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Internationale**



**International
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Court**

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PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR V. BOSCO NTAGANDA

Public redacted version

Decision on the Prosecutor's Application under Article 58

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor **Counsel for the Defence**
 Fatou Bensouda, Prosecutor

Legal Representatives of Victims **Legal Representatives of Applicants**

Unrepresented Victims **Unrepresented Applicants for
 Participation/Reparation**

**The Office of Public Counsel for
 Victims** **The Office of Public Counsel for the
 Defence**

States' Representatives *Amicus Curiae*

REGISTRY

Registrar and Deputy Registrar **Detention Section**
 Silvana Arbia

Victims and Witnesses Unit **Others**

**Victims Participation and
 Reparations Section**

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PRE-TRIAL CHAMBER II (the “Chamber”) of the International Criminal Court (the “Court”) renders this decision on the “Prosecutor’s Application under Article 58” (the “Prosecutor’s Application” or “Application”),¹ whereby the Prosecutor² sought the issuance of a second warrant of arrest against Bosco Ntaganda (Mr. Ntaganda).

1. On 3 March 2004, the situation in the Democratic Republic of the Congo (“DRC”), from which the case against Mr. Ntaganda arises, was referred to the Prosecutor by the DRC in accordance with articles 13(a) and 14 of the Rome Statute (the “Statute”).³
2. On 5 July 2004, the situation was assigned to Pre-Trial Chamber I.⁴
3. On 22 August 2006, Pre-Trial Chamber I issued the “Decision on the Prosecution Application for a Warrant of Arrest”,⁵ along with a corresponding warrant of arrest for Mr. Ntaganda,⁶ for his alleged responsibility for the war crimes of conscripting, enlisting children under the age of fifteen and using them to participate actively in hostilities under either article 8(2)(b)(xxvi) or article 8(2)(e)(vii) of the Statute.

¹ Prosecutor’s Application under Article 58 with Confidential *Ex Parte* Annex A and Annexes 1.1 to 26.6, 14 May 2012, ICC-01/04-611-Conf-Exp. A public version was filed on 14 May 2012 (ICC-01/04-611-Red), a corrigendum on 15 May 2012 (notified on 16 May 2012) (ICC-01/04-611-Conf-Exp-Corr) and a corrigendum to the public version on 14 May 2012 (notified on 15 May 2012) (ICC-01/04-611-Red-Corr).

² On 15 June 2012 Ms. Fatou Bensouda was sworn in as the Prosecutor of the Court.

³ Letter of Referral of the DRC Situation to the ICC by Joseph Kabila, dated 3 March 2004, annexed to the Prosecutor’s Application for Warrants of Arrest, Article 58, 12 January 2006 (notified on 13 January 2006), ICC-01/04-98-US-Exp-Anx1.

⁴ Presidency, “Decision assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I”, ICC-01/04-1.

⁵ Pre-Trial Chamber I, “Decision on the Prosecution Application for a Warrant of Arrest”, 22 August 2006, ICC-01/04-02/06-1-US-Exp-tEN; and Redacted version, 6 March 2007, ICC-01/04-02/06-1-tENG-Red.

⁶ Pre-Trial Chamber I, “Warrant of Arrest – Corrigendum”, 7 March 2007, ICC-01/04-02/06-2-Corr-tENG-Red.

4. On 15 March 2012, the situation in the DRC was re-assigned to the Chamber.⁷

5. On 14 May 2012, the Prosecutor filed an Application for a second warrant of arrest against Mr. Ntaganda for his individual criminal responsibility for (1) crimes against humanity of murder, rape/sexual slavery and persecution based on ethnic grounds under articles 7(1)(a), 7(1)(g) and 7(1)(h) of the Statute; and (2) war crimes of murder, intentional attacks against civilians, pillaging and rape/sexual slavery under articles 8(2)(c)(i), 8(2)(e)(i), 8(2)(e)(v) and 8(2)(e)(vi) of the Statute.⁸

6. For the sake of ruling on the Application, the Chamber shall examine: (i) jurisdiction of the Court and admissibility of the case; (ii) whether there are reasonable grounds to believe that one or more crimes outlined in the Application have been committed; (iii) whether there are reasonable grounds to believe that Mr. Ntaganda is criminally responsible for the crimes presented in the Application; and (iv) whether the requirements to issue a warrant of arrest for Mr. Ntaganda have been met.

I. Jurisdiction of the Court and admissibility of the case

A. Jurisdiction of the Court

7. Article 19(1) of the Statute provides that “[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it”. Consequently, an initial determination as to whether the case against Mr. Ntaganda falls within the

⁷ Presidency, “Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the Congo, Darfur, Sudan and Côte d’Ivoire situations”, 15 March 2012, ICC-01/04-02/06-32.

⁸ Prosecutor’s Application, p. 5.

jurisdiction of the Court is a prerequisite for the issuance of a warrant of arrest against him.⁹

8. For a crime to fall within the Court's jurisdiction, it is necessary that the following three criteria are met: (i) the crime must be one of the crimes set out in article 5 of the Statute (jurisdiction *ratione materiae*); (ii) the crime must have been committed within the timeframe specified in article 11 of the Statute (jurisdiction *ratione temporis*); (iii) the crime must satisfy one or the other of the two criteria laid down in article 12 of the Statute, namely, it must either have been committed on the territory of a State Party to the Statute or by a national of that State, or have been committed on the territory of a State which has made a declaration under article 12(3) of the Statute or by nationals of that State.¹⁰ The Chamber's findings on these three conditions are based on the Application and the evidence or other information submitted by the Prosecutor.

9. With regard to the first condition, the Chamber is satisfied that the crimes Mr. Ntaganda allegedly committed constitute crimes against humanity and war crimes as defined in the Statute. The Chamber observes that: murder constitutes a crime against humanity under article 7(1)(a) of the Statute as well as a war crime under article 8(2)(c)(i) of the Statute; rape and sexual slavery constitute crimes against humanity under article 7(1)(g) of the Statute as well as war crimes under article 8(2)(e)(vi) of the Statute; persecution on ethnic grounds constitutes a crime against humanity under article 7(1)(h) of the Statute; intentional attacks against the civilian population constitute a war crime under article 8(2)(e)(i) of the Statute; and pillaging constitutes a war crime under article 8(2)(e)(v) of the

⁹ Pre-Trial Chamber III, "Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo", 10 June 2008, ICC-01/05-01/08-14-tENG, para. 11.

¹⁰ *Ibid.*, para. 12.

Statute. The Chamber is therefore satisfied that the first condition relating to jurisdiction *ratione materiae* has been met.

10. With respect to the second condition, namely the Court's jurisdiction *ratione temporis*, the Chamber notes that the Statute entered into force for the DRC on 1 July 2002. Hence, as the Application refers to conduct alleged to have taken place between September 2002 and September 2003, the Chamber is satisfied that the second condition has been met.

11. Regarding the third condition, the Chamber is satisfied that the crimes were committed on DRC territory, and the Chamber accordingly concludes that the Court has jurisdiction *ratione loci* under article 12(2)(a) of the Statute.

12. For these reasons, the Chamber concludes that the case against Mr. Ntaganda falls within the jurisdiction of the Court.

B. Admissibility of the case

13. The second sentence of article 19(1) of the Statute provides that the Court may, on its own motion, determine the admissibility of a case in accordance with article 17 of the Statute. The Chamber does not consider it necessary to examine the admissibility of the case at this stage of the proceedings.¹¹

¹¹ See also Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang", 8 March 2011, ICC-01/09-01/11-01, para. 12.

II. Whether there are reasonable grounds to believe that one or more crimes outlined in the Application have been committed

14. Under article 58(1)(a) of the Statute, the Chamber shall determine whether there are reasonable grounds to believe that the person concerned has committed a crime within the jurisdiction of the Court.

15. It follows that the Chamber needs to analyse the Application, the annexes and the summary of evidence presented by the Prosecutor (collectively, the “material”) in order to determine whether there are reasonable grounds to believe that Mr. Ntaganda has committed the alleged crimes.¹²

16. As previously determined by the jurisprudence of this Court,¹³ the expression “reasonable grounds to believe” must be interpreted in a manner that is consistent with internationally recognised human rights (article 21(3) of the Statute). Accordingly, the Chamber has borne in mind the “reasonable suspicion” standard under article 5(1)(c) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, which, as interpreted by the European Court of Human Rights (“ECHR”), “requires the existence of some facts or information which would satisfy an objective observer that the person concerned may have committed the offence”.¹⁴ Moreover, the Chamber has also been guided by the jurisprudence of the Inter-American Court of Human Rights

¹² The Chamber has only referred below to a part of the available material that supports its overall conclusions.

¹³ Appeals Chamber, “Judgment on the appeal of the Prosecutor against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’”, 3 February 2010, ICC-02/05-01/09-73, paras 31 and 39. See also ICC-01/05-01/08-14-tENG, para. 24.

¹⁴ ICC-02/05-01/09-73, para. 31; ICC-01/05-01/08-14-tENG, para. 24; ECHR, *Fox, Campbell and Hartley v. United Kingdom*, “Judgment”, 30 August 1990, vol. 182, Series A, p. 16, para. 32; *K.-F. v. Germany*, Judgment of 27 November 1997, Reports 1997-VII, para. 57; *Labita v. Italy*, “Judgment”, 6 April 2000, para. 155; *Berktaş v. Turkey*, “Judgment”, 1 March 2001, para. 199; *O’Hara v. United Kingdom*, “Judgment”, 16 October 2001, para. 34.

("IACHR") as regards the fundamental right to liberty which is enshrined in article 7 of the *American Convention on Human Rights*.¹⁵

A. Crimes against humanity

17. In his Application, the Prosecutor alleges that crimes against humanity have been committed in different locations in the DRC as follows:¹⁶

Count 1

Murder Constituting Crimes Against Humanity (Article 7(1)(a) and Article 25(3)(a) of the Statute)

From 1 September 2002 until 30 September 2003, **Bosco NTAGANDA**, as a coperpetrator committed crimes against humanity in the form of murder in the district of Ituri, Province Orientale, Democratic Republic of Congo, including the murder of at least two hundred civilian residents in Mongbwalu town and Sayo village between 18 and 23 November 2002 and of at least three hundred and fifty civilian residents in Lipri, Bambu, Kobu and surrounding villages between 17 February 2003 and 2 March 2003 by the UPC/FPLC forces in violation of Article 7(1)(a) and Article 25(3)(a) of the Statute.

Count 4

Rape and Sexual Slavery Constituting Crimes Against Humanity (Article 7(1)(g) and Article 25(3)(a) of the Statute)

From 1 September 2002 until 30 September 2003, **Bosco NTAGANDA**, as a coperpetrator committed crimes against humanity in the form of rape and sexual enslavement in the district of Ituri, Province Orientale, Democratic Republic of Congo, including in Mongbwalu town and Sayo village between 18 and 23 November 2002 and Lipri, Bambu, Kobu and surrounding villages between 17 February 2003 and 2 March 2003 by the UPC/FPLC forces in violation of Article 7(1)(g) and Article 25(3)(a) of the Statute.

Count 6

Persecution Constituting Crimes Against Humanity (Article 7(1)(h) and Article 25(3)(a) of the Statute)

¹⁵ ICC-01/05-01/08-14-tENG, para. 24; see, for example, IACHR, *Bamaca Velasquez v. Guatemala*, "Judgment", 25 November 2000, Series C No. 70, paras 138-144; *Loayza-Tamayo v. Peru*, "Judgment", 17 September 1997, Series C No. 33, paras 49-55; *Gangaram Panday v. Surinam*, "Judgment", 21 January 1994, Series C No.16, paras 46-51.

¹⁶ Prosecutor's Application, pp. 12, 13.

From 1 September 2002 until 30 September 2003, **Bosco NTAGANDA**, as a coperpetrator committed crimes against humanity in the form of persecution of the non-Hema population, primarily Lendu, in the district of Ituri, Province Orientale, Democratic Republic of Congo, in, inter alia, Mongbwalu town and Sayo village between 18 and 23 November 2002 and Lipri, Bambu, Kobu and surrounding villages between 17 February 2003 and 2 March 2003 by the UPC/FPLC forces in violation of Article 7(1)(h) and Article 25(3)(a) of the Statute.

(1) Contextual elements of crimes against humanity

18. Under article 7(1) of the Statute, an act constitutes a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population. Article 7(2)(a) of the Statute defines an “attack directed against any civilian population” as a “course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”.

19. The reference to a widespread or systematic attack has been interpreted as excluding isolated or random acts from the concept of crimes against humanity. In this regard, the adjective “widespread” refers to “the large-scale nature of the attack and the number of targeted persons”¹⁷, while the adjective “systematic” refers to the “organised nature of the acts of violence and the improbability of their random occurrence”.¹⁸ The existence of a State or organisational policy is an element from which the systematic nature of an attack may be inferred.¹⁹

¹⁷ ICC-01/05-01/08-14-tENG, para. 33.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

An attack against a civilian population

20. The Prosecutor contends that, between September 2002 and September 2003, Mr. Ntaganda planned and commanded scores of co-ordinated military attacks against the Lendu and other non-Hema tribes. The *Union des Patriotes Congolais* (“the UPC”) and the *Forces Patriotiques pour la Libération du Congo* (“the FPLC”) troops allegedly overran and ransacked their villages and towns, killing and raping civilians across Ituri.²⁰ To demonstrate his allegations the Prosecutor reported killings of at least 800 Lendu and other non-Hema civilians by the UPC/FPLC in late 2002 and early 2003 in Mongbwalu, Kilo, Kobu, Lipri, Bambu and surrounding Lendu villages as well as to the thousands civilians that were injured and the population forced to live in the bush.²¹

21. On the basis of the overall material presented, the Chamber finds that there are reasonable grounds to believe that dozens of villages were attacked by the UPC/FPLC in Ituri between September 2002 and September 2003 which resulted in a high number of civilian deaths and a forced displacement of over 140,000 people and in the crimes of murder, rape, sexual slavery and persecution as outlined below.²² Specifically, attacks leading to the commission of said crimes appear to have been carried out in Mongbwalu and Sayo, between 18 and 23 November 2002, and in Lipri, Bambu, Kobu and surrounding villages, between 17 February and 2 March 2003.²³ The Chamber further finds that there are

²⁰ Prosecutor’s Application, para. 9.

²¹ Prosecutor’s Application, paras 11, 49.

²² Prosecutor’s Application, Annex 12.1, pp. 7-9, para. 24, Annex 25.17Corr, p. 237, Annex 25.18, pp. 34, 42, Annex 25.20, p. 13, Annex 25.21, pp. 9-10, Annex 25.24, p. 3, para. 8.

²³ Prosecutor’s Application, Annex 19.1, para. 33-34, Annex 20.1, pp. 5-6, paras 20-23, Annex 25.1, pp. 24, 32, Annex 25.16 pp. 33-36, Annex 25.20, pp. 17-20, Annex 25.25, p. 2.

reasonable grounds to believe that these attacks targeted the civilian population.²⁴

A State or organizational policy

22. The Prosecutor submits that the requirement that the crimes be committed pursuant to or in furtherance of a State or organisational policy is met.²⁵ He contends that the UPC/FPLC was a sophisticated and structured political-military organisation, akin to a government of a country, through which Mr. Ntaganda was able to commit crimes against humanity. Specifically, he submits that the UPC/FPLC (i) was a well structured organisation in which Mr. Ntaganda fulfilled significant functions; (ii) had structured and efficient reporting mechanisms; (iii) had the technical means to ensure that information and orders were effectively communicated up and down the established hierarchy; and (iv) had a hierarchy and structure permitting an appropriate degree of delegation to FPLC officials.²⁶

23. The Prosecutor further submits that the UPC/FPLC was set up to seek Hema political and military domination over Ituri²⁷ and that, in the period from September 2002 to September 2003, it executed its policy of attacking the Lendu and other non-Hema population throughout the territory of Ituri.²⁸ In particular, he contends that the UPC/FPLC intended criminal policy was made unequivocally clear in a declaration which promulgated the decision to massacre

²⁴ Prosecutor's Application, Annex 4.1, pp. 77, 96, 97; Annex 5.4, p. 6; Annex 13.1, pp. 12, 13, paras 46-50; Annex 16.1, p. 6, paras 18, 19; Annex 25.1, p. 24, para. 69; Annex 25.16, p. 33; Annex 25.17-Corr, pp. 240, 241, para. 420; Annex 25.18, pp. 34, 38, 40; Annex 25.20, pp. 2, 3, 17-20; Annex 26.1, pp. 3-5.

²⁵ Prosecutor's Application, para. 26.

²⁶ Prosecutor's Application, paras 7, 27-29.

²⁷ Prosecutor's Application, paras 3, 31.

²⁸ Prosecutor's Application, para. 30.

the “non-originaires” and to systematically loot and destruct their properties.²⁹ The Prosecutor further submits that the carefully planned *modus operandi* of the attacks and their magnitude show that a policy to commit the crimes existed.³⁰

24. This Chamber has established in its previous decisions the following elements as regards the State or organisational policy requirement: a) the attack must be thoroughly organised and follow a regular pattern; b) it must be conducted in furtherance of a common policy involving public or private resources; c) it can be implemented either by groups who govern a specific territory or by an organisation that has the capability to commit a widespread or systematic attack against a civilian population; and d) it need not be explicitly defined or formalised (indeed, an attack which is planned, directed or organised – as opposed to spontaneous or isolated acts of violence – will satisfy this particular criterion).³¹

25. On the basis of the material presented and as outlined below, the Chamber finds that there are reasonable grounds to believe that the attacks against the civilian population were committed pursuant to an organizational policy.

26. According to the material presented by the Prosecutor, there are reasonable grounds to believe that the UPC/FPLC was an organization under responsible command and had an established hierarchy at the top of which there is a president, Mr. Ntaganda as commander of operations, Chief Kahwa as minister of defence, Mr. Floribert Kisembo as chief of staff, and several other

²⁹ Prosecutor’s Application, paras 4, 35.

³⁰ Prosecutor’s Application, paras 49, 50.

³¹ ICC-01/09-19-Corr, paragraphs 84-86, referring to the following decisions: ICC-01/04-01/07-717, paragraph 396; and ICC-01/05-01/08-424, paragraph 81.

ministers and officers.³² There are also reasonable grounds to believe that the UPC/FPLC possessed the means to carry out a widespread or systematic attack against the civilian population, as it had access to a significant amount of weapons,³³ to a manpower pool of trained military personnel,³⁴ and to lines of communication with those responsible on the field.³⁵ In light of the foregoing, the Chamber considers that the UPC/FPLC qualifies as an organization within the meaning of article 7(2)(a) of the Statute.

27. With regard to the policy element, the Chamber considers that there are reasonable grounds to believe that the organization promoted a policy aimed at targeting “non-originares” civilians of Ituri, mainly Lendu, in order to expel them from the territory,³⁶ eliminate them,³⁷ systematically loot and burn their properties,³⁸ with the ultimate goal of occupying the territory and create the “Etat Indépendant de l’Ituri”.³⁹

The widespread and systematic nature of the attack

28. The Prosecutor submits that, from September 2002 to September 2003, the UPC/FPLC conducted large scale military operations in Ituri in furtherance of the organisational policy to assume military control of the territory through the

³² Prosecutor’s Application, Annex 1.1, p. 46; Annex 3.1, p. 76; Annex 3.2, p. 4; Annex 4.2, pp. 21, 24; Annex 5.1, pp. 32, 33; Annex 8.2, pp. 29-30; Annex 25.16, p. 18.

³³ Prosecutor’s Application, Annex 5.2, p. 21; Annex 5.7, p. 18; Annex 5.10, p. 31; Annex 5.12, pp. 13-15; Annex 8.2, p. 50.

³⁴ Prosecutor’s Application, Annex 2.3, pp. 42-46; Annex 3.2, pp. 41-43; Annex 4.2, pp. 44, 45; Annex 5.1, pp. 33-35, 38; Annex 5.7, p. 18.

³⁵ Prosecutor’s Application, Annex 4.2, p. 30; Annex 5.1, pp. 46, 47; Annex 5.3, p. 19; Annex 22.1, pp. 68-69.

³⁶ Prosecutor’s Application, Annex 2.1, p. 97; Annex 2.4, pp. 50-53; Annex 5.7, p. 18; Annex 5.12, p. 27; Annex 12.1, p. 6, para. 22; Annex 25.18, pp. 40, 41.

³⁷ Prosecutor’s Application, Annex 24.4, pp. 2-3; Annex 2.2, p. 9; Annex 3.2, pp. 19, 20; Annex 25.16, pp. 28, 30; Annex 25.18, p. 40.

³⁸ Prosecutor’s Application, Annex 24.4, pp. 2-3; Annex 5.3, p. 12; Annex 17.1, pp. 11, 12, para. 45.

³⁹ Prosecutor’s Application, Annex 24.4, pp. 2-3; Annex 2.2, pp. 8, 9; Annex 5.12, p. 27; Annex 13.1, p. 14, para. 53.

killing, persecution and rape of hundreds of civilians.⁴⁰ He alleges that, as a result of the attacks, at least 800 Lendu and other non-Hema civilians were killed by the UPC/FPLC in late 2002 and early 2003 in Mongbwalu, Kilo, Kobu, Lipri, Bambu and surrounding Lendu villages.⁴¹

29. The Prosecutor further submits that the military operations planned and commanded by Mr. Ntaganda followed the same pattern and method: (i) the targets of the attacks were Lendu and other non-Hema villages; (ii) the UPC/FPLC surrounded the villages; (iii) the villages were shelled with heavy artillery; (iv) the UPC/FPLC soldiers infiltrated the villages, killing everyone perceived as being the enemy by small arms fire, machetes and knives; (v) they subsequently pillaged and burnt the villages; (vi) they abducted women and raped them; and (vii) they attempted to capture and round up any Lendu or other non-Hema persons that remained.⁴²

30. On the basis of the material presented, the Chamber concludes that there are reasonable grounds to believe that the attack against the civilian population was widespread, as evidenced by the number of victims subjected to the attack and those who have been displaced as a result of such attack, as well as the different locations targeted.⁴³ In particular, the Chamber takes account of the violence in late 2002 and early 2003 which resulted in the killings of approximately 800 civilians by the UPC/FPLC, including at least 200 in

⁴⁰ Prosecutor's Application, paras 9, 51.

⁴¹ Prosecutor's Application, paras 11, 49.

⁴² Prosecutor's Application, paras 10, 49.

⁴³ Prosecutor's Application, Annex 16.1, p. 7, para. 24; Annex 17.1, p. 8, paras 28, 29 and p. 11, para. 44; Annex 18.1, p. 6, para. 20; Annex 19.1, p. 6, para. 22; Annex 20.1, p. 6, paras 21, 23; Annex 25.1, pp. 24-25, para. 70; Annex 25.17-Corr, pp. 240, 241, para. 420; Annex 25.18, pp. 40-42; Annex 25.20, pp. 8, 18, 19.

Mongbwalu and 350 in 26 localities around Lipri, Bambu and Kobu,⁴⁴ as well as the displacement of 60,000 persons.⁴⁵

31. Moreover, the Chamber considers that there are reasonable grounds to believe that the attack was also systematic as the perpetrators employed similar means and methods to attack the different locations: they approached the targets simultaneously, in large numbers, and from different directions,⁴⁶ they attacked villages with heavy weapons,⁴⁷ and systematically chased the population by similar methods, hunting house by house and into the bushes, burning all properties and looting.⁴⁸

32. In view of the above, the Chamber finds that the contextual elements for crimes against humanity alleged in the Application have been satisfied.

(2) Underlying acts constituting crimes against humanity committed in the context of a widespread and systematic attack

33. The Prosecutor alleges that Mr. Ntaganda, as a co-perpetrator, committed crimes against humanity between September 2002 and September 2003 in the form of murder, rape, sexual slavery and persecution on ethnic grounds of a large number of civilians – crimes punishable under articles 7(1)(a), 7(1)(g) and 7(1)(h) of the Statute.⁴⁹

⁴⁴ Prosecutor's Application, Annex 25.18, p. 42; Annex 25.1, pp. 24, 25, 32, paras 69, 70, 102; Annex 25.16, p. 34; Annex 25.20, pp. 2, 3; Annex 15.1, p. 10, para. 36; Annex 16.1, p. 11, para. 41; Annex 17.1, pp. 12, 13, para. 50.

⁴⁵ Prosecutor's Application, Annex 25.1, pp. 24, 25, para. 70.

⁴⁶ Prosecutor's Application, Annex 4.1, p. 96; Annex 11.1, p. 5, para. 18; Annex 16.1, p. 7, para. 24; Annex 20.1, p. 6, paras 21, 23; Annex 25.1, p. 24, para. 69; Annex 25.20, pp. 13, 17-19, paras 33, 56, 58, 59, 63.

⁴⁷ Prosecutor's Application, Annex 12.1, p. 6, para. 22; Annex 14.1, p. 7, para. 22; Annex 16.1, pp. 6, 7, paras 19, 22; Annex 25.1, pp. 31, 32, paras 101, 102; Annex 25.17-Corr, p. 241, para. 420.

⁴⁸ Prosecutor's Application, Annex 5.3, p. 22; Annex 12.1, p. 7; Annex 15.1, pp. 8, 9; Annex 25.1, p. 24, para. 69; Annex 25.18, p. 38; Annex 25.20, pp. 19, 20.

⁴⁹ Prosecutor's Application, pp. 12, 13.

Murder as a crime against humanity (Count 1)

34. The Prosecutor submits that at least 800 Lendu and other non-Hema civilians were reportedly killed by the UPC/FPLC in late 2002 and early 2003 in Mongbwalu, Kilo, Kobu, Lipri, Bambu and surrounding Lendu villages.⁵⁰ In particular, it is alleged that people were killed during the six-day military attack, as described below, in Mongbwalu⁵¹ and in Sayo.⁵² It is further alleged that people were killed in Lipri, Bambu, Kobu and surroundings,⁵³ including at least 47 unarmed civil representatives of the Lendu community.⁵⁴

35. Following a careful analysis of the material available, the Chamber is satisfied that there reasonable grounds to believe that murders were committed as part of the attacks namely those in Mongbwalu and Sayo between 18 and 23 November 2002 and Lipri, Bambu, Kobu and surrounding villages between 17 February and 2 March 2003.

36. Specifically, according to the material presented, the physical perpetrators targeted and killed civilians as part of the attacks in Mongbwalu, with firearms or, for those who had not fled, with machetes and spears.⁵⁵ Civilians were then reportedly slaughtered in Sayo in the Mungu Samaki church.⁵⁶ It appears that civilians were systematically killed by the UPC/FPLC by the same methods in Lipri, Bambu, Kobu and surrounding villages, either by being shot during the

⁵⁰ Prosecutor's Application, paras 11, 49.

⁵¹ Prosecutor's Application, paras 54, 60-62, 65, 66.

⁵² Prosecutor's Application, paras 68, 70, 71.

⁵³ Prosecutor's Application, paras 74, 81, 83, 85, 94, 96.

⁵⁴ Prosecutor's Application, paras 74, 91.

⁵⁵ Prosecutor's Application, Annex 25.1, p. 32, para. 102; Annex 25.16, pp. 33-34; Annex 25.18, p. 38; Annex 25.20, p. 13, para. 33.

⁵⁶ Prosecutor's Application, Annex 4.1, pp. 75-79; Annex 25.1, p. 32, para. 102; Annex 25.16, pp. 33, 34; Annex 25.18, pp. 39, 40.

military operations or executed during the subsequent manhunt in the bushes,⁵⁷ or after having been detained.⁵⁸ In particular, civilians who participated to a pacification meeting in Sangi were reportedly arrested and massacred in Kobu.⁵⁹

Rape and sexual slavery as crimes against humanity (Count 4)

37. The Prosecutor submits that, from September 2002 to September 2003, Lendu and other non-Hema “female civilians” were abducted, systematically raped, and subjected to other forms of sexual violence as part of the UPC/FPLC policy to gain control over Ituri.⁶⁰

38. On the basis of the facts presented in the material, the Chamber finds that there are reasonable grounds to believe, that crimes of rape and sexual slavery were committed as part of the attacks in different locations in Ituri, namely the incidents in Mongbwalu and Sayo between 18 and 23 November 2002 and Lipri, Bambu, Kobu and surrounding villages between 17 February and 2 March 2003.⁶¹

39. The Chamber notes that a member of the UPC/FPLC allegedly encouraged the troops before the Mongbwalu attack by saying that they would find lots of money and women there.⁶² An unknown number of civilians were also reportedly raped between 18 and 20 February 2003 during the attacks of Lipri, Bambu, Kobu and Nyangaraye and then for several days after 25 February 2003

⁵⁷ Prosecutor’s Application, Annex 8.1, p. 8; Annex 13.1, p. 13, paras 50, 51; Annex 17.1, p. 9, paras 31, 32; Annex 18.1, p. 8, para. 31; Annex 25.1, pp. 24, 25, paras 69, 70; Annex 25.17-Corr, pp. 240, 241, para. 420; Annex 25.20, pp. 2, 3, 16-19.

⁵⁸ Prosecutor’s Application, Annex 4.3, pp. 10, 11; Annex 5.5, p. 15; Annex 5.13, pp. 4-7; Annex 10.1, p. 9, para. 37; Annex 11.1, p. 7, paras 24, 25, 35, 40; Annex 12.1, pp. 9, 10, paras 37, 41; Annex 13.1, pp. 14, 15, paras 56, 58; Annex 19.1, pp. 9, 10, paras 36, 37; Annex 25.17-Corr, p. 241, para. 420.

⁵⁹ Prosecutor’s Application, Annex 5.13, pp. 8-33; Annex 10.1, p. 10, para. 41; Annex 11.1, p. 7, paras 24, 25, 35, 40; Annex 15.1, p. 10, para. 36; Annex 16.1, p. 11, paras 40, 41; Annex 17.1, pp. 12, 13, paras 49-51; Annex 20.1, pp. 9-11, paras 33-37, 40; Annex 25.1, p. 24, para. 69; Annex 25.17-Corr, p. 241, para. 420; Annex 25.20, pp. 18, 19.

⁶⁰ Prosecutor’s Application, para. 100.

⁶¹ See *supra*, paras 21, 30, 31.

⁶² Prosecutor’s Application, Annex 4.1, p. 70.

in the villages of Jitchu, Buli and surroundings.⁶³ According to two witnesses, women were detained and raped by the UPC/FPLC after the attacks of Kobu and surroundings.⁶⁴

40. Concerning sexual slavery, the findings of the Chamber that acts of sexual slavery as crimes against humanity were committed by the UPC/FPLC are supported by the two witnesses' statements to the effect that women were raped and taken away during the attacks of Kobu and surroundings⁶⁵ and by other circumstantial proof.⁶⁶ However, this finding of the Chamber is without prejudice to any determination to be made at later stages of the proceedings on the sufficiency of the supporting material concerning the crime of sexual slavery.

Persecution as a crime against humanity (Count 6)

41. The Prosecutor alleges that the UPC/FPLC attacks targeted and persecuted the non-Hema population, primarily the Lendu, from 1 September 2002 until 30 September 2003 in the district of Ituri.⁶⁷

42. In this regard, the Chamber takes note that the Prosecutor does not specify which underlying conduct forms the basis for the crime of persecution under Count 6 of his Application. However, the Chamber will rely on the underlying acts of murder, rape and sexual slavery, as well as on the war crimes, as outlined below, committed during the incidents expressly pleaded by the Prosecutor in support of his allegations against Mr. Ntaganda. Regarding the aforementioned

⁶³ Prosecutor's Application, Annex 25.17-Corr, pp. 240, 241, para. 420.

⁶⁴ Prosecutor's Application, Annex 10.1, pp. 8, 9, paras 32-35; Annex 11.1, p. 8, paras 27, 28.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ See e.g. Prosecutor's Application, paras 3, 9, 10, 52, 54, 61, 62, 73, 74, 82, 83, 85, 101.

crimes, the Chamber finds that there are reasonable grounds to believe that they were perpetrated primarily on ethnic grounds.⁶⁸

(3) Conclusion

43. In light of the foregoing, the Chamber concludes that there are reasonable grounds to believe that the crimes against humanity of murder, rape and sexual slavery and persecution on ethnic grounds – punishable under articles 7(1)(a), 7(1)(g) and 7(1)(h) of the Statute – were committed by the UPC/FPLC against the non-Hema population, in Mongbwalu and Sayo between 18 and 23 November 2002 and in Lipri, Bambu, Kobu and surrounding villages between 17 February and 2 March 2003, as part of a widespread and systematic attack against the civilian population and pursuant to the organisational policy.

B. War crimes

44. In the Application, the Prosecutor alleges that war crimes have been committed in different locations in the DRC as follows:⁶⁹

Count 2

Murder Constituting War Crimes

(Article 8(2)(c)(i) and Article 25(3)(a) of the Statute)

From 1 September 2002 until 30 September 2003, **Bosco NTAGANDA**, as a coperpetrator committed war crimes in the form of murder in the district of Ituri, Province Orientale, Democratic Republic of Congo, including the murder of at least two hundred civilian residents in Mongbwalu town and Sayo village between 18 and 23 November 2002 and of at least three hundred and fifty civilian residents in Lipri, Bambu, Kobu and surrounding villages between 17 February 2003 and 2 March 2003 by the UPC/FPLC forces in violation of Article 8(2)(c)(i) and Article 25(3)(a) of the Statute.

⁶⁸ See e.g. Prosecutor's Application, Annex 4.3, p. 11; Annex 10.1, p. 8, para. 32; Annex 11.1, pp. 7, 10, paras 25, 35; Annex 15.1, p. 9, para. 35; Annex 17.1, p. 12, para. 49; Annex 18.1, pp. 7, 8, 10, paras 23, 31, 37; Annex 25.16, pp. 33, 34; Annex 25.18, p. 38.

⁶⁹ Prosecutor's Application, pp. 12, 13.

Count 3

Attack against a Civilian Population Constituting War Crimes
(Article 8(2)(e)(i) and Article 25(3)(a) of the Statute)

From 1 September 2002 until 30 September 2003, **Bosco NTAGANDA**, as a coperpetrator committed war crimes in the form of intentionally directing attacks against the civilian population in the district of Ituri, Province Orientale, Democratic Republic of Congo, including in Mongbwalu town and Sayo village between 18 and 23 November 2002 and Lipri, Bambu, Kobu and surrounding villages between 17 February 2003 and 2 March 2003 by the UPC/FPLC forces in violation of Article 8(2)(e)(i) and Article 25(3)(a) of the Statute.

Count 5

Rape and Sexual Slavery Constituting War Crimes
(Article 8(2)(e)(vi) and Article 25(3)(a) of the Statute)

From 1 September 2002 until 30 September 2003, **Bosco NTAGANDA**, as a coperpetrator committed war crimes in the form of 8(2)(e)(vi) in the district of Ituri, Province Orientale, Democratic Republic of Congo, in, inter alia, Mongbwalu town and Sayo village between 18 and 23 November 2002 and Lipri, Bambu, Kobu and surrounding villages between 17 February 2003 and 2 March 2003 by the UPC/FPLC forces in violation of 8(2)(e)(vi) and Article 25(3)(a) of the Statute.

Count 7

Pillaging Constituting War Crimes
(Article 8(2)(e)(v) and Article 25(3)(a) of the Statute)

From 1 September 2002 until 30 September 2003, **Bosco NTAGANDA**, as a coperpetrator committed war crimes in the form of pillaging in the district of Ituri, Province Orientale, Democratic Republic of Congo, in, inter alia, Mongbwalu town and Sayo village between 18 and 23 November 2002 and Lipri, Bambu, Kobu and surrounding villages between 17 February 2003 and 2 March 2003 by the UPC/FPLC forces in violation of Article 8(2)(e)(v) and Article 25(3)(a) of the Statute.

(1) Contextual elements of war crimes

45. Articles 8(2)(c) and 8(2)(e) of the Statute set forth the crimes committed in the context of an armed conflict not of an international character. Pursuant to articles 8(2)(d) and 8(2)(f) of the Statute, articles 8(2)(c) and 8(2)(e) do not apply to “situations of internal disturbances and tensions, such as riots, isolated and

sporadic acts of violence or other acts of a similar nature.” Article 8(2)(f) further provides that such armed conflicts “take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”

46. The Prosecutor submits that there are reasonable grounds to believe that an armed conflict not of an international character took place in Ituri during the period covered by the charges, relying on the findings of Trial Chamber I in the *Lubanga* Judgement of 14 March 2012.⁷⁰

47. As outlined below, the Chamber finds on the basis of the material presented that there are reasonable grounds to believe that the contextual elements for war crimes alleged in the Application have been satisfied.

48. The Chamber finds that there are reasonable grounds to believe that, during the period of at least September 2002 to September 2003, a protracted armed conflict of a certain level of intensity, within the meaning of article 8(2)(f) of the Statute, took place between the UPC/FPLC, the *Front Nationaliste Intégrationniste* (the “FNI”) and other organised armed groups.⁷¹

49. The Chamber is of the view that there are reasonable grounds to believe that the UPC/FPLC and the FNI had a hierarchical structure which allowed them to act under a responsible command with operational and disciplinary powers and a sufficient level of internal organisation. In particular, the Chamber refers to its findings on the organizational policy⁷² as to the existence of reasonable grounds to believe that the UPC/FPLC was under responsible command and had an established hierarchy. Similarly, the Chamber considers that there are

⁷⁰ Prosecutor’s Application, para. 140.

⁷¹ See *infra*, paras 49-50.

⁷² See *supra*, paras 25-27.

reasonable grounds to believe that the other armed groups involved, including the FNI, were organised hierarchically and had the ability to plan and execute military operations.⁷³

50. 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 of time.⁷⁴ Both armed groups reportedly controlled parts of the territory of Ituri, which enabled them to plan and carry out military operations.⁷⁵

(2) Underlying acts constituting war crimes in the context of an armed conflict not of an international character or in relation thereto

51. The Prosecutor alleges that Mr. Ntaganda, as a co-perpetrator, committed war crimes between September 2002 and September 2003 in the form of murder, attack against a civilian population, pillaging, rape and sexual slavery of a large number of civilians – crimes punishable under articles 8(2)(c)(i), 8(2)(e)(i), 8(2)(e)(v) and 8(2)(e)(vi) of the Statute.⁷⁶

Murder constituting a war crime (Count 2)

52. In relation to murder as a war crime, the Prosecutor again submits that at least 800 Lendu and other non-Hema civilians were reportedly killed by the UPC/FPLC in late 2002 and early 2003.⁷⁷

53. The Chamber reiterates its findings made in relation to Count 1 as to the existence of reasonable grounds to believe that murders were committed, as

⁷³ Prosecutor's Application, Annex 25.1, pp. 48-50; Annex 25.16, pp. 23, 24; Annex 25.18, pp. 21, 22.

⁷⁴ Prosecutor's Application, Annex 25.1, pp. 9-15, 52-63; Annex 25.16, p. 27; Annex 25.18, pp. 34-68.

⁷⁵ Prosecutor's Application, Annex 1.1, pp. 14, 75; Annex 25.16, p. 30, Annex 25.18, p. 35.

⁷⁶ Prosecutor's Application, pp. 12, 13.

⁷⁷ Prosecutor's Application, paras 11, 49. See also *supra*, para. 34.

established above,⁷⁸ in the attacks on Mongbwalu and Sayo between 18 and 23 November 2002 and Lipri, Bambu, Kobu and surrounding villages between 17 February and 2 March 2003.⁷⁹

Attack against a civilian population constituting a war crime (Count 3)

54. The Prosecutor submits that the UPC/FPLC troops attacked the non-Hema civilian population across Ituri, overrunning and ransacking villages and towns, killing and raping civilians.⁸⁰

55. Having examined the material submitted by the Prosecutor, the Chamber finds that there are reasonable grounds to believe that attacks carried out by the UPC/FPLC, in Mongbwalu and Sayo, between 18 and 23 November 2002, and in Lipri, Bambu, Kobu and surrounding villages, between 17 February and 2 March 2003, targeted the civilian population.⁸¹

Rape and sexual slavery constituting war crimes (Count 5)

56. In relation to rape and sexual slavery as war crimes, the Prosecutor again submits that Lendu and other non-Hema female civilians were abducted, systematically raped, and subjected to other forms of sexual violence as part of the UPC/FPLC policy to gain control over Ituri.⁸²

57. The Chamber reiterates its findings made in relation to Count 4 as to the existence of reasonable grounds to believe that rape and sexual slavery were

⁷⁸ See *supra*, paras 34-36.

⁷⁹ See *supra*, para. 35.

⁸⁰ ICC-01/05-01/08-14-tENG, paras 9, 11, 49.

⁸¹ Prosecutor's Application, Annex 4.1, pp. 77, 96, 97; Annex 5.4, p. 6; Annex 13.1, pp. 12, 13, paras 46-50; Annex 16.1, p. 6, paras 18, 19; Annex 25.1, p. 24, para. 69; Annex 25.16, p. 33; Annex 25.17-Corr, pp. 240, 241, para. 420; Annex 25.18, pp. 34, 38, 40; Annex 25.20, pp. 2, 3, 17-20; Annex 26.1, pp. 3-5.

⁸² Prosecutor's Application, para. 100. See also *supra*, para. 37.

committed, as established above,⁸³ in different locations in Ituri, namely Mongbwalu and Sayo between 18 and 23 November 2002 and Lipri, Bambu, Kobu and surrounding villages between 17 February and 2 March 2003.

Pillaging constituting a war crime (Count 7)

58. The Prosecutor submits that UPC/FPLC forces committed war crimes by systematically pillaging and burning non-Hema villages during the attacks of Mongbwalu and Sayo, between 18 and 23 November 2002, and of Lipri, Bambu, Kobu and surrounding villages, between 17 February and 2 March 2003.⁸⁴

59. On the basis of the material presented, the Chamber concludes that there are reasonable grounds to believe that, during the attacks charged in the Application, acts of pillage constituting a war crime were committed. The material sufficiently demonstrates that pillaging was an essential part of the attacks of towns and villages in Mongbwalu and Sayo, between 18 and 23 November 2002, and in Lipri, Bambu, Kobu and surrounding villages, between 17 February and 2 March 2003, being authorised and supported by commanders.⁸⁵ The Chamber notes, in particular, explicit references to the personal war booty of Mr. Ntaganda.⁸⁶

(3) Conclusion

60. In light of the foregoing, the Chamber considers that there are reasonable grounds to believe that the alleged crimes were committed in the context of the armed conflict in Ituri and in association with this conflict. The alleged crimes of

⁸³ See *supra*, paras 37-40.

⁸⁴ Prosecutor's Application, paras 10, 52, 64, 65, 68, 82, 97, 98.

⁸⁵ Prosecutor's Application, Annex 3.1, p. 28; Annex 4.1, p. 96; Annex 5.2, pp. 23, 26-28; Annex 5.11, pp. 34, 35; Annex 26.1, pp. 3-5.

⁸⁶ Prosecutor's Application, Annex 3.1, pp. 26-28.

attacking civilians, murdering, pillaging and raping were closely related to the ongoing hostilities insofar as the existence of the conflict played a substantial role in the commission of the crimes.

61. On the overall-basis of the material presented, the Chamber concludes that there are reasonable grounds to believe that the war crimes of murder, attack against a civilian population, pillaging, rape and sexual slavery – punishable under articles 8(2)(c)(i), 8(2)(e)(i), 8(2)(e)(v) and 8(2)(e)(vi) of the Statute – were committed by the UPC/FPLC against the non-Hema population in Mongbwalu and Sayo between 18 and 23 November 2002 and in Lipri, Bambu, Kobu and surrounding villages between 17 February and 2 March 2003.

III. Whether there are reasonable grounds to believe that Mr. Ntaganda is criminally responsible for the crimes presented in the Application

62. The Prosecutor submits that, without excluding any other applicable mode of liability, Mr. Ntaganda is responsible as a co-perpetrator pursuant to article 25(3)(a) of the Statute for the crimes against humanity and war crimes as specified in the Application of the Prosecutor.⁸⁷

63. The Prosecutor alleges that “[g]iven that all the crimes listed were committed in the course of UPC/FPLC military operations, operations for which Mr. Ntaganda was in law and in fact responsible, [...] [he] is criminally responsible for their commission”.⁸⁸

⁸⁷ Prosecutor’s Application, pp. 12-13 and para.117.

⁸⁸ Prosecutor’s Application, para. 118.

64. According to the Prosecutor, Mr. Ntaganda helped devise and implement the UPC's policy to conquer the Ituri region through military means.⁸⁹ Mr. Ntaganda commanded all FPLC sectors and brigades, and all military operations. Furthermore, he recruited soldiers, visited and inspected the troops and the training camps, procured and distributed weapons and ammunition and was in constant communication up and down the chain of command.⁹⁰

65. In particular, the Prosecutor alleges that during the Mongbwalu operation in November 2002, Mr. Ntaganda deployed troops, briefed them and gave them specific instructions to carry out criminal activities. Furthermore, he briefed the soldiers of their tasks ahead; he told them to attack Mongbwalu and retake it⁹¹ and gave orders to shoot at the people.⁹²

66. Following a careful analysis of the material presented, the Chamber finds that there are reasonable grounds to believe that Mr. Ntaganda is criminally responsible as an indirect co-perpetrator (article 25(3)(a) of the Statute) for the crimes against humanity of murder (article 7(1)(a) of the Statute), rape and sexual violence (article 7(1)(g) of the Statute) and persecution (article 7(1)(h) of the Statute) and the war crimes of murder (article 8(2)(c)(i) of the Statute), attack against the civilian population (article 8(2)(e)(i) of the Statute), pillaging (article 8(2)(e)(v) of the Statute) and rape and sexual violence (article 8(2)(e)(vi) of the Statute). The Chamber underlines that this conclusion does not prejudice any subsequent finding regarding the applicability of a different mode of liability at a later stage of the proceedings.

⁸⁹ Prosecutor's Application, para. 120.

⁹⁰ Prosecutor's Application, para. 121.

⁹¹ Prosecutor's Application, para. 127.

⁹² Prosecutor's Application, para. 128.

67. As established in the jurisprudence of this and other chambers, indirect co-perpetration requires the following objective and subjective elements: (i) the suspect must be part of a common plan or an agreement with one or more persons; (ii) the suspect and the other co-perpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfilment of the material elements of the crime; (iii) the suspect must have joint control over the organisation; (iv) the organisation must consist of an organised and hierarchical apparatus of power; (v) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect; (vi) the suspect must satisfy the subjective elements of the crimes; (vii) the suspect and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfilment of the material elements of the crimes and (viii) the suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s).⁹³ Furthermore, the Chamber takes cognizance of the Elements of Crimes which establish that, for the alleged crimes against humanity, the perpetrator needs to know that the conduct was part of or intended the conduct to be part of the widespread or systematic attack against a civilian population⁹⁴.

⁹³ Pre-Trial Chamber III, “Confirmation of the Charges Decision”, ICC-01/05-01/08-424, paras 350-351; Pre-Trial Chamber II “Decision on the Confirmation of the Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” against William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (‘Decision on the Confirmation of the Charges’), ICC-01/09-01/11-373, para. 292; Pre-Trial Chamber II, “Decision on the Confirmation of the Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” in the case against Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali (‘Kenya II Decision on the Confirmation of the Charges’), ICC-01/09-02/11-382-Red, para. 297. See also: Pre-Trial Chamber I, “Decision on the confirmation of charges”, ICC-01/6-01/07-717, paras 500-514, 527-539; Pre-Trial Chamber I, “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir” (‘Arrest Warrant Decision’), ICC-02/05- 01/09-3, paras 209-213.

⁹⁴ See the Element of Crimes for article 7(1)(a) para. 3, article 7(1)(g)-1 para. 4 and article 7(1)(g)-2 para. 4 and article 7(1)(h) para. 6.

In equal measure, for war crimes the person needs to be aware of the factual circumstances establishing the existence of an armed conflict.⁹⁵

68. The Chamber finds that there are reasonable grounds to believe that Mr. Ntaganda fulfils the requisite elements of indirect co-perpetration.

69. As established by the jurisprudence of this Court, the common plan or agreement does not need to be directed at the commission of a crime but has to contain an “element of criminality”.⁹⁶

70. The Chamber is satisfied that there are reasonable grounds to believe that a plan existed between Mr. Ntaganda and other high-ranking members of the UPC/FPLC to occupy the territory of Ituri.⁹⁷ This plan included the expulsion of rivaling ethnicities of the region.⁹⁸ Furthermore, the Chamber finds that the crimes allegedly committed were encompassed in the common plan.

71. The Chamber recalls the jurisprudence of this Court, according to which an indirect co-perpetrator provides an essential contribution if he can frustrate the commission of the crime by not performing his or her tasks.⁹⁹ Furthermore, with regard to the mode of indirect co-perpetration, it suffices that the contribution consists of “activating the mechanisms which lead to the automatic compliance with their orders and, thus, the commission of the crimes.”¹⁰⁰

⁹⁵ See the Element of Crimes for article 8(2)(c)(i)-1 para. 5, article 8(2)(e)(i) para. 5, article 8(2)(e)(vi)-1 para. 4, article 8(2)(e)(v) para. 5 and article 8(2)(e)(vi)-2 para. 4.

⁹⁶ Trial Chamber I, “Lubanga Judgment”, ICC-01/04-01/06-2842, para. 984; Pre-Trial Chamber I, “Decision on the Confirmation of Charges”, ICC-01/04-01/06-803-tENG, para. 344; Pre-Trial Chamber II, “Decision on the Confirmation of the Charges”, ICC-01/09-01/11-373, para. 301.

⁹⁷ Prosecutor’s Application, Annex 2.2, p. 10, lines 1-11.

⁹⁸ Prosecutor’s Application, Annex 2.4, p. 53, line 23 to p. 54, line 6.

⁹⁹ Pre-trial Chamber I, “Decision on the Confirmation of the Charges”, ICC-01/04-01/05-717, para. 525.

¹⁰⁰ Pre-Trial Chamber I, “Decision on the Confirmation of Charges”, ICC-01/6-01/07-717, para. 525; Pre-Trial Chamber II, “Decision on the Confirmation of the Charges”, ICC-01/09-01/11-373, para. 306.

72. The Chamber finds that there are reasonable grounds that Mr. Ntaganda made an essential contribution. He was involved in the creation of the UPC,¹⁰¹ the bearer of the policy and provided an essential contribution to the aforementioned plan. Mr. Ntaganda played an essential role in the attack on Mongbwalu: he organised weapons and ammunition for the attacks¹⁰², he instructed the soldiers himself before the attack¹⁰³ and personally led one group in one of the attacks.¹⁰⁴ Generally, he was also responsible for the distribution of weapons,¹⁰⁵ *inter alia* for the attack on Kobu.¹⁰⁶ On a strategic level, he was also implicated in the planning of the military operations of the UPC/FPLC.¹⁰⁷ These actions, aside from the fact of his formal position within the UPC/FPLC as the deputy chief of staff, suffice to show the essential character of his contributions.

73. The Chamber finds that there are reasonable grounds to believe that, as outlined below, Mr. Ntaganda had joint control over the organisation, which consisted of an organised and hierarchal apparatus of power and in which orders were executed by an almost automatic compliance.

74. In this regard, the Chamber recalls its findings in paragraph 26, whereby it established that the UCP/FPLC constituted an organisation within the meaning article 7(2)(a) of the Statute. Furthermore, as stated in paragraph 26 of the present decision, Mr. Ntaganda, as commander of operations, belonged to the top level of the hierarchy of the FPLC.¹⁰⁸ The FPLC, as the armed wing, was highly

¹⁰¹ Prosecutor's Application, Annex 8.2, p. 30, line 20 to p. 31, line 11.

¹⁰² Prosecutor's Application, Annex 5.2, p. 21, lines 643-646; Annex 4.1, p. 73, lines 17-21.

¹⁰³ Prosecutor's Application, Annex 5.2, p. 20, line 596 to p. 21, line 611.

¹⁰⁴ Prosecutor's Application, Annex 5.2, p. 17, lines 500-502; Annex 2.3, p. 61, line 4 to p. 62, line 11; Annex 4.1, p. 72, line 10 to p. 73, line 5.

¹⁰⁵ Prosecutor's Application, Annex 8.1, p. 67, lines 11-19; Annex 2.3, p. 70, line 20 to p. 72, line 1.

¹⁰⁶ Prosecutor's Application, Annex 5.8, p. 7, lines 131-138.

¹⁰⁷ Prosecutor's Application, Annex 3.2, p. 65, lines 3-9, p. 66, line 18 to p. 67, line 7.

¹⁰⁸ Prosecutor's Application, Annex 2.3, pp. 43, 44, 46; Annex 3.2, p. 64; Annex 4.1, p. 77; Annex 5.2, p. 18; Annex 5.8, pp. 7, 8; Annex 8.2, pp. 26, 50, 51.

organised, imitating the structures of a national army,¹⁰⁹ with training camps¹¹⁰ and a strict hierarchy.¹¹¹ Together with other high-ranking members of the organisation Mr. Ntaganda managed the territories under the control of the UPC/FPLC.¹¹² He was involved in the decision-making process on the highest echelon, where the decision to start the attack was made and specific combat plans were discussed,¹¹³ *qua* his position he had command over the officers involved in the attack.¹¹⁴ Further, the material indicates that Mr. Ntaganda was in constant contact with the president of the organisation, and that the latter heeded his advice.¹¹⁵ The attack on Mongbwalu exemplifies the control Mr. Ntaganda had over the organisation: he was personally in charge of the troops of the FPLC¹¹⁶ and led one group in the attack.¹¹⁷ He instructed the troops before the attack, ordering that the Lendu population had to be driven out¹¹⁸ and that they had to attack Mongbwalu and take it back.¹¹⁹ Furthermore, during his briefing of the troops before the attack Mr. Ntaganda encouraged them to pillage the town of Mongbwalu.¹²⁰ In addition, there are reasonable grounds to believe that, due to their position and powers within and the strict hierarchy of the organization, Mr. Ntaganda and other high-ranking members of the organisation were able to

¹⁰⁹ Prosecutor's Application, Annex 4.2, p. 22, lines 10-20, p. 24, lines 3-13.

¹¹⁰ Prosecutor's Application, Annex 3.2, p. 42, line 8 to p. 43, line 11; Annex 5.1 p. 38, line 24 to p. 39, line 5.

¹¹¹ Prosecutor's Application Annex 5.1 p. 34, line 23 to p. 35, line 23.

¹¹² Prosecutor's Application, Annex 1.1, p. 47, lines 5-18.

¹¹³ Prosecutor's Application, Annex 8.3, p. 32, line 13-21.

¹¹⁴ Prosecutor's Application, Annex 5.2, p. 18, lines 525-526.

¹¹⁵ Prosecutor's Application, Annex 2.3, p. 47, lines 14-23; Annex 8.3, p. 13, lines 20-24.

¹¹⁶ Prosecutor's Application, Annex 8.3, p. 17, lines 6-8.

¹¹⁷ Prosecutor's Application, Annex 5.2, p. 17, lines 500-502; Annex 2.3, p. 61, line 6 to p. 62, line 11; Annex 25.16, pp. 34-35.

¹¹⁸ Prosecutor's Application, Annex 5.2, p. 22, lines 679-681.

¹¹⁹ Prosecutor's Application, Annex 5.2, p. 22, lines 668-669.

¹²⁰ Prosecutor's Application, Annex 5.2, p. 22, lines 670-673; Annex 4.1, p. 82, lines 5-9.

secure the execution of the crimes by almost automatic compliance of the physical perpetrators with the orders given by them.¹²¹

75. Considering the material presented, the Chamber further finds that there are reasonable grounds that Mr. Ntaganda satisfies the subjective elements of the alleged crimes pursuant to article 30 of the Statute. He knew that the execution of the common plan would result in the commission of the alleged crimes. Furthermore, he was aware that he had joint control over the organisation. Mr. Ntaganda knew that his conduct was part of the widespread and systematic attack. He was also aware of the circumstances establishing the existence of an armed conflict.

76. This can be inferred from the overall factual circumstances. Through his position in the UPC/FPLC, his numerous meetings with the president and other leaders of the organisation, Mr. Ntaganda was fully aware of the ongoing developments within the organisation. He personally participated in developing strategies for the attack. The Chamber recalls paragraph 26 of the present decision in which it found that Mr. Ntaganda was in constant communication with both his superiors and his subordinates, as well as paragraph 72, in which the Chamber established the essential contributions of Mr. Ntaganda. Furthermore, Mr. Ntaganda provided speeches in training camps where he incited the soldiers to “fight the enemy” and “vanquish the enemy”.¹²² One witness stated that Mr. Ntaganda was in charge of a town in which a camp was established, where women were abused, insulted, threatened to be killed,

¹²¹ Prosecutor’s Application, Annex 2.3, p. 30, line 25 to p. 32, line 22; Annex 3.1 p. 22, lines 19-22; Annex 3.2, p. 45, line 13 to p. 48, line 25; Annex 5.1, pp. 46-47; Annex 5.7, p. 19, line 15; Annex 8.1, p. 10, lines 3-5.

¹²² Prosecutor’s Application, Annex 8.1, p. 71, line 17 to p. 72, line 5.

subjected to forced labour and raped.¹²³ Overall, this shows that he fully supported the objectives of the organisation and actively worked on their implementation. Due to his position within the organisation Mr. Ntaganda also knew that his conduct was part of a widespread and systematic attack against the civilian population and was aware of the circumstances establishing the existence of an armed conflict.

IV. Whether the requirements to issue a warrant of arrest for Mr. Ntaganda have been met

77. The Chamber notes that, according to article 58(1) of the Statute, a warrant of arrest shall be issued if the Chamber is satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and that 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. For the purposes of the arrest warrant it is sufficient for the Chamber to establish the existence of one of the requirements as set out in article 58(1)(b) of the Statute.

78. The Chamber has already determined that there are reasonable grounds to believe that criminal responsibility under article 25(3)(a) of the Statute can be attributed to Mr. Ntaganda for the occurrence of the crimes against humanity and war crimes discussed in section II above.

¹²³ Prosecutor's Application, Annex 25.2, pp. 23-24.

79. In its application, the Prosecutor submits that the circumstances that led the Pre-Trial Chamber to issue a warrant of arrest on 22 August 2006 still exist. Accordingly, it contends that the issuance of a warrant of arrest is necessary (i) to ensure his appearance at trial; (ii) to ensure that he does not obstruct or endanger the investigation; and further (iii) to seek compliance with the arrest warrant already in force.¹²⁴

80. The Chamber recognises that the arrest of Mr. Ntaganda still appears necessary to ensure his appearance at trial, to ensure that he does not obstruct or endanger the investigation and to prevent the commission of crimes within the jurisdiction of the Court pursuant to article 58(1)(b)(i)-(iii) of the Statute. The Chamber has reached this conclusion because Mr. Ntaganda, despite criminal proceedings against him in the DRC and a first warrant of arrest of the Court, remains at large and, according to the material presented,¹²⁵ is still reportedly implicated in abuses including ethnic massacres, killings, rapes and recruitment of child soldiers.

81. On the basis of the material it has received and without prejudice to any subsequent decision under article 60 of the Statute and rule 119 of the Rules, the Chamber finds that the arrest of Mr. Ntaganda appears necessary pursuant to article 58(1)(b)(i), (ii) and (iii) of the Statute.

V. Conclusion

82. In view of the foregoing, the Chamber is satisfied that there are reasonable grounds to believe that, between September 2002 and the end of September 2003,

¹²⁴ Prosecutor's Application, para. 143.

¹²⁵ Prosecutor's Application, Annex 26.6.

Mr. Ntaganda is responsible under article 25(3)(a) of the Statute for the crimes identified in paragraphs 17-61 of the present decision.

83. The Chamber therefore decides to issue a warrant for Mr. Ntaganda's arrest, pursuant to article 58(1) of the Statute.

FOR THESE REASONS, THE CHAMBER HEREBY**DECIDES**

that the case against Mr. Ntaganda falls within the jurisdiction of the Court and that a warrant of arrest appears necessary for his responsibility under article 25(3)(a) of the Statute, to the required standard, as an indirect co-perpetrator, for the following crimes against humanity and war crimes committed in the Ituri District, Province Orientale of the Democratic Republic of the Congo, between 1 September 2002 and the end of September 2003 as established by the statement of facts contained in paragraphs 17-61 of this Decision:

(i) Murder constituting a crime against humanity (article 7(1)(a) of the Statute) (Count 1);

(ii) Rape and sexual slavery constituting crimes against humanity (article 7(1)(g) of the Statute) (Count 4);

(iii) Persecution constituting a crime against humanity (article 7(1)(h) of the Statute) (Count 6);

(iv) Murder constituting a war crime (article 8(2)(c)(i) of the Statute) (Count 2);

(v) Attack against the civilian population constituting a war crime (article 8(2)(e)(i) of the Statute) (Count 3);

(vi) Rape and sexual slavery constituting war crimes (article 8(2)(e)(vi) of the Statute) (Count 5);

(vii) Pillaging constituting a war crime (article 8(2)(e)(v) of the Statute) (Count 7);

ACCORDINGLY ISSUES A WARRANT OF ARREST

For Bosco Ntaganda, born in Rwanda, exact date and place unknown;

ORDERS THE REGISTRAR

1) to prepare and transmit in consultation and coordination with the Prosecutor, a request for cooperation to the competent authorities of the DRC for the arrest and surrender of Bosco Ntaganda; this request should contain the information and documents as required by articles 89(1) and 91 of the Statute and rules 176(2) and 187 of the Rules of Procedure and Evidence (the "Rules");

2) to prepare and transmit to any other State any additional request for arrest and surrender which may be necessary for the arrest and surrender of Bosco Ntaganda to the Court pursuant to articles 89 and 91 of the Statute;

3) to prepare and transmit if the circumstances so require, a request for provisional arrest in accordance with article 92 of the Statute;

4) to prepare and transmit to any State any request for transit which may be necessary for the surrender of Bosco Ntaganda to the Court, pursuant to article 89(3) of the Statute;

5) to liaise with the Prosecution in order to invite the DRC and the Kingdom of The Netherlands to request an exemption from the travel ban imposed by the UN Security Council and the Council of the European Union to allow the surrender of Bosco Ntaganda to the Court and to enter the territory of The Netherlands; and

[REDACTED]; and

REQUESTS THE PROSECUTOR

1) to transmit to the Chamber and to the Registrar, as far as the Prosecutor's confidentiality obligations allow, all information available to her that may assist in averting any risks to victims and/or witnesses associated with the transmission of the above-mentioned cooperation requests; and

2) to transmit to the Chamber and to the Registry, as far as the Prosecutor's confidentiality obligations allow, all information available to her that, in her view, would facilitate the transmission and execution of the above-mentioned cooperation requests.

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



Judge Ekaterina Trendafilova

Presiding Judge

 <hr/> <p>Judge Hans-Peter Kaul Judge</p>	 <hr/> <p>Judge Cuno Tarfusser Judge</p>
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Dated this 13 July 2012

At The Hague, The Netherlands