.1.

slavery and other inhumane acts of a similar character constitute crimes against humanity under article 7(1)(a), (g) and (k) of the Statute, and that wilful killings, inhumane treatment, cruel treatment, using children to participate actively in hostilities, sexual slavery, directing attacks against a civilian population or individual civilians not taking direct part in hostilities and pillaging constitute war crimes under article 8(2)(a)(i), (ii) and 8(2)(b)(i), (xvi), (xxii) and (xxvi) of the Statute if the conflict is of an international character or article 8(2)(c)(i) and 8(2)(e)(i), (v), (vi) and (vii) of the Statute if the conflict is of a non-international character. Accordingly, in the Chamber's view, the first condition has been met.

13. Considering that "[t]he Statute entered into force for the DRC on 1 July 2002, in conformity with article 126(1) of the Statute, the DRC having ratified the Statute on 11 April 2002,"¹⁵ the second condition is met because the crimes underlying the case against Mathieu Ngudjolo were committed after 1 July 2002.

14. Regarding the third condition, this Chamber has previously stated that:

[...] under article 12(2) of the Statute one of the following two alternative criteria must be met: (a) the relevant crime was committed in the territory of a State Party or a State which has made a declaration under article 12(3) of the Statute; or (b) the relevant crime was committed by a national of a State Party or a State which has made a declaration under article 12(3) of the Statute.¹⁶

15. The Chamber notes that the crimes underlying the case against Mathieu Ngudjolo were allegedly committed in the district of Ituri on the territory of the DRC, and therefore finds that the third condition has also been met.

¹⁵ ICC-01/04-100-Conf-Exp, para. 88.

¹⁶ Ibid, paras 91 and 93.

16. The Chamber therefore finds, on the basis of the evidence and information provided in the Prosecution Application, the Prosecution Supporting Materials and the Prosecution Response, that the case against Mathieu Ngudjolo falls within the jurisdiction of the Court.

17. Article 19(1) of the Statute grants the Chamber discretion to make an initial determination of the admissibility of the case before the issuance of a warrant of arrest. Such discretion should be exercised only if warranted by the circumstances of the case, bearing in mind the interest of the person concerned.

18. In the present case, according to the Prosecution Application, in or about 23 October 2003 Mathieu Ngudjolo was arrested by MONUC and surrendered to the Congolese authorities. As explained by the Prosecution in its application, Mathieu Ngudjolo was charged before the Tribunal de Grand Instance, in Bunia, for the murder of a UPC officer; he was acquitted for this charge in June 2004 and released from detention in December 2004.

19. The Prosecution further submits that the Bunia Prosecutor opened an investigation against Mathieu Ngudjolo for other murders allegedly committed within an attack brought on the village of Tchomia on 15 July 2003. Moreover, in September 2005, the national military Prosecutor issued a warrant of arrest for Mathieu Ngudjolo in relation to charges relating to his role within the Mouvement Revolutionnaire Congolaise (MRC).¹⁷

¹⁷ Prosecution Application para. 34.

20. The Chamber is of the view that the circumstances of the present case warrant an initial determination of the admissibility of the case prior to the issuance of a warrant of arrest.

21. When, as in the present case, the existence of national proceedings is the sole reason for a possible finding of inadmissibility, it is a *conditio sine qua non* for such finding that national proceedings encompass both the person and the conduct which is the subject of the case before the Court.¹⁸ In this regard, the Chamber finds that, on the basis of the evidence and information contained in the Prosecution Application, the Prosecution Supporting Materials and the Prosecution Response, the proceedings against Mathieu Ngudjolo in the DRC do not encompass the same conduct which is the subject of the Prosecution Application.¹⁹

22. In conclusion, on the basis of the evidence and information contained in the Prosecution Application, the Prosecution Supporting Materials and the Prosecution Response, the Chamber finds that the case against Mathieu Ngudjolo falls within the jurisdiction of the Court and is admissible. This is without prejudice to any subsequent determination on jurisdiction or admissibility concerning this case pursuant to article 19(1), (2) and (3) of the Statute.

III. Whether the requirements under article 58(1) of the Statute for the issuance of a warrant of arrest for Mathieu Ngudjolo are met

¹⁸ ICC-01/04-01/06-8-Cpr, para. 31.

¹⁹ ICC-01/04-348-US-Exp, pages. 5-8

23. The Prosecution requests that a warrant of arrest be issued for Mathieu Ngudjolo. The Chamber notes that article 58(1) of the Statute provides that:

At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

- (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
- (b) The arrest of the person appears necessary:
 - (i) To ensure the person's appearance at trial;
 - (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or
 - (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

24. As this Chamber has repeatedly stated,

“[...] the term “committed” in article 58(1) of the Statute includes:

- (i) the commission *stricto sensu* of a crime by a person “as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (ii) any other forms of accessory, as opposed to principal, liability provided for in article 25(3)(b) to (d) of the Statute
- (iii) an attempt to commit any of the crimes provided for in articles 6 to 8 of the Statute;
- (iv) direct and public incitement to commit genocide (the only preparatory act punishable under the Statute); and
- (v) the responsibility of commanders and other superiors under article 28 of the Statute.”²⁰

25. Therefore, in order for a warrant of arrest to be issued for Mathieu Ngudjolo, the Chamber must be satisfied that the following three questions are affirmatively answered:

²⁰ *Decision on the Issuance of a Warrant of Arrest* in the Lubanga case, para. 78. See also *Decision on the Confirmation of Charges* in the Lubanga Case, para. 320.

(A) Whether there are reasonable grounds to believe that at least one crime within the jurisdiction of the Court has been committed

(B) Whether there are reasonable grounds to believe that Mathieu Ngudjolo has incurred criminal liability for such crimes under any of the modes of liability provided for in the Statute

(C) Whether the arrest of Mathieu Ngudjolo appears to be necessary under article 58(1)(b) of the Statute

26. Furthermore, the Chamber wishes to emphasize that, in reaching its conclusions on whether the “reasonable grounds to believe” standard and the appearance standard required by article 58(1) of the Statute have been met, it has not relied only on the evidence and information specifically discussed in the following sections. On the contrary, the Chamber has reached its conclusions on the basis of the overall evidence and information contained in the Prosecution Application, the Prosecution Supporting Materials and the Prosecution Response.

A. Whether there are reasonable grounds to believe that at least one crime within the jurisdiction of the Court has been committed

27. According to the Statute and the Elements of Crimes, the definition of every crime within the jurisdiction of Court includes both contextual and specific elements.²¹ Hence, the Chamber will first determine whether there are reasonable grounds to believe that the contextual elements of at least one crime within the jurisdiction of the Court are present. Only if this question is

²¹ Decision on the Issuance of an Arrest Warrant in the Lubanga case, para. 80. See also the Decision on the Issuance of Arrest Warrants in the case *The Prosecutor vs. Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Al Abd-Al-Rahman (Ali Kushayb)*, ICC-02/05-01/07-1-Corr (hereafter “Decision on the Issuance of Arrest Warrants in the Harun and Kushayb case”), para. 29.

answered in the affirmative, shall the Chamber turn its attention to the question of whether the specific elements of any such crime have occurred.

1. Whether there are reasonable grounds to believe that the contextual elements of at least one crime within the jurisdiction of the Court exist

28. According to the Prosecution Application, Mathieu Ngudjolo is responsible for certain crimes against humanity and war crimes committed by members of the *Front Nationaliste et Integrationniste* ("FNI") and *la Force de Résistance Patriotique en Ituri* ("FRPI") during and in the aftermath of the joint attack by the FNI and the FRPI on the village of Bogoro on or about 24 February 2003.²² The Prosecution submits that these crimes were committed:

(i) in the context of an armed conflict not of an international character which had already started by July 2002 in the district of Ituri and continued throughout 2003, and in which several regional groups were involved;²³

(ii) as part of a widespread or systematic attack directed against the civilian Hema population of Ituri, which started after the fall of Bunia in August 2002 and continued throughout 2003.²⁴

29. The Chamber finds that there are reasonable grounds to believe that from July 2002 to the end of 2003, a protracted armed conflict, within the meaning of article 8(2)(f) of the Statute, occurred on the territory of Ituri involving a number of regional groups, including the FNI, the FRPI, *l'Union de Patriotes Congolais* ("UPC")/*les Forces Patriotiques pour la Libération du Congo* ("FPLC") and *le Parti pour l'Unité et la Sauvegarde de l'Intégrité du Congo* ("PUSIC").

²² Prosecution Application, *I. Summary of the Case*, pp. 5-7.

²³ Prosecution Application, paras. 60-68 and 99.

²⁴ Prosecution Application, paras. 95-101.

30. In the Chamber's view, there are reasonable grounds to believe that, at the very least, the FNI,²⁵ the FRPI,²⁶ the UPC/FPLC²⁷ and the PUSIC²⁸ had a hierarchical structure which allowed them to act under responsible command with operational and disciplinary powers (sufficient level of internal organisation). The Chamber also finds that there are reasonable grounds to believe that those groups resorted to armed violence of a certain intensity during a prolonged period.²⁹ Furthermore, the Chamber finds that there are reasonable grounds to believe that those armed groups controlled part of the territory of Ituri, which enabled them to plan and carry out concerted military operations.³⁰ Moreover, the Chamber finds that there are reasonable grounds to believe that Mathieu Ngudjolo was aware of the factual circumstances that established the existence of an armed conflict.³¹

31. The Chamber finds that there are reasonable grounds to believe that the alleged crimes, which occurred during and in the aftermath of the joint attack by the FRPI and the FNI on the village of Bogoro on or about 24 February 2003, were committed in the context of and in association with the ongoing conflict in Ituri.³² In the view of the Chamber, the evidence and information

²⁵ Prosecution Application, paras. 86, 89 and 91. See also Prosecution Supporting Materials, AnxF, paras. 13-14, 51, 53 and 144; Anx H, para.57; Prosecution Response, Anx11, paras. 20, 24 and 37; and MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, p.48.

²⁶ Prosecution Application, paras. 77-80. See also Prosecution Supporting Materials, AnxF, para.144 and MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, p.49.

²⁷ Prosecution Application, *I. Summary of the Case*, p.1; Prosecution Response, Anx14, paras. 172-184; MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, pp. 47 and 52.

²⁸ Prosecution Response, Anx14, paras.187-200. See also MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, pp.47-48.

²⁹ Prosecution Application, paras. 61 and 99. See also Prosecution Supporting Materials, Anx7; Prosecution Response, Anx. 14, paras.368-371; MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, p. 51-61.

³⁰ Prosecution Application, paras. 49, 77, 83, 86, 87. See also MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, paras. 84 and 89.

³¹ Prosecution Application, paras. 66-68.

³² MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, paras 64-67.

submitted by the Prosecution also provides reasonable grounds to believe that the alleged crimes were closely related to the ongoing hostilities.³³

32. The Chamber considers, on the basis of the evidence and information brought by the Prosecution, that there are reasonable grounds to believe that the Uganda People's Defence Force ("UPDF") may have directly or indirectly intervened in the conflict in Ituri in the context of which the crimes allegedly committed during and in the aftermath of the joint attack by the FNI and the FRPI on Bogoro took place. Consequently, the Chamber finds that there are reasonable grounds to believe that the conflict in Ituri may have had either a non international character or an international character.

33. As the Chamber has previously stated,

"Pursuant to article 7(1) of the Statute, in order to constitute a crime against humanity, the acts must have been committed as part of a widespread or systematic attack against any civilian population. Pursuant to article 7(2)(a) of the Statute, an attack directed against a civilian population is defined as a " course of conduct involving a multiple commission of crimes referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such an attack."³⁴

34. The Chamber recalls that the expression "widespread or systematic" in article 7(1) of the Statute excludes random or isolated acts of violence.³⁵ Furthermore, the adjective "widespread" connotes the large-scale nature of the attack and the number of targeted persons, whereas the adjective "systematic" refers to the organised nature of the acts of violence and the improbability of their random occurrence.³⁶

³³ Prosecution Application, paras. 60-68.

³⁴ ICC-02/05-01/07-1-Corr, para. 61.

³⁵ Ibid, para. 62.

³⁶ Ibid, para. 62

35. The Chamber finds that there are reasonable grounds to believe that:

- (i) prior to the creation of the FNI and the FRPI at the end of 2002, Ngiti and Lendu militia, along with APC forces, killed at least 850 civilians, mostly from the Hema and Bira ethnic groups, in Nyankunde;³⁷
- (ii) after the alliance between the FRPI and the FNI at the beginning of 2003 and until the end of March/beginning of April 2003 at the latest, around 700 civilians, predominantly from the Hema ethnic group, were killed in Mandro,³⁸ Kilo³⁹ and Drodoro⁴⁰ by the joint action of the FRPI and the FNI;
- (iii) in the month following the fall of Bunia on 6 May 2003, which appears to have brought about the end of the alliance between the FNI and the FRPI around 500 civilians, predominantly from the Hema ethnic group, were killed by the FNI in Bunia/Nyakasanza,⁴¹ Tchomia,⁴² and Katoto.⁴³

36. As a result, the Chamber finds that there are reasonable grounds to believe that, at the very least, between January and March 2003, the FNI and the FRPI jointly conducted a widespread or systematic attack directed against the civilian population, predominantly of the Hema ethnic group, in certain areas of the district of Ituri. Furthermore, the Chamber finds that there are reasonable grounds to believe that the crimes which allegedly took place during and in the aftermath of the joint military operation conducted by the

³⁷ Prosecution Application, para. 73 and Prosecution Supporting Materials Anx7.

³⁸ Prosecution Supporting Materials, Anx7; see also MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, paras. 71 and 73.

³⁹ Prosecution Supporting Materials, Anx7; see also MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, paras. 113.

⁴⁰ Prosecution Supporting Materials, Anx7; see also MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, paras. 75 and 76.

⁴¹ Prosecution Supporting Materials, Anx7; see also MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, paras. 77-79.

⁴² Prosecution Supporting Materials, Anx7; see also MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, para. 85.

⁴³ Prosecution Supporting Materials, Anx7; see also MONUC, *Special Report on the Events in Ituri, January 2002-December 2003*, para. 88.

FRPI and the FNI against the village of Bogoro on or about 24 February 2003 were allegedly committed as part of such a widespread or systematic attack,⁴⁴ and that Mathieu Ngudjolo was aware of it.⁴⁵

2. Whether there are reasonable grounds to believe that the specific elements of at least one crime within the jurisdiction of the Court exist

37. The Prosecution alleges that in the early hours of 24 February 2003, members of the FNI and the FRPI, acting in concert, carried out a joint attack against the civilian population of Bogoro village in the Bahema Sud *collectivité* “as a means of driving out the largely Hema population of Bogoro”, and against individual civilians not taking direct part in hostilities.⁴⁶ As a result, according to the Prosecution, the crime of “intentionally directing attacks against the civilian population as such or against individual civilians not taking part in hostilities” was committed.

38. The Chamber considers that the crime provided for under article 8(2)(b)(i) and (2)(e)(i) of the Statute does not require any harmful impact on the civilian population or on the individual civilians targeted by the attack, and is committed by the mere launching of the attack against a civilian population or individual civilians not taking direct part in hostilities, who have not fallen yet into the hands of the attacking party.

39. The Chamber finds that there are reasonable grounds to believe that the village of Bogoro, given its location at the junction of three major roads which lead to Bunia to the north, Kasenyi to the east and Aveba and Gety to the

⁴⁴ Prosecution Application, para. 106; Prosecution Response Anx1, para. 13, Anx3, para. 14-15.

⁴⁵ Prosecution Response, Anx3, paras 52-56.

⁴⁶ Prosecution Application, *I. Summary of the case*, p. 7 and para. 109.

south, had a very important strategic value for the FNI and the FRPI. This is particularly so, in light of the fact that the UPC/FPLC presence in Bogoro prevented the FNI and the FRPI from effectively coordinating their forces based in the Irumu territory with those based in the Zumbe area and farther north.⁴⁷ The Chamber therefore finds that there are reasonable grounds to believe that, according to the circumstances prevailing at the time, taking over such a village provided the FNI and the FRPI with a definitive and concrete military advantage.

40. The Chamber also finds that there are reasonable grounds to believe that:

(i) the village was defended by a UPC/FPLC camp including some 150 uniformed soldiers located in the centre of the city, and by two or three additional small UPC positions in the north and south of the village;⁴⁸ and

(ii) the rest of the village was inhabited by civilians, including women, children and elderly, who were not taking a direct part in hostilities, as demonstrated by the fact that as soon as the attack started they fled unarmed to the woods or to the positions defended by UPC/FPLC soldiers.⁴⁹

41. The Chamber finds that there are reasonable grounds to believe that the attack jointly launched by the FNI and the FRPI on the village of Bogoro on or about 24 February 2003 was neither specifically aimed at the civilian population of Bogoro nor at individual civilians not taking direct part in hostilities. The Chamber finds that there are reasonable grounds to believe that on the contrary Mathieu Ngudjolo, and other senior FNI and FRPI commanders

⁴⁷ Prosecution Application, para. 106.

⁴⁸ Prosecution Application, para. 135; Prosecution Response, Anx2, paras.23-25.

⁴⁹ Prosecution Application, paras. 115, 127, 134, 135 and 139.

planned to launch an indiscriminate attack against the village of Bogoro which was to be targeted as a single military objective, instead of directing the attack to the clearly separated and distinct military objectives located in the village.⁵⁰

42. The Chamber notes that:

- (i) paragraphs (b)(i) and (e)(i) of article 8(2) of the Statute only criminalise conduct consisting of “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;”
- (ii) paragraph (b)(ii) of article 8(2) of the Statute only criminalises conduct consisting of “intentionally directing attacks against civilian objects, that is, objects which are not military objectives;” and
- (iii) paragraph (b)(iv) of article 8(2) of the Statute only criminalises violations of the proportionality rule when an attack is specifically directed against a military objective.

43. In this regard, the Chamber is of the view that, given the fact that this is not the only crime attributed by the Prosecution to Mathieu Ngudjolo, the question of whether criminal liability can arise under article 8(2)(b)(i) or 8(2)(e)(i) of the Statute for the launching, or attempted launching, of an indiscriminate attack will be better dealt with at the confirmation hearing stage rather than at the stage of issuance of a warrant of arrest.

⁵⁰ According to article 51(5)(a) of Additional Protocol I to the Geneva Conventions, “The following types of attacks are to be considered as indiscriminate: (a) An attack by bombardment or by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects”.

44. The Prosecution alleges that during and in the aftermath of the joint attack by the FNI and the FRPI on the village of Bogoro on or about 24 February 2003, members of the FNI and FRPI:

- (i) murdered approximately 200 civilians;⁵¹
- (ii) inflicted serious injuries upon civilians;⁵²
- (iii) detained civilians, threatened them with weapons and imprisoned them in a room filled with corpses;⁵³
- (iv) pillaged the village of Bogoro;⁵⁴
- (v) sexually enslaved women and girls;⁵⁵ and
- (vi) used children under the age of fifteen to participate actively in hostilities.⁵⁶

45. The Chamber finds that there are reasonable grounds to believe that during, and particularly in the aftermath of, the joint indiscriminate attack by the FNI and the FRPI upon the village of Bogoro on or about 24 February 2003, members of the FNI and FRPI :

- (i) chased down civilians who were fleeing, notably in the direction of Mount Waka and shot at them;⁵⁷
- (ii) shot certain civilians in their houses, and killed others by setting their houses on fire;⁵⁸ and
- (iii) killed civilians who had found refuge in the Hotel Lagura,⁵⁹ as well as within the UPC camp, and in particular in the classrooms of the former Institute of Bogoro.⁶⁰

⁵¹ Prosecution Application, *I. Summary of the case*, p. 5 and para. 155.

⁵² Prosecution Application, *I. Summary of the case*, p. 5 and para. 112.

⁵³ Prosecution Application, *I. Summary of the case*, p. 6 and para. 122.

⁵⁴ Prosecution Application, *I. Summary of the case*, p. 7 and para. 108.

⁵⁵ Prosecution Application, *I. Summary of the case*, p. 6 and para. 108.

⁵⁶ Prosecution Application, *I. Summary of the case*, p. 6 and para. 113.

⁵⁷ Prosecution Application, paras. 114, 129, 136. See also Prosecution Response, Anx3, paras. 46-47 and Anx2, para. 46.

⁵⁸ Prosecution Application, paras. 107. See also Prosecution Response, Anx5, para. 48 and Anx11, para. 51.

The Chamber finds that there are reasonable grounds to believe that members of the FNI and FRPI killed around 200 civilians, and that most of them were killed once they had fallen into the hands of the FNI and FRPI.⁶¹

46. The Chamber finds that there are reasonable grounds to believe that during and in the aftermath of the joint indiscriminate attack by the FNI and the FRPI upon the village of Bogoro on or about 24 February 2003, members of the FNI and FRPI inflicted serious injuries upon civilians, notably as a result of gun shots or machete blows.⁶²

47. The Chamber finds that there are reasonable grounds to believe that in the aftermath of the joint indiscriminate attack by the FNI and the FRPI upon the village of Bogoro on or about 24 February 2003, members of the FNI and FRPI detained civilians, threatened them with weapons and imprisoned them in a room filled with corpses in the Bogoro Institute.⁶³

48. The Chamber finds that there are reasonable grounds to believe that in the aftermath of the joint indiscriminate attack by the FNI and the FRPI upon the village of Bogoro on or about 24 February 2003, members of the FNI and FRPI pillaged the village of Bogoro.⁶⁴

49. The Chamber finds that there are reasonable grounds to believe that in the aftermath of the joint indiscriminate attack by the FNI and the FRPI upon the village of Bogoro on or about 24 February 2003, members of the FNI and FRPI

⁵⁹ Prosecution Application, paras. 118 and 154. See also Prosecution Response, Anx2, para. 59.

⁶⁰ Prosecution Application, paras. 107, 122, 197 and 212. See also Prosecution Response, Anx2, para. 73-74, Anx4, paras. 28, 29 and 36.

⁶¹ Prosecution Application, paras. 147-150. See also Prosecution Response, Anx6, pp. 27-32.

⁶² Prosecution Application, paras. 112, 133 and 147. See also Prosecution Response, Anx4, para. 30.

⁶³ Prosecution Application, paras. 121 and 122. See also Prosecution Response, Anx2, para. 65-74.

⁶⁴ Prosecution Application, paras 108, 120 and 132. See also Prosecution Response, Anx2, paras. 61-64 and Anx4, para. 34.

abducted women and girls to be used as their “wives” and serve as sexual slaves for them and other commanders.⁶⁵

50. The Chamber finds that there are reasonable grounds to believe that during the joint indiscriminate attack by the FNI and the FRPI upon the village of Bogoro on or about 24 February 2003, children under the age of fifteen were used to participate actively in hostilities by members of the FNI and FRPI.⁶⁶ In the Chamber’s view, there are also reasonable grounds to believe that those members of the FNI and FRPI who used children under the age of fifteen to participate actively in hostilities were aware that the children were under the age of fifteen.⁶⁷

51. As the Chamber has previously stated in relation to the crime of using children under the age of fifteen years to participate actively in hostilities:

[...] each individual instance of [...] use to participate actively in hostilities of children under the age of fifteen gives rise to a crime within the jurisdiction of the Court. However, the Chamber considers that it is advisable to treat [...] all instances of use to participate actively in hostilities of children under the age of fifteen by members of the UPC/FPLC as a continuous crime to use to participate actively in hostilities of children under the age of fifteen.”⁶⁸

52. In the view of the Chamber, this principle is applicable to all crimes committed after the launching of the joint indiscriminate attack by the FNI and the FRPI upon the village of Bogoro on or about 24 February 2003.

⁶⁵ Prosecution Application, paras. 108, 114 to 116. See also Prosecution Response, Anx1, paras. 19, 21, 28 and 29 and Anx5, para. 27.

⁶⁶ Prosecution Application, paras. 112, 163, 173, 178, 182 and 206. See also Prosecution Response, Anx3, paras. 63 and 64; Anx7, para. 79; Anx8, para. 32 and Anx11, para. 26.

⁶⁷ Prosecution Supporting Material, AnxD, para. 36 and 43; AnxE, para. 10 and 11, AnxF, para. 66; Prosecution Response, Anx3, para. 64.

⁶⁸ Decision on the Issuance of an Arrest Warrant in the Lubanga case, para. 91.

53. In conclusion, and without prejudice to any subsequent interpretation by the Chamber at the confirmation hearing stage of the definition of the crime provided for under article 8(2)(b)(i) or 8(2)(e)(1) the Chamber finds that there are reasonable grounds to believe that on or about 24 February 2003, members of the FNI and FRPI committed a war crime under article 8(2)(b)(i) or 8(2)(e)(i) of the Statute by launching a joint indiscriminate attack upon the village of Bogoro.

54. Moreover, the Chamber finds that there are reasonable grounds to believe that during and in the aftermath of the joint indiscriminate attack by the FNI and the FRPI on the village of Bogoro on or about 24 February 2003, the following crimes were committed by FNI and FRPI members:

- (i) a continuous crime against humanity of murder under article 7(1)(a) of the Statute;
- (ii) a continuous crime against humanity of other inhumane acts under article 7(1)(k) of the Statute;
- (iii) a continuous crime against humanity of sexual slavery under article 7(1)(g) of the Statute;
- (iv) a continuous war crime of wilful killings under article 8(2)(a)(i) or 8(2)(c)(i) of the Statute;
- (v) a continuous war crime of inhumane treatment under article 8(2)(a)(ii) or of cruel treatment under article 8(2)(c)(i) of the Statute;
- (vi) a continuous war crime of using children under the age of fifteen years to participate actively in hostilities under article 8(2)(b)(xxvi) or 8(2)(e)(vii) of the Statute;
- (vii) a continuous war crime of sexual slavery under article 8(2)(b)(xxii) or 8(2)(e)(vi) of the Statute; and

(viii) a continuous war crime of pillaging a town or place, even when taken by assault, under article 8(2)(b)(xvi) or 8 (2)(e)(v) of the Statute.

B. Whether there are reasonable grounds to believe that Mathieu Ngudjolo is criminally responsible for the crimes above-mentioned

55. The Prosecution alleges that Mathieu Ngudjolo is criminally responsible under article 25(3)(b) of the Statute for ordering the commission of crimes committed by the forces under his command during and in the aftermath of the joint FNI and FRPI attack on Bogoro on or about 24 February 2003.⁶⁹ In this regard, the Chamber notes that:

- (i) direct commission, indirect commission and co-perpetration based on joint control over the crime, within the meaning of article 25(3)(a) of the Statute, each gives rise to principal liability, whereas those modes of participation in the commission of the crime punishable under article 25(3)(b) to (d) of the Statute give rise to accessorial liability;⁷⁰
- (ii) according to the Prosecution, Mathieu Ngudjolo acted in concert with other senior commanders of the FNI and the FRPI when planning and ordering the commission of the crimes.

56. The Chamber finds that there are reasonable grounds to believe that already before the attack on Bogoro on or about 24 February 2003, Mathieu Ngudjolo

⁶⁹ Prosecution Application, *I Summary of the case*, p. 3-7.

⁷⁰ ICC-01/04-01/06-8-US-Corr, para. 78. ICC-01/04-01/06-796-Conf-tEN, para. 320.

was the highest ranking commander of the FNI in the Zumbe area⁷¹. Moreover, the Chamber finds that there are reasonable grounds to believe that after the UPC was chased out of Bunia on or about 6 March 2003, Mathieu Ngudjolo became one of the three most senior commanders of the allied forces of the FNI and the FRPI.⁷²

57. The Chamber finds that there are reasonable grounds to believe that, in the weeks prior to 24 February 2003, a common plan to carry out an attack on the village of Bogoro was agreed upon by Mathieu Ngudjolo and other senior FNI and FRPI commanders.⁷³ The Chamber is also of the view that there are reasonable grounds to believe that the attack on Bogoro, as planned by Mathieu Ngudjolo and other senior FNI and FRPI commanders, neither specifically targeted the civilian population of Bogoro nor individual civilians not taking direct part in hostilities. The Chamber finds that there are reasonable grounds to believe that on the contrary Mathieu Ngudjolo and other senior FNI and FRPI commanders planned to launch an indiscriminate attack on the village of Bogoro, and that according to their plan the whole village was to be treated as a single military objective instead of directing the attack to the clearly separated and distinct military objectives located in the village.⁷⁴

58. The Chamber finds that there are reasonable grounds to believe that the crimes against humanity and the war crimes allegedly committed during and

⁷¹ Prosecution Application, paras. 29, 86-88. Besides, on 18 March 2003 Mathieu Ngudjolo signed as "Colonel Ngudjolo Mathieu" the "Agreement to cease the Hostilities in Ituri" promoted by MONUC, as the Lendu representative from the territory of Djugu, Prosecution Application, para. 67. Prosecution Supporting Materials AnxC, para. 103; AnxE, para. 27; AnxF, para. 144; AnxH, paras. 14, 17. Prosecution Response, Anx3, para. 32. Anx10, para. 13; Anx11, para 10.

⁷² Prosecution Application, para 32. Prosecution Supporting Materials, Anx B, paras. 36-37.

⁷³ Prosecution Application, para 157 and Prosecution Supporting Materials, AnxF, paras 19-35.

⁷⁴ According to article 51 (5) (a) of Additional Protocol I to the Geneva Conventions, "The following types of attacks are to be considered as indiscriminate: (a) An attack by bombardment or by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects".

in the aftermath of the joint indiscriminate attack by the FNI and the FRPI upon the village of Bogoro on or about 24 February 2003, were either encompassed by the common plan⁷⁵ or, at the very least, a likely consequence of the implementation of this common plan, which was mutually accepted by Mathieu Ngudjolo and the other senior FNI and FRPI commanders.⁷⁶

59. The Chamber finds that there are reasonable grounds to believe that Mathieu Ngudjolo and other senior FNI and FRPI commanders directed their respective subordinates in a coordinated manner, in order to jointly implement the common plan. Furthermore, in the view of the Chamber there are reasonable grounds to believe that the level of coordination in the implementation of the common plan was such that in a matter of a few hours: (i) the attack *stricto sensu* was over as the members of the FNI and the FRPI overpowered the UPC soldiers and consequently took control of Bogoro⁷⁷; and (ii) the members of the FNI and FRPI were already engaging in acts of murder and sexual enslavement of civilians and in the pillaging and destruction of the village that had already fallen under their control.⁷⁸

60. The Chamber finds that there are reasonable grounds to believe that Mathieu Ngudjolo played an essential role in the implementation of the common plan which led to the alleged commission of crimes during and in the aftermath of the joint indiscriminate attack by the FNI and the FRPI on the village of Bogoro on or about 24 February 2003. In this regard, the Chamber finds that there are reasonable grounds to believe that Mathieu Ngudjolo played an important role in the planning of the attack,⁷⁹ that he went to Medhu the day

⁷⁵ Prosecution Application, para. 159 and Prosecution Supporting Materials, AnxF, paras. 40, 44, 80-87.

⁷⁶ Prosecution Application, para. 160 and Prosecution Supporting Materials, AnxF, paras. 75-77.

⁷⁷ Prosecution Supporting Materials, AnxH, para. 110.

⁷⁸ Prosecution Application, paras. 110-146 and Prosecution Supporting Materials, AnxH, paras. 104, 106, 110; Prosecution Response, Anx1, paras. 13-29; Anx2, paras. 61-64, 83-87; Anx3, para. 52.

⁷⁹ Prosecution Application, paras. 177 and 191; Prosecution Supporting Materials, AnxF, paras. 19, 26, 28, 30 and 33; AnxG, para. 64; Monuc *Special Report on the Events in Ituri, January 2002/December 2003*, para. 4.

before the attack where he met other senior FNI and FRPI commanders,⁸⁰ that he ordered his subordinates to execute the common plan,⁸¹ and that immediately after the UPC forces were chased out of Bogoro he went to the former UPC defence positions in the center of the village to celebrate their victory.⁸² Furthermore, the Chamber finds that there are also reasonable grounds to believe that Mathieu Ngudjolo was aware of his essential role and that such a role gave him joint control over the implementation of the common plan.⁸³

61. Consequently, the Chamber finds that there are reasonable grounds to believe that Mathieu Ngudjolo is criminally responsible under article 25(3)(a) of the Statute, as a principal to the crimes committed by members of the FNI and FRPI during and in the aftermath of the joint indiscriminate attack by the FNI and the FRPI on the village of Bogoro on or about 24 February 2003. In the alternative, the Chamber finds that there are reasonable grounds to believe that Mathieu Ngudjolo is criminally responsible under article 25(3)(b) of the Statute, as an accessory to the crimes committed by his subordinates during and in the aftermath of the attack.

C. Whether the arrest of Mathieu Ngudjolo appears necessary under article 58(1) of the Statute

62. Under article 58(1)(b) of the Statute, the Chamber may issue a warrant of arrest only if it is satisfied that the arrest of the person appears necessary:

- (i) to ensure the person's appearance at trial;

⁸⁰ Prosecution Application, para. 180; AnxC, paras. 123 and 126.

⁸¹ Prosecution Application, para. 217; Prosecution Supporting Materials, AnxB, para. 37; AnxF, paras. 35, 44-46; Prosecution Response, Anx3, para. 52, 56

⁸² Prosecution Supporting Materials, AnxF, para. 76.

⁸³ Prosecution Supporting Materials, AnxF, paras. 81-87; AnxH, paras. 83, 84.

- (ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings; or
- (iii) where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

63. The Prosecution in its Application, submits that the issuance of a warrant of arrest against Mathieu Ngudjolo is necessary because he has previously made efforts to avoid criminal proceedings, has failed to surrender to a Congolese warrant of arrest⁸⁴ and has “ample resources and connections to flee if he so chooses”.⁸⁵

64. The Chamber finds that there are reasonable grounds to believe that by virtue of his current position as a Colonel of the *Forces Armées de la République Démocratique du Congo* (“FARDC”) in Bunia and as the advisor to the Operational Zone Commander in the Ituri district,⁸⁶ Mathieu Ngudjolo is able to make use of “the services” of former FNI and FRPI members who have integrated into the ranks of FARDC, and that he might use his connections and the means at his disposal in order to flee as soon as he would become aware of the warrant of arrest issued against him.

65. Therefore, the Chamber is satisfied that the arrest of Mathieu Ngudjolo appears necessary at this stage to ensure his appearance at trial pursuant to article 58(1)(b)(i) of the Statute.

⁸⁴ Prosecution Application, para. 221.

⁸⁵ Prosecution Application, paras. 221-222.

⁸⁶ Prosecution Application, para. 14.

66. Moreover, and although the first condition under 58(1)(b) of the Statute has already been satisfied, the Chamber further notes that according to the Prosecution Application, Mathieu Ngudjolo also has the means to obstruct or endanger the investigation pursuant to article 58(1)(b)(ii) of the Statute.

67. In this regard, the Prosecution indicates that the men under Mathieu Ngudjolo's control have threatened witnesses in the past, both with regard to the ongoing investigation by the Prosecutor of Court and to a domestic proceeding before the national Congolese judicial authorities.⁸⁷ Moreover, as the Prosecution indicates, Mathieu Ngudjolo as a well known senior former commander of the FNI/FRPI, and current Colonel of the FARDC has the resources to "obtain information which ordinary citizens cannot obtain".⁸⁸

68. Therefore, in the view of the Chamber, on the basis of the evidence and information contained in the Prosecution Application, the Prosecution Supporting Materials and the Prosecution Response, and without prejudice to subsequent determination under article 60 of the Statute and rule 119 of the Rules, the arrest of Mathieu Ngudjolo appears necessary pursuant to article 58(1)(b)(i) and (ii) of the Statute, both to ensure his appearance at trial and to ensure that he does not obstruct or endanger the investigation or the court proceedings.

FOR THESE REASONS,

⁸⁷ Prosecution Application, paras. 14, 221-223.

⁸⁸ Prosecution Application, para. 224.

DECIDES that, on the basis of the evidence and information contained in the Prosecution Application, the Prosecution Supporting Materials and the Prosecution Response:

(a) the case against Mathieu Ngudjolo falls within the jurisdiction of the Court and is admissible;

(b) the conditions required by article 58(1) of the Statute for the issuance of a warrant of arrest against Mathieu Ngudjolo are met in relation to his alleged criminal responsibility under article 25(3)(a) and (b) of the Statute for:

(i) murder as a crime against humanity under article 7(1)(a) of the Statute;

(ii) other inhumane acts as a crime against humanity under article 7(1)(k) of the Statute;

(iii) sexual slavery as a crime against humanity under article 7(1)(g) of the Statute;

(iv) wilful killings as a war crime under article 8(2)(a)(i) or 8(2)(c)(i) of the Statute;

(v) inhumane treatment as a war crime under article 8(2)(a)(ii) or cruel treatment as a war crime under article 8(2)(c)(i) of the Statute;

(vi) the war crime of using children under the age of fifteen years to participate actively in hostilities under article 8(2)(b)(xxvi) or 8(2)(e)(vii) of the Statute;

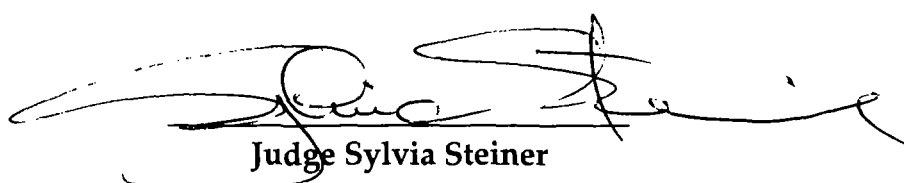
(vii) sexual slavery as a war crime under article 8(2)(b)(xxii) or 8(2)(e)(vi) of the Statute;

(viii) the war crime of directing attacks against a civilian population as such or against individual civilians not taking direct part in hostilities under article 8(2)(b)(i) or 8(2)(e)(i) of the Statute;

(ix) pillaging a town or place, even when taken by assault, as a war crime under article 8(2)(b)(xvi) or 8(2)(e)(v) of the Statute.

Done in both English and French, the English version being authoritative.

Judges Akua Kuenyehia and Anita Ušacka are unavailable to sign the decision because they are absent from the seat of the Court on the day of signature.



Judge Sylvia Steiner

Dated this Friday 6 July 2007

At The Hague, The Netherlands