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Pénale
Internationale**



**International
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Court**

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PRE-TRIAL CHAMBER I

Before: Judge Claude Jorda, Presiding Judge
Judge Akua Kuenyehia
Judge Sylvia Steiner

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

**Under Seal
Redacted Version**

Decision on the Prosecution Application for a Warrant of Arrest

The Office of the Prosecutor:

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PRE-TRIAL CHAMBER I of the International Criminal Court (“the Chamber” and “the Court” respectively) to which the Appeals Chamber on 13 July 2006 remanded the Prosecution application for the issuance of a warrant of arrest for Bosco Ntaganda pursuant to article 58 of the Rome Statute (“the Statute”) in the context of the investigation of the situation in the Democratic Republic of the Congo (“the DRC”). Having examined the written and oral submissions of the Prosecution, the evidentiary materials and information attached to the Prosecution Application and the further evidentiary materials and information submitted by the Prosecution at the request of the Chamber, the Chamber

RENDERS THIS DECISION:

I. Introduction

I.1. Background

1. The "Prosecutor's Application for Warrants of Arrest, Article 58" ("the Prosecution Application"), filed by the Prosecution on 13 January 2006, requested the issuance of warrants of arrest for Thomas Lubanga Dyilo and Bosco Ntaganda.
2. The "Decision concerning Supporting Materials in Connection with the Prosecution's Application for Warrants of Arrest pursuant to article 58" ("the Decision concerning Supporting Materials"), filed by the Chamber on 20 January 2006, invited the Prosecution to submit supporting materials and convened a hearing on the Prosecution Application to be held on 2 February 2006.
3. The "Prosecution's Submission of Information and Materials" ("the Prosecution Submission") was filed by the Prosecution on 25 January 2006.
4. The "Prosecution's Submission of Further Information and Materials" ("the Prosecution Further Submission") was filed by the Prosecution on 27 January 2006.
5. The "Decision concerning the hearing on 2 February 2006", filed by the Chamber on 31 January 2006, informed the Prosecution of the agenda of the hearing.
6. On 2 February 2006 a hearing was held with the Prosecution *ex parte* and in closed session to deal with matters arising from the Prosecution Application.

7. On 10 February 2006, the Chamber issued the "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58" ("the Decision"), in which the Chamber decided to issue a warrant of arrest for Thomas Lubanga Dyilo and rejected the issuance of a warrant of arrest for Bosco Ntaganda based on the inadmissibility of the case against him.
8. On 14 February 2006, the Prosecution filed a notice of appeal against the Decision in relation to the finding that the case against Bosco Ntaganda was inadmissible which resulted in the rejection of the issuance of a warrant of arrest for Bosco Ntaganda.
9. On 13 July 2006, the Appeals Chamber issued its "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'" ("the Appeals Chamber Judgment"), in which:
 - a. the decision was reversed insofar as it found the case against Bosco Ntaganda inadmissible; and
 - b. the Prosecution Application for a warrant of arrest for Bosco Ntaganda was remanded to the Chamber (i) for completion of the review limited to the requirements of article 58(1) of the Statute; and, should the arrest warrant be issued, (ii) for identification of the appropriate organ responsible for the preparation and transmission of the request for arrest and surrender.

I.2 Preliminary Comments

10. According to the Appeals Chamber Judgment, the initial determination of the admissibility of a case is not a pre-requisite for the issuance of a warrant of arrest because:

Article 58(1) of the Statute stipulates only two substantive prerequisites for the issuance of an arrest: firstly, the Pre-Trial Chamber must be satisfied that there “are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court” (see article 58(1)(a) of the Statute); secondly, the arrest of the person must appear necessary for at least one of the three reasons enumerated in article 58(1)(b) of the Statute.¹

11. Nevertheless, the Appeals Chamber Judgment acknowledged that article 19(1) of the Statute gives the Chamber discretion to make an initial determination of admissibility before the issuance of a warrant of arrest.²

12. According to the Appeals Chamber Judgment, such discretion should be exercised only “when it is appropriate in the circumstances of the case, bearing in mind the interests of suspects.”³

13. In this regard, the Appeals Chamber Judgment stressed that, given the fact that Bosco Ntaganda could not make submissions on the preliminary determination by the Chamber as to the inadmissibility of the case, his interests are better served by issuing the warrant of arrest and allowing him to challenge *a posteriori* the admissibility of the case.⁴

¹ The Appeals Chamber Judgment, para. 42.

² The Appeals Chamber Judgment, paras. 48 and 52.

³ The Appeals Chamber Judgment, para. 52.

⁴ The Appeals Chamber Judgment, paras. 49 to 51.

14. In its *ratio decidendi*, the Appeals Chamber Judgment found that the exercise by the Chamber of its discretion in the present case was inappropriate⁵ because:

The Pre-Trial Chamber conducted the review in circumstances where (a) admissibility was not raised in the Prosecutor's ex parte application, (b) the review was ex parte without the participation of the suspect, victims or entities and (c) no ostensible cause or self evident factor was manifest impelling the exercise of *proprio motu* review, in other words, the exercise of discretion was not appropriate in the circumstances of the case.⁶

15. Consequently, the Chamber will not revisit the issue of the admissibility of the case against Bosco Ntaganda in the present decision. For the purpose of the present decision, none of the factors provided for in article 17 of the Statute is relevant, including the gravity threshold provided for in article 17(1)(d) of the Statute.

I.3 Preliminary Observations

16. Before discussing the substance of the Prosecution Application, the Chamber would make several preliminary observations.
17. First, the Prosecution submits that at this stage the legislator has chosen to require the Chamber "to trust the Prosecution's summary" of the available evidentiary materials provided for in the Prosecution Application.⁷ In the view of the Chamber, however, the legislator has chosen at this stage to require that the Chamber, pursuant to article 58(1) of the Statute, review not only the Prosecution Application but also "the evidence or other information submitted by the Prosecution" in order to satisfy itself that

⁵ The Appeals Chamber Judgment, para. 53.

⁶ The Appeals Chamber Judgment, para. 53.

⁷ The Prosecution Further Submission, para. 19.

there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and that his arrest appears necessary.⁸

18. Second, in determining whether the Chamber has an intimate conviction that both the “reasonable grounds to believe” standard and the appearance standard required by article 58(1) of the Statute have been met, the Chamber, despite its not being under any obligation to do so, will often refer to the evidentiary materials and information provided in the Prosecution Application, the Prosecution Submission and the Prosecution Further Submission. However, the Chamber wishes to emphasise that the intimate conviction of the Chamber in relation to any given finding has not been reached solely on the basis of the evidentiary materials and information expressly discussed here.
19. Third, in the view of the Chamber, when deciding on the Prosecution Application, the Chamber, pursuant to article 58(1) of the Statute, is bound by the factual basis and the evidentiary materials and information provided by the Prosecution in the Prosecution Application, the Prosecution Submission and the Prosecution Further Submission.
20. However, the Chamber considers that it is not bound by the Prosecution legal characterisation of the conduct referred to in the Prosecution Application. Indeed, a literal interpretation of article 58(1) of the Statute would require that the Chamber issue a warrant of arrest if, in addition to the apparent need for the arrest of the relevant person, “there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court”. Hence, in the view of the Chamber,

⁸ The Decision, para. 19.

the reference to “a crime”, as opposed to any of the specific crimes referred to in the Prosecution Application, leads to the conclusion that a warrant of arrest must be issued even if the Chamber disagrees with the Prosecution legal characterisation of the relevant conduct.

21. Fourth, the Chamber notes that article 19(1) of the Statute provides that “[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it.”
22. The Chamber also recalls the practice of Pre-Trial Chamber II in its decisions on the Prosecution requests for warrants of arrest for Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen, which granted the requests of the Prosecution only after having found that the cases fell within the jurisdiction of the Court.⁹
23. In this regard, it is the view of the Chamber that an initial determination on whether the case against Bosco Ntaganda falls within the jurisdiction of the Court is a prerequisite for the issuance of a warrant of arrest for him.
24. The Chamber notes that, in the present case, its review of whether the case against Bosco Ntaganda falls within the jurisdiction of the Court is *ex officio* insofar as the Prosecution has raised no issue of jurisdiction in the Prosecution Application.¹⁰ The Chamber also notes that rule 58(2) of the Rules of Procedure and Evidence (“the Rules”) establishes that, when the Chamber is acting on its own motion as provided for in article 19(1) of the

⁹ “Warrant of Arrest for Joseph Kony as amended on 27 September 2005”, public redacted version filed by PTC II on 13 October 2005, para. 38; “Warrant of Arrest for Vincent Otti”, public redacted version filed by PTC II on 13 October 2005, para. 38; “Warrant of Arrest for Raska Lukwiya”, public redacted version filed by PTC II on 13 October 2005, para. 26; “Warrant of Arrest for Okot Odhiambo”, public redacted version filed by PTC II on 13 October 2005, para. 28; and “Warrant of Arrest for Dominic Ongwen”, public redacted version filed by PTC II on 13 October 2005, para. 26.

¹⁰ The Prosecution Submission, para. 3, footnote 5.

Statute, it shall decide on the procedure to be followed, may take appropriate measures for the proper conduct of the proceedings and may hold a hearing. Furthermore, the Chamber recalls its decision of 20 January 2006 to receive and maintain the Prosecution Application under seal and to conduct proceedings in connection with the Prosecution Application *ex parte* and in closed session.¹¹

25. In the present context, the Chamber holds that with respect to the need to first determine *ex officio* whether the case against Bosco Ntaganda does indeed fall within the jurisdiction of the Court and is admissible, the decision must be made *ex parte* with the exclusive participation of the Prosecution and on the basis of the evidentiary materials and information provided by the Prosecution in the Prosecution Application, in the Prosecution Submission, in the Prosecution Further Submission and at the hearing of 2 February 2006. Furthermore, such a determination is without prejudice to any determination on jurisdiction or admissibility which might be taken subsequently concerning the case against Bosco Ntaganda pursuant to articles 19(1)(2) and (3) of the Statute.

II. Analysis of whether the case against Bosco Ntaganda falls within the jurisdiction of the Court

26. As the Chamber held in paragraph 21 of the Decision, 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.

¹¹ The Decision concerning Supporting Materials, p. 4.

27. The situation under investigation from which the case against Bosco Ntaganda arises has been defined as encompassing the territory of the DRC since 1 July 2002.¹² Hence, as the Prosecution Application refers to conduct alleged to have taken place between July 2002 and December 2003 in certain camps and areas located in the region of Ituri in the territory of the DRC,¹³ the Chamber finds that the case against Bosco Ntaganda falls within the DRC situation currently under investigation.

28. As the Chamber pointed out in the decision issued on 18 January 2006:

To fall within the Court's jurisdiction, a crime must meet the following 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.¹⁴

29. With regard to the first condition, the Chamber finds¹⁵ that there are reasonable grounds to believe that between July 2002 and December 2003 there was an armed conflict in the region of Ituri and that the alleged crimes underlying the case against Bosco Ntaganda (the alleged policy/practice of the *Union des Patriotes Congolais* ("the UPC")) and the

¹² In this regard, the Chamber recalls that on pp. 2 and 3 of the 21 April 2004 "Decision to Hold Consultation under Rule 114", (ICC-01/04-18-Conf), and in paras. 65, 68 and 84 of the 18 January 2006 Decision on the Application 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-tEN), the Chamber found:

- (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 articles 13(a) and 14 of the Statute;
- (ii) that on receiving the letter of referral, 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 the 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.

Moreover, the Chamber notes the letter of 21 July 2004 sent by the Ministry of Foreign Affairs of the Republic of Rwanda to the Prosecution under article 18(2) of the Statute, stating that "[...] no Rwandan National, acting under authority of the Government of Rwanda has been in the area of Ituri and in the Democratic Republic of Congo generally. For that matter, there has been no basis for any investigation and prosecution of any Rwandan National in connection with events in Ituri" (Exhibit No. HNE 5-01/04-US, p. 2).

¹³ The Prosecution Application, pp. 5 and 6.

¹⁴ ICC-01/04-100-Conf-Exp-tEN, para. 85.

¹⁵ See *infra* section III.3.1.

Forces Patriotiques pour la Libération du Congo (“the FPLC”) of enlisting into the FPLC, conscripting into the FPLC and using to participate actively in hostilities children under the age of fifteen) were committed in connection with that armed conflict. In addition, the Chamber observes that enlisting into the FPLC, conscripting into the FPLC or using to participate actively in hostilities children under the age of fifteen constitutes a war crime under either article 8(2)(e)(vii) of the Statute if the conflict is of a non-international character or article 8(2)(b)(xxvi) of the Statute if the conflict is of an international character. Hence, in the Chamber’s view, the first condition has been met.

30. 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,”¹⁶ the second condition would be met pursuant to article 11 of the Statute if the crimes underlying the case against Bosco Ntaganda were committed after 1 July 2002. As the case against Bosco Ntaganda refers to crimes committed between July 2002 and December 2003, the Chamber considers that the second condition has also been met.
31. Regarding the third condition, in its decision of 17 January 2006 the Chamber found 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.¹⁷ The Chamber notes that the crimes underlying the case against Mr Bosco Ntaganda were allegedly committed

¹⁶ ICC-01/04-100-Conf-Exp-tEN, para. 88.

¹⁷ ICC-01/04-100-Conf-Exp-tEN, paras. 91 and 93.

in the region of Ituri on the territory of the DRC and that the third condition has also been met.

32. As a result, the Chamber finds that, on the basis of the evidentiary materials and information provided by the Prosecution in the Prosecution Application, in the Prosecution Submission, in the Prosecution Further Submission and at the hearing of 2 February 2006, the above-mentioned three conditions have been met in the case against Bosco Ntaganda. Hence, in the view of the Chamber, the case against Bosco Ntaganda falls within the jurisdiction of the Court.

III. Whether the requirements under article 58(1) of the Statute for the issuance of a warrant of arrest for Bosco Ntaganda have been met

33. As the Chamber pointed out in paragraph 92 of the Decision, the term “committed” in article 58(1)(a) of the Statute includes:

- (i) the commission *strictu 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.

34. Accordingly, the Chamber considers that, according to article 58(1) of the Statute, the Prosecution Application for the issuance of a warrant of arrest for Bosco Ntaganda can be granted only if the three following questions are answered affirmatively:

- (i) Are there reasonable grounds to believe that at least one crime within the jurisdiction of the Court has been committed?
- (ii) Are there reasonable grounds to believe that Bosco Ntaganda has incurred criminal liability for such crimes under any of the modes of liability provided for in the Statute?
- (iii) Does the arrest of Bosco Ntaganda appear to be necessary under article 58(1)(b) of the Statute?

III.1. Are there reasonable grounds to believe that at least one crime within the jurisdiction of the Court has been committed?

35. The Chamber observes that according to the Statute and the Elements of Crimes, the definition of every crime within the jurisdiction of the Court includes both contextual and specific elements. Hence, the Chamber will first analyse whether there are reasonable grounds to believe that the contextual elements of at least one crime within the jurisdiction of the Court are present, and only then will it turn its attention to the question of whether the specific elements of any such crime are also present.

III.1.1. Are there reasonable grounds to believe that the contextual elements of at least one crime within the jurisdiction of the Court are present?

36. According to the Prosecution Application, Bosco Ntaganda is criminally responsible for the UPC/FPLC policy/practice of enlisting into the FPLC, conscripting into the FPLC and using to participate actively in hostilities

children under the age of fifteen between July 2002 and December 2003.¹⁸ This practice was implemented in the context of the conflict in the region of Ituri which had started by mid-2002 at the latest and continued through 2003.¹⁹ According to the Prosecution, the armed conflict in Ituri was not of international character²⁰ and several regional groups were involved.²¹

37. The Chamber finds that there are reasonable grounds to believe that during the time relevant to the Prosecution Application, a protracted armed conflict within the meaning of article 8(f) of the Statute took place between the UPC/FPLC, the *Front Nationaliste Intégrationniste* ("the FNI") and other organised armed groups.
38. In the view of the Chamber, there are reasonable grounds to believe that, at the very least, the UPC/FPLC²² and the FNI²³ had a hierarchical structure which allowed them to act under a responsible command with operational and disciplinary powers (sufficient level of internal organisation). The Chamber also considers that there are reasonable grounds to believe that both groups resorted to armed violence of a certain intensity over a prolonged period.²⁴ Furthermore, in the opinion of the Chamber there are reasonable grounds to believe that both armed groups controlled parts of the territory of Ituri, which enabled them to plan and carry out concerted military operations.²⁵ Moreover, the Chamber considers that there are

¹⁸ The Prosecution Application, pp. 5 and 6.

¹⁹ The Prosecution Application, paras. 40-47.

²⁰ The Prosecution Application, para. 42.

²¹ The Prosecution Application, para. 41.

²² The Prosecution Application, paras. 49-56; and the Prosecution Further Submission, paras. 28-31 and Annexes 7 to 9.

²³ The Prosecution Further Submission, para. 35 and Annex X.

²⁴ The Prosecution Further Submission, Annex X.

²⁵ Concerning the UPC see the Prosecution Application, para. 39; the Prosecution Further Submission, para. 27 and Annex X. Concerning the FNI, see the Prosecution Further Submission, para. 35(iv), and Annex X.

reasonable grounds to believe that Bosco Ntaganda was aware of the factual circumstances that established the existence of an armed conflict.²⁶

39. The Chamber finds that there are also reasonable grounds to believe that the alleged UPC/FPLC policy/practice of enlisting into the FPLC, conscripting into the FPLC and using to participate actively in hostilities children under the age of fifteen took place in the context of and in association with the conflict in Ituri. In the view of the Chamber, the evidentiary materials and information submitted by the Prosecution provide reasonable grounds to believe that such a practice was closely related to the ongoing hostilities insofar as the existence of the conflict played a substantial role in the decision to implement such a policy/practice and in the ability of the UPC/FPLC to carry it out.²⁷

40. The Chamber emphasises that, on the basis of the evidentiary materials and information brought by the Prosecution, there are reasonable grounds to believe that the Uganda People's Defence Force ("the UPDF") may have directly²⁸ or indirectly²⁹ intervened in the conflict in Ituri, in the context of

²⁶ The Prosecution Application, para. 46.

²⁷ The Prosecution Application, para. 78.

²⁸ See the Prosecution Further Submission, Annex X, which states that in March 2003 "FNI/FRPI assist UPDF in driving UPC from Bunia". See also the witness statement of [REDACTED] (the Prosecution Further Submission, Annex 5), para. 61. Furthermore, according to the MONUC, hundreds of Lendu villages had been completely destroyed during attacks by Ugandan army helicopters together with Hema militia on the ground (see MONUC, "Special Report on the events in Ituri, January 2002 – December 2003, S/2004/57", 16 July 2004, report cited in the Prosecution Application at para. 35, footnote 9 and para. 41, footnote 11, available at: http://www.monuc.org/downloads/S_2004_573_2004_English.pdf, and see particularly p. 5, para. 5 of the report). Moreover, according to the Human Rights Watch, Ugandan troops joined the UPC in ousting Governor Molondo and APC forces from Bunia (see Human Rights Watch, "Ituri: Covered in Blood. Ethnically Targeted Violence in Northeastern DR Congo", July 2003, report cited in the Prosecution Application at para. 35, footnote 10, available at: <http://www.hrw.org/reports/2003/ituri0703/>, and see particularly p. 6 of the report).

²⁹ According to MONUC, the UPC, PUSIC, FPDC, FNI, FRPI, MLC, were armed and political groups all founded with the support of Uganda, (see MONUC's Special Report on the events in Ituri, January 2002 – December 2003, S/2004/57", 16 July 2004, report cited in the Prosecution Application at para. 35 footnote 9 and para. 41 footnote 11, see particularly pp.47-53 of the report). In the same MONUC report it is, inter alia, stated that the local problems would never have resulted in massive slaughter without the involvement of external factors notably the Ugandan support in 1998 when the rebels took over Ituri, (p. 8, para. 18) and that the Ugandan military trained thousands of Hema youths in Ituri and Uganda, (p. 10 para. 21 of the report). According to the Human Rights Watch, Ugandans basically had the role of directing the various groups and their attacks (see Human Rights

which the above-mentioned UPC/FPLC policy/practice allegedly took place. As a result, the Chamber considers that there are reasonable grounds to believe that the conflict in Ituri may have had either a non-international character or an international character.

III.1.2. Are there reasonable grounds to believe that the specific elements of at least one crime within the jurisdiction of the Court are present?

41. According to the Prosecution Application, between July 2002 and December 2003, the UPC/FPLC implemented a policy/practice of enlisting into the FPLC, conscripting into the FPLC, and using to participate actively in hostilities children under the age of fifteen.³⁰
42. The Chamber finds that there are reasonable grounds to believe that during the relevant time repeated acts of enlistment into the FPLC of children under the age of fifteen who were trained in the FPLC training camps in Bule, Centrale, Rwampara, Mandro, Bogoro, Sota and Irumu were carried out by members of the FPLC.³¹
43. In the opinion of the Chamber, there are reasonable grounds to believe that during the relevant time repeated acts of conscription into the FPLC of children under the age of fifteen who were trained in the FPLC training

Watch Report on Ituri: "Covered in Blood. Ethnically Targeted Violence in Northeastern DR Congo", July 2003, report cited in the Prosecution Application at para. 35, footnote 10, see particularly p. 21 of the report; see also Human Rights Watch report "The Curse of Gold", April 26, 2005, report cited in the Prosecution Application at para. 35, footnote 10, see particularly pp. 37 and 38).

³⁰ The Prosecution Application, paras. 71-102.

³¹ The Prosecution Application, paras. 78 and 85-87, and Annex 5; Statement of witness [REDACTED], contained in the Prosecution Further Submission, Annex 1, paras. 20-29; and images of onlookers in the video contained in Annex VI to the Prosecution Application.

camps in Bule, Centrale, Rwampara, Mandro, Bogoro, Sota and Irumu were carried out by members of the FPLC.³²

44. The Chamber also considers that there are reasonable grounds to believe that during the relevant time children under the age of fifteen were repeatedly used to participate actively in hostilities by members of the FPLC in [REDACTED],³³ [REDACTED],³⁴ [REDACTED]³⁵ and [REDACTED]³⁶ [REDACTED]³⁷ and [REDACTED]³⁸ and [REDACTED].³⁹
45. In the view of the Chamber, there are also reasonable grounds to believe that those members of the FPLC who repeatedly enlisted into the FPLC, conscripted into the FPLC and used to participate actively in hostilities children under the age of fifteen knew that such children were under the age of fifteen.⁴⁰
46. The Chamber is of the opinion that each individual case of enlistment into the FPLC, conscription into the FPLC or use to participate actively in

³² The Prosecution Application, para. 88 and Annex V; Statement of witness [REDACTED], contained in the Prosecution Further Submission, Annex II, paras. 19-34; Statement of witness [REDACTED], contained in the Prosecution Further Submission, Annex III, paras. 20-31; Statement of witness [REDACTED], contained in the Prosecution Further Submission, Annex IV, paras. 21-36; Statement of witness [REDACTED], contained in the Prosecution Further Submission, Annex V, paras. 21-40; and Statement of witness [REDACTED], contained in the Prosecution Further Submission, Annex VI, paras. 20-36.

³³ Statement of witness [REDACTED], contained in the Prosecution Further Submission, Annex IV, paras. 41-50.

³⁴ Statement of witness [REDACTED], contained in the Prosecution Further Submission, Annex VI, paras. 46-54.

³⁵ Statement of witness [REDACTED], contained in the Prosecution Further Submission, Annex I, paras. 40-47; Statement of witness [REDACTED], contained in the Prosecution Further Submission, Annex II, paras. 42-50; Statement of witness [REDACTED], contained in the Prosecution Further Submission, Annex III, paras. 39-44; and Statement of witness [REDACTED], contained in the Prosecution Further Submission, Annex IV, paras. 47-53.

³⁶ Statement of witness [REDACTED], contained in the Prosecution Further Submission, Annex II, para. 51.

³⁷ Statement of witness [REDACTED], contained in the Prosecution Further Submission, Annex V, paras. 65-67; and Statement of witness [REDACTED], contained in the Prosecution Further Submission, Annex VI, paras. 55-57.

³⁸ Statement of witness [REDACTED] contained in the Prosecution Further Submission, Annex V, paras. 68-69.

³⁹ Idem.

⁴⁰ Statement of witness [REDACTED], contained in the Prosecution Further Submission, Annex I, paras. 20-23, 41 and 45; Statement of witness [REDACTED], contained in the Prosecution Further Submission, Annex II, paras. 19-21, and 43-46 and 51; Statement of witness [REDACTED], contained in the Prosecution Further Submission, Annex III, paras. 20-22 and 43; Statement of witness [REDACTED], contained in the Prosecution Further Submission, Annex IV, paras. 22, 26, 27 and 51; Statement of witness [REDACTED], contained in the Prosecution Further Submission, Annex V, paras. 23, 39 and 43-45; and Statement of witness [REDACTED], contained in the Prosecution Further Submission, Annex VI, paras. 20-21, 48 and 51.

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 (1) all instances of enlistment into the FPLC as a continuous war crime of enlistment of children under the age of fifteen into the FPLC; (2) all instances of conscription into the FPLC as a continuous war crime of conscription of children under the age of fifteen into the FPLC; and (3) all instances of using to participate actively in hostilities children under the age of fifteen by members of the UPC/FPLC as a continuous war crime of using to participate actively in hostilities children under the age of fifteen.

47. Accordingly, the Chamber concludes that there are reasonable grounds to believe that:
- (i) a continuous war crime of enlistment of children under the age of fifteen punishable under either article 8(2)(b)(xxvi) or article 8(2)(e)(vii) of the Statute has been committed;
 - (ii) a continuous war crime of conscription of children under the age of fifteen punishable under either article 8(2)(b)(xxvi) or article 8(2)(e)(vii) of the Statute has been committed; and
 - (iii) a continuous war crime of using children under the age of fifteen to participate actively in hostilities punishable under either article 8(2)(b)(xxvi) or article 8(2)(e)(vii) of the Statute has been committed.

III.2 Are there reasonable grounds to believe that Bosco Ntaganda has incurred criminal liability for the above-mentioned crimes under any of the modes of liability provided for in the Statute?

48. The Prosecution alleges that Bosco Ntaganda, along with Thomas Lubanga Dyilo and a number of other FPLC officers, are responsible as co-

perpetrators within the meaning of 25(3)(a) of the Statute for the war crimes of enlisting into the FPLC, conscripting into the FPLC and using to participate actively in hostilities children under the age of fifteen from July 2002 to December 2003.⁴¹

49. The Chamber considers that there are reasonable grounds to believe that the FPLC structure was a typical military command structure,⁴² which resembled the structure of traditional armies⁴³ and that Thomas Lubanga Dyilo was, from its creation in September 2002, *de jure* and *de facto* Commander-in-Chief or Supreme Commander.⁴⁴
50. The Chamber also considers that there are reasonable grounds to believe that Floribert Kisembo, the FPLC Chief of General Staff, occupied the second level of the chain of command within the FPLC and was the immediate superior of Bosco Ntaganda in a way that reflects the regular military structure.⁴⁵
51. Hence, in the view of the Chamber there are reasonable grounds to believe that in the period relevant to the Prosecution Application (July 2002 to December 2003), Bosco Ntaganda ranked third in the hierarchy of the FPLC, directly subordinate to the FPLC Chief of General Staff, Floribert Kisembo), who was in turn directly subordinate to the FPLC Commander-in-Chief, Thomas Lubanga Dyilo.⁴⁶
52. Furthermore, the Chamber considers that there are reasonable grounds to believe that Bosco Ntaganda, as Deputy Chief of General Staff for Military

⁴¹ The Prosecution Application, pp. 5 and 6 and paras. 103-106.

⁴² ICC-01/04-T-8-Conf-EXP-EN, p. 37, lines 10-11.

⁴³ The Prosecution Application para. 60; and ICC-01/04-T-8-Conf-EXP-EN, p. 38, lines 22-24.

⁴⁴ ICC-01/04-T-8-Conf-EXP-EN, p. 24, lines 10-11, p. 27, lines 11-25, p. 38, lines 1-3, and p. 40, lines 11-18.

⁴⁵ The Prosecution Further Submission, para. 37.

⁴⁶ The Prosecution Further Submission, Annex 9.

Operations, was the immediate superior of the FPLC sector commanders and had *de jure* and *de facto* authority over the FPLC training camp commanders and the FPLC field commanders.⁴⁷

53. Moreover, the Chamber finds that there are reasonable grounds to believe that on 8 December 2003 Bosco Ntaganda was appointed by Thomas Lubanga Dyilo as FPLC Chief of General Staff, thus replacing Floribert Kisembo in that position.⁴⁸

54. Hence, as the Chamber already pointed out at paragraph 109 of the Decision, there are reasonable grounds to believe that Thomas Lubanga Dyilo was the man who had the final say about the adoption and implementation of the policies/practices of the UPC/FPLC - a hierarchically organised armed group⁴⁹ - during the period relevant to the Prosecution Application,⁵⁰ including enlisting into the FPLC, conscripting into the FPLC and using to participate actively in hostilities children under the age of fifteen.⁵¹ In this context, the Chamber considers that there are reasonable grounds to believe that Bosco Ntaganda used his authority within the FPLC to actively implement the policies/practices adopted at a higher level of the UPC/FPLC, including those of enlisting into the FPLC, conscripting into the FPLC and using to participate actively in hostilities children under the age of fifteen.⁵²

⁴⁷ The Prosecution Further Submission, Annex 9; and ICC-01/04-T-8-Conf-EXP-EN, p. 38, lines 8-21.

⁴⁸ *Idem*. See also ICC-01/04-T-8-Conf-EXP-EN, p. 42, line 7.

⁴⁹ The Prosecution Application, paras. 49-56; and the Prosecution Further Submission, paras. 28-31 and Annexes 7 to 9.

⁵⁰ The Prosecution Application, paras. 52, 68 and 105; and ICC-01/04-T-8-Conf-EXP-EN, p. 24 lines 1-16.

⁵¹ *Idem*. See also Transcript of video contained in Annex VI to the Prosecution Application, pp. 7 and 8, and 10.

⁵² *Idem*. See also Transcript of video contained in Annex VI to the Prosecution Application, pp. 7 and 8, and 10.

55. Moreover, the Chamber finds that there are reasonable grounds to believe that Bosco Ntaganda was aware of his role within the UPC/FPLC in implementing the above-mentioned policies.⁵³
56. The Chamber also finds that there are reasonable grounds to believe that Bosco Ntaganda often visited the FPLC training camps where children under the age of fifteen were being trained to become FPLC soldiers and directly took part in attacks in which FPLC soldiers under the age of fifteen actively participated.⁵⁴
57. Therefore, the Chamber considers that there are reasonable grounds to believe that Bosco Ntaganda is criminally responsible under article 25(3)(a) of the Statute for the above-mentioned crimes.
58. The Chamber has reached this conclusion based in part on the existence of reasonable grounds to believe that Bosco Ntaganda directly participated in the commission of some of the crimes referred to in the Prosecution Application.
59. Moreover, in the view of the Chamber, each intermediate commander who actively transmits the orders received from above to the next level below in the chain of command can, under article 25(3)(a) of the Statute, be said to have committed the crime through another person, regardless of whether that other person is criminally responsible, since each intermediate

⁵³ The Prosecution Application, paras. 80, 82 and 105

⁵⁴ According to the Prosecution, Mr Bosco Ntaganda deployed the troops in the field with his five subordinates and took part in many FPLC military operations. ICC-01/04-T-8-Conf-EXP-EN, p. 38, lines 4-7. See also Statement of witness [REDACTED], contained in the Prosecution Further Submission, Annex 1, paras. 45-47; Statement of witness [REDACTED], contained in the Prosecution Further Submission, Annex V, paras. 53-71; and Statement of witness [REDACTED], contained in the Prosecution Further Submission, Annex VI, paras. 48-49.

commander is in a position to manoeuvre the part of the organised structure of power controlled by him.⁵⁵

60. In this regard, the Chamber recalls that it has already found that there are reasonable grounds to believe that the structure of the FPLC was a typical military command structure⁵⁶ which resembled the structure of traditional armies and that the relationship among Thomas Lubanga Dyilo, Floribert Kisembo and Bosco Ntaganda was hierarchical. Accordingly, the Chamber considers that there are reasonable grounds to believe that the concept of indirect perpetration, which, along with the concept of co-perpetration based on joint control of the crime referred to in the Prosecution Application⁵⁷, is provided for in article 25(3)(a) of the Statute, could be also applicable to the alleged role of Bosco Ntaganda in the commission of the crimes set out in the Prosecution Application.

III.3 Does the arrest of Bosco Ntaganda appear necessary under article 58(1)(b) of the Statute?

61. Under article 58(1)(b) of the Statute, the Chamber may issue a warrant of arrest for Bosco Ntaganda only if it is satisfied that his arrest 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

⁵⁵ Roxin, C., *Täterschaft und Tatherrschaft*, 7th ed., 2000, p. 248. See also Ambos, K., Article 25. Individual Criminal Responsibility, in Triffterer, O. (ed.): *Commentary on the Rome Statute of the International Criminal Court*, 1999, pp. 475-492, p. 479; and Eser, A, Individual Criminal Responsibility, in Cassese, A./Gaeta, P./Jones, J.R.W.D.: *The Rome Statute of the International Criminal Court: A Commentary*, 2002, pp. 767-822, pp. 793-795.

⁵⁶ ICC-01/04-T-8-Conf-EXP-EN, p. 37, lines 10-11.

⁵⁷ According to the Prosecution Application, para. 104: "Based on the intent shared by Thomas Lubanga Dyilo, Bosco Ntaganda and all other joint perpetrators to recruit children under the age of fifteen and to use them in combat, they, in pursuing their common goal, coordinated their efforts, enjoying joint control over the execution of their common plan."

(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.

62. According to the Prosecution, the arrest of Bosco Ntaganda is necessary because "he will not appear at trial unless compelled to do so by arrest."⁵⁸ The Prosecution submits that Bosco Ntaganda refused to join the peace process and be integrated in the *Forces Armées de la République Démocratique du Congo* ("the FARDC") as a brigadier general.⁵⁹ Instead, the Prosecution alleges that Bosco Ntaganda has since early 2005 been a member of and currently holds a leadership position in the *Mouvement Révolutionnaire du Congo* ("the MRC"), which is a new militia group led by former officers of the FPLC and the FNI fighting the FARDC and operates in and around the Ituri District.⁶⁰
63. As a result, according to the Prosecution, Bosco Ntaganda "to date successfully avoided being located and apprehended by the DRC authorities, at their request supported by MONUC, following a request for arrest issued by the Prosecutor of Bunia of 25 February 2005 and the issuance of an arrest warrant against him in April 2005."⁶¹
64. The Chamber considers that, on the basis of the evidentiary materials and information provided by the Prosecution in the Prosecution Application, in the Prosecution Submission, in the Prosecution Further Submission and at the hearing of 2 February 2006, and without prejudice to subsequent determinations under article 60 of the Statute and rule 119 of the Rules, the arrest of Bosco Ntaganda appears necessary at this stage both to ensure his appearance at trial and to ensure that he does not obstruct or endanger the

⁵⁸ The Prosecution Application, para. 201.

⁵⁹ *Idem.*

⁶⁰ *Idem.*

⁶¹ *Idem.*

investigation. The Chamber has reached this conclusion because it appears that Bosco Ntaganda, despite criminal proceedings against him in the DRC, remains at large and is currently fighting the FARDC in the Ituri District after having refused to join the peace process in Ituri.⁶²

65. Furthermore, the Chamber notes that, according to the Prosecution, [REDACTED] in the case against Bosco Ntaganda referred to in the Prosecution Application are currently settled [REDACTED].⁶³ The Chamber considers that it appears that some witnesses in trials held before the *Tribunal de Grande Instance* in Bunia against middle or high ranking UPC/FPLC members have been killed or threatened,⁶⁴ and that Bosco Ntaganda, still at large and fighting as one of the top military commanders of the MRC against the FARDC in the Ituri District, may be in a position to obstruct or endanger the investigation by *inter alia* threatening potential witnesses.⁶⁵

IV. Should the Office of the Prosecutor be the organ of the Court responsible for making and transmitting the request for cooperation seeking arrest and surrender of Bosco Ntaganda to the relevant State authorities?

66. In paragraph 217 of the Prosecution Application, the Prosecution requests that:

[...] the Pre-Trial Chamber [should] state in the body of the warrant(s) that the Prosecution will be the organ of the Court responsible for the making and the transmission (sic) of the request(s) for cooperation seeking arrest and surrender to the relevant State authorities.

⁶²The Prosecution Application para. 201; the Prosecution Submission, para. 16; and ICC-01/04-T-8-Conf-EXP-EN, p. 18, lines 8 to 25 and p. 19, lines 1 to 7.

⁶³ The Prosecution Further Submission, para. 4.

⁶⁴ "Observations on the Protection of Victims and Human Rights Organizations in Eastern Democratic Republic of Congo", filed by Human Rights Watch and Redress on 30 June 2005, pp. 10 and 15.

⁶⁵ The Prosecution Application para. 201; the Prosecution Submission, para. 16; and ICC-01/04-T-8-Conf-EXP-EN, p. 18, lines 8 to 25 and p. 19, lines 1 to 7.

67. According to the Prosecution:

[...] the organ to make the request should be the organ that is in the best position to secure its effective execution. This properly reflects the flexibility built into Articles 58(1) and 89(1) of the Statute and Rule 176(2) of the Rules of Procedure and Evidence, and will best promote the object and purpose of the Statute.⁶⁶

68. The Prosecution also alleges that the Office of the Prosecutor is the organ of the Court best positioned to secure effective execution of the request for cooperation seeking arrest and surrender.⁶⁷ Furthermore, the Prosecution submits that the approach adopted by Pre-Trial Chamber II, whereby the Prosecution can transmit a cooperation request for arrest and surrender only under specific and compelling circumstances, has no basis in the Statute or the Rules.⁶⁸ Even if the Chamber disagrees with the Prosecution on this point, the Prosecution submits that the “specific and compelling circumstances” standard has been met here.⁶⁹

69. As the Chamber has pointed out in paragraphs 121 to 131 of the Decision, under articles 19, 58(1) and (6), 59(5) and (6), and 89(2) of the Statute and rules 117 and 184 of the Rules, the Pre-Trial Chamber is the only competent

⁶⁶ The Prosecution Application, para. 210.

⁶⁷ The Prosecution submits the following reasons:

- (i) there is a cooperation agreement between the Office of the Prosecutor and the DRC which *inter alia* deals with the confidentiality of the cooperation requests for arrest and surrender (the Prosecution Application, para. 211 (i));
- (ii) when transmitting the cooperation requests for arrest and surrender, the Office of the Prosecutor can rely on existing relationships resulting from arrangements and agreements which it has established in the course of its investigations with States, organisations and individuals for the provision of confidential information (the Prosecution Application, para. 211 (ii));
- (iii) the Office of the Prosecutor is the sole organ of the Court privy to the full set of relevant information and therefore best able to ensure that all aspects of providing security to both victims and witnesses and to its staff are fully considered (the Prosecution Application, para. 211 (iii)); and
- (iv) the Prosecution knows the whereabouts of Bosco Ntaganda and continues to monitor his movements closely (the Prosecution Application, para. 211 (iv)).

⁶⁸ The Prosecution Application, para. 213.

⁶⁹ The Prosecution Application, para. 214.

organ of the Court (1) to issue and amend a warrant of arrest,⁷⁰ (2) to deal with the national authorities of the requested State concerning any incident which might affect the surrender of the person to the Court once such person has been arrested,⁷¹ and (3) in a position to thoroughly follow up on the execution of cooperation requests for both arrest and surrender of the relevant person. Hence, the Pre-Trial Chamber, assisted by the Registry in accordance with rule 176(2) and rule 184 of the Rules, must be regarded as the only organ of the Court competent to make and transmit a cooperation request for arrest and surrender.⁷²

70. In the context of the present Prosecution Application, the Chamber considers that there is no need to decide whether the Statute and the Rules leave any room for the Chamber to authorise the Prosecution to transmit a particular cooperation request for arrest and surrender in case of "specific and compelling circumstances."⁷³ In this regard, the Chamber recalls the Prosecution submission that Bosco Ntaganda, despite criminal proceedings against him in DRC, remains at large, even though he is being actively sought by the DRC authorities supported by MONUC following a request for arrest issued by the Prosecutor of Bunia of 25 February 2005.⁷⁴

71. The Chamber also takes note of the Prosecution's assertion that the Office of the Prosecutor is the sole organ of the Court privy to the full set of relevant information and therefore best able to ensure that all aspects of

⁷⁰ Article 58(1) and (6) of the Statute.

⁷¹ Articles 59, 117

⁷² The Chamber recalls the "Decision on the Prosecution's Application for Warrants of Arrest under Article 58", issued by Pre-Trial Chamber II on 12 July 2005, ICC-02/04-01/05-1-US-Exp, in which Pre-Trial Chamber II states at p. 6 that: "[...] unlike rule 55(D) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, referred to by the Prosecutor in his submissions, rule 176, sub-rule 2, of the Rules is not explicit as to any discretion of the Chamber regarding the organ to be entrusted with the transmission of the requests for cooperation and the receipt of the responses thereto."

⁷³ Pre-Trial Chamber II answered this question in the affirmative on p. 6 of its "Decision on the Prosecution's Application for Warrants of Arrest under article 58".

⁷⁴ The Prosecution Application, para. 201.

providing security to both victims and witnesses and to its staff are fully considered, and that it has built certain relationships in the DRC that would facilitate the execution of the cooperation request for the arrest and surrender of Bosco Ntaganda.⁷⁵

72. In this regard, the Chamber considers that it is necessary for the protection and privacy of witnesses and victims within the meaning of article 57(3)(c), of the Statute that the Prosecution, insofar as it is not prevented from doing so by its confidentiality obligations, transmit to the Pre-Trial Chamber and the Registry as soon as practicable any information related to the potential risks that the transmission of the cooperation request for the arrest and surrender of Bosco Ntaganda may cause to victims and witnesses.
73. Furthermore, the Chamber considers that it would be beneficial for the expeditious execution of the cooperation request for arrest and surrender of Bosco Ntaganda that the Prosecution, insofar as it is not prevented from doing so by its confidentiality obligations, transmit as soon as practicable to the Pre-Trial Chamber and to the Registry any information that, in the view of the Prosecution, would facilitate the expeditious execution by the national authorities of such a cooperation request.
74. The Chamber takes note of the submission of the Prosecution that Bosco Ntaganda may at one point take refuge in "the wider region, including outside the DRC".⁷⁶ In this regard, the Chamber is mindful that the Ituri district shares a border with Uganda, a State Party to the Rome Statute. Furthermore, the Chamber recalls its finding that there are reasonable grounds to believe that the UPDF may have directly or indirectly intervened in the conflict in Ituri, in the context of which the UPC/FPLC

⁷⁵ The Prosecution Application, para. 211 (iii).

⁷⁶ The Prosecution Application, para. 211 (iv).

policy/practice for which a warrant of arrest for Bosco Ntaganda is sought by the Prosecution allegedly took place.⁷⁷ For this reason, the Chamber considers that a cooperation request for arrest and surrender of Bosco Ntaganda should also be addressed to the Ugandan authorities.

75. Moreover, the Chamber considers that there are reasonable grounds to believe that Bosco Ntaganda has Rwandan origins,⁷⁸ that he currently owns a house in Kigali⁷⁹ and that, in the past, he has maintained contact with a number of individuals residing in Rwanda.⁸⁰ Furthermore, the Chamber recalls the Prosecution's allegation that Bosco Ntaganda "was key in negotiating weapon and ammunition supplies from Rwanda and organizing their deliveries."⁸¹ Moreover, according to the Prosecution, in the past, Rwanda "substantially supported the Hema militia and, once evolved into it, the FPLC."⁸²

76. The Chamber is mindful that Rwanda is not currently a State Party to the Rome Statute. Nevertheless, article 87(5) of the Statute allows for the conclusion of ad hoc cooperation arrangements or agreements between the Court and non-party States. Hence, the Chamber considers that the Registry, acting under the authority of the President as provided for in regulation 97 of the Regulations of the Court, should do its utmost to secure an ad hoc arrangement or agreement with Rwanda concerning the modalities of cooperation provided for in Part IX of the Statute. In the view of the Chamber, such an ad hoc arrangement or agreement should cover the overall investigation of the DRC situation and any case deriving from

⁷⁷ See *supra* para. 40.

⁷⁸ The Prosecution Application, para. 23.

⁷⁹ ICC-01/04-T-8-Conf-EXP-EN, p. 87, lines 1 to 4.

⁸⁰ See, for instance, Prosecution Application, para. 31.

⁸¹ The Prosecution Application, para. 31.

⁸² The Prosecution Application, para. 42.

such an investigation. Only as a last resort, should such an arrangement be confined to the case against Bosco Ntaganda.

V. Should the Prosecution be authorised to disclose information relating to the warrant of arrest for Bosco Ntaganda to the competent representatives of the entities able and willing to assist in the arrangements necessary for his arrest and surrender?

77. In paragraphs 11 and 13 of the Prosecution's Application, the Prosecution requests:

[...] authorisation to notify the competent representatives of such entities that, in the assessment of the OTP, at the relevant time are able and willing to assist in the arrangements necessary for arrests and surrender, of the existence of the warrant(s) of arrest against Thomas LUBANGA DYILO and/or Bosco NTAGANDA, and the contents of the warrant(s).

Due to the ever changing situation on the ground, the Prosecution is not in a position to already now in detail determine the entities that will be able and willing to assist at the time. Accordingly, the Prosecution submits this request in such terms that allow the OTP, if necessary, to react quickly and in time.

78. At the hearing of 2 February 2006, the Prosecution further elaborated on its request:

For Bosco Ntaganda, the specific entities would include any other appropriate authorities of those states whose co-operation is essential to the successful execution of the warrant of arrest which would imply, possibly, again the Democratic Republic of the Congo and in addition possibly Uganda, possibly Rwanda, and again MONUC.⁸³

79. The Chamber recalls its decision of 20 January 2006 to receive and maintain the Prosecution Application under seal and to conduct

⁸³ ICC-01/04-T-8-Conf-EXP-EN, p. 80, lines 21-25 and p. 81, lines 2 to 8.

proceedings in connection with the Prosecution Application *ex parte* and in closed session⁸⁴ because:

[...] the Prosecution assures to the Chamber that public knowledge of the Prosecution's Application prior to any decision might (i) result in Mr Thomas Lubanga Dyilo and/or Mr Bosco Ntaganda's hiding, fleeing, and/or obstructing or endangering the investigations or the proceedings of the Court; and (ii) put the physical well-being of Mr Thomas Lubanga Dyilo at risk.⁸⁵

80. The Chamber is not aware of any change of circumstances in the current situation of Bosco Ntaganda since the filing of the Prosecution Application as he remains at large despite criminal proceedings against him in the DRC and continues to fight as a top commander of the MRC against the FARDC in the Ituri district. As a result, the Chamber has decided that the present decision and the warrant of arrest for Bosco Ntaganda, as with previous decisions taken in connection with the Prosecution Application, shall be issued under seal and shall remain under seal until otherwise provided for by the Chamber.
81. The Chamber has already found that the Chamber, assisted by the Registry in accordance with rule 176(2) and rule 184 of the Rules, must be regarded as the only organ of the Court competent to make and transmit a cooperation request for arrest and surrender,⁸⁶ and that in the present case Bosco Ntaganda is currently at large, allegedly in the territory of the DRC, although he could also be hiding in the territories of Uganda and Rwanda.⁸⁷

⁸⁴ The Decision concerning Supporting Materials, p. 4.

⁸⁵ The Decision concerning Supporting Materials, pp. 3 and 4.

⁸⁶ See *supra* section IV.

⁸⁷ *Idem*.

82. In the view of the Chamber, the procedure set out above for making and transmitting the two cooperation requests for arrest and surrender of Bosco Ntaganda requires that the Registry be authorised to inform, if necessary prior to the transmittal of such cooperation requests, the following of the existence of a warrant of arrest for Bosco Ntaganda: (1) the DRC authorities competent to receive a cooperation request for arrest and surrender from the Court in order to ensure the successful execution of the warrant of arrest; (2) the Ugandan authorities competent to receive a cooperation request for arrest and surrender from the Court in order to ensure the successful execution of the warrant of arrest; (3) the persons involved in the transfer of Bosco Ntaganda to the seat of the Court in The Hague; and (4) the Under-Secretary-General of the United Nations for Peacekeeping Operations and the Special Representative of the Secretary-General of the United Nations for the DRC for purpose of taking protective measures.
83. In addition, the Chamber considers that it may be necessary to provide to the competent Rwandan authorities information about the existence of a warrant of arrest for Bosco Ntaganda either in the context of negotiating an ad hoc arrangement or agreement between the Court and Rwanda concerning the modalities of cooperation provided for in Part IX of the Statute, or, subsequently, prior to the transmittal to Rwanda of a cooperation request for the arrest and surrender of Bosco Ntaganda.
84. The Chamber considers that granting authorisation to the Prosecution to disclose information about the existence of the warrant of arrest to the competent representatives of any other undetermined entity would defeat the purpose of issuing the present decision and the warrant of arrest for Bosco Ntaganda under seal. In the view of the Chamber, should the

Prosecution consider that it would further the execution of the cooperation requests for arrest and surrender to give notice of the warrant of arrest for Bosco Ntaganda to a specific person, other than to those referred to in paragraphs 82 and 83, the Prosecution may request the Chamber to authorise giving notice to such person(s).

VI. Should measures be requested under article 57(3)(e) of the Statute and rule 99(1) of the Rules?

85. As pointed out in paragraphs 144 to 151 of the Decision, although a first reading of article 57(3)(e) of the Statute might suggest that cooperation requests for taking of protective measures under such a provision can be aimed only at guaranteeing the enforcement of a future penalty of forfeiture under article 77(2) of the Statute, the literal, contextual and teleological interpretation of the scope of article 57(3) of the Statute leads to the conclusion that it also covers cooperation requests for the taking of protective measures for the purpose of securing the enforcement of a future reparation award.
86. Moreover, in the view of the Chamber, if assets and property are not seized or frozen at the time of the execution of a cooperation request for arrest and surrender, or very soon thereafter, the subsequent efforts of the Chamber, the Prosecution or the victims participating in the case might very well prove fruitless. This would also occur in the case of Bosco Ntaganda against whom the Chamber has already found the existence of reasonable grounds to believe that he is criminally responsible for the alleged UPC/FPLC policy/practice of enlisting into the FPLC, conscripting into the FPLC and using to participate actively in hostilities children under the age of fifteen between July 2002 and December 2003 (*fumus boni iuris*).

Indeed, it appears that Bosco Ntaganda, insofar as he is at large and is currently fighting as a top commander of the MRC against the FARDC,⁸⁸ has the incentive and means to place his property and assets beyond the reach of the Court as soon as he becomes aware of the issuance of a warrant of arrest for him (*periculum in mora*).

87. In the view of the Chamber, cooperation requests pursuant to articles 57(3)(e) and 93(1)(k) of the Statute for the taking of protective measures to secure the enforcement of future reparation awards should be transmitted simultaneously with the cooperation requests for arrest and surrender to the DRC and Uganda, as well as to Rwanda if an ad hoc arrangement or agreement is concluded pursuant to article 87(5) of the Statute and rule 97 of the Regulations.

88. The Chamber notes that the Prosecution has made no application to this effect.⁸⁹ Therefore, in requesting States to take measures under article 57(3)(e) of the Statute, the Chamber will act *proprio motu*, as provided for in rule 99(1) of the Rules. However, the Chamber is of the view that, as the organ of the Court primarily in charge of the investigation of the DRC situation, the Prosecution should take this matter into consideration in view of future applications for a warrant of arrest or a summons to appear. It is the view of the Chamber that the effectiveness of the reparation system would greatly benefit from due consideration of this matter by the Prosecution during the investigation stage.

⁸⁸ The Prosecution Application, para. 201.

⁸⁹ The Chamber notes, however, that at the hearing of 2 February 2006, the Prosecution asserted that the Prosecution is paying attention to these matters in the course of its investigation (ICC-01/04-T-8-Conf-EXP-EN, p. 86, lines 7 and 8 and p. 87, lines 1-4).

FOR THESE REASONS,

DECIDES to issue a warrant of arrest for Bosco Ntaganda for his alleged responsibility under article 25(3)(a) of the Statute for:

- (i) the war crime of enlistment of children under the age of fifteen, punishable under either article 8(2)(b)(xxvi) or article 8(2)(e)(vii) of the Statute;
- (ii) the war crime of conscription of children under the age of fifteen, punishable under either article 8(2)(b)(xxvi) or article 8(2)(e)(vii) of the Statute; and
- (iii) the war crime of using to participate actively in hostilities children under the age of fifteen, punishable under either article 8(2)(b)(xxvi) or article 8(2)(e)(vii) of the Statute;

DECIDES that the warrant of arrest for Bosco Ntaganda shall be included in a separate self-executable document containing the information required by article 58(3) of the Statute, which shall remain under seal until otherwise provided for by the Chamber.

DECIDES that, as soon as practicable, the Registry (i) shall prepare two requests for cooperation seeking the arrest and surrender of Bosco Ntaganda and containing the information and documents required by article 89(2) of the Statute; and (ii) shall transmit such requests to the competent DRC and Ugandan authorities in accordance with rule 176(2) of the Rules.

DECIDES to authorise the Registry to inform, if necessary, prior to the transmittal of the cooperation requests for the arrest and surrender of Bosco Ntaganda, the following of the existence of a warrant of arrest for Bosco Ntaganda:

- (i) the DRC authorities competent to receive a cooperation request for arrest and surrender from the Court in order to ensure the successful execution of the warrant of arrest;
- (ii) the Ugandan authorities competent to receive a cooperation request for arrest and surrender from the Court in order to ensure the successful execution of the warrant of arrest;
- (iii) the persons involved in the transfer of Bosco Ntaganda to the seat of the Court in The Hague; and
- (iv) the Under-Secretary-General of the United Nations for Peacekeeping Operations and the Special Representative of the Secretary-General of the United Nations for the DRC for protection purposes.

DECIDES that, as soon as practicable, the Registry shall prepare two cooperation requests for the DRC and Uganda in order for the DRC and Uganda to identify, trace and freeze or seize the property and assets belonging to Bosco Ntaganda at the earliest opportunity, without prejudice to the rights of third parties; and that the Registry shall transmit such cooperation requests to the competent DRC and Ugandan authorities along with the cooperation requests for arrest and surrender in accordance with rule 176(2) of the Rules.

DECIDES that the Registry, acting under the authority of the President, shall initiate as soon as practicable talks with the Rwandan authorities with a view to conclude, pursuant to article 89(5) of the Statute and regulation 107 of the Regulations, an ad

hoc arrangement or agreement between the Court and Rwanda concerning the modalities of cooperation provided for in Part IX of the Statute.

DECIDES that such an ad hoc arrangement or agreement should in principle cover the overall investigation of the DRC situation and any case deriving from such an investigation; and that only as a last resort, acting under the authority of the President, the Registry should be prepared to negotiate an ad hoc arrangement or agreement confined to the case against Bosco Ntaganda.

DECIDES that as soon as an ad hoc cooperation arrangement or agreement has been signed between the Court and Rwanda pursuant to article 89(5) of the Statute and regulation 107 of the Regulations, the Registry shall:

- (i) prepare a cooperation request in order for Rwanda to arrest Bosco Ntaganda and surrender him to the Court containing the information and documents required by article 89(2) of the Statute, and shall transmit such a request to the competent Rwandan authorities in accordance with rule 176(2) of the Rules;
- (ii) prepare a cooperation request in order for Rwanda to identify, trace and freeze or seize the property and assets belonging to Bosco Ntaganda at the earliest opportunity, without prejudice to the rights of third parties, and shall transmit such a cooperation request to the competent Rwandan authorities along with the cooperation request for arrest and surrender in accordance with rule 176(2) of the Rules.

DECIDES to authorise the Registry to inform the competent Rwandan authorities of the existence of a warrant of arrest for Bosco Ntaganda if necessary (i) for the purpose of negotiating an ad hoc arrangement or agreement between the Court and Rwanda concerning the modalities of cooperation provided for in Part IX of the Statute; or (ii) subsequently, prior to the transmittal to Rwanda of a cooperation request for the arrest and surrender of Bosco Ntaganda.

REQUESTS the Prosecution to transmit to the Chamber and to the Registry, as far as its confidentiality obligations so allow, all information available to the Prosecution that may assist in averting any risks to victims or witnesses associated with the transmission of any of the above-mentioned cooperation requests.

INVITES the Prosecution to transmit to the Chamber and to the Registry, as far as its confidentiality obligations so allow, all information available to it that, in its view, would facilitate the transmission and execution of any of the above-mentioned cooperation requests.

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

Judge Claude Jorda
Presiding Judge

Judge Akua Kuenyehia

Judge Sylvia Steiner

Dated this Tuesday, 6 March 2007

No. 01/04-02/06

37/38

6 March 2007

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