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International
Criminal
Court

Original : **English**

No.**: ICC-01/04**
Date: **28 January 2011**

THE APPEALS CHAMBER

Before: **Judge Navanethem Pillay, Presiding Judge**
Judge Philippe Kirsch
Judge Georghios M. Pikis
Judge Sang-Hyun Song
Judge Erkki Kourula

Registrar: **Mr Bruno Cathala**

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Redacted Version

Prosecutor's Document in Support of the Appeal

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Introduction

1. This document is filed in support of the appeal brought by the Prosecution against Pre-Trial Chamber I's 10 February 2006 Decision on the Prosecutor's Application for Warrants of Arrest, Article 58 (the "Decision").[1] The Prosecution argues that the Pre-Trial Chamber made fundamental errors of law and procedural errors materially affecting the Decision. Specifically, the Pre-Trial Chamber: (1) misinterpreted Article 17 (1) (d), imposing an incorrectly restrictive three-part legal-bar, which includes criteria and requirements unsupported in law and unrelated to gravity, whereby inter alia anybody falling short of being a "most senior leader" as narrowly defined by the Pre-Trial Chamber can never be prosecuted before this Court, regardless of their actual responsibility and the gravity of their crimes; (2) failed to provide the Prosecution with adequate notice and a proper opportunity to address a determinative issue, namely the inadmissibility of the proposed case against Bosco Ntaganda, before deciding to end the proposed prosecution; and (3) approached and evaluated the information presented and the submissions made by the Prosecution in an improperly selective fashion, which resulted in the erroneous determination that Bosco Ntaganda's case was inadmissible, even assuming the correctness of the test found by the Chamber.

2. As a result of these legal and procedural errors, the case against a top military commander who was instrumental in the implementation of a policy of recruitment of child soldiers, and further directly selected and ordered children to participate in combat activities, including under his direct command, has been dismissed due to lack of gravity and accordingly cannot be prosecuted before this Court.

Procedural background

3. On 12 January 2006, the Prosecution filed the "Prosecutor's Application for Warrants of Arrest, Article 58" (the "Prosecutor's Application"), requesting, *inter alia*, that arrest warrants be issued for Thomas Lubanga Dyilo and Bosco Ntaganda. On 20 January 2006, Pre-Trial Chamber I rendered the "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58" (the "Decision"). In this Decision, the Chamber issued a warrant of arrest against Thomas Lubanga Dyilo, but rejected the Prosecution's application for a warrant of arrest against Bosco Ntaganda on the ground that the case against him was inadmissibile.

[1] Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, ICC-01/04-01/06-1-US-Exp-Corr.

4. On 14 February 2006, the Prosecution filed its appeal against the Decision pursuant to Rule 154 and Regulation 64,[2] seeking that the Decision be reversed, that the case against Bosco Ntaganda be declared admissible by the Appeals Chamber, and that the matter be remanded to Pre-Trial Chamber I for the determination of the remaining issues.

Renewal of Application for Extension of the Page Limit

5. On 23 February 2006 the Prosecution requested an extension of the page-limit by a further 20 pages.[3] At the time of filing of this document, no decision had been entered on this request. Accordingly, the Prosecution renews its request for an extension of the page limit by a further 20 pages. In the event that this renewed request is not granted, or is granted for a lesser amount of pages, the Prosecution makes an alternative request for an extension of the time limit of 10 days to file a new document, pursuant to Regulation 35, running from the notification of the decision on the applicable page limit.

The Nature of the Errors

The Errors made by the Pre-Trial Chamber in the Decision

6. As this is the first submission ever made before the Appeals Chamber of the Court, the Prosecution respectfully provides argument regarding the standards of review that are applicable, in its view, *vis-à-vis* the errors alleged in this Appeal, before discussing in detail the Pre-Trial Chamber's findings. Of course, it is ultimately for the Appeals Chamber to define the errors and standards of review, and a Chamber is free to depart from the submissions of the parties when it comes to legal characterisation of facts.[4] The Prosecution respectfully submits that if the Appeals Chamber disagrees with the Prosecution's characterisation of the errors,[5] then the Appeals Chamber should re-cast the errors in the manner that the Chamber considers appropriate and apply the corresponding standard of review. It is hoped that the material set forth below, which includes an interpretation of the

[2] Prosecutor's Appeal against Pre-Trial Chamber I's 10 February 2006 "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", ICC-01/04-01/06-3-US-Exp. Since the Decision had been issued in the Case No. ICC-01/04-01/06 (*The Prosecutor v Thomas Lubanga Dyilo*), the Prosecution filed its Appeal in the same proceedings. However, pursuant to the Decision Rectifying Typographical or Other Formal Errors of the Decision on the Prosecutor's Application for Warrants of Arrest, ICC-01/04-01-06-7-US-Exp, 24 February 2006, the correct title of the proceedings remains "Situation in the Democratic Republic of the Congo" (see p. 2).

[3] Prosecutor's Application for an Extension of the Page Limit for the Document in Support of the Appeal, ICC-01/04-01/06-6-US-Exp, 23 February 2006.

[4] Or when it comes to the correct application of the law in general (*iura novit curia*). See Regulation 55 for a specific example of the principle in the legal framework of the ICC.

[5] For example, commentators have noted that the boundary between procedural error and error of law is unclear, and that there may be some overlap – Roth and Henzelin "The Appeals Procedure of the ICC" in Cassese, Gaeta and Jones (eds), *The Rome Statute of the International Criminal Court* (2002) at p. 1544; Staker "Article 81" in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) at p. 1019.

statutory scheme and references to the jurisprudence of the *ad hoc* tribunals, may be of assistance to the Chamber.

7. While Article 82 is silent as to the possible grounds of appeal under that provision, the appellate process of the ICC was always conceived as a device aimed at correcting specific errors invalidating the decision. The Prosecution submits that it is appropriate to import into Article 82 the categories of error in Article 81 that can be meaningfully transposed to interlocutory appeals, namely the core errors in Article 81 (1) (a): procedural error, error of fact or error of law.[6]

8. The Prosecution submits that the Pre-Trial Chamber made the following errors in the Decision:

- First, an error of law, by misinterpreting the basic threshold of Article 17 (1) (d), and imposing improper requirements and criteria under that paragraph;
- Second, a procedural error, by failing to give adequate notice of a determinative issue and entering a *proprio motu* finding on that determinative issue without hearing the Prosecution's views;
- Third, a procedural error, by taking an improperly selective approach to the information relevant to determine whether the case against Bosco Ntaganda was inadmissible, even under the test adopted by the Chamber.

9. The Prosecution advances these three errors as grounds of appeal in the alternative, within the terms of Regulation 64 (3). Accordingly, the Prosecution's second and third grounds of appeal need only be examined if the Prosecution's first and main ground of appeal is not granted. However even if the Chamber grants the first ground of appeal, it is obviously within the discretion of the Appeals Chamber to enter findings with respect to the issues raised in the second and third grounds of appeal if the Appeals Chamber considers that such findings would serve the effective functioning of the Court, including the fairness and overall quality of its procedure.

The Nature of the Errors and the Standards of Review Applicable to Each[7]

[6] These categories of error are repeated in Article 81 (1) (b) (i)-(iii). Article 81 (1) (b) (iv) appears to be an error specific to convictions, rather than a general one capable of effective application to other decisions.

[7] As none of the errors alleged in this appeal are errors of fact, the Prosecution will not deal with these in detail. In summary, an *error of fact* occurs when a Chamber errs in the factual findings that it makes on the evidence before it, including inferences of fact drawn from that evidence. This includes when a Chamber misapprehended the evidence before it, drew unreasonable conclusions from such evidence, or reached a factual conclusion on the

The first error: error of law

10. An *error of law* primarily occurs when a Chamber's decision is based on an incorrect interpretation of the governing law.[8] Such an error extends to "any determination by a Chamber on a question of the substantive or procedural law of the Court, or on any issue of international law generally that arises in the case",[9] including when the Chamber "misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of the discretion".[10] In this case, the Prosecution contends that the Pre-Trial Chamber committed an error of law when it misinterpreted Article 17 (1) (d).

11. In relation to errors of law, the Prosecution respectfully submits that *de novo* review by the Appeals Chamber is appropriate. The ICTY and ICTR Appeals Chambers have consistently held that the Appeals Chamber is "the final arbiter of the law of the international Tribunal", and that it may freely review the decision to determine whether the legal findings and standards were *correct*.[11] The Appeals Chamber should therefore review any alleged errors of law in the impugned decision and substitute its own judgement on the correct legal standard.

12. When the relevant factual basis is not in dispute, the Appeals Chamber should then apply that correct legal standard to the facts as established by the original Chamber. If both legal and factual dimensions of the decision are affected, the Appeals Chamber may, after

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basis of evidence that could not have been accepted by any reasonable tribunal. The Appeals Chamber should show deference to factual findings of the original Chamber, and should only overturn a finding of fact where:

(a) the evidence relied upon could not have been accepted by any reasonable tribunal of fact;

(b) the conclusion is one which no reasonable tribunal of fact could have reached on the evidence; or

(c) the factual finding or the evaluation of the evidence was wholly erroneous.

See e.g. *Musema v Prosecutor*, ICTR-96-13-A, Judgement, 16 November 2001 at para 17; *Prosecutor v Blaskic*, IT-95-14-A, Judgement, 29 July 2004 at paras 16-18.

[8] This includes "the application of the wrong legal standard" - *Prosecutor v Blaskic*, IT-95-14-A, Judgement, 29 July 2004 at para 15.

[9] Staker, at p. 1020. See also *Prosecutor v Krnojelac*, IT-97-25-A, Judgement, 17 September 2003 at para 10. When a Chamber wrongly construes a substantive or procedural provision of the Statute or the Rules, either by defectively interpreting its elements or by erroneously defining its scope, or when a Chamber fails to properly identify the governing legal provision, there is an error of "pure law" – Fleming, "Appellate Review in the International Criminal Tribunals" (2002) 37 *Texas International Law Journal* 111 at p. 124. The Prosecution submits that an error of "applied law", the erroneous application of the correct legal standard to the facts of the case or an error in the legal characterisation of the facts, should also be treated as errors of law – see Fleming at pp. 124-125. This type of error, although involving factual elements, is primarily a defective legal operation performed by the Chamber: the error does not lie in "a legally incorrect determination of the facts to be subsumed [in the legal rule], but in the subsuming process in and of itself" – Sarsted and Hamm, *Die Revision in Strafsachen* (1998) at p. 553.

[10] *Milosevic v Prosecutor*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004 ("Milosevic Assignment of Counsel Decision") at para. 10.

[11] See e.g. *Prosecutor v Blaskic*, IT-95-14-A, Judgement, 29 July 2004 at para 14; *Prosecutor v Krnojelac*, IT-97-25-A, Judgement, 17 September 2003 at para 10; *Rutaganda v The Prosecutor*, ICTR-96-3-A, Judgement, 26 May 2003, para 20.

correcting the legal error and examining the factual findings, remand the case for a new factual determination with instructions that the original Chamber apply the correct legal standard; or substitute its own finding for any factual finding deemed defective[12] and itself apply the correct legal standard to these new factual findings.

The second and third errors: procedural errors

13. *Procedural error* is a relatively new category of appealable error in international criminal law.[13] The Prosecution respectfully submits that a *procedural error* occurs when a Chamber errs in the exercise of its procedural authority under the Statute and the Rules. Errors of this type will often involve a Chamber erring in the exercise of its discretion,[14] but also include the defective implementation of a mandatory procedural step.

14. In this case, the Prosecution contends that Pre-Trial Chamber erred when it failed to give adequate notice of the legal test it was contemplating, on a determinative issue, and in entering a *proprio motu* finding on that determinative issue without seeking the Prosecution's views on the standard it was in fact obligating the Prosecution to meet. This process violated mandatory principles of procedural fairness and constituted a procedural error (the second error).

15. When a procedural error entails the defective implementation of a non-discretionary procedural provision or obligation (as the Prosecution characterises its second ground of appeal), the Appeals Chamber need not show deference.[15] As in the case of errors of law, the Appeals Chamber should review whether the procedural decision was correct, and if not should consider whether the error was sufficiently material that review should be granted.[16]

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[12] Unlike a final appeal, in which the Trial Chamber was in a privileged position because it heard all the evidence and could assess the credibility of witnesses, in an interlocutory appeal the Appeals Chamber may be as well situated as the original Chamber to make a factual determination. Certainly this circumstance exists when the original Chamber has reached its conclusions on the basis of written material that is fully available to the Appeals Chamber as part of the record on appeal (see Rule 156 (1)), see for example *Prosecutor v Sainovic and Ojdanic*, IT-99-37-AR65, Decision on Provisional Release, 30 October 2002 at para. 12.

[13] The Statutes of the *ad hoc* Tribunals do not refer to "procedural error", and while the Statute of the Special Court for Sierra Leone (SCSL) does include "procedural error" (Article 20), its jurisprudence has not yet considered this category but has focused on errors of law and of fact, including in relation to procedural matters, e.g. *Sesay v Prosecutor*, SCSL-04-15-AR65, Decision on Appeal Against Refusal of Bail, 14 December 2004; *Fofona v Prosecutor*, SCSL-04-14-AR65, Appeal Against Decision refusing Bail, 11 March 2005.

[14] Staker, at p. 1019. See also Milosevic Assignment of Counsel Decision at para. 9 - "a Trial Chamber exercises its discretion in many different situations … in relation to the admissibility of some types of evidence … *and (more frequently) in deciding points of practice or procedure*." (emphasis added)

[15] In contrast with procedural errors involving the exercise of discretion, see below. A procedural error involving a mandatory obligation can never be, and accordingly cannot be reviewed for whether it was, "reasonable".

[16] An appeal will succeed if "the decision or sentence appealed from was *materially affected* by error of fact or law or procedural error" (Article 83 (2), emphasis added). Article 83 (2) also provides a remedy where "the

16. A procedural error can also occur in the exercise of discretion. In this case, the Prosecution submits that the Pre-Trial Chamber erred in the exercise of its discretion by wrongly considering irrelevant factors and failing to consider relevant factors in determining whether the case against Bosco Ntaganda was inadmissible. This circumstance constituted a further procedural error (the third error).

17. For procedural errors related to a Chamber's alleged defective exercise of discretion (as the Prosecution characterises its third ground of appeal), unless the original Chamber has made an error of law in interpreting its discretion,[17] a deferential standard of review is appropriate.[18] The Appeals Chamber thus does not review the outcome of the exercise of the discretion, but ensures that the discretion was properly exercised.[19] One clear manner in which a Chamber can fail to properly exercise its discretion is if it has "given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations".[20]

18. If a procedural error is found, then the Appeals Chamber has two means of remedying it: it may substitute its own judgement or discretion for that of the original Chamber;[21] or it may determine the correct procedure to be applied and remand the matter to the original Chamber for reconsideration. It will usually be appropriate for the Appeals Chamber to substitute its

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proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence", but it is submitted that this most logically applies to appeals under Article 81 (1) (b) (iv).

[17] i.e. where "the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion" (*Prosecutor v Milosevic*, IT-99-37-AR73, IT-01-50-AR73 and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal From Refusal to Order Joinder, 18 April 2002 ("Milosevic Joinder Decision") at para. 5), or the decision was "based on an incorrect interpretation of governing law" (Milosevic Assignment of Counsel Decision at para. 10).

[18] *Prosecutor v Halilovic*, IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused From the Bar Table, 19 August 2005 at para 5; *Prosecutor v Karemera*, ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003 at para. 9; Milosevic Joinder Decision at para. 4; Milosevic Assignment of Counsel Decision at para. 9-10.

[19] i.e. whether the Chamber "failed to exercise its discretion judiciously" – Milosevic Assignment of Counsel Decision (at para. 10) which goes on to consider whether "there was a legitimate basis" for the decision, and whether "it was within the Trial Chamber's discretion" (at para. 15).

[20] Milosevic Joinder Decision at para. 5; Milosevic Assignment of Counsel Decision at para. 10.
There may be cases in which the Appeals Chamber cannot determine which considerations the original Chamber took into account. In such cases the Appeals Chamber should review whether the result is so unreasonable, or unjust, that the original Chamber must have failed to exercise its discretion judiciously - "Even if the precise nature of the error made in the exercise of the discretion may not be apparent on the face of the decision under appeal, the result may nevertheless be so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly" - Milosevic Joinder Decision at para. 6; *Prosecutor v Sainovic and Ojdanic*, IT 99-37-AR65, Dissenting Opinion of Judge David Hunt on Provisional Release, 30 October 2002 at para. 23; see also Milosevic Assignment of Counsel Decision at para. 10.

[21] Where a Chamber has erred in the exercise of its discretion the Appeals Chamber may "without fetter, substitute its own exercise of discretion for that of the [original] Chamber" unless the circumstances of the case make it inappropriate to do so – Milosevic Joinder Decision at para. 6. See also *Prosecutor v Sainovic and Ojdanic*, IT-99-37-AR65, Decision on Provisional Release, 30 October 2002 at para. 12.

own discretion when all of the relevant information is before it in substantially the same manner as it was before the original Chamber.[22]

The Prosecution's First Ground of Appeal:
Error of law in interpretation of "gravity" under Article 17 (1) (d)

The Pre-Trial Chamber's Decision

19. The Pre-Trial Chamber rejected the Prosecution's request to issue a warrant of arrest against Bosco Ntaganda on the basis that the case against him was inadmissible due to insufficient gravity. The Chamber concluded that "Article 17(1)(d) of the Statute is intended to ensure that the Court initiates cases only against the most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court allegedly committed in any given situation under investigation".[23] The Chamber supported this approach by reference to its opinion that "only by concentrating on this type of individual can the deterrent effects of the activities of the Court be maximized".[24] The Chamber identified criteria, which were first referred to as "factors",[25] but then were established as cumulative requirements.[26] The cumulative requirements were that the conduct be *large-scale or systematic*,[27] also taking into account "social alarm";[28] that "the person falls within the category of *most senior leaders* of the situation under investigation";[29] and in addition, that the person be in the "category of most senior leaders suspected of being *most responsible*", given his or her role played within his or her organisation and the role played by his or her organisation within the overall commission of crimes within the situation.[30]

20. With respect to the specific requirement of being a "most senior leader", the Pre-Trial Chamber's application of the test to the facts illustrated the stringency of the requirement that a person be "at the top" of the entity, organization or armed group.[31] After considering factors such as authority to sign peace agreements, to decide, change or implement policies, and the

[22] Such cases will be common in interlocutory appeals on discrete issues which are not embedded in the evidentiary matrix of an ongoing trial, and judicial economy favours immediate resolution of the issue by the Appeals Chamber rather than remanding the issue for reconsideration. In contrast, where a decision requires information not fully before the Appeals Chamber or consideration of factors beyond the scope of the appeal, remission to the original Chamber may be appropriate. These considerations are similar to those that apply to whether the Appeals Chamber is in a position to enter its own findings of fact, see footnote 12, above.
[23] Decision, para. 51.
[24] Decision, para. 55.
[25] Decision, paras. 54 and 62.
[26] Decision, paras. 64, 65, 66, 85 and 89.
[27] Decision, paras. 47, 64 and 66.
[28] Decision, paras. 47 and 64.
[29] Decision, para. 64 (ii).
[30] Decision, para. 64 (iii).
[31] Decision, para. 54.

fact that Thomas Lubanga Dyilo had greater authority,[32] the Pre-Trial Chamber held that a military commander ranked in the third and then second highest position within a major armed group was not senior enough.[33] As a result, Bosco Ntaganda, a high-level military commander exercising authority over sector commanders, training camp commanders and field commanders, and directly taking part in the relevant criminal activities, including enlisting, training and sending children to combat operations, was not considered senior enough for the purposes of Article 17 (1) (d) and cannot be brought to justice before this Court.

Overview

21. The Prosecution agrees with the statement by the Pre-Trial Chamber that "the gravity threshold is in addition to the drafters' careful selection of crimes" and "the fact that a case addresses one of the most serious crimes of concern to the international community as a whole is not sufficient for it to be admissible before the Court."[34] The Prosecution further supports many of the views of the Pre-Trial Chamber on the desirability of focused case selection, as a matter of *policy*.[35] While investigations in both situations are ongoing, and a sequential approach is being applied, to date the Prosecution has sought warrants against only five top leaders of the Lord's Resistance Army (LRA) in the situation in Northern Uganda, and against two top leaders of the closely inter-related UPC and FPLC in the situation in the Democratic Republic of the Congo (DRC), demonstrating a focused approach to case selection.

22. The Prosecution submits, however, that it was an error of law to inject exceptionally rigid requirements into the *legal* standard of "sufficient gravity" in Article 17 (1) (d). The Prosecution submits that this overarching error with respect to the role of, and standard required by, Article 17 (1) (d) is illustrated by a number of specific errors, namely:

- restricting admissibility to the "most senior leaders", permanently excluding other major criminals with particular responsibility for exceptionally serious crimes from the exercise of jurisdiction by the Court;[36]
- applying an excessively narrow interpretation of "senior leader", thereby exempting from prosecution a top commander (ranking number three and then number two) in a major armed group;[37]

[32] Decision, paras. 86-88.
[33] Decision, para. 89.
[34] Decision, para. 42.
[35] See e.g. Decision, para. 55, 61 and footnotes 48 and 49.
[36] Decision, para. 51-55, 64.

- creating a criterion that perpetrators be core actors in the decision making process of policies/practices or have autonomy to change or to prevent implementation of policies/practices;[38]
- placing improper emphasis on authority to negotiate and sign peace agreements, which is not necessarily relevant to the issue of responsibility for crimes;[39]
- applying an irrelevant criterion of whether a group is "merely a regional group", which may have no bearing on the role of the group in the most serious crimes;[40]
- imposing a requirement for "large-scale or systematic" for all crimes, contrary to the balance struck by the drafters of the Rome Statute;[41]
- applying an improper criterion of "social alarm", which relates to subjective and contingent reactions rather than the objective gravity of the crime.[42]

23. The Prosecution submits that Article 17 (1) (d) is intended to establish a basic standard for gravity, excluding minor offenders and minor crimes that clearly do not warrant the exercise of jurisdiction.[43] Among those cases that satisfy the gravity threshold, the Prosecution must, like other Offices of the Prosecutor, apply selection criteria in order to prioritize a limited number of cases for presentation before the Court.

24. The Prosecution submits three general observations about the ramifications of the Decision. First, the Decision imposes a threshold for gravity that is far more restrictive than that indicated by the ordinary language or purpose of Article 17 (1) (d) or the applicable law. It entrenches a permanent legal barrier that will preclude this Court from prosecuting any perpetrator unless he or she is not only among the most responsible, but also a senior leader within his or her organization. This would undermine the deterrent impact of the Court by signalling to a majority of perpetrators that they are forever legally exempt from prosecution by the Court and have nothing to fear from international justice.

25. Second, the Prosecution submits that the test is not only incorrectly restrictive but is also incorrectly focused. The Decision converts matters that appear irrelevant to gravity (regional nature of group, social alarm) into considerations, and converts matters that could in some circumstances be relevant considerations (seniority of perpetrator, large-scale or systematic)

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[37] Decision, para. 54, 64, 85-89.
[38] Decision, para. 87.
[39] Decision, para. 86.
[40] Decision, para. 84.
[41] Decision, paras. 64, 66.
[42] Decision, paras. 47, 67 and 77.
[43] See para. 50 *et seq*., below.

into *requirements*. As a result, the test is not only too restrictive, but could in fact exclude many of the gravest cases in terms of gravity of the crime and responsibility of the perpetrators.

26. Third, the Decision appears to conceive Article 17 (1) (d) not as a basic threshold but rather as a means of directing the policy of case selection among grave cases.[44] This not only eclipses any scope for case selection, but in addition, hardening a restrictive case selection policy into a *legal* requirement would erect a fixed and permanent legal barrier. Whereas a prosecutorial policy does not create rights to non-prosecution, gravity is available to perpetrators as a means to challenge admissibility. This would offer new opportunities for persons with high levels of responsibility for serious international crimes to escape justice, by demanding proof not only of their crimes but also that the additional rigorous requirements are also met.

27. In short, the Decision circumscribes the universe of admissible cases so narrowly as to preclude any discretion by the Prosecution or future Chambers, and to prevent the Court from acting with respect to very serious cases. The issue for the Appeals Chamber in this appeal is whether it was the intent of the drafters, under Article 17 (1) (d), to create a legal straightjacket for the Court or simply to screen out frivolous and minor cases.[45]

Inappropriate restriction to senior leaders and overly narrow interpretation thereof

Ordinary meaning

28. Article 17 (1) (d) requires simply that the "case is … of sufficient gravity to justify further action by the Court". The ordinary meaning of these terms in their context[46] does not contain any rigid legal restriction that the Court may only act with respect to "the most senior leaders suspected of being the most responsible for the crimes…in any given situation",[47] nor indeed any other restrictive category of perpetrator. If the drafters had intended to impose a legal restriction to the very top leaders, they would have expressly done so.

Legislative intent[48]

[44] Decision, paras. 62-63 and see also para 55.
[45] See para. 29, below.
[46] Vienna Convention on the Law of Treaties, Article 31(1).
[47] Decision, para. 51.
[48] Vienna Convention on the Law of Treaties, Article 31(4) (special meaning shall be given if intended by parties), Article 32 (recourse to preparatory works to confirm meaning or to clarify meaning where otherwise ambiguous, obscure, or manifestly absurd or unreasonable).

29. The *travaux préparatoires* and the major commentaries on the negotiating history of Article 17 (1) (d) do not provide any indication of a special meaning assigned to the terms nor any other support in the drafting history for the restrictive interpretation advanced by the Pre-Trial Chamber.[49] Quite on the contrary, the few records of the debate indicate that the provision was intended to prevent the Court from being "*burdened with minor violations*"[50] and that "*it would serve the purpose of enabling the Court to sift out frivolous cases*."[51]

Relevant rules and principles of international criminal law[52]

30. The Prosecution submits that the extent of responsibility of the perpetrator is an appropriate factor in assessing the gravity of a case under Article 17 (1) (d), and submits that, in accordance with the ordinary language and legislative intent, this factor excludes cases against minor actors that clearly do not warrant an exercise of jurisdiction by the Court. The Prosecution submits that more stringent standards, such as "persons most responsible", or "those bearing the greatest responsibility" may be appropriate for case selection among serious cases, but should not be *legal preconditions* for admissibility. Nonetheless, even those comparatively stringent standards are not as restrictive as the test espoused by the Pre-Trial Chamber. For example, most authorities indicate that these terms are not restricted to those in high leadership positions, but also include notorious perpetrators who distinguish themselves by their extent of participation and responsibility for particularly serious or notorious crimes. This includes statements by the UN Secretary-General[53] and the Security Council,[54] the ICTR completion strategy,[55] ICTY case law,[56] statements by the ICTY Prosecutor,[57] national laws,[58]

[49] Article 17(1)(d) originated in Article 35(c) of the ILC Draft Statute (*Report of the International Law Commission on the Work of its Forty-Sixth Session*, A/49/355 (1994)). Whereas the complementarity provisions underwent extensive discussion and re-drafting, there was little discussion of Article 17(1)(d), suggesting that it was not seen as a major provision.

[50] Statement, Ms. Hodak (Croatia), 5th meeting of the Committee of the Whole, A/CONF.183/C.1/SR.11.

[51] Report, Working Group 3 on Complementarity and Trigger Mechanisms, Committee on the Establishment of an International Criminal Court (August 4-15, 1997) This is a report by the Coalition for an International Criminal Court, and is not an official record.

> A number of delegations spoke in favour of deleting [Article 17 (1) (d)]… These states explained that this paragraph was superfluous if the jurisdiction of the Court were to be limited to the core crimes. Other states however spoke in favour of its retention, claiming that it would serve the purpose of enabling the Court to sift out frivolous cases.

[52] Vienna Convention on the Law of Treaties, Article 31(3)(c); ICC Statute, Article 21(1)(b).

[53] The Secretary-General expressed his interpretation that "persons who bear the greatest responsibility" "does not mean that the personal jurisdiction is limited to the political and military leaders only": Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, UN Doc S/2001/40.

[54] The Security Council confirmed that "the members of the Council share your analysis of the importance and role of the phrase 'persons who bear the greatest responsibility'": Letter dated 31 January 2001 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2001/95.

[55] The ICTR Completion Strategy states that "the Prosecutor will be guided by the need to focus on those who are alleged to have been in positions of leadership *and* those who, according to the Prosecutor, bear the greatest responsibility for genocide … The criteria taken into consideration when making this determination are as

the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia,[59] reports of groups of experts[60] and of non-governmental organizations,[61] and academic commentary.[62]

31. Moreover, even if "senior leadership" were a legal requirement under Article 17 (1) (d), the Pre-Trial Chamber has applied an exceedingly narrow interpretation of the term in the instant case, excluding an individual at the highest levels (ranked third and then second) in a major armed group, exercising command responsibilities over FPLC forces.[63]

32. The Prosecution notes that the Pre-Trial Chamber has sought support for its particular construction of Article 17 (1) (d) in the rules adopted by the ICTY and ICTR pursuant to the completion strategies of those institutions.[64] Those rules, adopted in order to bring about the closure of institutions, involve the transfer of cases to national courts willing to accept the cases, which were reformed with the assistance of the international community and which

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follows: the alleged status and extent of participation of the individual during the genocide…" (emphasis added) Annex to Letter dated 30 April 2004 from the President of the [ICTR]…addressed to the President of the Security Council, S/2004/341 (3 May 2004)

[56] *Prosecutor v Delalic et al*, IT-96-21-A, Judgement, 20 February 2001 at para 614: "it is quite clear that the decision to continue the trial against Landzo was consistent with the stated policy of the Prosecutor to 'focus on persons holding higher levels of responsibility, or on those who have been personally responsible for the exceptionally brutal or otherwise extremely serious offences.'"

[57] Carla Del Ponte "Prosecuting the Individuals Bearing the Highest Level of Responsibility" (2004) 2 *Journal of International Criminal Justice* 516 at 517:

> Some individuals who have no particularly important functional role may have distinguished themselves in committing numerous crimes in the most overt, systematic or widespread manner. Their criminal conduct may be such as to qualify them as bearing the highest responsibility for particularly serious crimes. Such individuals often play a great role in setting the example and encourage, by their acts, speech and behaviour, the commission of other gruesome crimes."

[58] Rwanda, *Organic Law No. 08/96 of August 30,1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990*, wherein the first category includes planners, organisers and leaders of the genocide as well as notorious murderers.

[59] Article 1 of the Law provides that: "The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea *and* those who were most responsible for the crimes and serious violations" (emphasis added).

[60] The Group of Experts for Cambodia recommended that the tribunal focus on "senior leaders with responsibility over the abuses as well as those at lower levels who are directly implicated in the most serious atrocities." Identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council, UN Doc. A/53/850-S/1999/231, annex (Group of Experts Report).

[61] See e.g., Human Rights Watch, *Bringing Justice: the Special Court for Sierra Leone: Accomplishments, Shortcomings, and Needed Support*, 8 September 2004: "Human Rights Watch believes that the mandate should be interpreted to also include other perpetrators who, while not at the top of the chain of command, were regional or mid-level commanders who stood out above similarly ranking colleagues for the exceedingly brutal nature of the crimes they committed."

[62] See e.g., the seminal article by Dianne Orentlicher "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime" (1990-1) 100 *Yale Law Journal* 2537 at 2599; Kritz "Coming to terms with atrocities: a review of accountability mechanisms for mass violations of human rights", (1997) 59 *Law and Contemporary Problems* 127 at 134. In the context of Article 17(1)(d), see Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut* (2003) at pp. 79-80 (rank of perpetrator should at most be a supplementary criterion).

[63] See paras. 56-62, below.

[64] Decision, paras. 56-61.

have the necessary resources to handle cases effectively,[65] so the result is not impunity. This will not typically be the case for this Court when rejecting cases under Article 17 (1) (d) (as opposed to 17 (1) (a) – (c)).

33. Furthermore, even if the demanding standards of the ICTY completion strategy were applied under Article 17 (1) (d) (which, the Prosecution submits, would be incorrect), the case against Bosco Ntaganda would satisfy those standards. Whereas the Pre-Trial Chamber emphasized that Bosco Ntaganda was a military rather than political leader,[66] the ICTY Appeals Chamber has found that the concept of senior leaders encompasses both military and political leaders.[67] Whereas the Pre-Trial Chamber emphasized that the available information did not indicate that Bosco Ntaganda was a core actor in deciding or changing policies and practices,[68] the ICTY has found that the concept of senior leaders is not restricted to "architects of an overall policy which forms the basis of alleged crimes", nor is it limited to "military commanders who were at the highest policy-making levels of an army".[69] Whereas the Pre-Trial Chamber emphasized that Mr. Ntaganda was subordinate to others,[70] the ICTY affirmed that a person can be "senior" even where there is an echelon of military commanders above him.[71] The ICTY also indicated that deference should be shown to conclusions of the Office of the Prosecutor that a case warrants prosecution at the international level.[72] Thus the test set out in the Decision, especially as applied by Pre-Trial Chamber, is dramatically narrower than even the restrictive test applied by the ICTY in the course of the completion strategy ordered by the UN Security Council.

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[65] Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts, June 2002, paras. 1-9, annexed to Letter dated 17 June 2002 from the Secretary-General addressed to the President of the Security Council, 19 June 2002, S/2002/678; Rule 11*bis* (A) (iii) ICTY Rules of Procedure and Evidence (IT/32/Rev. 36).
[66] Decision, para. 83.
[67] *Prosecutor v Jankovic*, IT-96-23/2-AR11bis.2, Decision on Rule 11*bis* Referral, 15 November 2005 at para. 19.
[68] Decision, para 87.
[69] *Prosecutor v Milosevic*, IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11*bis*, 8 July 2005 at para 22.
[70] Decision, paras. 79, 88.
[71] *Prosecutor v Milosevic*, IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11*bis*, 8 July 2005 at para 23.
[72] *Prosecutor v Mrksic et al.* IT-95-13/1-PT, Decision on Prosecutor's Motion to Withdraw Motion and Request for Referral of Indictment under Rule 11*bis*, 30 June 2005 at p. 2: "The Referral Bench asserts that the role of the Prosecutor before the Tribunal may enable him to have a particular insight into many factors relevant to the complex question whether a particular case can be appropriately tried by another State or not. The Bench considers therefore it should be hesitant to refuse a motion to withdraw a referral request. The Referral Bench also reckons that though it can act *proprio motu* on the issue of referrals, it would only be appropriate for it to do so in an obvious case."

Other ICC decisions

34. The Decision is also inconsistent with the jurisprudence from Pre-Trial Chamber II, where cases were found admissible in relation not only to Joseph Kony, who was alleged by the Prosecution to be the top leader of the LRA, but four other leaders who occupied lesser high-ranking positions. These lesser LRA leaders included brigade commanders who reported to Kony; the Vice-Chairman, Vincent Otti; and others. Significantly, in terms of hierarchical rank, the two accused persons who were brigade commanders at the times relevant to the Uganda warrant application – Dominic Ongwen and Okot Odhiambo – could fairly be characterized as occupying only the fifth tier of commanders within the LRA. It was because the evidence and information established that these two were among the five LRA leaders most responsible for serious crimes within the jurisdiction of the Court that the Prosecution made the requests for arrest, which were granted *in toto*. In contrast, in this Decision, because Pre-Trial Chamber I imposed an additional legal requirement of seniority of position, the case was found admissible only against the top leader, while the person who was third in command (and subsequently second in command) was deemed beyond the authority of the Court to prosecute. The Prosecution submits that the approach to gravity of Pre-Trial Chamber II was correct: Article 17 does not prevent the Court from bringing charges against a number of perpetrators, as long as the case is sufficiently grave. It may also be noted that the test created by Pre-Trial Chamber I, if adopted, provides an incentive for some of the persons named in the LRA warrants, if apprehended, to challenge admissibility using the factors in the Decision and seek to escape trial before the Court.

Teleological considerations

35. Still greater difficulties arise when one examines the consequences of such an interpretation (in terms of the *object and purpose* of the Statute) and its compatibility with other provisions of the Statute (context of the provisions).[73]

36. First, the approach mandated by the Pre-Trial Chamber runs precisely backward to an evidence-driven investigation based on the principle of objectivity. Consistent with Article 54 (1) (a), the Office of the Prosecutor conducts investigations in order to establish the truth, investigating exonerating and incriminating evidence equally, and following the chain of *criminal* responsibility *as high up as the evidence supports*. The requirements laid down by the Pre-Trial Chamber would turn these principles on their head, by imposing a pre-requisite

[73] Vienna Convention on the Law of Treaties, Article 31.

that the Court may *only* prosecute the very top, since cases against any others will not be admissible due to lack of seniority.[74] Indeed, the Decision makes clear that the requirements are cumulative: *in addition* to being a person most responsible one must *also* be a "most senior leader", a person "at the top" of an entity, organization or armed group.[75] This generates devastating consequences in the event that, after investigation of a serious situation, the evidence indicates that responsibility rises only to a medium-high level in the chain (for example, if battalion commanders launched a brutal campaign of massive crimes and higher ranking authorities had discharged their duties to attempt to prevent the crimes). The Prosecution would be unable to bring charges against top leaders because the evidence does not indicate their responsibility, and also unable to bring charges against those most responsible because they are not hierarchically high enough to meet the test created by the Decision.[76] The Court, even with plentiful evidence concerning the most responsible perpetrators, would be paralyzed and unable to act because of a legal requirement that perpetrators must also fall within an extremely narrowly defined category of "the most senior leaders". This is why any "extent of responsibility" requirement *must* be based on multiple factors allowing sensitivity to significance of role in the overall commission of crimes and degree of involvement, including culpability according to the evidence, and without any fixed preconditions concerning level of seniority.

37. Second, the impugned decision would deprive the Court of any future possibility of adopting a case-building approach where circumstances require. For example, where the Prosecution is unable to obtain linkage evidence relating to the highest levels of command, it may be necessary to pursue mid-level leaders in order to generate evidence and to use the findings to build a case against highest levels. It would be undesirable to legally foreclose this possibility at this stage through an interpretation on admissibility. To do so could be highly prejudicial for current investigations.

38. Third, the independent requirement relating to seniority means that persons with the greatest responsibility could be excluded from prosecution because of lack of sufficient formal rank or position. For example, persons playing a particularly prominent role in the commission of international crimes, for example inciting the crimes or making a particularly

[74] Decision, paras. 51-55, as applied in paras. 79 and 85-89.
[75] Decision, para 52 sets out seniority as a requirement and separate from the question of responsibility (paras. 53-54). Paragraph 54 repeats again that "in addition to being at the top" of the State entity, organization or armed group, the person must also satisfy the other requirements.
[76] *Ibid.*

substantial contribution, may causally be of greatest responsibility yet have no formal rank or role.[77] Thus, the test in the Decision could screen out the gravest cases.[78]

39. Fourth, the emphasis given to authority to negotiate agreements[79] raises many difficulties, as it would exclude many perpetrators with great responsibility for international crimes. While signature of a peace agreement may be one means of confirming a person's level of authority[80] where it is otherwise in doubt, the absence of such signature cannot be an indicator of lack of responsibility, since persons often play important roles without the authority or the will to sign agreements. It particularly should not be a significant consideration when there is ample evidence indicating that a person is one of the top leaders in an organization with extensive command responsibilities. The issue for the Court is not authority to sign agreements but responsibility for crimes. Further, if the lack of signature of peace agreements were used as a significant factor, it would create a perverse incentive to avoid signing any peace agreements, in order to avoid prosecution by the Court.

40. Fifth, the interpretation in the Decision creates tensions and inconsistencies with other provisions of the Statute. The exclusive focus on the top decision-makers, and the emphasis given to participation in policy formulation, is not only more restrictive than any test known in applicable law,[81] but it also conflicts with other general principles and provisions in the Statute:

(a) The Decision re-introduces by the back door a form of "superior orders" argument. Persons with major responsibility for committing or directing atrocities would be able to argue that they were only "following orders", or indeed "only implementing policies", that they could not change or prevent,[82] from superiors higher up. Such an approach would be incongruous with the principles of Article 33, if not rendering it *inutile*.[83]

[77] For instance, in *Prosecutor v Ruggiu*, ICTR-97-32-I, Judgement and Sentence, 1 June 2000, the ICTR Trial Chamber noted that "The media […] was a key tool used by extremists within the political parties to mobilize and incite the population to commit the massacres" (at para. 50).
[78] Persons with no formal rank at all may play a major causal role in the crimes, for example, by supplying and supporting the crimes, and a case against such persons could bring an end to the crimes. The Court should not rule out, at this early stage, the possibility of such a case through a restrictive interpretation of Article 17(1)(d).
[79] Decision, para 86.
[80] *Prosecutor v Milosevic*, IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11*bis*, 8 July 2005 at para 23.
[81] See, paras. 30-33, above.
[82] Decision, paras. 87-89.
[83] Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law* (9th ed) (Vol 1, parts 2-4) (1996) at p. 1280: "The parties are assumed to intend the provisions of a treaty to have a certain effect and not to be meaningless: the maxim is *ut res magis valeat quam pereat.* Therefore, an interpretation is not admissible which would make a provision meaningless or ineffective."

(b) Interpreting Article 17 to legally restrict the Court to dealing with those with authority to adopt, change or prevent the implementation of policies or practices[84] also contradicts provisions of the Statute and subsidiary instruments, where the drafters took pains to ensure in the context of crimes against humanity that the Court is not limited to dealing with those who shaped policies; indeed, not even detailed knowledge of policy is required.[85] The Prosecution submits that Article 17 should not be interpreted as re-introducing restrictions that the legislators specifically rejected elsewhere.

41. Sixth, while Article 17 (1) (d) clearly allows for judicial verification of sufficient gravity, the Decision establishes such a restrictive standard as to preclude any discretion by the Prosecution or future Chambers, even to meet circumstances that could not possibly be foreseen at this time. Indeed, the publicised policy of the Prosecution, adopted after a public hearing and extensive consultations, states that the Office will take a focused approach to case selection.[86] However, the policy takes a nuanced approach, in keeping with the authorities cited above, indicating that it will focus on "those who bear the greatest responsibility, *such as* the leaders of the State or organisation allegedly responsible for those crimes", and that investigation "may go wider than high-ranking officers if, *for example*, investigation of *certain types of crimes or those officers lower down the chain* of command is necessary for the whole case".[87] Moreover, in addition to the specific problems in the test imposed, using Article 17 (1) (d) as a mechanism to determine a stringent case selection policy creates a host of difficulties. A prosecutorial policy does not create rights to non-prosecution, whereas accused persons are entitled to bring challenges in accordance with whatever gravity threshold the Court sets.[88] Thus the Decision creates a new legal mechanism for serious perpetrators, who have admittedly committed grave crimes, to escape justice on the grounds that it has not been proven that others were not even more guilty or even that others were more senior. This greatly elevates the burden on the Office of the Prosecutor, which would not only have to

[84] Decision, paras. 87-89.
[85] This was emphasized in the negotiation of Article 7(2)(a): see e.g. von Hebel and Robinson, "Crimes within the Jurisdiction of the Court", in Lee, *The Making of the Rome Statute* (1999) at p. 97, note 51: "It was also observed that nothing in Article 7 requires that the accused participated in the formation of the policy". See also Elements of Crimes, Article 7, Introduction at para. 2: "However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of … the precise details of the plan or policy of the State or organization".
[86] *Paper on some policy issues before the Office of the Prosecutor* (2003). The policy indicates that the Office should, as a general rule, focus its resources and efforts on "those who bear the greatest responsibility, *such as* the leaders of the State or organisation allegedly responsible for those crimes" (p. 7) (emphasis added).
[87] *Ibid*. at p. 7 and at p. 3 respectively (emphasis added). While the Prosecution emphasizes the principle that "those bearing the greatest responsibility" includes persons other than senior leaders, it must be recalled that in the instant case, Bosco Ntaganda is a senior leader of the FPLC.
[88] Article 19 (2) (a).

prove commission of crimes but also these weighty additional factors for which evidence may be difficult to collect. It would be more appropriate to maintain Article 17 (1) (d) as a mechanism allowing the judiciary to screen out clearly minor cases, and allow the Prosecution to do the additional case selection among the grave cases. As discussed below, this is an appropriate role for the Office of the Prosecutor, as recognized in other institutions, and remains subject to appropriate forms of judicial control.[89]

42. Seventh, and finally, the Decision leaves the Court legally and permanently unable to address persons outside an extremely circumscribed set of perpetrators. This would undermine, not strengthen, the Court's deterrent effect, the importance of which was emphasized in the Decision.[90] It would send a disastrous signal, at the beginning of this permanent Court's operations, to other senior or mid-level leaders and perpetrators of exceptionally serious crimes that they have nothing to fear from the ICC – the ICC is *legally* barred from pursuing them. The Court should not set legal requirements that provide clear *ex ante* impunity to serious perpetrators.

Inappropriate criterion concerning area of operation of the relevant groups

43. The Pre-Trial Chamber, in considering the role of the group in the commission of crimes, found that "although there are reasonable grounds to believe that the UPC/FPLC played an important role in the Ituri conflict during the second half of 2002 and in 2003, the UPC/FPLC was *merely a regional group operating only in the Ituri region*".[91] The Prosecution submits that this consideration is irrelevant in law, as it has no bearing on the gravity of the alleged crimes and the extent of responsibility of the perpetrator. "Merely regional" groups may well be responsible for far more massive crimes than national or international groups. Indeed, in contexts of a collapsed State, regional groups may typically be more influential and active than collapsed or enfeebled national structures. The criterion is particular inappropriate when the region in question is Ituri, a district which is larger than The Netherlands and about twice the size of Rwanda or Burundi, and a region featuring exceptionally massive crimes[92] and which has been a specific focus of multiple Security Council resolutions under Chapter VII.[93] The Prosecution submits that the criterion is irrelevant under Article 17 (1) (d), and indeed its application could incorrectly prioritize

[89] See paras. 50-52, below.
[90] Decision, paras. 49, 55.
[91] Decision, para. 84, emphasis added.
[92] See references provided in footnote 174, below.
[93] See e.g. the Prosecutor's Application, footnotes 13, 14 and 16.

groups responsible for less serious crimes over groups responsible for more serious crimes. For example, the UPC appears to be the group responsible for the gravest crimes in Ituri,[94] the region featuring the gravest crimes in the DRC.[95]

Inappropriate restrictions with respect to the requisite of gravity of the crimes

44. Whereas the Decision states that "the relevant conduct must present particular features which render it *especially* grave",[96] the Prosecution submits that the correct test is whether "the case is… of *sufficient* gravity to warrant further action by the Court".

45. The Prosecution submits that gravity of the crimes is a relevant consideration to be taken into account under Article 17 (1) (d). However, the Decision establishes a novel mandatory requirement that "*the conduct which is the subject of a case must be either systematic (patterns of incidents) or large-scale*".[97] The Prosecution submits that the Chamber erred in law in imposing a requirement tantamount to the Article 7 threshold for all crimes, including war crimes and genocide. No such requirement can be found in the ordinary meaning of the words in Article 17 (1) (d). Moreover, it is particularly difficult to sustain in the context of the rest of the Statute, where the drafters have consistently rejected efforts to impose such thresholds for all crimes.

46. For example, imposing a legal *requirement* of "large scale or systematic" within Article 17 (1) (d) would render *inutile* Article 8 (1) of the Statute,[98] contrary to principles of interpretation.[99] Further, it would flatly contradict the express intent of the drafters in rejecting any such fixed requirement in Article 8 (1)[100] and using the terms "*in particular when*" in order to allow the Court to deal with serious cases not meeting these requirements.[101] The Decision would also impose the higher standard of "systematic", rather than "plan or policy"

[94] English Transcript of the Hearing on 2 February 2006, T-01-04-8-Exp-EN (the "Transcript") at p. 29, lines 9-14.
[95] *Compte rendu en français et en anglais de la réunion du 9 novembre 2004*, ICC-01/04-3-Conf, 30 November 2004 (the "Informal Meeting Transcript") at p. 46.
[96] Decision, para 46, emphasis added.
[97] Decision, para 47.
[98] Article 8(1): "The Court shall have jurisdiction in respect of war crimes *in particular when* committed as part of a plan or policy or as part of a large-scale commission of such crimes" (emphasis added).
[99] Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law* (9th ed) (Vol 1, parts 2-4) (1996) at p. 1280: "The parties are assumed to intend the provisions of a treaty to have a certain effect and not to be meaningless: the maxim is *ut res magis valeat quam pereat.* Therefore, an interpretation is not admissible which would make a provision meaningless or ineffective.
[100] Proposal by USA, UN Doc. A/AC.249/1997/WG.1/DP.1.
[101] See e.g. Meron, "Crimes Under the Jurisdiction of the ICC" in von Hebel, Lammers and Schukking (eds) *Reflections on the International Criminal Court* (1999) at 52; Bothe, "War Crimes" in Cassese, Gaeta and Jones, (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) at p. 380.

which was seen by the drafters as a less demanding requirement.[102] The Prosecution submits that it is impermissible to impose an interpretation that contradicts other fundamental provisions of the Statute.

47. Similarly, a proposal to introduce a "widespread or systematic" requirement for genocide was rejected in the negotiation of the Elements of Crime.[103] The Statute should not lightly be interpreted as imposing requirements that were specifically rejected by drafters.[104]

48. The Prosecution recognizes that the *degree* of scale and the *degree* of organization may be relevant *considerations* in assessing the gravity of crimes, along with other factors. However, it cannot be a legal *requirement* that one or the other is satisfied; otherwise one is imposing the Article 7 threshold for all crimes before the Court via the admissibility provisions, thereby contradicting the deliberate balance struck by the drafters for war crimes and genocide.

49. The Decision also introduced a concept of "social alarm in the international community" as a factor to be considered.[105] The Prosecution observes that the concept is known in the law of some States, albeit more in the context of provisional release decisions, and it has given rise to concerns.[106] The Prosecution submits that the criterion is not a relevant and reliable criterion with respect to gravity of crimes, since it depends on subjective and contingent reactions rather than the objective gravity of the crimes. The Prosecution suggests however that somewhat related concepts, such as 'impact on community', 'répercussion sociale', 'detrimental effects', 'social danger' or 'influence on society' are known in national laws as factors in case selection and may indeed be relevant concepts.[107] The Prosecution would also suggest that international reactions, including Security Council resolutions may be relevant considerations, not as a direct indicator of "social alarm", but insofar as they are evidentiary indicators that the crimes have had a significant impact on the community or region.

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[102] von Hebel and Robinson, at p. 97.
[103] Proposal by USA, PCNICC/1999/DP.4 at p. 5; see Oosterveld, "The Elements of Genocide", in Lee (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) at p. 46.
[104] Reference to a subsidiary instrument such as the Elements of Crimes can illuminate the interpretation of the Statute: Vienna Convention on the Law of Treaties, Article 31(3)(a); Statute, Article 21(1)(a).
[105] Decision, paras. 47, 67 and 77.
[106] Spain, Judgement of Constitutional Tribunal, STC 66/1997, 7 April 1997, para 6
[107] See for example, "detrimental effects", Finland, Code of Criminal Procedure, Section 7; "social danger", Poland, Code of Criminal Procedure, Article 17(3); "impact of the offense on the community" USA, U.S. Department of Justice, Principles of Federal Prosecution, para. 9.27.230(A)(2); "répercussion sociale", Belgium, Circulaire n° COL 12/98 du Collège des Procureurs généraux près les Cours d'appel, 1 October 1998, para 2.1.1; and "influence on society" Japan, Code of Criminal Procedure, Article 248 (cited in Tachi, *Community Involvement in the Prosecution of Crimes*, paper presented to the Philippines-UNAFEI Joint Seminar, held from 5 to 8 December 2001 in Manila, Philippines, p. 58).

Conversely, however, an absence of international reaction (as is tragically often the case) is not necessarily an indicator of lack of impact of the crimes on the community. The underlying issue should remain the gravity of the crimes, with impact being a factor for consideration (as possibly evidenced by international reactions).

Application of correct law to the facts of the case

50. The Prosecution submits that the correct interpretation is that Article 17 (1) (d) establishes a basic standard for gravity – a requirement of "sufficient gravity" – excluding minor offenders and minor crimes that clearly do not warrant the exercise of jurisdiction by the Court.[108]

51. With respect to those cases that satisfy the gravity threshold, the Prosecution must, like other Offices of the Prosecutor, apply case selection criteria in order to select a limited number of cases for presentation before the Court. As in other institutions, case selection among those cases satisfying a basic gravity threshold is done in accordance with prosecutorial policy. The Prosecution submits that this necessary process of case selection among sufficiently grave cases is still subject to judicial control, in addition to the control of public scrutiny and budgetary control by the Assembly of States Parties. First, any decisions not to proceed with prosecution that are based on the "interests of justice" must be notified to the Pre-Trial Chamber and are subject to judicial scrutiny in accordance with Article 53 (3). Second, this Court may properly decide to adopt the line of Tribunal authorities enabling judicial review of case selection decisions that appear to be clearly based on discriminatory or improper motives.[109] These two bases for review are of course in addition to the power to review on the basis of gravity.

52. Tribunal jurisprudence, noting that the role and responsibilities of the Prosecution, and the fact that its direct involvement in investigation "may enable [it] to have a particular insight" into the many factors involved, has indicated that judicial restraint is appropriate in reviewing case selection decisions of the Office of the Prosecutor.[110] Accordingly, the

[108] See, for purposes of analogy, *Prosecutor v Stankovic*, IT 96-23/2-PT, Decision on Referral of Case under Rule 11*bis*, 17 May 2005, approving the request of the Prosecution to transfer to national authorities a case against one soldier for crimes against nine victims.
[109] *Prosecutor v Delalic et al*, IT-96-21-A, Judgement, 20 February 2001 at paras. 596-618 indicated that review of prosecutorial discretion is possible if there is clear evidence that the decision to prosecute "was based on impermissible motives, such as race or religion, and that the Prosecution failed to prosecute similarly situated defendants".
[110] *Prosecutor v Mrksic et al.*, IT-95-13/1-PT, Decision on Prosecutor's Motion to Withdraw Motion and Request for Referral of Indictment under Rule 11*bis*, 30 June 2005. See also Côté, "Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law", (2005) 3 *Journal of International Criminal Justice* 162;

Prosecution respectfully submits that such restraint should accompany the necessary and appropriate judicial review of prosecutorial discretion on the grounds of gravity, interests of justice or potentially improper motives.

53. If the Appeals Chamber chooses to elaborate a test under Article 17 (1) (d), the Prosecution submits that the standard should be a basic test, taking into account as factors the gravity of the crimes and the extent of responsibility of the person. The Prosecution submits that, at this early stage in the jurisprudence of the Court, the factors should be simply stated as factors to be considered, without imposing any particular legal requirements. The Prosecution also submits that the list of factors should be non-exhaustive, to take into account unforeseen future circumstances.

54. The Prosecution submits, taking into account its practice, the Decision, and other authorities, that (a) with respect to gravity of crimes, relevant factors include: the nature or severity of the crimes; the scale of the crimes (including number of victims); the degree of systematicity, where applicable; the impact of the crimes; and any particularly aggravating aspects in the manner of commission of the crimes; and (b) with respect to extent of responsibility, relevant factors include: alleged status or hierarchical level of the accused or implication in particularly serious or notorious crimes; significance of role of the accused in the overall commission of crimes; and the degree of involvement (commission, ordering or indirect participation).[111]

55. If the Appeals Chamber agrees with these legal arguments, in whole or in part, then the factual record provides an ample basis on which the Appeals Chamber can readily reach a finding of admissibility. The Pre-Trial Chamber made a finding that the gravity of the crimes was sufficient for admissibility, and this finding is not in dispute.[112] Thus, the remaining issue is whether the degree of responsibility, as alleged, satisfies the requirements of admissibility under Article 17 (1) (d).

56. The Prosecution submitted that Thomas Lubanga Dyilo, Bosco Ntaganda and others enlisted and conscripted children "systematically and in large numbers", gave them military

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Prosecutor v Delalic et al, IT-96-21-A, Judgement, 20 February 2001, paras. 596-618: "It is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments." The Appeals Chamber found that "It is also clear that a discretion of this nature is not unlimited" and that decisions may be reviewed for improper motive, but the burden on an appellant is heavy and "there is a presumption that the prosecutorial functions under the Statute are exercised regularly".

[111] See paras. 30-33, above, and authorities cited therein; see also *Prosecutor v Stankovic*, IT 96-23/2-PT, Decision on Referral of Case under Rule 11*bis*, 17 May 2005.

[112] Decision, para 77.

training and used them to participate actively in hostilities.[113] The Pre-Trial Chamber found reasonable grounds to believe that a UPC and FPLC policy/practice of enlisting and conscripting children into the FPLC and using them to participate actively in hostilities existed, and that it resulted in hundreds of children being enlisted or conscripted into the FPLC and/or used by the FPLC to participate actively in hostilities from July 2002 to December 2003.[114]

57. The Pre-Trial Chamber noted that Bosco Ntaganda was appointed Deputy Chief of the General Staff in charge of military operations of the FPLC on 3 September 2002 and held this position until December 2003, and that he was appointed FPLC Chief of the General Staff in December 2003. During the period from September 2002 to December 2003, Bosco Ntaganda ranked third in the FPLC hierarchy, under Floribert Kisembo and Thomas Lubanga Dyilo,[115] and after this period he ranked second in the hierarchy.[116]

58. The Pre-Trial Chamber found that it had reasonable grounds to believe that Bosco Ntaganda 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.[117] Bosco Ntaganda often visited the training camps and took direct part in attacks in which FPLC child soldiers participated.[118]

59. These findings are consistent with the submissions of the Prosecution that Bosco Ntaganda was a hands-on commander, that he deployed to the field with his subordinate commanders,[119] and that he ordered children to participate actively in hostilities, both directly[120] and through subordinate commanders.[121]

60. The Prosecution further notes that its conclusion on the basis of the evidence collected was that the role and responsibility of Bosco Ntaganda in the crimes alleged warranted prosecution, while those of the second-in-command, Floribert Kisembo (FPLC Chief of the

[113] Prosecutor's Application at paras. 71-102, in particular para. 74; Transcript at p. 14, lines 17-24 and at p. 20, lines 24 to p. 21, line 9.
[114] Decision, paras. 67 and 101-103.
[115] Decision, paras. 78 and 79.
[116] Decision, para. 79.
[117] Decision, para. 85. See also Prosecution's submission of the FPLC organizational chart, which shows Bosco Ntaganda was the exclusive immediate superior to FPLC sector commanders: Prosecution's Submission of Further Information and Materials, ICC-01/04-106-US-Exp, 27 January 2006 (the "27 January 2006 Submission")., Annex 9, and Transcript at p. 42, lines 24 to p. 43, line 5.
[118] Decision, para 85.
[119] Transcript, page 38, lines 4-7 and child soldier witness statements, e.g. REDACTED, para. 48, and Prosecutor's Application at para. 174.
[120] Prosecutor's Application at paras. 112, 157, 158, 160; child soldier witness statements: REDACTED, para. 45; REDACTED, paras 43, 44, 47, 68; REDACTED, paras 49-50; Transcript at p. 22, lines 3-6.
[121] Child soldier witness statements, e.g. REDACTED, para 46.

General Staff), at this point, did not; indeed, as noted by the Prosecution, while the investigation was ongoing there did not appear to be, at the time of the arrest warrant application, a sufficient basis to seek charges against Floribert Kisembo in relation to the alleged crimes.[122] Thus, the Prosecution identified the region involving the gravest crimes in the DRC, and the armed group most responsible for those crimes, and sought warrants against the two persons most responsible for the alleged crimes on the basis of the information and evidence available.

61. In short, Bosco Ntaganda was one of the top leaders of the FPLC, ranking third and then second in the hierarchy, with responsibilities over the sector commanders, training camp commanders and field commanders. His was the group responsible for the gravest crimes in a region of particularly grave crimes. He was in charge of military operations and he was the person responsible for directing and executing the crimes in question.

62. The Prosecution submits that the facts on the record are more than sufficient to satisfy any degree of responsibility required by Article 17 (1) (d), whether the terms be his seniority, his role and importance in directing and ordering the crimes, or his direct involvement. Accordingly, the Prosecution respectfully requests that the Appeals Chamber correct the error of law with respect to the standards required under Article 17 (1) (d) and declare the case against Bosco Ntaganda admissible.

The Prosecution's Second Ground of Appeal:
The Pre-Trial Chamber's failure to provide adequate notice and request specific submissions from the Prosecution on the issue of admissibility

The requirement of adequate notice and the right to be heard

63. This ground of appeal concerns the duty of all Chambers to provide adequate notice to all participants as to the specific issues that Chambers consider critical for a proper judicial determination.[123] It addresses the scope of the fundamental right to be heard, which is a crucial component of procedural fairness. It is submitted that, in particular in the context of a *proprio motu* decision, a participant is entitled to receive adequate notice in a manner that

[122] See footnote 162, below.
[123] As already stated (see para. 9, above) this ground of appeal is advanced in the alternative: it should be considered, first and foremost, if the Appeals Chamber does not grant the Prosecution's first ground of appeal. However, to the extent that this ground of appeal raises issues of particular relevance for a proper interaction between Chambers of this Court and procedural participants, the Appeals Chamber may consider it appropriate to discuss and enter findings on the matters advanced herein.

allows the participant to comprehensively address the legal and factual issues the Chamber considers to be the determining factors.[124]

64. In the instant case, the Pre-Trial Chamber violated the Prosecution's right to be heard:

i. by not adequately notifying the Prosecution that it was considering declaring *proprio motu* the case against Bosco Ntaganda inadmissible due to lack of gravity; and

ii. by not informing the Prosecution about the test and the criteria it intended to apply for determining the gravity threshold in Article 17 (1) (d).

65. As the ICTY Appeals Chamber has stated, the fact that a Chamber has a right to decide *proprio motu* "entitles it to make a decision whether or not invited to do so by a party; but the fact that it can do so does not relieve it of the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made".[125] A participant's right to be heard is of a fundamental nature, going to the heart of the fairness of any judicial proceedings, and is recognized as such in most jurisdictions by way of specific statutory provisions[126] or through judicial precedent.[127] The availability of this right to a participant is also instrumental for a proper judicial determination of the issues, since a court can benefit from that participant's analysis of the evidence and his or her argument on the applicable law.[128] Accordingly, and in a manner consistent with the existing standard in international criminal jurisdictions, the Statute, the Rules and the Regulations must necessarily be read to include "a right of the parties to be heard in accordance with the judicial character" of the Chamber.[129]

66. However, the mere existence of a *formal* opportunity to be heard does not in itself satisfy compliance with the right to be heard. A hearing is a necessary, but not a *sufficient*, condition *vis-à-vis* the duty of any Chamber to respect a participant's right to be heard. If a participant is afforded a hearing, but in the course of the hearing denied an opportunity to adequately and comprehensively advance its arguments, then that participant's right to be

[124] This is the principle underlying the procedure enshrined in Regulation 55, whereby a Trial Chamber can only exercise the authority to change the legal characterisation of the facts after providing "notice to the participants of such a possibility" and after having given "the participants the opportunity to make oral or written submissions."
[125] *Prosecutor v Jelisic*, IT-95-10-A, Judgement, 5 July 2001 at para. 27.
[126] See, *inter alia*, § 33 of the German Code of Criminal Procedure (StPO).
[127] See, *inter alia*, *Director of Public Prosecutions v Cosier*, High Court of Justice Queen's Bench Division (England and Wales), CO/4180/99, 5 April 2000.
[128] *Prosecutor v Jelisic*, IT-95-10-A, Judgement, 5 July 2001 at para. 27.
[129] *Prosecutor v Jelisic*, IT-95-10-A, Judgement, 5 July 2001 at para. 27. See also *Prosecutor v Karemera*, ICTR-98-44-A15bis, Decision in the Matter of Proceedings Under Rule 15bis (D), 21 June 2004 at paras. 9 (relying on the general principle adopted in *Jelisic*) and 10 (noting that the existence of a right to appeal in the provision governing the decision in question implies itself that the parties have a right to be heard at the making of the decision from which they appeal).

heard is violated.[130] In addition, a participant should not be required to guess a Chamber's concerns at a hearing on the basis of incomplete, ambiguous or unclear information. It is "fundamental that notice be given and that it be timely and clearly inform the individual of the proposed action and the grounds for it. Otherwise the individual likely would be unable to marshal evidence and present his case so as to benefit from any hearing that was provided".[131]

67. Whilst the Prosecution is not suggesting that a Chamber must give notice and provide for an adequate opportunity for a participant to be heard prior to every single *proprio motu* determination, it submits that adequate notice *must* be given if and when the Chamber addresses a *determinative* issue, i.e. an issue that has the power or tendency to terminate a particular matter.[132] In the instant proceedings, the Chamber's decision to declare the case against Bosco Ntaganda inadmissible effectively foreclosed the prosecution of that case at the earliest stage.[133]

68. The Prosecution further emphasizes that the Decision was the *first* determination made by a Chamber of this Court on the fundamental issue of the legal criteria for admissibility of a case under Article 17. As such, it required a careful and thorough procedure, including a full discussion on the legal and factual elements relevant for that determination. In this sense, the Prosecution stresses that the Chamber's failure to provide the Prosecution with adequate notice of the test that it was intending to use effectively resulted in (a) the Prosecution being unable to make any submissions before the Chamber as to the adequacy and legal correctness of that test; and (b) the Prosecution having no opportunity to marshal the facts of the case against Bosco Ntaganda in light of the legal test developed by the Pre-Trial Chamber, in order to demonstrate how those facts met such test.

69. As a result, the scope of Article 17 (1) (d), especially in respect of the role and position of the persons involved in the crimes alleged and the groups to which they belonged, and the admissibility of the case against Bosco Ntaganda under that provision are being comprehensively discussed *for the first time* on appeal. The Prosecution had a right, and the

[130] See e.g. ECtHR, *Case of Constantinescu v Romania* (Application no. 28871/95), Judgement, 27 June 2000 at paras. 45-60 (affirming a violation of Article 6 (1) of the ECHR – right to a fair and public hearing for the determination of criminal charges – in a case where an applicant was denied the right to make submissions and adduce evidence at a hearing before an appellate court which subsequently reversed a prior acquittal and entered a conviction).
[131] Friendly, "Some Kind of Hearing", (1975) 123 *University of Pennsylvania Law Review* 1267 at pp. 1280-81.
[132] See *FindLaw Legal Dictionary*, s.v. "determinative" (http://dictionary.lp.findlaw.com, last accessed on 2 March 2006); See also Garner, *A Dictionary of Modern Legal Usage* (1995): "determine" defined in the sense of "to terminate; bring or come to an end" (at p. 271).
[133] Subject to the Prosecution's ability to submit a request for review on the basis of new facts - Article 19 (10).

Pre-Trial Chamber a duty, to fully discuss these fundamental matters before any decision on admissibility was made.[134]

The procedure before the Pre-Trial Chamber

70. The Chamber's procedure *vis-à-vis* the issue of admissibility comprised three interrelated steps: (1) a decision issued on 20 January 2006 inviting the Prosecution to furnish the Chamber with additional materials;[135] (2) the agenda provided by the Chamber two days prior to the 2 February 2006 hearing;[136] and (3) the hearing itself. The Prosecution submits that for the purposes of determining whether adequate notice was provided to the Prosecution, this sequence must be analyzed in its entirety.

The Pre-Trial Chamber's Decision inviting the submission of "supporting materials" and of further information and materials

71. The Prosecution submits that the 20 January 2006 Decision did not allow for a conclusion that the Pre-Trial Chamber had concerns about the admissibility of the case against Bosco Ntaganda due to gravity considerations. It only invited the Prosecution to provide supporting materials, including *inter alia* in respect of a number of areas related to Bosco Ntaganda. The invitation concerned (1) the *de jure* and *de facto* authority of Bosco Ntaganda within the FPLC,[137] and (2) the hierarchical relationship between Thomas Lubanga Dyilo and Bosco Ntaganda.[138] In respect of other areas that are remotely related to the matters the Pre-Trial Chamber considered in its determination on gravity in terms of Article 17 (1) (d), the invitation concerned (3) the level of organization and organizational charts of the UPC and the FPLC[139] and (4) the relationship between the UPC and the FPLC.[140] The invitation did not concern certain aspects that the Pre-Trial Chamber ultimately considered as the main determining factors – the ability to negotiate or to sign ceasefires and peace agreements and to participate in negotiations relating to controlling access of MONUC and other UN personnel

[134] In a case where a lower court had ordered *proprio motu* a new trial in a civil case, it was held that "where the court acts *sua sponte* it is only fair that it should indicate, both before it rules and in the ruling itself, the ground upon which the new trial is ordered. If it does not do the first, the aggrieved party is unable to know the particular point the court is considering and therefore cannot meet the issue"; see *Southern Arizona Freight Lines v Jackson*, 63 P. 2d 193, 198 (1936) (Supreme Court of Arizona).
[135] Decision concerning Supporting Materials in Connection with the Prosecution's Application for Warrants of Arrest pursuant to article 58, ICC-01/04-102-US-Exp, 20 January 2006 (the "20 January 2006 Decision")
[136] Decision concerning the Hearing on 2 February 2006, ICC-01/04-108-US-Exp, 31 January 2006 (the "31 January 2006 Decision")
[137] 20 January 2006 Decision at page 6, (iv) f.
[138] 20 January 2006 Decision at page 6, (iv) g.
[139] 20 January 2006 Decision at page 6, (iv) b.
[140] 20 January 2006 Decision at page 6, (iv) c.

to Bunia or other parts of the territory of Ituri[141] – and was concerned only in very vague terms with other determining factors, such as Bosco Ntaganda's autonomy in relation to UPC/FPLC policies and practices.[142]

72. In response to the invitation, the Prosecution submitted on 27 January 2006[143] various materials, including a chart detailing the organization of the FPLC from its creation in September 2002 throughout December 2003,[144] visualizing the *de jure* authority of Bosco Ntaganda within the FPLC. The Prosecution emphasized that Bosco Ntaganda was involved in the creation of the UPC and maintained a substantial role throughout his tenure as FPLC military officer.[145]

The agenda for the 2 February 2006 Hearing

73. Prior to the Hearing, the Prosecution was not adequately put on notice that the Chamber was considering declaring the case against Bosco Ntaganda inadmissible due to lack of gravity nor was it informed about the test that the Pre-Trial Chamber intended to apply for such a determination.

74. On 31 January 2006 the Pre-Trial Chamber provided the Prosecution with an agenda for the 2 February 2006 Hearing.[146] The agenda included fourteen items, listing a wide variety of issues to be discussed during the Hearing. Out of the fourteen agenda items, the following two are relevant:

> *3. Prosecution's view on the content of the gravity threshold under article 17, paragraph 1(d), of the Statute in relation to a case arising from the investigation of a situation;*
>
> …
>
> *6. Whether the case against Mr. Bosco Ntaganda has any or all features mentioned under 4, paying particular attention to the following issues:*
>
> *(i) Detailed description of the hierarchical organization of the FPLC and the position within such a hierarchy of Mr Bosco Ntaganda;*
>
> *(ii) Detailed description of the hierarchical organization of the UPC, of the relationship between the UPC and the FPLC and of the position of Mr. Bosco Ntaganda within the broader movement UPC/FPLC;*

[141] Decision, at para. 86.
[142] Decision, at para. 87.
[143] 27 January 2006 Submission.
[144] 27 January 2006 Submission at para. 30, and Annex 9 to the 27 January 2006 Submission.
[145] 27 January 2006 Submission at para. 32 (i).
[146] 31 January 2006 Decision, at pages 3 - 6.

(iii) Hierarchical relationship between Mr Bosco Ntaganda and Mr Thomas Lubanga Dyilo and between Bosco Ntaganda and other high ranking members of the UPC on the one hand, and on the FPLC on the other hand;

(iv) Role of Mr Bosco Ntaganda in the commission of the crimes alleged in the Prosecution's Application;[147]

75. The Prosecution submits that:

(i) Not only did the Pre-Trial Chamber not highlight the agenda item on the gravity of the specific case, but kept it in general and vague terms, unrelated to the concrete situation of Bosco Ntaganda;

(ii) The agenda item addressing Bosco Ntaganda's situation was not connected to the agenda item on gravity;

(iii) The factors enumerated at item 5 of the agenda, which were ultimately the factors considered to be relevant by the Chamber for the purposes of making its determination on admissibility, were presented in a manner completely disconnected from the question of gravity under Article 17 (1) (d), included as item 3 of the agenda;[148] in addition, the factors enumerated at item 5 appeared to be, on their face, factual questions unrelated to the issue of gravity under Article 17 (1) (d);[149]

(iv) The consideration that was the main determining factor for the Pre-Trial Chamber to declare the case against Bosco Ntaganda inadmissible, namely his (alleged lack of) seniority, was not only not emphasized; it was also not clearly identifiable in the agenda.[150]

[147] The Prosecution assumes that "the features mentioned under 4" are meant to be the features detailed in **number 5** of the 31 January 2006 Decision, namely: a) systematic and large scale nature of the crimes contained in the Prosecution's Application; b) Social alarm of the crimes contained in the Prosecution's Application; c) Seniority within the UPC and the FPLC; d) Role played in the alleged commission of crimes within the jurisdiction of the Court; e) Role of the UPC/FPLC in relation to the crimes within the jurisdiction of the Court allegedly committed in the DRC situation currently under investigation and in the alleged armed conflict in Ituri in the second half of 2002 and 2003.

[148] Between item 3 and item 5 the Chamber included an item related to the necessity of arrest of Thomas Lubanga Dyilo, hence wholly unrelated to the question of gravity (see item 4 in the agenda).

[149] Sub-item (a) appeared to pertain to the *chapeau* of war crimes under Article 8 (1); the at that point in time very unclear sub-item (b) did not provide any identifiable connection with the issue of gravity, and rather appeared to be more related to the issue of necessity of the arrest (see para. 49, above); in turn, sub-items (c), (d) and (e) appeared to relate to the alleged individual criminal responsibility of the individuals named in the Application.

[150] The agenda contained an erroneous cross-reference to item 4 in the agenda; item 5 did contain a reference to the seniority of Thomas Lubanga Dyilo at sub-item (c).

The 2 February 2006 Hearing

76. The lack of clarity was aggravated by the content of the questions, and the manner in which the Pre-Trial Chamber asked them during the Hearing.[151] Neither prior to discussing agenda item three nor during or after the Prosecution's submissions did the Pre-Trial Chamber notify the Prosecution that, based on the information provided by the Prosecution on Bosco Ntaganda, it considered it a possibility to declare the case against him inadmissible. To the contrary, once the Prosecution had finished its respective submissions on agenda item three, which focused solely on the gravity of the crimes and not on the seniority of Thomas Lubanga Dyilo or Bosco Ntaganda, the Pre-Trial Chamber did not make any comment or ask follow-up questions. Rather, it proceeded into the discussion of the unrelated agenda item four.[152]

77. Though the Pre-Trial Chamber later touched upon issues related to gravity a number of times, neither the questions put to the Prosecution nor the context in which they were asked can be seen as providing adequate notice of the Chamber's particular concerns on the admissibility of the case, or of the test it intended to apply for the purposes of Article 17 (1) (d). This included questions[153] about the notion of a "plan" as a pre-condition of Article 8 which appeared[154] to relate to Thomas Lubanga Dyilo; and a question about the latter's political plan[155] and the long-term objective of the UPC and the FPLC,[156] both *unrelated* to Bosco Ntaganda. The closest the Pre-Trial Chamber came to touching on the relevant issues in the Decision was in a question from the Presiding Judge about the "judicial policy of the Office of the Prosecutor":

> "*I would now like to move onto the judicial policy of the Office of the Prosecutor. The Chamber notes that the arrest warrants which you request concern a group of regional militiamen. We would like to broach with you the nature of the conflict concerned. To that end we are particularly interested is seeing the statute of the UPC and the FPLC. My question to you is: where is the Office of the Prosecutor heading? We are at the beginning of these proceedings and this is a very central issue. Do you intend to*

[151] In the course of the Hearing, the Pre-Trial Chamber discussed the various agenda items in the order of the 31 January 2006 Decision. Agenda items three and six were discussed in an unconnected manner.
[152] Namely the question as to why the Prosecution considers that Thomas Lubanga Dyilo currently being in detention is in a position to obstruct or endanger the investigation and Court proceedings.
[153] Transcript at p. 19, lines 12 – 25 and p. 20, lines 6-8.
[154] A close reading of the English and French versions of the Transcript does not allow for a proper determination of whom or what was the focus of the question. *cf* Transcript at p. 19, line 12 to p. 20, line 1, especially lines 14-16; and French Transcript of the Hearing on 2 February 2006, T-01-04-8-Exp-FR (the "French Transcript") at p. 16, lines 11-22, especially lines 12-14
[155] Transcript at p. 24, line 21.
[156] Transcript at p. 24, lines 24-25.

prosecute individuals with national-level responsibilities? Or do you intend to limit your action to individuals who are leaders of militias? As you have said in your own submissions, there are many militias. It is an inter-ethnic conflict, as you have just mentioned yourself. So there is a risk that your Prosecutions and investigations may become – your efforts may become rather diffuse, and result in many requests for arrest warrants from this Chamber."[157]

78. This introduction indicated that the Pre-Trial Chamber was inquiring about the future *"judicial policy"* of the OTP, and the Chamber's questions were answered accordingly.[158] The Prosecution continued to elaborate on the fact that the FPLC is "*the armed group responsible for the gravest crimes committed in Ituri"* and that, "*compared with other regions of the Democratic Republic of the Congo it is certainly within the top of the armed groups that are allegedly responsible for the crimes committed in Ituri."*[159] The Presiding Judge commented on the Prosecution's observations: "*Very good. First of all I would like to thank you for trying to respond to this concern. I did want to draw your attention to this concern of the Chamber: all international Courts face this issue. Obviously it is no direct concern of mine, the Office may do want it wants. But the applications for arrest warrants are addressed to the judges if you prosecute regional militias. You said yourself in your application who these people are, and you refer to other militias, whence my question*."[160]

79. The Prosecution submits that these observations of the Pre-Trial Chamber, on their face unrelated to the case of Bosco Ntaganda, also failed to indicate that the Chamber considered the case inadmissible due to lack of gravity, or the test that the Chamber intended to adopt for the purposes of applying Article 17 (1) (d).

80. Agenda item six - the questions specifically related to Bosco Ntaganda - was the only agenda item that the Pre-Trial Chamber did not discuss in the order of the agenda item. To the contrary, some aspects of that particular item, such as the aspect of "social alarm", were not addressed at all, and the answers of the Prosecution to questions pertaining to other aspects were not challenged by the Pre-Trial Chamber.[161] The aspect of gravity was only addressed in relation to a question of the Pre-Trial Chamber inquiring why the Prosecution had chosen to seek an arrest warrant against the "third level commander" rather than to seek such a warrant

[157] Transcript at p. 28, lines 3-21
[158] Transcript at p. 28, line 25 to page 29, line 8.
[159] Transcript at p. 29, lines 13-17.
[160] Transcript at p. 30, lines 1 – 11.
[161] Transcript at p. 36, line 9 to p. 44, line 4.

against the Chief-of-the-General-Staff, Floribert Kisembo, a matter that was explained to the Chamber.[162] The questions and observations of the Pre-Trial Chamber to the answers of the Prosecution do not even remotely provide for an interpretation that the Pre-Trial Chamber considered declaring the case against Bosco Ntaganda inadmissible. [163]

Insufficient notice

81. This summary of the proceedings shows that the Pre-Trial Chamber did not provide sufficient notice to the Prosecution about its concerns about the admissibility of the case against Bosco Ntaganda due to his alleged lack of seniority and in particular about the legal test that the Chamber considered the case had to satisfy. In the context of a novel institution lacking a comprehensive body of jurisprudence capable of adequately guiding participants, the mere inclusion of items in an agenda in no particular order, and without any clear indication as to the function and relevance of the factors enumerated therein, cannot be considered to constitute adequate notice ensuring that the affected participant enjoys a meaningful opportunity to be heard. Had the Pre-Trial Chamber provided the Prosecution with adequate notice of its reservations about the admissibility of the case against Bosco Ntaganda due to gravity considerations and of the applicable test, the Prosecution would have submitted further observations on Article 17 (1) (d), as set out in this brief, and it would have also been in a position to provide further submissions and/or factual information in relation to the matters that constituted determining factors for the Pre-Trial Chamber.[164] If necessary, the Prosecution could have requested an adjournment of the proceedings, with a view to ensuring that the Chamber was furnished with all relevant materials and submissions for the purposes of a proper determination of the issue of admissibility.

[162] The Prosecution provided explanations to the Chamber at pp. 41-42 of the Transcript. REDACTED.
[163] Other exchanges during the Hearing further conveyed the impression that the admissibility of the case against Bosco Ntaganda was not in issue; for instance, the Pre-Trial Chamber inquired about the interrelation between the anticipated arrest and surrender procedures of Thomas Lubanga Dyilo and Bosco Ntaganda (Transcript at p. 17, lines 17–24, and at p. 18, lines 2–7). In relation to agenda items seven and ten, both specifically related to evidentiary issues in relation to Bosco Ntaganda, the Pre-Trial Chamber made the Prosecution comprehensively explain substantial portions of its supporting materials (Transcript at p. 44, line 6 to p. 49, line 2; and at p. 57, line 20 to p. 64, line 10, respectively)
[164] In this context the Prosecution notes that none of the questions of the Pre-Trial Chamber in relation to Bosco Ntaganda address one of the main determining aspects for the Pre-Trial Chamber, namely his authority "to negotiate, sign and implement ceasefires or peace agreements, or to participate in negotiations relating to controlling access of MONUC and other UN personnel to Bunia or other parts of the territory of Ituri in the hands of the UPC/FPLC during the relevant time frame (see Decision, at para. 86).

The Prosecution's Third Ground of Appeal:
the Chamber's selective approach to the information presented by the Prosecution

82. For the third error, the Prosecution submits that the Pre-Trial Chamber took an erroneous and unduly selective approach to the information presented regarding the admissibility of the case against Bosco Ntaganda.[165] The Chamber did not challenge any of the information put forward by the Prosecution, and indeed explicitly accepted the substance of the Prosecution's case against Bosco Ntaganda.[166] However when it came to make its determination of admissibility, the Chamber disregarded facts relevant to the gravity of the case without explanation, while referring directly to irrelevant facts in order to support its conclusion. It also focused on particular aspects of the information, while ignoring other closely related aspects, to justify factual statements that, while technically correct, are incomplete and do not accurately represent the totality of the information relevant to a determination of admissibility.

83. The Prosecution submits that, even if the Appeals Chamber concurs with the Pre-Trial Chamber's interpretation of the principles to be applied in assessing the gravity of a case, the Pre-Trial Chamber committed a further error as it took into consideration irrelevant factors, and failed to consider relevant factors, in exercising its discretion. The Prosecution submits that these errors constitute procedural errors invalidating the Decision.[167]

[165] As stated above (para 9), this ground is also advanced in the alternative: it need only be considered if the first and second grounds of appeal have been rejected. If the Appeals Chamber grants this ground of appeal, then it is in a position to substitute its own judgement for that of the Pre-Trial Chamber: the question is one of considering and weighing the relevant factors in the information presented by the Prosecution, all of which is before the Appeals Chamber in the same way as it was before the Pre-Trial Chamber, and none of which has been disputed - "the Appeals Chamber is in as good a position as the Trial Chamber to decide on the proper inferences to be drawn from undisputed facts" – *Prosecutor v Tadic*, Separate Opinion of Judge Shahabuddeen, 15 July 1999 at para 29. See further para 18, above – for example in *Prosecutor v Sainovic and Ojdanic* the Appeals Chamber quashed the impugned decision and substituted its own judgement "Having taken into account all the relevant factors mentioned by the Trial Chamber as well as the additional factors mentioned in its decision" (at para. 12)

[166] See in particular the Decision, paras. 66-67, 77-78 and 85 (in addition to section III.1 at which it was found that a crime within the jurisdiction of the Court had been committed). See further paras. 56-60, above.

[167] See para. 17, above, on the link between procedural error and consideration of irrelevant factors. In the alternative, the Appeals Chamber may consider that the errors committed by the PTC in making narrow, selective, and in some cases irrelevant, factual findings without considering other relevant aspects of the evidence constitutes an error of fact, rather than a procedural error. The cases cited in support of para. 17 also confirm that an Appeals Chamber can review the exercise of discretion by a lower Chamber where it "made an error as to the facts upon which it has exercised its discretion". As set out above (para. 6), given that procedural error is a relatively new category in international criminal law, the Appeals Chamber disagrees with the Prosecution's characterisation of an error then it should recast the error and consider the substance of the submissions.

The omissions in the Chamber's findings

84. The Prosecution will highlight factors considered by the Chamber to support its decision and which, it is submitted, are irrelevant and/or are taken out of context and ignore closely related relevant factors.

(a) UPC/FPLC "merely" a regional group

85. The Chamber stated that "the UPC/FPLC was … only a regional group not operating outside the region of Ituri",[168] and repeated this finding during its analysis of the case against Bosco Ntaganda: "although there are reasonable grounds to believe that the UPC/FPLC played an important role in the Ituri conflict during the second half of 2002 and in 2003, the UPC/FPLC was *merely a regional group* operating only in the Ituri region".[169]

86. While the Chamber's statement that the UPC and the FPLC were regional entities is essentially correct, the fact that a group operates in one region only does not itself mean that the group is of lesser importance in the overall situation, as the Chamber's reasoning erroneously implies.[170] The Chamber's focus on the formal regional nature of the group was an irrelevant consideration, even for the purposes of its own test – rather, what is relevant is the nature and scale of crimes committed by that group.[171] The Chamber also did not consider the following relevant factors which highlight the particular prominence of the group(s)[172] and the seriousness of the crimes that they are responsible for:

- It was as a result of hostilities in the Ituri region that the UN Security Council decided to exercise its Chapter VII powers, finding the situation to constitute "a threat to international peace and security".[173]
- The conflict in Ituri was one of the most serious conflicts in the DRC during the period under investigation resulting in the most serious commission of crimes, including

[168] See Decision at para. 72, and citations included in footnote 65.
[169] Decision, para. 84 (emphasis added). This last finding is made immediately after the Chamber's statement that according to the Prosecution, Bosco Ntaganda did not play any official role in the UPC at the relevant time (para. 83 - this finding will be discussed separately below) and is clearly one of the factors considered by the Chamber for the purposes of concluding that Bosco Ntaganda "does not fall within the category of the most senior leaders of the DRC situation" (para. 89).
[170] The Chamber's use of the adverbs "only" and "merely", above, highlights the manner in which the Chamber diminished the importance of the group based on its regional scope.
[171] See Decision at para 64 (iii) – "the role played by [the] armed group in the overall commission of crimes within the jurisdiction of the Court in the relevant situation".
[172] Whereas throughout most of its Decision the Chamber refers to the UPC/FPLC as a single group, both groups are distinguishable: the FPLC was the military wing of the UPC, with its own structure. See Prosecution's Application, paras. 57 *et seq*.
[173] See Prosecution's Application, para. 43 and sources cited at footnote 14, including reference to different Security Council Resolutions.

approximately 8,000 people killed, as well as other offences including conscription of child soldiers.[174]

- Ituri is one of the most densely populated regions of the DRC,[175] and is also of great importance as it contains one of the richest concentrations of mineral wealth, which is a significant factor in generating and sustaining the conflict.[176]
- The conflict in Ituri had broad ramifications both at the national and regional level, and was aggravated by the intervention of international actors.[177] Both Uganda and Rwanda substantially supported the FPLC at different times, providing, *inter alia*, military training, equipment and military expertise.[178]
- The UPC signed agreements with the Ugandan UPDF and made unilateral commitments regarding the pacification of Ituri.[179]
- The UPC aimed at establishing Hema dominance and control of Ituri by military violence.[180]
- From summer 2002 onwards, the FPLC conducted large-scale military operations and took control of significant parts of Ituri.[181]
- Thomas Lubanga Dyilo declared that he would not agree to a proposal concerning the integration of the militias in the national army, and that he had a dream of making Ituri an independent republic.[182]
- The UPC aimed at the formation of a "National Army" and had "national secretaries", equivalent to the positions of "ministers".[183]

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[174] Prosecutor's Application, para 48; HRW Report on "Ituri: 'Covered in Blood'", July 2003 (cited in Prosecutor's Application, footnote 10, and in the Decision, footnotes 61, 68, 94, 95 and 114) "Ituri is often described as the bloodiest corner of the Democratic Republic of Congo (DRC). Despite three peace agreements purportedly ending the five year-old Congolese civil war, fighting in northeastern DRC intensified in late 2002 and early 2003" (p. 1, going on to cite at least 5,000 civilian deaths from direct violence between July 2002 and March 2003); MONUC Special Report on the events in Ituri, January 2002 – December 2003, 16 July 2004 (cited in Prosecutor's Application, footnotes 9 and 11, and in the Decision, footnotes 26, 69, 114) "The Ituri district … currently has one of the world's worst … human rights records." (para. 1); see further.the Informal Meeting Transcript at p. 46.

[175] Prosecutor's Application, para. 33; see further Informal Meeting Transcript at p. 50 ("the eastern provinces of the country, from Ituri to the north of Katanga, Kivu, which are very highly populated areas. It is in these areas that the most important massacres occurred.") and 54.

[176] Prosecutor's Application, para. 34; HRW Report on "Ituri: 'Covered in Blood'", p. 11-12; MONUC Special Report, para 16.

[177] Prosecution's Application, para. 37

[178] Prosecution's Application, para. 42. See also paras. 50, 63, 64 and 73 for concrete examples of foreign involvement.

[179] Prosecution's Application, para. 45.

[180] Prosecution's Application, para. 53.

[181] Prosecution's Application, para. 70.

[182] The 27 January 2006 Submission, para. 27.

[183] Prosecution's Application, para. 52.

- The Office of the Prosecutor concluded on the basis of the information collected and analyzed that the UPC and its armed wing, the FPLC, appeared to be the armed group responsible for the gravest crimes committed in Ituri, including in comparison with other groups in the DRC allegedly responsible for crimes committed in that region.[184]

87. Despite recognising that it was "bound … by the evidence and information provided by the Prosecution",[185] the Chamber did not consider any of these relevant factors in reaching its determination of gravity.[186] This failure further led the Chamber to place undue weight on the isolated fact that the UPC/FPLC was a regional group (an irrelevant consideration) as a factor against a finding of gravity.[187]

Bosco Ntaganda's lack of authority or influence within the UPC

88. The Chamber concluded that Bosco Ntaganda did not hold any official position or play any official role in the UPC at the relevant time, but merely supported the authority of Thomas Lubanga Dyilo.[188] It is submitted that this is one of the main pillars of the Chamber's subsequent conclusion that the Prosecution had failed to show that Bosco Ntaganda was a core actor in the decision-making process of the UPC/FPLC's policies/practices and had *de jure or de facto* autonomy to change such policies/practices or to prevent their implementation.[189]

89. Whereas the proposition that Bosco Ntaganda did not hold any *official* position in the UPC at the relevant time is correct, this does not detract from his overall involvement in UPC activities and from his prominent role in the implementation of the UPC policies through the FPLC. The Prosecution submits that the Chamber erred in failing to consider, at a minimum, the following facts:

- Bosco Ntaganda was instrumental in the creation of the UPC. In supporting Thomas Lubanga Dyilo in his position as President,[190] he maintained a substantial role within the inner circle of the UPC.[191]

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[184] Transcript at p. 29, lines 9-17.
[185] Decision, para. 15.
[186] There is no reason to believe that the Chamber rejected any of the factors described by the Prosecution, since (a) no specific finding to that effect was ever made, and (b) the Chamber accepted in general the information and submissions made by the Prosecution (see, for instance, paras. 67-75 of the Decision).
[187] The Prosecution maintains that the regional nature of a group *per se* is not relevant; however even if it was, the Prosecution submits that the facts enumerated above clearly show that, while regional in essence, the UPC and FPLC were groups of particular relevance within the DRC situation.
[188] Decision, para. 83.
[189] Decision, para. 87.
[190] The Chamber appears to have misconstrued the Prosecution's submissions as being that Bosco Ntaganda had supported Thomas Lubanga Dyilo "as his Commander-in-Chief within the FPLC" (Decision at para. 83, citing

- A substantial overlap in people allowed continuous exchanges between the UPC and the FPLC, thus ensuring permanent coordination between them. In particular, Floribert Kisembo and Bosco Ntaganda were involved in the creation of the UPC and maintained a substantial role throughout their tenure as FPLC officers.[192]
- Thomas Lubanga Dyilo at all times had close, almost daily, contact with Floribert Kisembo and, in particular, Bosco Ntaganda. Thomas Lubanga Dyilo and Bosco Ntaganda frequently met for hours, and often twice a day, at the FPLC Headquarters in Bunia.[193]
- After convening with[194] and receiving orders from Thomas Lubanga Dyilo, Bosco Ntaganda "decided, on his level, military operations", and "implemented his decisions".[195]
- Bosco Ntaganda was key in negotiating weapon and ammunition supplies from Rwanda and organizing their deliveries.[196]
- Bosco Ntaganda participated in meetings with Hema communities in Bunia and ordered Hema families to enroll their children into the FPLC, threatening to recruit them by force.[197]
- Already prior to the formal foundation of the FPLC, Bosco Ntaganda, together with Thomas Lubanga Dyilo, was very active in recruiting children; this policy continued with the creation of the FPLC.[198]

90. The facts listed above show that Bosco Ntaganda had a position of substantial influence within the UPC, in addition to his high position of military authority within the FPLC. He played, as the Prosecution put it to the Pre-Trial Chamber, a crucial role in the Ituri conflict as a whole,[199] and was instrumental in the implementation of the policy of recruitment of children and, in particular, in directly selecting and ordering children to participate in combat activities, including under his direct command. As with the Chamber's analysis of the

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the Transcript at p. 50, lines 10-14), whereas at that point in the Hearing the Prosecution explicitly referred to Bosco Ntaganda's support of Thomas Lubanga Dyilo "in his function as the President of the UPC".

[191] Prosecution's Application, para. 25; Transcript at p. 49, lines 20-25 and p. 50, lines 10-14.

[192] 27 January 2006 Submission, para. 32 (i).

[193] Prosecution's Application, para. 61.

[194] Note that there is a slight discrepancy with the French translation, where the phrase "convened with" is not part of the record. See French Transcript at p. 30, line 25 to p. 31, line 3.

[195] Transcript at p. 37, lines 23 to p. 38, line 3.

[196] Prosecution's Application, para. 31.

[197] Prosecution's Application, para. 80.

[198] Transcript at p 51, line 25 to p. 52, line 6, and at p. 52, lines 16-21.

[199] Transcript at p. 50, line 20 to p. 51, line 1; when asked by Judge Steiner whether Bosco Ntaganda could be considered one of the most prominent commanders involved in the Ituri conflict as a whole, the Prosecution answered in the affirmative (p. 50, line 23 to p. 51, line 1).

UPC/FPLC's role as a regional group, critical factors that were relevant for the purposes of any determination on admissibility based on gravity considerations have been overlooked by the Pre-Trial Chamber.

Remedy sought

91. The appropriate remedial action for the Appeals Chamber to take varies depending on whether the Appeals Chamber grants the first, the second or the third ground of appeal. If the Appeals Chamber accepts that the Pre-Trial Chamber erred in law when interpreting the elements of Article 17 (1) (d) and applying them to the case against Bosco Ntaganda, then the Chamber should identify the correct legal principle to be applied, reverse the Decision on this point, declare the case admissible and remand it to the Pre-Trial Chamber for the confined purposes of completing its review under Article 58, to determine (a) whether there are reasonable grounds to believe that Bosco Ntaganda has committed a crime within the jurisdiction of the Court; (b) whether his arrest appears necessary; and (c) if an arrest warrant is issued, the appropriate organ responsible for the preparation and transmission of the request for arrest and surrender. As the Prosecution has submitted above,[200] due to the combination of specific findings already made by the Pre-Trial Chamber in relation to the case brought by the Prosecution against Bosco Ntaganda[201] and the full availability to the Appeals Chamber of all the relevant material and submissions presented by the Prosecution to the Pre-Trial Chamber, the Appeals Chamber has at its disposal all the necessary information enabling it to make its own finding on admissibility.

92. If the Appeals Chamber rejects the first ground of appeal, but considers that the Chamber made a procedural error in the manner advanced in the Prosecution's second ground of appeal, then the Appeals Chamber should reverse the Decision, insofar as it declares the case against Bosco Ntaganda inadmissible, and remand the matter for a new determination after allowing the Prosecution to make submissions on the issue of admissibility, including

[200] See paras. 55 *et seq*. above.

[201] The Prosecution notes that, in a striking difference with Pre-Trial Chamber II, Pre-Trial Chamber I has adopted a "reasonable grounds" test for the purposes of determining admissibility under Article 17. As a result, the Chamber's determination of admissibility in the Decision, both in relation to Thomas Lubanga Dyilo and Bosco Ntaganda contains a number of factual findings which significantly overlap with the subsequent "pure" Article 58 (1) determinations. In contradistinction, Pre-Trial Chamber II appears to have adopted a standard of "appearance of admissibility", distinguishable from the subsequent factual findings reached under a "reasonable grounds" test pertaining to Article 58 (1) (a). See *Situation in Uganda*, ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued On 8 July 2005 As Amended on 27 September 2005, 27 September 2005, para. 38. The Prosecution considers that the latter approach is the correct one, and that the "reasonable grounds" test ought to be reserved for proper determinations under Article 58 (1). The Prosecution's appeal does not directly cover this particular aspect of the Decision; however, the Prosecution deems it appropriate to bring this matter to the Chamber's attention.

specific submissions as to how the facts of the case meet the applicable legal test. The Appeals Chamber may decide to remit the matter to the original Pre-Trial Chamber or, if the Chamber considers that so doing would not provide for an adequate remedy, to a different Pre-Trial Chamber.[202]

93. Finally, if the Appeals Chamber grants the Prosecution's third ground of appeal, the Chamber should reverse the Decision in the manner described in the preceding paragraph, and make a new determination on admissibility with full consideration to the facts that have been overlooked by the Pre-Trial Chamber.

Conclusion

94. For the reasons given above, the Prosecution respectfully requests the Appeals Chamber to reverse the Decision impugned, and to grant the relief sought, as set out in paragraphs 91-93 of this document.

Luis Moreno-Ocampo
Prosecutor

Dated this 28th day of January 2011
At The Hague, The Netherlands

[202] The Appeals Chamber has the authority to do so through a *mutatis mutandis* application of Article 83 (2) (b) of the Statute. The Prosecution notes that Article 65 (4) (b) provides an example of flexibility, to the extent that it empowers a Trial Chamber that has concluded that the abbreviated proceedings triggered by an admission of guilt are not appropriate in the instant case, to decide to continue with trial proceedings itself or to remit the case to a different Trial Chamber.