

11:16:01 1 International Criminal Court
11:16:01 2 Appeals Chamber
11:16:01 3 Situation Democratic Republic of Congo
11:16:01 4 Case number ICC-01/04
11:16:01 5 Thursday, 13 July 2006 - Closed session *EX PARTE* only available to the
11:39:44 6 Office of The Prosecutor. The hearing begins at 11:39 a.m.
11:39:44 7 The hearing is presided by the Judge Pillay.
11:39:49 8 THE USHER: The International Criminal Court is in session. Please be seated.
11:40:26 9 JUDGE PILLAY: I now declare this session of the Appeals
11:40:30 10 Chamber open and call upon the court official to read the
11:40:34 11 matter on record.
11:40:39 12 THE REGISTRY: Your Honour, the Appeals Chamber comprising of
11:40:43 13 Judge Navanethem Pillay, Judge Philippe Kirsch,
11:40:54 14 Judge Georgios Pikis, Judge Kourula and Judge Song is
11:40:54 15 sitting today in the Situation in the Democratic Republic
11:40:58 16 of Congo.
11:40:59 17 JUDGE PILLAY: Thank you. I invite the Prosecution to place
11:41:01 18 themselves on the record.
11:41:04 19 MS BENSoudA: Madam President, your Honours, the Office of
11:41:04 20 the Prosecutor is represented this morning by Senior
11:41:16 21 Appeals Counsel, Fabricio Guariglia; Senior Trial Lawyer,
11:41:16 22 Ekkehard Withopf; Associate Appeals Counsel, Ben Batros;
11:41:23 23 and my name is Fatou Bensouda, the Deputy Prosecutor.
11:41:29 24 JUDGE PILLAY: Thank you, Madam Bensouda. The
11:41:32 25 Appeals Chamber delivers its judgment on the Prosecutor's

11:41:37 1 appeal against the decision of Pre-Trial Chamber I
11:41:40 2 entitled "Decision on the Prosecutor's Application for
11:41:44 3 Warrant of Arrest, Article 58". A summary of the Appeals
11:41:50 4 Chamber's decision will be delivered today. The judgment
11:41:54 5 dated 13 July 2006, and not this summary, is the
11:42:02 6 authoritative text.

11:42:03 7 Procedural history:

11:42:05 8 On February 14, 2006 the Prosecutor lodged an appeal
11:42:10 9 against the decision of Pre-Trial Chamber I declaring the
11:42:15 10 case against Mr Bosco Ntaganda inadmissible and the
11:42:20 11 consequent rejection of the Prosecutor's application for
11:42:24 12 the issuance of a warrant of arrest against him.

11:42:27 13 Grounds of appeal:

11:42:29 14 The Prosecutor advanced three grounds of appeal; the
11:42:32 15 second and third were advanced in the alternative. The
11:42:36 16 first ground, that Pre-Trial Chamber I made an error in
11:42:40 17 law in its interpretation of the "gravity" requirement of
11:42:46 18 Article 17(1)(d) of the Statute; (2) that the
11:42:52 19 Pre-Trial Chamber made a procedural error in failing to
11:42:56 20 provide the Prosecutor with adequate notice and an
11:43:01 21 opportunity to address the determinative issue of
11:43:05 22 inadmissibility; and the third ground, that the Pre-Trial
11:43:11 23 Chamber made a procedural error in its evaluation of the
11:43:14 24 information presented by the Prosecutor.

11:43:18 25 The Prosecutor claimed the following relief:

11:43:25 1 (1) a request that the Appeals Chamber identify the
11:43:30 2 correct legal principle to be applied to the
11:43:31 3 interpretation of the term "sufficient gravity" under
11:43:36 4 Article 17(1)(d) of the Statute; (2) the request was to
11:43:40 5 reverse the decision on this point; (3) to declare the
11:43:46 6 case admissible; and, (4), to remand the case to the
11:43:51 7 Pre-Trial Chamber for review of the application for the
11:43:55 8 issuance of the warrant of arrest under Article 58 of the
11:44:00 9 Statute against Mr Bosco Ntaganda.
11:44:06 10 Under seal proceedings:
11:44:08 11 The Appeals Chamber maintained the appeal under seal and
11:44:13 12 ex parte, Prosecutor only, upon being satisfied that a
11:44:16 13 sufficient factual and legal basis for such a procedure
11:44:20 14 had been made.
11:44:22 15 The first ground of appeal, that is, error of law:
11:44:26 16 The Appeals Chamber considered this ground under two
11:44:30 17 heads: (1) whether the admissibility of the case is a
11:44:36 18 prerequisite for the decision on the application for a
11:44:39 19 warrant of arrest and the circumstances under which the
11:44:44 20 Pre-Trial Chamber should invoke its discretion to address
11:44:49 21 admissibility in Article 58 proceedings.
11:44:54 22 The second head is whether the Pre-Trial Chamber
11:45:00 23 misdirected itself in the interpretation of "gravity"
11:45:06 24 under Article 17(1)(d) of the Statute. The discussion of
11:45:13 25 the issues and the reasons for the decision are set out

11:45:15 1 in detail in the judgment and will not be addressed in
11:45:19 2 this summary.
11:45:21 3 I will now make mention of the key findings made by the
11:45:24 4 Appeals Chamber. An initial determination of the
11:45:30 5 admissibility of a case cannot be made an integral part
11:45:34 6 of the decision on an application for a warrant of arrest
11:45:38 7 for the reason that Article 58(1) of the Statute lists
11:45:44 8 the substantive prerequisites for the issuance of a
11:45:51 9 warrant of arrest exhaustively. Article 19(1), second
11:45:54 10 sentence of the Statute, cannot be invoked to make the
11:45:58 11 admissibility of the case an additional substantive
11:46:01 12 prerequisite for the issuance of a warrant of arrest.
11:46:06 13 The Appeals Chamber accepts that the Pre-Trial Chamber
11:46:11 14 may, on its own motion, address admissibility. However,
11:46:14 15 when deciding on an application for a warrant of arrest
11:46:18 16 the Pre-Trial Chamber should exercise its discretion only
11:46:23 17 when it is appropriate in the circumstances of the case,
11:46:29 18 bearing in mind the interests of the suspect. Such
11:46:33 19 circumstances may include instances where a case is based
11:46:38 20 on the established jurisprudence of the Court,
11:46:44 21 uncontested facts that render a case clearly
11:46:47 22 inadmissible, or an ostensible cause impelling the
11:46:52 23 exercise of *proprio motu* powers.
11:46:52 24 On the ground of appeal on the Pre-Trial Chamber's
11:47:02 25 interpretation of "gravity" under Article 17(1)(d) of the

11:47:04 1 Statute, the Appeals Chamber is of the view that
11:47:07 2 ordinarily it would not address this issue in proceedings
11:47:12 3 that are held under seal and ex parte, Prosecutor only.
11:47:18 4 In view of the fact, however, that the interpretation of
11:47:21 5 Article 17(1)(d) of the Statute by the Pre-Trial Chamber,
11:47:27 6 if upheld, could have an impact on the Court as a whole,
11:47:31 7 the Appeals Chamber considers it necessary to address the
11:47:36 8 Pre-Trial Chamber's interpretation of Article 17(1)(d) of
11:47:41 9 the Statute in this present case.
11:47:44 10 The Appeals Chamber holds that the Pre-Trial Chamber's
11:47:48 11 interpretation of Article 17(1)(d) of the Statute
11:47:52 12 contains errors which, if not addressed now, could lead
11:47:57 13 to future cases being declared inadmissible on grounds
11:48:01 14 that are incorrect.
11:48:03 15 Given that these proceedings are currently ex parte,
11:48:06 16 Prosecutor only, and in the light of its findings above,
11:48:11 17 the Appeals Chamber will not, at this stage, proceed to
11:48:16 18 determine admissibility in this case in the absence of
11:48:21 19 submissions from other participants.
11:48:24 20 The Appeals Chamber finds that the three-pronged test
11:48:30 21 developed by the Pre-Trial Chamber for "gravity" is
11:48:33 22 flawed for the reasons given in the judgment. The
11:48:36 23 application of such a flawed test by the Pre-Trial
11:48:41 24 Chamber to the circumstances of the case against Mr Bosco
11:48:44 25 Ntaganda is necessarily incorrect.

11:48:49 1 The Appeals Chamber grants the Prosecutor's request for
11:48:53 2 relief in part. As to the first request by the
11:48:57 3 Prosecutor -- identification of the correct legal
11:49:00 4 principle in the interpretation of Article 17(1)(d) of
11:49:04 5 the Statute -- the Appeals Chamber, as stated in a
11:49:09 6 preceding section of this judgment, having determined
11:49:13 7 that the Pre-Trial Chamber's interpretation of
11:49:16 8 Article 17(1)(d) of the Statute was incorrect will not
11:49:21 9 "identify the correct legal principle to be applied",
11:49:25 10 given the ex parte, Prosecutor only, nature of the
11:49:28 11 proceedings and in the absence of full submissions from
11:49:35 12 all participants.
11:49:36 13 As to the second and third requests -- to reverse the
11:49:39 14 impugned decision on inadmissibility and declare the case
11:49:44 15 against Mr Bosco Ntaganda admissible -- the Chamber, for
11:49:48 16 the reasons set out above, will reverse the finding of
11:49:53 17 inadmissibility and not make any finding of its own as to
11:49:58 18 the admissibility of the case against Mr Bosco Ntaganda.
11:50:03 19 As to the fourth request -- the remand of the matter to
11:50:06 20 the Pre-Trial Chamber for the purpose of determining, on
11:50:11 21 the basis of Article 58(1) of the Statute, whether a
11:50:15 22 warrant of arrest should be issued against
11:50:19 23 Mr Bosco Ntaganda -- the Appeals Chamber notes that
11:50:23 24 Rule 158(1) of the Rules of Procedure and Evidence does
11:50:27 25 not explicitly foresee the remand of a matter to the

11:50:32 1 Pre-Trial or Trial Chamber that rendered the impugned
11:50:37 2 decision. Nevertheless, the Appeals Chamber considers
11:50:39 3 that in the present case the remand of the matter to
11:50:43 4 Pre-Trial Chamber I is warranted, because the
11:50:47 5 Pre-Trial Chamber curtailed its inquiry under Article 58
11:50:52 6 of the Statute on the basis that the case was
11:50:56 7 inadmissible. In those circumstances, the Pre-Trial
11:51:02 8 Chamber continued by stating that it -- and I'm quoting
11:51:06 9 -- "did not consider it possible to issue a warrant of
11:51:09 10 arrest for Mr Bosco Ntaganda and for this reason no
11:51:14 11 further question concerning the Prosecutor's application
11:51:17 12 in relation to Mr Bosco Ntaganda need be analysed".
11:51:24 13 As the Appeals Chamber has reversed the
11:51:29 14 Pre-Trial Chamber's determination that the case against
11:51:32 15 Mr Bosco Ntaganda is inadmissible, the Prosecutor's
11:51:35 16 application for a warrant of arrest against him has to be
11:51:39 17 remanded to the Pre-Trial Chamber for the Chamber to
11:51:44 18 complete its review under Article 58 of the Statute.
11:51:50 19 Having upheld the Prosecutor's first ground of appeal,
11:51:52 20 the Appeals Chamber has not addressed the alternate
11:51:57 21 grounds of appeal.
11:52:00 22 And now the judgment. The Appeals Chamber unanimously
11:52:04 23 decides that:
11:52:05 24 (i) the decision of the Pre-Trial Chamber I of
11:52:08 25 10 February 2006 entitled "Decision on the Prosecutor's

11:52:13 1 Application for Warrants of Arrest, Article 58" is
11:52:19 2 reversed insofar as it declares the case against
11:52:23 3 Mr Bosco Ntaganda inadmissible.
11:52:27 4 The Appeals Chamber decides, by a majority, that:
11:52:33 5 (ii) the Prosecutor's application for a warrant of arrest
11:52:37 6 against Mr Bosco Ntaganda is remanded to the
11:52:41 7 Pre-Trial Chamber for completion of the review limited to
11:52:46 8 the requirements stipulated in Article 58(1) of the
11:52:54 9 Statute. Should the Pre-Trial Chamber issue a warrant of
11:52:58 10 arrest, it should identify the appropriate organ
11:53:00 11 responsible for the preparation and transmission of the
11:53:02 12 request for arrest and surrender.
11:53:07 13 That is the judgment of the Court.
11:53:10 14 Judge Georghios M Pikis issues a separate decision
11:53:16 15 concurring in part and dissenting in part. I now invite
11:53:26 16 Judge Pikis to deliver his opinion.
11:53:32 17 JUDGE PIKIS: I shall not refer to the history of the
11:53:35 18 proceedings to which explicit reference was made by the
11:53:42 19 Presiding Judge, nor shall I dwell in detail on the
11:53:50 20 reasoning of the judgment delivered by myself. To begin,
11:54:00 21 I address the issue of admissibility, and note that the
11:54:08 22 Pre-Trial Chamber misconstrued the provisions of
11:54:20 23 Article 19(1) insofar as the Statute lays down that the
11:54:31 24 Court is duty-bound to address an issue of jurisdiction
11:54:35 25 but not likewise bound to advert to the issue of

11:54:41 1 admissibility.

11:54:42 2 There is a contrast there between the words "shall"

11:54:46 3 and "may". A discretion is vested nonetheless in the

11:54:51 4 Court -- a discretion that should be exercised

11:54:54 5 judicially.

11:54:55 6 Reference is made to the criteria that might guide the

11:54:59 7 Court in the exercise of its discretion, including

11:55:02 8 criteria -- including those set down by Article 19(3).

11:55:12 9 However, I note that the decision of the

11:55:16 10 Pre-Trial Chamber to rule on admissibility is not, as

11:55:25 11 such, questioned or a subject of the appeal. The appeal

11:55:30 12 is confined, in essence, to the dismissal of the case on

11:55:35 13 grounds of gravity, as understood and applied by the

11:55:44 14 Pre-Trial Chamber, and lengthily referred to in its

11:55:48 15 judgment.

11:55:49 16 They make a point of Article 5, to my comprehension,

11:55:55 17 introducing a "gravity" requirement, inasmuch as they, to

11:56:00 18 my mind, misconstrue its provisions as limiting the

11:56:04 19 jurisdiction of the Court to the most serious crimes of

11:56:11 20 concern to the international community, whereas the

11:56:19 21 relevant part of Article 5 is exclusively designed to --

11:56:28 22 descriptively, as a reference to the crimes, to the

11:56:30 23 offences, criminalised under the Statute and thereafter

11:56:36 24 they regard Article 17 as imposing an additional gravity

11:56:40 25 requirement, essentially limiting amenity on the part of

11:56:48 1 the Court -- or the jurisdiction of the Court to the
11:56:51 2 trial of the top leadership of any group or organisation
11:56:56 3 taking part in acts constituting crimes under the
11:57:03 4 Statute, and who they are. They identify inter alia
11:57:08 5 ability to negotiate the cease-fire or conclude peace.
11:57:14 6 In that way they make the proposition that the Statute
11:57:27 7 will acquire its proper deterrent effect. Of course, one
11:57:32 8 is apt to ask whether the Statute would have lesser
11:57:35 9 effect if it encompassed each and everyone.
11:57:43 10 I advert to the analysis of Article 17 and conclude --
11:57:48 11 I shall not dwell upon the reasons finding this
11:57:53 12 conclusion -- that (a), but subject to one qualification
11:58:00 13 to which I shall refer immediately afterwards, only
11:58:05 14 matters -- only cases insignificant in themselves can be
11:58:15 15 ruled out from the range of the jurisdiction of the
11:58:18 16 Court. "Gravity" is correlated to what need not concern
11:58:26 17 the Court with, and only with trivia the Court will not
11:58:31 18 concern itself with.
11:58:32 19 However, there is one additional matter that must be
11:58:37 20 mentioned in this connection, that the Statute refers to
11:58:40 21 further action by the Court in the context of
11:58:44 22 Article 17(1)(d).
11:58:46 23 The word "further" does indicate additional action, and
11:58:51 24 the question would arise whether any action has already
11:58:55 25 been taken. That is -- this is a question defined

11:59:06 1 dialectically, in the sense of bringing to the fore one
11:59:10 2 other constraint attaching to gravity -- the significance
11:59:20 3 and the consequences attached to it by the Pre-Trial
11:59:24 4 Chamber.
11:59:24 5 I conclude, like the majority of the Court, that the
11:59:30 6 decision on admissibility, whereby the case was ruled to
11:59:38 7 be inadmissible, should be reversed, explaining, in my
11:59:43 8 judgment, what "reverse" means as a term of art in the
11:59:48 9 context of judicial proceedings.
11:59:52 10 My dissent with the result of the Pre-Trial Court's
11:59:58 11 judgment is confined to the second order of the Court.
12:00:07 12 To begin with, I have serious reservations whether it is
12:00:11 13 at all possible, in the context of the Statute and the
12:00:16 14 powers vested in it on appeal to remit the case back
12:00:20 15 either for consideration or for further consideration.
12:00:27 16 I am not giving a concluded opinion on the question;
12:00:31 17 I merely note that where the legislature intended this
12:00:38 18 result -- that is, to confer power upon the Court to
12:00:43 19 remand the case back to the Court of first instance -- it
12:00:47 20 did so as appears from the provisions of Article 83 of
12:00:50 21 the Statute.
12:00:53 22 But leaving that aside -- I am not offering a concluded
12:00:59 23 opinion on the subject -- in my view, the Court is bound
12:01:02 24 to conclude the proceedings and address the questions --
12:01:08 25 and address any questions relevant to the issuance of a

12:01:11 1 warrant of arrest, because of its powers as a Court of
12:01:18 2 Appeal, this being an incident of its appellate
12:01:22 3 jurisdiction and, secondly, the powers vested in it by
12:01:26 4 Rule 149 whereby the Court is vested with the powers with
12:01:31 5 which the Pre-Trial Chamber, inter alia, as well as the
12:01:35 6 Trial Court, is endowed.
12:01:40 7 Hence, I disagree with the decision that the matter
12:01:44 8 should be referred back. The facts -- the uncontested
12:01:49 9 facts of the case are all before us, and in my view the
12:01:53 10 Court should conclude the process on appeal and not send
12:01:58 11 it back for further consideration. The judgment is
12:02:06 12 available as the judgment of the Court. Thank you.
12:02:12 13 JUDGE PILLAY: This brings the proceedings to a close.
12:02:15 14 I declare the session of the Appeals Chamber closed.
12:02:18 15 THE USHER: All rise.
12:02:18 16 The hearing is adjourned at 12:02 p.m.
12:02:18 17 [The Chamber adjourned accordingly]
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20 RECLASSIFICATION REPORT

21 Pursuant to Appeals chamber instruction dated 26th January 2011,
22 the transcript is reclassified as Public.

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