Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/04**
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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

Under Seal
Ex parte, Prosecutor only

Judgment
on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58"

The Office of the Prosecutor
Mr. Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia, Senior Appeals Counsel
Mr Ekkehard Withopf, Senior Trial Lawyer

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor of 14 February 2006 (ICC-01/04-125-US-Exp) against the decision of Pre-Trial Chamber I of 10 February 2006 entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58",

After deliberation,

Delivers the following

JUDGMENT

The Appeals Chamber unanimously decides that:

(i) The decision of Pre-Trial Chamber I of 10 February 2006 entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58" is reversed in so far as it declares the case against Mr. Bosco Ntaganda inadmissible.

The Appeals Chamber decides by a majority that:

(ii) The Prosecutor's application for a warrant of arrest against Mr. Bosco Ntaganda is remanded to the Pre-Trial Chamber for completion of the review limited to the requirements stipulated in article 58 (1) of the Statute. Should the Pre-Trial Chamber issue a warrant of arrest, it should identify the appropriate organ responsible for the preparation and transmission of the request for arrest and surrender.

Judge Georghios M. Pikis appends a separate opinion concurring in part and dissenting in part.

REASONS

I. KEY FINDINGS

1. An initial determination by the Pre-Trial Chamber that the case is admissible is not a prerequisite for the issuance of a warrant of arrest pursuant to article 58 (1) of the Statute.

2. The Pre-Trial Chamber has the discretion pursuant to article 19 (1), second sentence, of the Statute to address the admissibility of a case on an application for the issuance of a warrant of arrest that is made ex parte, Prosecutor only, but should exercise such discretion only when it is appropriate in the circumstances of the case, bearing in mind the interests of the suspect.

3. The Pre-Trial Chamber erred in law in its interpretation of "sufficient gravity" under article 17 (1) (d) of the Statute.

II. PROCEDURAL HISTORY

4. This is an appeal against the determination of inadmissibility of the case of Mr. Bosco Ntaganda by Pre-Trial Chamber I emanating from an application by the Prosecutor for a warrant of arrest.

5. The Prosecutor filed the "Prosecutor's Application for Warrants of Arrest, Article 58," dated 12 January 2006, before Pre-Trial Chamber I against Mr. Thomas Lubanga Dyilo and Mr. Bosco Ntaganda, (ICC-01/04-98-US-Exp, hereafter "application for warrants of arrest"), alleging that the two suspects had committed war crimes under article 8 (2) (e) (vii) of the Statute.

6. In paragraph 7 of his application for warrants of arrest, the Prosecutor requested the Pre-Trial Chamber (1) to receive the application under seal, (2) that the fact of the existence of this application also be sealed, and (3) that any proceedings conducted in connection with this application be held ex parte and in closed session. The Prosecutor gave as his reasons for the request the risk that public awareness of the proceedings prior to certain arrangements being put in place could cause the suspects to hide, flee or obstruct or endanger the investigation or proceedings and could also put at risk the physical well-being of Mr. Thomas Lubanga Dyilo.

7. On 20 January 2006, Pre-Trial Chamber I decided "to grant the Prosecution's requests concerning: (i) receipt of the Prosecution's Application under seal by the Pre-Trial Chamber; (ii) maintaining the Prosecution's Application under seal; and (iii) conducting *ex parte* and closed session proceedings in connection with the Prosecution's Application" (ICC-01/04-102-US-Exp, hereafter "decision of 20 January 2006," page 4).

8. On 10 February 2006, Pre-Trial Chamber I rendered the "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58" (ICC-01/04-118-US-Exp-Corr, hereafter "impugned decision"). In this decision, the Pre-Trial Chamber granted the Prosecutor's

application for a warrant of arrest against Mr. Thomas Lubanga Dyilo and rejected the application for a warrant of arrest against Mr. Bosco Ntaganda "because [...] the case against him is inadmissible" (see impugned decision, page 66).

9. On 14 February 2006, the Prosecutor filed an appeal against the impugned decision (ICC-01/04-125-US-Exp, hereafter "notice of appeal"). In paragraph 2 of the notice of appeal, the Prosecutor stated that:

> "The Prosecution is bringing an appeal under Article 82 (1) (a) solely against the Pre-Trial Chamber's decision to declare the case against Bosco Ntaganda inadmissible, and to consequently reject the Prosecution's request to issue a warrant of arrest against Mr Ntaganda." (Footnotes omitted.)

10. The notice of appeal was filed "under seal" and "ex parte, Prosecution only."

11. On 23 February 2006, the Prosecutor filed an application entitled "Prosecutor's Application for an Extension of the Page Limit for the Document in Support of the Appeal" (ICC-01/04-127-US-Exp).

12. On 3 March 2006, the Prosecutor filed a document in support of the appeal (ICC-01/04-120-US-Exp, hereafter "document in support"), advancing three grounds of appeal, namely:

> (i) that the Pre-Trial Chamber made an error of law in its interpretation of the gravity requirement of article 17 (1) (d) of the Statute (paragraphs 19 to 62 of the document in support),
>
> (ii) that the Pre-Trial Chamber failed to provide adequate notice and request specific submissions from the Prosecution on the issue of admissibility (paragraphs 63 to 81 of the document in support),
>
> (iii) that the Pre-Trial Chamber had adopted a selective approach to the information presented by the Prosecution (paragraphs 82 to 90 of the document in support). The second and third grounds of appeal were advanced in the alternative (see paragraph 9 of the document in support).

13. On 6 March 2006, the Appeals Chamber granted the Prosecutor's request for an extension of the page limit for the document in support of the appeal by a further 20 pages. A separate concurring opinion to the decision from Judge Georghios M. Pikis was appended (ICC-01/04-128-US-Exp).

14. By notice dated 9 March 2006 the Registrar filed a request entitled "Registrar's Request for an Order of Transfer of Certain Parts of the Case Record to the Situation Record" (see ICC-01/04-129-US-Exp). By majority decision dated 16 March 2006 the Appeals Chamber granted the Registrar's request. Judge Georghios Pikis appended a dissenting opinion to the

order of the Court (ICC-01/04-124-US-Exp). Judge Sang-Hyun Song filed a separate opinion on 24 March 2006 (ICC-01/04-131-US-Exp).

15. In paragraph 91 of the document in support, the Prosecutor identified the relief sought in respect of his first ground of appeal and requested the Appeals Chamber to:

> "[…] identify the correct legal principle to be applied [to the interpretation of article 17 (1) (d) of the Statute], 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."

16. In respect of the second ground of appeal, the Prosecutor requested the Appeals Chamber to reverse the impugned 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 specific submissions as to how the facts of the case meet the applicable legal test" (see document in support, paragraph 92). In respect of the third ground of appeal, the Prosecutor requested the Appeals Chamber to reverse the impugned decision insofar as it declares the case against Mr. Bosco Ntaganda inadmissible and to make a new determination of the admissibility of the case (see document in support, paragraph 93).

17. On 29 March 2006, the Appeals Chamber ordered the Prosecutor pursuant to regulation 28 of the Regulations of the Court to respond to the Chamber's questions in respect of the ex parte and under seal filing of the appeal and the applicability of article 19 (3), second sentence, of the Statute (ICC-01/04-133-US-Exp, hereafter "order pursuant to regulation 28"). In response, the Prosecutor on 5 April 2006 filed supplementary submissions (ICC-01/04-136-US-Exp, hereafter "supplementary submissions").

III. COMPLIANCE WITH FORMAL REQUIREMENTS

18. The Prosecutor has filed an interlocutory appeal pursuant to article 82 (1) (a) of the Statute. Although the impugned decision is a decision on an application for warrants of arrest, the decision by the Pre-Trial Chamber to reject the Prosecutor's application in respect of Mr. Bosco Ntaganda was based on a ruling of the admissibility of the case against him. To this extent, the impugned decision is a decision "with respect to […] admissibility," as required by

article 82 (1) (a) of the Statute. The Prosecutor has limited his appeal to this aspect of the impugned decision.

IV. UNDER SEAL AND EX PARTE PROCEEDINGS

19. As stated above, in the decision of 20 January 2006 Pre-Trial Chamber I granted the Prosecutor's request to (i) receive the Prosecution's Application under seal; (ii) maintain the Prosecution's Application under seal; and (iii) conduct ex parte and closed session proceedings in connection with the Prosecution's Application. In determining the appropriate level of confidentiality, the Pre-Trial Chamber had accepted the Prosecutor's factual submissions relating to the necessity of arrest and to the need to provide for the requisite levels of confidentiality.

20. Mindful of its discretion in the conduct of its own proceedings to determine whether this characterisation of the proceedings should continue to have force and effect on appeal, the Appeals Chamber in the order pursuant to regulation 28 requested the Prosecutor to explain the factual and legal bases for the filing of the appeal under seal and ex parte, Prosecution only. In his supplementary submissions the Prosecutor indicated that the appeal was filed ex parte and under seal in compliance with the protective order issued by the Pre-Trial Chamber (see footnote 4, supplementary submissions). The Prosecutor submitted that the appeal be maintained ex parte and under seal for the additional reasons that tensions in the Ituri region had increased with several militia groups engaging in armed operations and a renewal of large scale violence subsequent to the arrest of Mr. Thomas Lubanga Dyilo.

21. The Prosecutor affirmed that any disclosure at this stage of the existence of an application for a warrant of arrest against Mr. Bosco Ntaganda posed serious risks to the life and well-being of victims and witnesses, the integrity and efficiency of ongoing investigative efforts, and the prospects of success of any future arrest efforts.

22. The Prosecutor submitted that under article 68 (1) and article 57 (3) (c) of the Statute provision is made for the protection of victims and witnesses during the investigation and prosecution of crimes and that rules 87 (2) (e) and 88 (4) of the Rules of Procedure and Evidence provide two of the procedural avenues for the implementation of article 68 (1) of the Statute by allowing for the filing of motions or requests under seal and ex parte.

23. The Chamber is satisfied that a sufficient factual and legal basis exists for the proceedings on appeal to be maintained under seal and ex parte, Prosecution only.

V. THE APPLICABILITY OF ARTICLE 19 (3), SECOND SENTENCE, OF THE STATUTE

24. The Chamber notes that pursuant to article 19 (3), second sentence, of the Statute: "[in] proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court."

25. Pursuant to rule 59 of the Rules of Procedure and Evidence, the Registrar is responsible for informing those who have referred a situation to the Court pursuant to article 13 of the Statute and victims who have already communicated with the Court in relation to that case or their legal representative of any question or challenge of admissibility which has arisen pursuant to article 19 (1), (2) or (3) of the Statute.

26. The Chamber notes the Prosecutor's submission that "[t]o the best of the Prosecution's knowledge, such notice has not been provided by any other organ of the Court" (see supplementary submissions, paragraph 40).

27. With respect to the applicability of article 19 (3), second sentence, of the Statute to the present proceedings, the Prosecutor argued in paragraphs 22 to 33 of his supplementary submissions that States and victims do not have a right to submit observations if the admissibility of a case is made only incidentally upon an application for a warrant of arrest.

28. In addition the Prosecutor "submits that the procedures set out in article 19 were geared towards substantial hearings, such as challenges and questions, and not preliminary assessments of admissibility which are incidental to other determinations" (see supplementary submissions, paragraph 25).

29. The Prosecutor argues further that "to permit admissibility proceedings with participation of victims and referring entities, at the stage of issuance of an arrest warrant would produce absurd results. On the one hand, if victims and referring entities are permitted to submit observations, but the suspect is not, then this would seem a curious and unfair process [...]. On the other hand, if the suspect is permitted to submit observations, then the ICC would have a very curious system wherein suspects are permitted to comment on their own arrest warrants before they are issued. The logical interpretation, avoiding these implausible results, is that admissibility proceedings under Article 19 are held after the issuance of the arrest warrant, when interested parties have the opportunity to submit observations" (see supplementary submissions, paragraph 30).

30. The Chamber considers that it is not necessary to rule on the applicability of article 19 (3) of the Statute in general but in the present circumstances even if this right is applicable it must of necessity be restricted in its enforcement due to the under seal and ex parte, Prosecutor only, nature of the proceedings.

31. The Chamber therefore concludes that article 19 (3), second sentence, of the Statute is not applicable to these proceedings.

VI. MERITS OF THE APPEAL

A. Grounds of appeal under article 82 (1) (a) of the Statute

32. Neither the Statute nor the Rules of Procedure and Evidence provide for what grounds can be raised on appeal pursuant to article 82 (1) (a) of the Statute.

33. Article 81 (1) (a) and (b) of the Statute, which provides for appeals against decisions of acquittal or conviction, specifies three categories of grounds of appeal that may be raised by the Prosecutor and four grounds of appeal that may be raised by the convicted person or the Prosecutor acting on behalf of such a person. In the absence of specification of any grounds the parties are at liberty to raise any relevant ground of appeal including the grounds as specified under article 81 (1) (a) and (b).

34. The Prosecutor in his document in support "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“ (see document in support, paragraph 7).

35. The procedure adopted by the Prosecutor in this regard is acceptable.

B. First ground of appeal: Error of law

36. As his first ground of appeal, the Prosecutor argues that the Pre-Trial Chamber in the impugned decision interpreted the gravity requirement of article 17 (1) (d) of the Statute too narrowly, which, in the Prosecutor's opinion, led the Pre-Trial Chamber to determine wrongly that the case against Mr. Bosco Ntaganda was inadmissible and to reject the Prosecutor's application for the issuance of a warrant of arrest against him (see document in support, paragraphs 19 to 62).

37. In the Chamber's view two issues arise for consideration under this ground of appeal:

(i) was the Pre-Trial Chamber correct in finding that the admissibility of the case was a prerequisite for its decision on the Prosecutor's application for warrants of arrest and under what circumstances should the Pre-Trial Chamber invoke its discretion to address admissibility in article 58 proceedings?; and

(ii) was the Pre-Trial Chamber correct in its interpretation of "gravity" under article 17(1) (d) of the Statute?

1. The application of article 17 (1) of the Statute as a prerequisite to the issuance of a warrant of arrest

38. The Prosecutor did not raise the question as to whether issues of admissibility of any particular case are intended to be raised prior to the issuance of an arrest warrant explicitly in his first ground of appeal but addressed the issue in response to questions raised by the Appeals Chamber in the order pursuant to regulation 28. Notwithstanding this fact the Appeals Chamber considers the question to be encompassed in the Prosecutor's first ground of appeal and to be an important and relevant question for the proper disposition of the appeal in so far as it concerns the content and ambit of article 58 of the Statute.

39. Pre-Trial Chamber I stated in paragraph 18 of the impugned decision that:

> "[…] it is the Chamber's view that an initial determination on whether the cases against Mr Thomas Lubanga Dyilo and Mr Bosco Ntaganda fall within the jurisdiction of the Court and are admissible is a prerequisite to the issuance of a warrant of arrest for them."

40. The use of the word "prerequisite" indicates that the Pre-Trial Chamber considered that an initial determination that the case against the suspect is admissible is a condition for the issuance of a warrant of arrest and therefore an integral part of its decision on the Prosecutor's application for warrants of arrest. The Pre-Trial Chamber, however, in paragraphs 17 and 19 of the impugned decision, also referred to its authority under article 19 (1) of the Statute to make a determination of the admissibility of a case on its own motion. The Pre-Trial Chamber noted in paragraph 19 of the impugned decision that "rule 58 of the Rules establishes that, when the Chamber is acting on its own motion as provided for in article 19 (1) of the Statute, it shall decide on the procedure to be followed." The references to article 19 (1) and rule 58 of the Rules of Procedure and Evidence could be read as indicating that the Pre-Trial Chamber considered its initial determination of the admissibility of the case not as an integral part of its decision on the Prosecutor's application for warrants of arrests, but as a separate procedural step, which was prompted by the Prosecutor's application for warrants of arrest.

41. The Pre-Trial Chamber's view that an initial determination of the admissibility of the case is a prerequisite for the issuance of a warrant of arrest cannot be upheld on appellate review in either of the two possible readings, as will be explained below.]

(a) Initial determination of the admissibility of a case not a prerequisite for the issuance of a warrant of arrest

42. An initial determination of the admissibility of a case cannot be made an integral part of the decision on an application for a warrant of arrest for the reason that article 58 (1) of the Statute lists the substantive prerequisites for the issuance of a warrant of arrest exhaustively. Article 19 (1), second sentence, of the Statute cannot be invoked to make the admissibility of the case an additional substantive prerequisite for the issuance of a warrant of arrest.

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

44. That the list of substantive prerequisites for the issuance of a warrant of arrest in article 58 (1) of the Statute is exhaustive follows from the wording of that provision itself. If the two prerequisites listed in article 58 (1) of the Statute are met, the opening sentence of article 58 (1) of the Statute gives the Pre-Trial Chamber clear and unambiguous instructions as to what the Chamber should do: "the Pre-Trial Chamber shall […] issue a warrant of arrest". The use of the word "shall" indicates that the Pre-Trial Chamber is under an obligation to issue a warrant of arrest, provided that the prerequisites listed in article 58 (1) of the Statute are met. Had the drafters of the Statute wanted the Pre-Trial Chambers to consider the admissibility of the case when considering an application for a warrant of arrest, reference to the admissibility of the case could have been included in article 58 (1) of the Statute. Therefore, article 19 (1), second sentence, of the Statute cannot be invoked to make the admissibility of the case a third substantive prerequisite for the issuance of a warrant of arrest.

45. Another clear indication that the substantive prerequisites are listed exhaustively in article 58 (1) of the Statute and that the admissibility of the case is not a criterion for the issuance of a warrant of arrest can be found in article 58 (2) of the Statute. This provision stipulates the minimum content of the Prosecutor's application for a warrant of arrest. Article 58 (2) of the Statute does not impose an obligation on the Prosecutor to furnish evidence or information in relation to the admissibility of the case. Thus, the Pre-Trial Chamber generally

will not have the necessary factual information to determine the admissibility of the case based on the Prosecutor's application. If the Pre-Trial Chamber wanted to assess the admissibility of the case, it would have to request additional information from the Prosecutor, which may substantially prolong the proceedings in respect of the application for a warrant of arrest. This result would not be reconcilable with the approach taken in article 58 of the Statute, which foresees that the Pre-Trial Chamber takes its decision on the application for a warrant of arrest on the basis of the information and evidence provided by the Prosecutor.

(b) Determination of admissibility prompted by an application for a warrant of arrest must take into account interests of the suspect

46. In the preceding section, it was explained why the initial determination of the admissibility of a case is not an integral part of a Pre-Trial Chamber's consideration of and decision on an application for a warrant of arrest. In this following section, it will be explained why in the present case, the Pre-Trial Chamber should not have made an initial determination of the admissibility of the case as a separate procedural step either.

47. Article 19 (1), second sentence, of the Statute reads as follows:

> "The Court may, on its own motion, determine the admissibility of the case."

48. The use of the word "may" indicates that a Chamber is vested with discretion as to whether the Chamber makes a determination of the admissibility of a case. In the circumstances of the present case, however, the exercise of Pre-Trial Chamber I's discretion under article 19 (1), second sentence, of the Statute in the impugned decision was erroneous, because by deciding that it had to make an initial determination of the admissibility of the case before it could issue a warrant of arrest, the Pre-Trial Chamber did not give sufficient weight to the interests of Mr. Bosco Ntaganda.

49. This follows from the following consideration: the proceedings before Pre-Trial Chamber I in relation to the Prosecutor's application for warrants of arrest were held "ex parte, Prosecutor only." This meant that those persons against whom warrants of arrest were sought did not have a right to make submissions to the Pre-Trial Chamber and did not even know about the proceedings. The Pre-Trial Chamber sought to address the interests of the suspects by pointing out that:

> "Such determination [of the admissibility of the case] is without prejudice to subsequent determinations on jurisdiction or admissibility concerning such cases

pursuant to article 19 (1), (2) and (3) of the Statute." (See impugned decision, paragraph 20.)

50. This assertion protects the interests of the suspect insufficiently: if the Pre-Trial Chamber makes a determination that the case against a suspect is admissible without the suspect participating in the proceedings, and the suspect at a later stage seeks to challenge the admissibility of a case pursuant to article 19 (2) (a) of the Statute, he or she comes before a Pre-Trial Chamber that has already decided the very same issue to his or her detriment. A degree of predetermination is inevitable. If, on the other hand, the Pre-Trial Chamber decides that the case against the suspect is inadmissible, the situation for the suspect could be even worse: pursuant to article 82 (1) (a) of the Statute, decisions with respect to admissibility can be appealed by the Prosecutor as matter of right; the present appeal is an appeal of this kind. If the Appeals Chamber overturns the Pre-Trial Chamber's decision and determines that the case is admissible, the suspect would be faced with a decision by the Appeals Chamber that the case is admissible. The right of the suspect to challenge the admissibility of the case before the Pre-Trial and - potentially - the Appeals Chamber thus would be seriously impaired.

51. The impediment of the interests of the suspect caused by Pre-Trial Chamber I's initial determination of the admissibility of the case is not outweighed by the benefit such a determination could have for the suspect. It is true that in the present case, the Pre-Trial Chamber refused to issue a warrant of arrest against Mr. Bosco Ntaganda because it determined that the case against him was inadmissible. Thus, Mr. Bosco Ntaganda was not subjected to a warrant of arrest by the Court and therefore could not be surrendered to the Court. Yet, this advantage is only marginal and could be attained through other procedures as well: Pursuant to article 19 (2) (a) of the Statute, a person against whom a warrant of arrest has been issued under article 58 of the Statute has the right to challenge the admissibility of his or her case. Such a challenge may be brought before the person concerned has been surrendered to the Court and even before the person's arrest. Thus, the Statute provides the suspect against whom a warrant of arrest has been issued with an opportunity to challenge the admissibility of the case even before the person is arrested and surrendered to the Court. It is not necessary for a Pre-Trial Chamber to "come to the aid" of a suspect by making an initial determination of a case before a warrant of arrest has been issued.

52. The Appeals Chamber accepts that the Pre-Trial Chamber may on its own motion address admissibility. However, in the Appeals Chamber's view, when deciding on an application for a warrant of arrest in ex parte Prosecutor only proceedings the Pre-Trial Chamber should exercise its discretion only when it is appropriate in the circumstances of the

case, bearing in mind the interests of the suspect. Such circumstances may include instances where a case is based on the established jurisprudence of the Court, uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of proprio motu review. In these circumstances it is also imperative that the exercise of this discretion take place bearing in mind the rights of other participants.

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

2. The interpretation of "gravity" under article 17(1) (d) of the Statute

54. The Appeals Chamber will now turn to the Pre-Trial Chamber's interpretation of article 17 (1) (d) of the Statute. For the reasons given in the preceding section, the Appeals Chamber ordinarily would not address this issue in proceedings that are held under seal and ex parte, Prosecutor only. In view of the fact, however, that the interpretation of article 17 (1) (d) of the Statute by the Pre-Trial Chamber, if upheld, could have an impact on the Court as a whole, the Appeals Chamber considers it necessary to address the Pre-Trial Chamber's interpretation of article 17 (1) (d) of the Statute in this present case. The Appeals Chamber is of the view that the Pre-Trial Chamber's interpretation of article 17 (1) (d) of the Statute contains errors which, if not addressed now, could lead to future cases being declared inadmissible on grounds that are incorrect. Given that these proceedings are currently ex parte, Prosecutor only, and in the light of its findings above, the Appeals Chamber will not at this stage proceed to determine admissibility in this case in the absence of submissions from other participants.

55. Article 17 (1) of the Statute reads: "[h]aving regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) […]; (b) […]; (c) […]; (d) the case is not of sufficient gravity to justify further action by the Court."

(a) The Pre-Trial Chamber's interpretation of article 17 (1) (d)

56. In the impugned decision, the Pre-Trial Chamber interpreted this article and came to the conclusion that the gravity threshold provided for in article 17 (1) (d) of the Statute was met:

"[…] if the following three questions can be answered affirmatively:

> i) Is the conduct which is the object of a case systematic or large-scale (due consideration should also be given to the social alarm caused to the international community by the relevant type of conduct)?;
>
> ii) Considering the position of the relevant person in the State entity, organisation or armed group to which he belongs, can it be considered that such person falls within the category of most senior leaders of the situation under investigation?; and
>
> iii) Does the relevant person fall within the category of most senior leaders suspected of being most responsible, considering (1) the role played by the relevant person through acts or omissions when the State entities, organisations or armed groups to which he belongs commit systematic or large-scale crimes within the jurisdiction of the Court, and (2) the role played by such State entities, organisations or armed groups in the overall commission of crimes within the jurisdiction of the Court in the relevant situation?" (See impugned decision, paragraph 64.)

57. The Pre-Trial Chamber had reached this conclusion on the basis of a literal, contextual and teleological interpretation of article 17 (1) (d) of the Statute, also taking into account what the Pre-Trial Chamber described as applicable principles and rules of international law.

58. The Pre-Trial Chamber's argumentation may be summarized as follows: On the basis of a literal interpretation, the Pre-Trial Chamber pointed out that article 17 (1) of the Statute left a Chamber no discretion; if a Chamber is convinced that a case is not of sufficient gravity, the Chamber has to declare the case inadmissible (see impugned decision, paragraph 44). The Pre-Trial Chamber proceeded to consider the meaning of article 17 (1) (d) of the Statute by reference to contextual and teleological interpretations.

59. The first prong of the Pre-Trial Chamber's test for the gravity threshold – that the conduct must be systematic or large-scale – is the result of a contextual interpretation by the Pre-Trial Chamber of article 17 (1) (d) of the Statute. The Pre-Trial Chamber opined that the selection of the crimes over which the Court had jurisdiction had been gravity-driven itself; only the most serious crimes fell under the jurisdiction of the Court (see impugned decision, paragraphs 43 and 46). Hence, the Pre-Trial Chamber stated that in order for a case to reach the gravity threshold of article 17 (1) (d) of the Statute, the "relevant conduct must present particular features which render it especially grave" (see impugned decision, paragraph 46). The Pre-Trial Chamber went on to state that two features would have to be considered in this respect: First of all, whether the conduct was either systematic or large-scale, because "[i]f isolated instances of criminal activity were sufficient, there would be no need to establish an additional gravity threshold beyond the gravity-driven selection of the crimes (which are defined by both contextual and specific elements) included within the material jurisdiction of

the Court" (see impugned decision, paragraph 47). Secondly, in the Pre-Trial Chamber's opinion "due consideration must be given to the social alarm such conduct may have caused in the international community" (see impugned decision, paragraph 47). The Pre-Trial Chamber did not explain further why the social alarm caused was to be taken into account.

60. The Pre-Trial Chamber derived the second and third prongs of its test for the gravity threshold through a teleological interpretation of article 17 (1) (d) of the Statute. The Pre-Trial Chamber argued that the deterrent effect of the Court had to be maximised and that "any retributory effect of the activities of the Court must be subordinate to the higher purpose of prevention" (see impugned decision, paragraph 49). The Pre-Trial Chamber went on to state that not only the relevant conduct but also three additional factors would have to be considered to determine whether a case meets the gravity threshold (see impugned decision, paragraph 50), namely whether the suspect is one of the most senior leaders, the role the suspect played when the State entities, organizations or armed groups to which the suspect belonged committed systematic or large-scale crimes within the jurisdiction of the Court, and, lastly, the role of the suspect's State entity, organization or armed group in the overall commission of crimes in the relevant situation (see impugned decision, paragraphs 52 and 53). The Pre-Trial Chamber derived these three factors from its consideration that persons who meet this threshold "are the ones who can most effectively prevent or stop the commission of those crimes" (see impugned decision, paragraph 54). The Pre-Trial Chamber opined that "only by concentrating on this type of individual can the deterrent effects of the activities of the Court be maximised because other senior leaders in similar circumstances will know that solely by doing what they can to prevent the systematic or large-scale commission of crimes within the jurisdiction of the Court can they be sure that they will not be prosecuted by the Court" (see impugned decision, paragraph 55).

61. The Pre-Trial Chamber sought to support its interpretation of article 17 (1) (d) of the Statute and its test for the gravity-threshold by reference to the procedural law and practice of the ad hoc international criminal tribunals of the United Nations, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") (see impugned decision, paragraphs 56 to 59). Notably, the Pre-Trial Chamber referred to the terms of United Nations Security Council resolution 1534 of 26 March 2004 and pointed to rule 28 (A) of the ICTY Rules of Procedure and Evidence, which provides that indictments before the ICTY must concentrate on "the most senior leaders suspected of being most responsible for crimes under the jurisdiction of the Tribunal" and to rule 11 bis (C) of the ICTY Rules of Procedure and Evidence, which makes the level of

responsibility of the suspect a consideration for the decision by the ICTY to refer a case to a national jurisdiction. Furthermore, the Pre-Trial Chamber pointed out that the indictments before the ICTY and ICTR regarding any of the most senior leaders included either systematic or large-scale criminal activities.

62. The Pre-Trial Chamber applied the test it had developed and which is reproduced in paragraph 56 above, to the cases of Mr. Thomas Lubanga Dyilo and Mr. Bosco Ntaganda (see impugned decision, paragraphs 65 to 89), thereby shedding further light on the Pre-Trial Chamber's understanding of the gravity threshold of article 17 (1) (d) of the Statute.

63. In relation to the second prong of its test – most senior leader – the Pre-Trial Chamber considered in relation to the case against Mr. Bosco Ntaganda whether he had "de jure or de facto authority to negotiate, sign and implement ceasefires or peace agreements, or participate in negotiations relating to controlling access of MONUC or other UN personnel to Bunia or other parts of the territory of Ituri in the hands of the UPC/FPLC during the second half of 2002 and in 2003" (see impugned decision, paragraph 86, footnote omitted). The Pre-Trial Chamber came to the conclusion that the "evidence and information provided to support the Prosecution's Application do not show reasonable grounds to believe that during the relevant period Mr. Ntaganda (1) was a core actor in the decision-making process of the UPC/FPLC's policies/practices; (2) had de jure or de facto autonomy to change such policies/practices; or (3) had de jure or de facto autonomy to prevent the implementation of such policies/practices" (see impugned decision, paragraph 87, footnotes omitted).

64. As to the third prong of the Pre-Trial Chamber's test, the Pre-Trial Chamber appeared to consider that the following factors were considerations that, in principle, would argue against the case fulfilling the gravity requirement of article 17 (1) (d) of the Statute: The FPLC was exclusively the military wing of the broader political movement called the UPC; Mr. Ntaganda did not hold any official role within the UPC; and the UPC/FPLC was merely a regional group operating only in the Ituri region (see impugned decision, paragraphs 82 to 84).

65. The application of the test developed by the Pre-Trial Chamber led the Chamber to declare the case against Mr. Bosco Ntaganda inadmissible.

(b) The arguments of the Prosecutor

66. In his document in support, the Prosecutor argued that the Pre-Trial Chamber's interpretation of article 17 (1) (d) of the Statute was erroneous. The Prosecutor disagreed both

with the three-pronged test developed by the Pre-Trial Chamber and with its application by the Pre-Trial Chamber to the present case. In relation to the test itself, the Prosecutor submitted that neither the ordinary meaning of article 17 (1) (d) of the Statute nor the intent of the drafters of the Rome Statute justified the rigid interpretation of the gravity threshold by the Pre-Trial Chamber (see document in support, paragraphs 28, 29, 44 and 45). Furthermore, in the Prosecutor's opinion, the examples of the ICTY and ICTR cited by the Pre-Trial Chamber were of no relevance to the International Criminal Court, since the ad hoc tribunals were in the process of completing their tasks, whereas the International Criminal Court was a permanent institution (see document in support, paragraphs 30 to 33). In relation to the "social alarm" consideration as part of the first prong of the Pre-Trial Chamber's test, the Prosecutor pointed out that the concept of social alarm could not be found in the Rome Statute and that the criterion related to subjective and contingent reactions rather than the objective gravity of the crime (see document in support, paragraphs 22 and 49). In addition, the Prosecutor argued that the teleological interpretation by the Pre-Trial Chamber was flawed: Limiting the Court in the fashion foreseen by the Pre-Trial Chamber would not maximise the Court's deterrent effect but mean that, by law, the majority of perpetrators would have nothing to fear from the International Criminal Court (see document in support, paragraph 42). The Prosecutor also pointed out that, in his opinion, the Pre-Trial Chamber's test was inconsistent with the provisions on substantive jurisdiction of the Court, as article 8 (1) of the Statute provided that the Court shall have jurisdiction over war crimes "in particular when committed as part of a plan or a policy or as part of a large-scale commission of such crimes", which allowed the Court to address war crimes even if these requirements have not been met (see document in support, paragraph 46). Reference was made also to the drafting history of the Elements of Crimes, where an inclusion of a "widespread or systematic" requirement for the crime of genocide was rejected (see document in support, paragraph 47). The Prosecutor argued further that the Pre-Trial Chamber's test inappropriately limited his prosecutorial discretion and would make it impossible to investigate and prosecute perpetrators lower down the chain of command (see document in support, paragraph 41); the investigation and prosecution of low and mid-level perpetrators may in certain circumstances be necessary to generate evidence and build a case against the perpetrators on the highest level (see document in support, paragraph 37).

67. In addition to submitting that the three-pronged test developed by the Pre-Trial Chamber was incorrect in itself, the Prosecutor submitted that the application by the Pre-Trial Chamber of its test to the cases against Mr. Thomas Lubanga Dyilo and Mr. Bosco Ntaganda was

flawed. In relation to the second prong of the test, the Prosecutor argued that the Pre-Trial Chamber applied an excessively narrow interpretation of "senior leader", which exempted from prosecution a top commander. Furthermore, the Prosecutor argued that the Pre-Trial Chamber improperly placed emphasis on the authority of suspects to negotiate and sign peace agreements, and that the Pre-Trial Chamber improperly created a criterion that suspects have to be core actors in the decision-making process of policies and practices or have autonomy to change or to prevent the implementation of policies and practices (see document in support, paragraph 22). In relation to the application of the third prong of the test, the Prosecutor argued that the Pre-Trial Chamber, by considering whether the perpetrator's organisation was merely a regional group, applied an irrelevant criterion (see document in support, paragraphs 22 and 43).

(c) The findings of the Appeals Chamber

68. The Appeals Chamber finds that the test developed by the Pre-Trial Chamber is incorrect.

(i) The requirement that conduct must be either systematic or large-scale and cause social alarm

69. The Pre-Trial Chamber introduces factors in relation to conduct (requiring it to be "systematic or large-scale") for the purposes of determining admissibility on the basis of a flawed contextual interpretation of the Statute. The Pre-Trial Chamber's interpretation is inconsistent with the definitions of the crimes over which the Court has jurisdiction. Article 8 of the Statute on war crimes reads: "(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". For its part, article 7 on crimes against humanity requires that those crimes are "*committed as part of a widespread or systematic attack directed against any civilian population*", the latter being defined as *"a course of conduct involving the multiple commission of acts referred to in paragraph 1... pursuant to or in furtherance of a State or organizational policy to commit such attack"*.

70. In requiring conduct that is either systematic or large-scale, the Pre-Trial Chamber introduces at the admissibility stage of proceedings criteria that effectively blur the distinction between the jurisdictional requirements for war crimes and crimes against humanity that were adopted when defining the crimes that fall within the jurisdiction of the Court. First, with respect to war crimes, the requirement of large-scale commission under the Statute is *alternative* to the requirement of commission as part of a policy. Second, the statutory

requirement of either large-scale commission or part of a policy is not absolute but qualified by the expression "in particular". Third, the requirement of "systematic" commission of crimes is not contained in article 8 but only in article 7 on crimes against humanity.

71. The Prosecutor is correct in arguing that imposing a legal requirement of "large-scale or systematic" within article 17 (1) (d) of the Statute would not only render inutile article 8 (1) of the Statute contrary to the principles of interpretation but would further contradict the express intent of the drafters in rejecting any such fixed requirement therein (see document in support, paragraph 46). Indeed, it would be inconsistent with article 8 (1) of the Statute if a war crime that was not part of a plan or policy or part of a large-scale commission could not, under any circumstances, be brought before the International Criminal Court because of the gravity requirement of article 17 (1) (d) of the Statute.

72. As to the "social alarm" caused to the international community by the relevant conduct, which, in the Pre-Trial Chamber's opinion, is a consideration for the first prong of the Pre-Trial Chamber's test, the Pre-Trial Chamber has not explained from where it derived this criterion. It is not mentioned in the Statute at all. As the Prosecutor has correctly pointed out in his document in support (at paragraph 49), the criterion of "social alarm" depends upon subjective and contingent reactions to crimes rather than upon their objective gravity. The crimes listed in articles 5 to 8 of the Statute have been carefully selected. As is apparent from the Preamble and articles 1 and 5 of the Statute, these crimes are considered the most serious crimes of international concern. The subjective criterion of social alarm therefore is not a consideration that is necessarily appropriate for the determination of the admissibility of a case pursuant to article 17 (1) (d) of the Statute.

(ii) The category of most senior leaders suspected of being most responsible

73. The second and third prongs of the test developed by the Pre-Trial Chamber are also based on a flawed interpretation of article 17 (1) (d) of the Statute. The Pre-Trial Chamber stated that the deterrent effect would be greatest if the International Criminal Court only dealt with the highest ranking perpetrators. In this context, the Pre-Trial Chamber stated that persons at the top who play a major role "are the ones who can most effectively prevent or stop the commission of such crimes" and that "only by concentrating on this type of individual can the deterrent effects of the Court be maximised" (see impugned decision, paragraphs 54-55). This assertion is questionable: It may indeed have a deterrent effect if high-ranking leaders who are suspected of being responsible for having committed crimes

within the jurisdiction of the Court are brought before the International Criminal Court. But that the deterrent effect is highest if all other categories of perpetrators *cannot* be brought before the Court is difficult to understand. It seems more logical to assume that the deterrent effect of the Court is highest if no category of perpetrators is *per se* excluded from potentially being brought before the Court.

74. The imposition of rigid standards primarily based on top seniority may result in neither retribution nor prevention being achieved. Also, the capacity of individuals to prevent crimes in the field should not be implicitly or inadvertently assimilated to the preventive role of the Court more generally. Whether prevention is interpreted as a long-term objective, i.e. the overall result of the Court's activities generally, or as a factor in a specific situation, the preventive role of the Court may depend on many factors, much broader than the capacity of an individual to prevent crimes.

75. The predictable exclusion of many perpetrators on the grounds proposed by the Pre-Trial Chamber could severely hamper the preventive, or deterrent, role of the Court which is a cornerstone of the creation of the International Criminal Court, by announcing that any perpetrators other than those at the very top are automatically excluded from the exercise of the jurisdiction of the Court.

76. The particular role of a person or, for that matter, an organization, may vary considerably depending on the circumstances of the case and should not be exclusively assessed or predetermined on excessively formalistic grounds.

77. Criteria considered by the Pre-Trial Chamber such as the national or regional scope of activities of a group or organization, the exclusively military character of a group, the capacity to negotiate agreements, the absence of an official position, the capacity to change or prevent a policy, are not necessarily directly related to gravity as set out in article 17 (1) (d). They ignore the highly variable constitutions and operations of different organizations and could encourage any future perpetrators to avoid criminal responsibility before the International Criminal Court simply by ensuring that they are not a visible part of the high-level decision-making process. Also, individuals who are not at the very top of an organization may still carry considerable influence and commit, or generate the widespread commission of, very serious crimes. In other words, predetermination of inadmissibility on the above grounds could easily lead to the automatic exclusion of perpetrators of most serious crimes in the future.

78. In addition, the teleological interpretation by the Pre-Trial Chamber conflicts with a contextual interpretation of the Statute. Various provisions of the Rome Statute could relate to persons other than the most senior leaders suspected of being the most responsible. Article 33 establishes rules relating to the irrelevance of superior orders; rules regarding the irrelevance of superior orders for those who received such orders would be superfluous if only perpetrators who were in senior positions - and would thus be more likely to be giving than acting pursuant to those orders - could be brought before the International Criminal Court. Furthermore, article 27 (1), first sentence, of the Statute provides that the Statute "shall apply equally to all persons without any distinction based on official capacity."

79. In addition, the Preamble to the Rome Statute mentions "most serious crimes" but not "most serious perpetrators". The Preamble to the Statute in paragraphs five and six respectively states "perpetrators" and "those responsible for international crimes". The reference in paragraph five of the Preamble to "perpetrators" is not prefixed by the delineation "most serious" or "most responsible". Such language does not appear elsewhere in the Statute in relation to the category of perpetrators. Had the drafters of the Statute intended to limit its application to only the most senior leaders suspected of being most responsible they could have done so expressly.

(iii) The reference to the ad hoc international criminal tribunals

80. The reliance by the Pre-Trial Chamber on the procedural law and practice of the ICTY and ICTR is flawed in the present case. It should be noted that United Nations Security Council resolution 1534 of 26 March 2004, to which the Pre-Trial Chamber refers prior to citing the rules of the ICTY Rules of Procedure and Evidence referring to "most senior leaders suspected of being most responsible", was adopted in the context of, and made specific reference to, the completion strategies of the ICTY and the ICTR. In addition, prior to the relatively recent adoption of the rules referred to, the ICTY had conducted proceedings against individuals of various ranks over a number of years without being restricted to the most senior leaders. The International Criminal Court is not in the same position in that it is beginning, rather than ending, its activities. In addition, being a permanent institution, it may face a variety of different and unpredictable situations. For the foregoing reasons, the reference made by the Pre-Trial Chamber to the current criteria applicable to the ICTY and the ICTR does not lead the Appeals Chamber to the conclusion that article 17 (1) (d) of the Statute should be interpreted as imposing the extremely high threshold attributed to it by the Pre-Trial Chamber, thereby also weakening the preventive effect of the proceedings of the Court.

(iv) The Pre-Trial Chamber's test in light of the drafting history of article 17 (1) (d) of the Statute

81. The drafting history of article 17 (1) (d) of the Statute also contradicts the Pre-Trial Chamber's interpretation of the gravity requirement. The current article 17 (1) (d) of the Statute was contained as article 35 (c) in the draft Statute for an International Criminal Court prepared by the International Law Commission in 1994 (contained in *Report of the International Law Commission on the work of its forty-sixth session, 2 May to 22 July 1994,* General Assembly Official Records, Forty-ninth Session, Supplement No. 10 (A/49/10), pages 43 to 146, hereafter: "1994 draft Statute," at page 105). The provision reads as follows: "The Court may … decide … that a case is inadmissible on the ground that the crime in question … (c) is not of such gravity to justify further action by the Court." The language that is used in the current article 17 (1) (d) of the Statute was used in the commentary of the International Law Commission to article 35 of the 1994 draft Statute, where the International Law Commission pointed out that "[t]he grounds for holding a case inadmissible are, in summary, that the crime in question … *is not of sufficient gravity to justify further action by the Court*" (see ibid., at page 106, emphasis added). By the time of the Rome Conference, this latter language had found its way into the draft Statute (see article 15 (1) (d) of the draft Statute for the International Criminal Court prepared by the Preparatory Committee, contained in *Report on the Preparatory Committee for the Establishment of an International Criminal Court*, 14 April 1998, UN Doc. A/Conf.183/2/Add. 1, pages 2 to 167, at pages 40 and 41). It is important to note that in the discussions and negotiations leading to the Rome Conference, a suggestion had been made to replace the wording of the gravity clause in article 35 of 1994 draft Statute with stricter language: In 1996, an alternative proposal for article 35 was submitted by a delegation at the Preparatory Committee; the relevant part on the gravity requirement was to read as follows: "A case is inadmissible before the Court if: … (e) the matters of which complaint has been made were not of exceptional gravity such as to justify further action by the Court" (see *Preparatory Committee on the Establishment on an International Criminal Court, 25 March – 12 April 1996, Annex Complementarity, A compilation of concrete proposals made in the course of the discussion for amendment of the ILC draft statute,* 8 April 1996, UN Doc. A/AC/CRP.9/Add. 1, at page 7).

82. For the reasons stated above, the Appeals Chamber finds that the three-pronged test that has been established by the Pre-Trial Chamber is flawed. The application of such a flawed test by the Pre-Trial Chamber to the circumstances of the case against Mr. Bosco Ntaganda was necessarily incorrect.

C. Material effect of the error of law on the impugned decision

83. Article 83 (2) of the Statute provides that in case of an error of law, the Appeals Chamber may reverse or amend an appealed decision only if the error has materially affected the appealed decision. Whether this provision also applies to appeals that are brought under article 82 (1) (a) of the Statute or only to appeals brought under 81 (1) and (2) of the Statute is questionable. The Appeals Chamber considers that in the present case, there is no need to determine this question, because, in any event, the appealed decision was materially affected by the error of law identified in the preceding section of this judgment.

84. A decision is materially affected by an error of law if the Pre-Trial or Trial Chamber would have rendered a decision that is substantially different from the decision that was affected by the error, if it had not made the error. The Prosecutor's application for a warrant of arrest against Mr. Bosco Ntaganda was rejected by Pre-Trial Chamber I only because the Pre-Trial Chamber found the case against him inadmissible. Had the Pre-Trial Chamber refrained from determining the admissibility, it would have considered on the basis of article 58 (1) of the Statute whether a warrant of arrest should be issued against the suspect. Even if one assumes, for the sake of argument, that the Pre-Trial Chamber had come to the conclusion that it is not satisfied that there are reasonable grounds to believe that Mr. Bosco Ntaganda has committed a crime within the jurisdiction of the Court or that his arrest does not appear necessary for the reasons enumerated in article 58 (1) (b) of the Statute, and for that reason had refused to issue a warrant of arrest against Mr. Bosco Ntaganda, such refusal would have been substantially different from the refusal on the ground that the case against the suspect is inadmissible. This follows already from the fact that while a refusal on the ground of the inadmissibility of the case can be appealed pursuant to article 82 (1) (a) of the Statute, a refusal of a warrant of arrest on other grounds can only be appealed pursuant to article 82 (1) (d) of the Statute, if at all.

D. The Second and Third grounds of appeal

85. The Chamber deems it unnecessary to examine these grounds which have been made in the alternative, in light of its upholding the first ground of appeal.

E. Appropriate relief

86. In respect of the first ground of appeal the Prosecutor has advanced four requests to the Appeals Chamber: The identification of the correct legal principle in the interpretation of

article 17 (1) (d) of the Statute; the reversal of the impugned decision as far as it determines that the case against Mr. Bosco Ntaganda is inadmissible; the declaration that the case against Mr. Ntaganda is admissible; and, lastly, the remand of the matter to the Pre-Trial Chamber for it to determine whether or not the Prosecutor's application for a warrant of arrest against Mr Bosco Ntaganda should be granted.

87. The requested relief can only be granted in part.

88. Pursuant to rule 158 (1) of the Rules of Procedure and Evidence, the Appeals Chamber on an appeal under article 82 (1) (a) of the Statute may "confirm, reverse or amend the decision appealed." Clearly, as the impugned decision was materially affected by an error of law, the Appeals Chamber cannot confirm the impugned decision.

89. As to the first request by the Prosecutor – identification of the correct legal principle in the interpretation of article 17 (1) (d) of the Statute – the Appeals Chamber, as stated in a preceding section of this judgement, having determined that the Pre-Trial Chamber's interpretation of article 17 (1) (d) of the Statute was incorrect will not "identify the correct legal principle to be applied" given the ex parte, Prosecutor only, nature of the proceedings and in the absence of full submissions from all participants.

90. As to the second and third requests – to reverse the impugned decision on inadmissibility and declare the case against Mr Bosco Ntaganda admissible – the Chamber for the reasons set out above will reverse the finding of inadmissibility and not make any finding of its own as to the admissibility of the case against Mr. Bosco Ntaganda.

91. As to the fourth request – the remand of the matter to the Pre-Trial Chamber for the purpose of determining, on the basis of article 58 (1) of the Statute, whether a warrant of arrest should be issued against Mr. Bosco Ntaganda – the Appeals Chamber notes that rule 158 (1) of the Rules of Procedure and Evidence does not explicitly foresee the remand of a matter to the Pre-Trial or Trial Chamber that rendered the impugned decision. Nevertheless, the Appeals Chamber considers that in the present case, the remand of the matter to Pre-Trial Chamber I is warranted, because the Pre-Trial Chamber curtailed its enquiry under article 58 of the Statute on the basis that the case was inadmissible. In those circumstances, the Pre-Trial Chamber continued by stating that it "did not consider it possible to issue a warrant of arrest for Mr. Bosco Ntaganda and for this reason no further question concerning the Prosecutor's application in relation to Mr. Bosco Ntaganda need be analysed" (see impugned decision, paragraph 89).

92. As the Appeals Chamber has reversed the Pre-Trial Chamber's determination that the case against Mr. Bosco Ntaganda is inadmissible, the Prosecutor's application for a warrant of arrest against him has to be remanded to the Pre-Trial Chamber to complete its review under article 58 of the Statute.

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

Judge Navanethem Pillay
Presiding Judge

Judge Philippe Kirsch

Judge Sang-Hyun Song

Judge Erkki Kourula

Dated this 13th day of July 2006

At The Hague, The Netherlands

Situation in the Democratic Republic of the Congo **"Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'", 13 July 2006**

Separate and partly dissenting opinion of Judge Georghios M. Pikis

1. Pre-Trial Chamber I ("Pre-Trial Chamber") refused[1] the application[2] of the Prosecutor for the issuance of a warrant for the arrest of Mr. Bosco Ntaganda, sought in the context of the investigation of war crimes allegedly committed by him, in the district of Ituri of the Democratic Republic of the Congo, between July 2002 and December 2003. The Pre-Trial Chamber found the case against him to be inadmissible and on that account dismissed the application.

2. The Prosecutor appealed[3] the decision pursuant to the provisions of article 82 (1) (a) of the Rome Statute ("Statute") making decisions on admissibility appealable. By his appeal he seeks primarily the reversal of the decision on admissibility.[4]

3. The Pre-Trial Chamber determined the case to be inadmissible upon consideration of the provisions of article 19 (1) of the Statute, binding it, as it declared, to rule from the outset on the admissibility of the case and the facts founding it against the suspected person, lacking, according to its decision, the attributes of gravity envisaged by the Statute. The pre-trial court acknowledged in the process that there are reasonable grounds to believe that the crimes in respect of which the arrest was sought were committed, holding themselves bound at that preliminary stage of the proceedings by the facts set out

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[1] *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58" 10 February 2006 (ICC-01/04-01/06-US-Exp-Corr renumbered ICC-01/04-118-US-Exp-Corr) – "decision of the Pre-Trial Chamber".
[2] *Situation in the Democratic Republic of the Congo* "Prosecutor's Application for Warrants of Arrest, Article 58" 12 January 2006 (ICC-01/04-98-US-Exp).
[3] *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* "Prosecutor's Appeal against Pre-Trial Chamber I's 10 February 2006 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'" 14 February 2006 (ICC-01/04-01/06-3-US-Exp renumbered ICC-01/04-125-US-Exp).
[4] See *ibid.* paragraph 3.

in the Prosecutor's application though not by their legal characterization. The following extracts from their decision reflect the pre-trial court's position on the subject:

> 15. Second, in the Chamber's view, when deciding on the Prosecution's Application, the Chamber is bound, pursuant to article 58 (1) of the Statute, by the factual basis and the evidence and information provided by the Prosecution in the Prosecution's Application, the Prosecution's Submission and the Prosecution's Further Submission.
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> 16. However, the Chamber considers that it is not bound by the Prosecution's legal characterization of the conduct referred to in the Prosecution's Application. Indeed, a literal interpretation of article 58 (1) of the Statute would require that the Chamber issue a warrant of arrest if, in addition to the apparent need for the arrest of the relevant person, "there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court". Hence, in the Chamber's view, the reference to "a crime", as opposed to any of the specific crimes referred to in the Prosecution's Application, leads to the conclusion that a warrant of arrest must be issued even if the Chamber disagrees with the Prosecution's legal characterization of the relevant conduct.

It would be strange if it was otherwise for admissibility cannot be decided in the abstract but by reference to the facts founding the case against the person whose arrest is sought. The pertinent question is whether a case is admissible in the light of the facts founding it. Do they disclose a justiciable crime under the Statute? That is the question to be answered.

4. Adhering to a previous decision[5] of Pre-Trial Chamber II, the Pre-Trial Chamber held that the determination of admissibility is a prerequisite for the assumption of jurisdiction to deal with an arrest warrant.[6] The decision of Pre-Trial Chamber II relied upon is encapsulated in the following laconic statement "[…] the case against Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen falls within the jurisdiction of the Court and appears to be admissible."[7] The Pre-Trial Chamber addressed the question of admissibility on its own motion feeling duty bound to so before

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[5] *Situation in Uganda* "Decision on the Prosecutor's Application for Warrants of Arrest under Article 58" 8 July 2005 (ICC-02/04-01/05-1-US-Exp) unsealed pursuant to Decision no. ICC-02/04-01/05-52 dated 13 October 2005..
[6] Paragraph 18 of the decision of the Pre-Trial Chamber.
[7] See *supra*, footnote 5, page 2.

dealing with any other issue in the cause.[8] In so ruling, as may be surmised, the pre-trial court construed the word "may" in the context of article 19 (1) of the Statute as meaning "shall".

5. Their decision on the subject defies the principal rule on the interpretation of treaties and conventions enshrined in the Vienna Convention on the Law of Treaties[9] - section 31 (1) –, referred to by the Pre-Trial Chamber, inasmuch as a meaning is attached to a word other than its ordinary one. Article 19 (1) reads:

> The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.[10]

6. The use of the auxiliary verbs "shall" and "may" as definitive of the circumstances under which different powers of the Court may be exercised in the same legal provision suggests in itself a differentiation between the requisites for their invocation. The context in which the word "may" is employed reinforces the view that it was intended to carry a meaning other than the one imported by the word "shall". Unlike jurisdiction, the Pre-Trial Chamber is not under duty to satisfy itself *ab initio* that a case is admissible. It is bound to address such a question if a challenge to the admissibility of a case is mounted by anyone of the parties enumerated in sub-paragraphs a), b) or c) of article 19 (2) or raised by the Prosecutor under article 19 (3) of the Statute. The Pre-Trial Chamber may address admissibility on its own motion at a stage of the proceedings it considers appropriate. The word "may" in the context of article 19 (1) of the Statute imports permission as opposed to a duty to do something; and as with every permissive power, discretion vests in the court to adopt or refrain from adopting a course. Discretion is vested in a Chamber to raise a question of admissibility on its own motion by article 19 (1) of the Statute, a discretion that must be exercised judicially by reference to such factors as in justice have a bearing on the decision. Among those factors is amenity to hear the persons and entities specified in article 19 (3) of the Statute, namely a referring

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[8] Paragraph 19 of the decision of the Pre-Trial Chamber.
[9] 1155 United Nations Treaty Series 18232, signed on 23 May 1969 and entered into force on 27 January 1980.
[10] The French version reads: "La Cour s'assure qu'elle est compétente pour connaître de toute affaire portée devant elle. Elle peut d'office se prononcer sur la recevabilité de l'affaire conformément à l'article 17."

State or the Security Council and victims. The suspect is not at the scene at the time the warrant of arrest is sought. This is yet another consideration to be taken into account by the Court in deciding whether admissibility should be addressed at that stage of the proceedings. The Rules of Procedure and Evidence, notably rules 58 and 59, establishing the procedural framework for the determination of an issue of admissibility, are premised on the aforesaid understanding of the Statute. In this case admissibility was addressed in their absence because the proceedings for the issue of a warrant of arrest were held ex parte (Prosecutor only) and in camera. The Pre-Trial Chamber touched[11] upon this issue in passing without dwelling on the implications of holding an admissibility hearing in the absence of persons and entities with a say in the matter (article 19 (3) of the Statute). One cannot underestimate the cogency of the reasons that led the Pre-Trial Chamber to hear the application for a warrant of arrest in camera and attach a seal to the documents in the proceedings. Attention is drawn to the fact that lack of amenity to hear the entities and persons specified in article 19 (3) of the Statute and other parties on an issue of admissibility may provide strong grounds to refrain from ruling on admissibility. The correctness of its decision to address the admissibility of the case at the outset of the proceedings in the circumstances outlined above is not a ground of appeal or an issue in these proceedings. The appeal is directed against the decision of the Pre-Trial Chamber that the case is inadmissible for the reason that the crimes attributed to the suspect lack the gravity envisaged by the Statute.

I. THE DECISION OF THE PRE-TRIAL CHAMBER

7. The Pre-Trial Chamber determined, in the first place, that the crimes attributed to Mr. Bosco Ntaganda were committed a) after the Statute came into force; b) within the territory of a State Party which c) confessed inability to assume jurisdiction for the investigation of the case.[12] In fact, the case was referred to the Prosecutor by the State herself, the Democratic Republic of the Congo. The Pre-Trial Chamber satisfied itself

[11] Paragraph 19 of the decision of the Pre-Trial Chamber.
[12] Paragraphs 21 to 28 of the decision of the Pre-Trial Chamber.

that it had a right to deal with the case under the provisions of article 19 (1) of the Statute in the light of the facts disclosed in the application for the issuance of a warrant of arrest; an application fashioned to the provisions of article 58 (1) of the Statute.

8. The court ruled that the case against Mr. Bosco Ntaganda is inadmissible because the accusation levelled against him lacked the elements of seriousness and gravity envisaged by articles 5 (1) and 17 (1) (d) of the Statute respectively to merit judicial consideration by the International Criminal Court. Their reasons for coming to this conclusion may be summarized as follows.

9. Only "the most serious crimes for the international community as a whole"[13] can be made the subject of investigation and prosecution. The Pre-Trial Chamber came to this conclusion on a consideration of the opening part of article 5 (1) of the Statute reading: "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole." At paragraph 42 of its decision, it is stated:

> The Chamber also observes that this gravity threshold is in addition to the drafters' careful selection of the crimes included in articles 6 to 8 of the Statute, a selection based on gravity and directed at confining the material jurisdiction of the Court to "the most serious crimes of international concern". Hence, the fact that a case addresses one of the most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court. [footnote omitted]

It does appear that the court drew a distinction between jurisdiction and material jurisdiction, a differentiation made nowhere in the Statute. The analysis made in the aforesaid paragraph may be seen at the background of the finding of the Pre-Trial Chamber that the crimes ascribed to the suspect fall within the jurisdiction of the Court.[14] As the court said, "material jurisdiction" is confined to the crimes that are of the gravest concern to the international community. Here they juxtapose "material jurisdiction" and "jurisdiction", implying that only crimes in respect of which the Court has "material jurisdiction" are justiciable and consequently can be made the subject of investigation and prosecution.

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[13] Paragraph 42 of the decision of the Pre-Trial Chamber.
[14] See Paragraphs 21 to 28 of the decision of the Pre-Trial Chamber.

10. Having defined what appears to be the first gravity threshold pursuant to the provisions of article 5, the Pre-Trial Chamber proceeded to establish the requisites of "the additional gravity threshold"[15], as it described the effect of the provisions of article 17 (1) (d) of the Statute. In interpreting its provisions the pre-trial court invoked the principles laid down in the Vienna Convention on the Law of Treaties[16], albeit without detailing them.

11. According to the decision under appeal, article 17 (1) (d) of the Statute limits the crime(s) triable by the International Criminal Court to those that "[...] present particular features which render it especially grave"[17]. The Pre-Trial Chamber added later that "[...] the conduct [...] must be either systematic [...] or large scale. If isolated instances of criminal activity were sufficient, there would be no need to establish an additional gravity threshold [...]"[18]. The Pre-Trial Chamber said thereafter that "in assessing the gravity of the relevant conduct, due consideration must be given to the social alarm such conduct may have caused in the international community"[19].

12. The interpretation placed by the Pre-Trial Chamber on article 17 (1) (d) of the Statute confines the crime(s) triable by the International Criminal Court to those committed by the top leadership of a State, organization or entity. In its view only "the most senior leaders"[20] are liable to prosecution for the international crimes defined in the Statute "suspected of being the most responsible"[21]; the persons bearing the highest responsibility for the commission of crimes coming within the purview of the Statute.

13. In the Pre-Trial Chamber's view only crimes (a) involving systematic conduct or committed on a large-scale, (b) by the top leadership of States, organizations or entities are triable by the Court or can be made the subject of a prosecution.[22] A restrictive definition is provided as to the culprit or culprits who may qualify as a member or

[15] Terminology used in *inter alia* paragraphs 47, 49, 51 of the decision of the Pre-Trial Chamber.
[16] 1155 United Nations Treaty Series 18232, signed on 23 May 1969 and entered into force on 27 January 1980.
[17] Paragraph 46 of the decision of the Pre-Trial Chamber.
[18] Paragraph 47 of the decision of the Pre-Trial Chamber.
[19] Paragraph 47 of the decision of the Pre-Trial Chamber.
[20] Paragraph 51 of the decision of the Pre-Trial Chamber.
[21] Paragraph 51 of the decision of the Pre-Trial Chamber.
[22] See paragraph 64 of the decision of the Pre-Trial Chamber.

members of the top leadership. A leader in the above sense, the court explained, is a person that is in a position to "effectively prevent or stop the commission of those crimes"[23] and to "negotiate, sign and implement ceasefires or peace agreements"[24]. If more than one group or entity take part in the perpetration of such crimes only the top leadership of the group most responsible can be made the subject of prosecution and trial.

14. Only by construing the Statute in the way outlined above, will in the view of the Pre-Trial Chamber, the Statute acquire maximum deterrent effect. In their decision the matter is put thus:

> In the Chamber's opinion, only by concentrating on this type of individual can the deterrent effects of the activities of the Court be maximized because other senior leaders in similar circumstances will know that solely by doing what they can to prevent the systematic or large-scale commission of crimes within the jurisdiction of the Court can they be sure that they will not be prosecuted by the Court.[25]

One is apt to infer from the above that if everyone guilty of the crimes defined by the Statute would be liable to be prosecuted and tried by the Court the Statute would have lesser deterrent effect.

15. The parallelism of the jurisdiction of the International Criminal Court with that of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") as currently fashioned[26] in the ICTY's Rules of Procedure and Evidence is unfortunate. The jurisdiction of the ICTY was limited by a resolution of the United Nations Security Council of 26 March 2006 (Resolution 1534[27]), calling upon the ICTY that indictments concentrate on "[...] the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in resolution 1503 (2003)."[28], a resolution the provisions of which were incorporated[29] in the Rules of

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[23] Paragraph 54 of the decision of the Pre-Trial Chamber.
[24] Paragraph 86 of the decision of the Pre-Trial Chamber.
[25] Paragraph 55 of the decision of the Pre-Trial Chamber.
[26] Rule 28 (A) of the Rules of Procedure and Evidence of the ICTY (adopted on 11 February 1994; last amendment on 29 March 2006).
[27] S/RES/1534 (2004) adopted by the United Nations Security Council at its 4935th meeting on 26 March 2004.
[28] United Nations Security Council Resolution 1534 of 26 March 2004 (S/RES/1534 (2004)), paragraph 5.

Procedure and Evidence of the ICTY. The jurisdiction of the ICTY was not thus fettered at the inception of the Tribunal.[30] The jurisdiction of the International Criminal Court is neither limited nor confined in the above or in any way. This apart, there are many other differences between the jurisdictional framework, objects and mandate of the International Criminal Court and ad hoc courts endowed with jurisdiction to try crimes committed in a particular country or area often limited to a specific period in time. Evidently, the Pre-Trial Chamber construed the jurisdiction of the International Criminal Court in much the same way as the jurisdiction of the ICTY was redefined by the aforesaid resolution of the United Nations Security Council.

16. The Rome Statute makes no distinction between persons liable to the jurisdiction of the courts of States Parties and the International Criminal Court. The Court has, subject to complementarity, jurisdiction over every crime punishable under the Statute. In the Preamble of the Statute, it is proclaimed that every State Party must "exercise its criminal jurisdiction over those responsible for international crimes"[31], i.e. the crimes penalized by the Statute. States Parties are enjoined to exercise the jurisdiction trusted to them. If they do not, a corresponding duty is cast upon the Court to investigate, prosecute and try the persons liable for the commission of one or more crimes punishable under the Statute.

17. In its conclusions, the Pre-Trial Chamber refers approvingly to the Prosecutor's policy paper of September 2003 citing[32] therefrom its concluding remarks:

> The global character of the ICC, its statutory provisions and logistical constraints support a preliminary recommendation that, as a general rule, *the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.*[33]

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[29] Rule 28 (a) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia.
[30] See Statute of the ICTY adopted on 25 May 1993by United Nations Security Council Resolution 827.
[31] Paragraph 6 of the Preamble of the Statute.
[32] Paragraph 62 of the decision of the Pre-Trial Chamber.
[33] Paper on Some Policy Issues before the Office of the Prosecutor, September 2003, p. 7, available at http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf (last accessed on 12 July 2006).

The Pre-Trial Chamber's agreement with the Prosecutor is subject to the proviso that the confinement of the investigation and prosecution of crimes to those bearing the greatest responsibility as leaders of States or organizations is not a matter of discretion but a jurisdictional imperative binding the Court and the Prosecutor alike.

18. In the opinion of the Pre-Trial Chamber article 17 (1) (d) of the Statute imposes an "additional gravity threshold"[34] that confines the jurisdiction of the Court to try crimes enumerated in the Statute to a small class or group of persons that may under certain circumstances dwindle down to one. Their approach to the subject is reflected in the passage cited below.

> In this regard, the Chamber considers that the additional gravity threshold provided for in 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.[35]

19. The Pre-Trial Chamber addressed the admissibility of the case against Mr. Bosco Ntaganda in light of the above criteria, deciding that the case against him was inadmissible as he did not belong to the top leadership of the organization (the FPLC[36]) in furtherance to the plans of which the crimes attributed to him were committed.[37] The court underlined that the suspect was third in the command hierarchy of the aforesaid organization and lacked *inter alia* authority to negotiate a ceasefire or peace. Its position on the subject is mirrored in the following extract from its decision:

> In this regard, on the basis of the evidence and information provided by the Prosecution, the Chamber finds that, for instance, unlike Mr. Thomas Lubanga Dyilo, Mr. Bosco Ntaganda (as FLPC Deputy Chief of General Staff subordinated to both the FPLC Chief of General Staff and the FPLC Commander-in-Chief) did not have *de iure* or *de facto* authority to negotiate, sign and implement ceasefires or peace agreements, or 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

[34] Terminology used in *inter alia* paragraphs 47, 49, 51 of the decision of the Pre-Trial Chamber.
[35] Paragraph 51 of the decision of the Pre-Trial Chamber.
[36] Abbreviation for "Forces Patriotiques pour la Libération du Congo" (see page 5 of the "Prosecutor's Application for Warrants of Arrest, Article 58" 12 January 2006 (ICC-01/04-98-US-Exp)).
[37] Paragraph 89 and page 66 of the decision of the Pre-Trial Chamber.

> hands of the UPC/FPLC during the second half of 2002 and in 2003.[38] [footnotes omitted]

20. The Pre-Trial Chamber concluded there are no reasonable grounds to believe that Mr. Bosco Ntaganda "(1) was a core actor in the decision-making process of the UPC/FPLC's policies/practices; (2) had *de iure* or *de facto* autonomy to prevent the implementation of such policies/practices"[39].

21. According to article 58 of the Statute in order to effect an arrest, the suspected person must appear to have committed a crime within the jurisdiction of the Court. That such crime(s) for the purposes of assuming jurisdiction have been committed, as recorded in the decision under review,[40] is noted earlier in this judgment. The additional requirements stipulated for above can find no justification anywhere in the Statute. The picture relevant to the position and activities of Mr. Bosco Ntaganda is portrayed in the following passage from paragraph 85 of the decision of the Pre-Trial Chamber:

> In the Chamber's view, and according to the evidence and information presented by the Prosecution, there are reasonable grounds to believe that Mr Bosco Ntaganda, as Deputy Chief of General Staff for military operations, was the immediate superior of the FPLC sector commanders and had *de iure* and *de facto* authority over the FPLC training camp commanders and the FPLC field commanders. Furthermore, there are reasonable grounds to believe that Mr Bosco Ntaganda often visited the FPLC training camps where children under the age of fifteen were being trained to become FPLC soldiers and directly took part in attacks in which FPLC soldiers under the age of fifteen actively participated. However, in the Chamber's view, Mr Bosco Ntaganda's command position over the FPLC sector commanders, FPLC training camp commanders and FPLC field officers and his alleged direct participation in the commission of some of the crimes referred to in the Prosecution's Application do not necessarily mean that he was among the most senior leaders within the DRC situation. [footnotes omitted]

It follows from the above that the commission of a crime falling within the jurisdiction of the Court is not the ground by reference to which admissibility is evaluated. And so the

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[38] Paragraph 86 of the decision of the Pre-Trial Chamber.
[39] Paragraph 87 of the decision of the Pre-Trial Chamber.
[40] See *inter alia* paragraphs 25, 26, 27, 78, 79, 85 of the decision of the Pre-Trial Chamber.

application of the Prosecutor for the issue of a warrant for the arrest of Mr. Bosco Ntaganda was refused.

II. THE PROSECUTOR'S ARGUMENTS

22. The Prosecutor appealed[41] the decision. In his document[42] that followed his notice he sets out the grounds of appeal and the reasons in support thereof. He acknowledges that while article 82 (1) (a) of the Statute renders decisions on admissibility liable to appeal, it does not spell out or specify the grounds upon which such a decision may be challenged. Such grounds in his view should be no different from those set down in article 81 (1) (a), namely "(i) Procedural error, (ii) Error of fact, (iii) Error of law".[43] He submits that the decision of the Pre-Trial Chamber is vulnerable to be set aside for both procedural and substantive errors of law.[44]

23. An appeal by way of review imports competence to examine the correctness of the decision which is the subject of the appeal. This is a necessary incident of the conferment of appellate jurisdiction to review the decision of a first instance court. Article 4 of the Statute provides that the "Court" shall have the legal capacity necessary for the exercise of its functions and the fulfilment of its purposes. Ponderation of the grounds upon which a decision may be reviewed is an incident of the appellate jurisdiction of the Appeals Chamber. Such grounds are inevitably tied to the purposes of the appellate jurisdiction, which endow the court of appeal with power to review its correctness. A correct judgment is one legally and factually well-founded. Consequently, the grounds of appeal must be defined by reference to the legal and factual foundation of the decision under review. Legal errors may arise from the misapplication of adjectival or

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[41] *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* "Prosecutor's Appeal against Pre-Trial Chamber I's 10 February 2006 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'" 14 February 2006 (ICC-01/04-01/06-3-US-Exp renumbered ICC-01/04-125-US-Exp).
[42] *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* "Prosecutor's Document in Support of the Appeal" 3 March 2006 (ICC-01/04-120-US) – "document in support".
[43] See paragraphs 6 to 18 of the document in support.
[44] Paragraph 8 of the document in support.

substantive law. The factual substratum and its soundness is the second element of the equation. The powers of the Appeals Chamber in an appeal under article 82 (1) and (2) of the Statute set out in rule 158 (1) of the Rules of Procedure and Evidence lend support to the view expressed above. The Appeals Chamber may "confirm, reverse or amend the decision appealed". Examination of the correctness of the decision under appeal is a prerequisite for the exercise of the aforesaid powers. Ultimately, the grounds upon which a decision on admissibility can be impugned are no different from those enumerated in article 81 (1) (a) of the Statute. To these grounds one must necessarily add those affecting a fair trial that should pervade the judicial process as mandated by article 21 (3) of the Statute. The Regulations of the Court make it incumbent upon the parties to specify the grounds of appeal together with the reasons, legal and/or factual that support them (regulation 64 of the Regulations of the Court).

24. The Prosecutor complains that the Pre-Trial Chamber determined the issue of admissibility without identifying it as a specific subject meriting separate consideration from any other issue in the cause. This is put forward as his second ground of appeal.[45] Earlier in this judgment attention was drawn to the procedural framework governing admissibility. No need arises to repeat what has been said on the matter. It emerges from the examination of the record of the proceedings that the complaint of the Prosecutor is not justified. The Pre-Trial Chamber listed[46] as a subject for consideration and sequential examination at the hearing of 2 February 2006 the following among other issues:

> 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;[47]
>
> 6. Whether the case against Mr. Bosco Ntaganda has any or all of the features mentioned under 4, paying particular attention to the following issues:

[45] Paragraphs 63 to 81 of the document in support.
[46] See *Democratic Republic of the Congo* "Decision concerning the Hearing on 2 February 2006" 31 January 2006 (ICC-01/04-108-US-Exp); see also subsequently with respect to agenda point 3 the transcript of the hearing of 2 February 2006 (T-01-04-8-Conf-Exp-EN), at pages 12 (question by Judge Kuenyehia), and 19 (question by Judge Jorda).
[47] Page 4 of *Democratic Republic of the Congo* "Decision concerning the Hearing on 2 February 2006" 31 January 2006 (ICC-01/04-108-US-Exp).

i. Detailed description of the hierarchical organization of the FPLC and of 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 FPLC and of the position of Mr Bosco Ntaganda within the broader movement UPC/FPLC;
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 of the FPLC on the other hand;
iv. Role of Mr Bosco Ntaganda in the commission of the crimes alleged in the Prosecution's Application;[48]

During the hearing that followed, the Pre-Trial Chamber sought information about the position of Mr. Bosco Ntaganda in the command structure of the UPC[49]/FPLC and his participation, if any, in the decision-making process.[50] The political and military situation in Ituri was the subject of many questions designed to elicit the stature of the organization to which the suspected person allegedly belonged and the range of their activities[51]. A fair inference from the above is that admissibility by reference to the gravity of the offences attributed to Mr. Bosco Ntaganda was raised as a distinct subject for examination. And the Prosecutor was afforded an opportunity to put forward his case on the subject.

25. Other errors or mistakes vitiating, in the Prosecutor's contention, the ruling on admissibility result from a) the misinterpretation of article 17 (1) (d) of the Statute and wrongful exegesis of it,[52] and b) failure to make a proper evaluation of the facts relevant to the case against Mr. Bosco Ntaganda.[53] The scale of the crimes allegedly committed by

[48] Pages 4 and 5 of *Democratic Republic of the Congo* "Decision concerning the Hearing on 2 February 2006" 31 January 2006 (ICC-01/04-108-US-Exp).
[49] Abbreviation for "Union des Patriots Congolais" (see page 5 of the "Prosecutor's Application for Warrants of Arrest, Article 58" 12 January 2006 (ICC-01/04-98-US-Exp)).
[50] See transcript of the hearing of 2 February 2006 (T-01-04-8-Conf-Exp-EN) at pages 36 and 49, 50 (questions by Judge Steiner).
[51] See transcript of the hearing of 2 February 2006 (T-01-04-8-Conf-Exp-EN), at pages 12 (question by Judge Kuenyehia), and 19 (question by Judge Jorda); see also in this respect *Situation in the Democratic Republic of Congo* "Decision concerning Supporting Materials in Connection with the Prosecution's Application for Warrants of Arrest pursuant to article 58" 20 January 2006 (ICC-01/04-102-US-Exp), page 6, point (iv) (a.)-(h.).
[52] Paragraphs 19 to 62 of the document in support.
[53] See paragraphs 82 to 90 of the document in support.

Mr. Bosco Ntaganda, as submitted, was far greater than the Pre-Trial Chamber conceived it to be and his position in the hierarchy of the FPLC far more consequential than it found it to be.[54]

26. In his document in support of the appeal the Prosecutor expresses agreement with the position of the Pre-Trial Chamber that "the gravity threshold is in addition to the drafters' careful selection of crimes"[55]. And as the Prosecutor says he "supports many of the views of the Pre-Trial Chamber on the desirability of focused case selection, as a matter of policy"[56]; a fact reflected in his policy statement[57] cited by the Pre-Trial Chamber.[58]

27. The gravamen of the Prosecutor's complaint with the decision under appeal lies in his own words in "an error of law to inject exceptionally rigid requirements into the *legal* standard of 'sufficient gravity' in Article 17 (1) (d)"[59]

III. THE GRAVITY OF A CASE AND ADMISSIBILITY

28. Article 17 (1) (d) of the Statute reads:

> Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) [...]; (b) [...]; (c) [...]; (d) The case is not of sufficient gravity to justify further action by the Court.[60]

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[54] See paragraphs 88 to 90 of the document in support.
[55] Paragraph 21 of the document in support.
[56] Paragraph 21 of the document in support.
[57] Paper on Some Policy Issues before the Office of the Prosecutor, September 2003, p. 7, available at http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf (last accessed on 13 July 2006).
[58] See also *Office of the Prosecutor*, Iraq response, 9 February 2006, available at http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (last accessed on 13 July 2006) and *Office of the Prosecutor*, Venezuela response, 9 February 2006, available at http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf (last accessed on 13 July 2006) of which judicial notice may be taken under the provisions of article 69 (6) of the Statute.
[59] Paragraph 22 of the document in support.
[60] The French version reads: "Eu égard au dixième alinéa du préambule et à l'article premier, une affaire est jugée irrecevable par la Cour lorsque [...] d) L'affaire n'est pas suffisamment grave pour que la Cour y donne suite."

29. To begin, neither by its terms nor contextually is the gravity requirement set down in article 17 (1) of the Statute associated with or linked to the provisions of any other section of the Statute. It is an autonomous provision to be interpreted and applied in the context of article 17 illuminated to the extent that light may be thrown on the subject by the general purposes of the Statute.

30. In the determination of an issue of admissibility, article 17 (1) of the Statute requires the "Court" to have regard to paragraph 10 of the Preamble that emphasizes that: "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions". Complementarity is a significant aspect of the Statute trusting in the first place jurisdiction to try the offences defined by the Statute to national courts and in the second place to the International Criminal Court, if such States are unable or unwilling to do so (article 17 (1) (a) and (b) of the Statute).

31. In this connection reference may be made with benefit to another paragraph of the Preamble, notably paragraph 6 "recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". This part of the Preamble underlines the duty of every Member State to bring to justice everyone responsible for the crimes penalized by the Statute. If a State is either unable or unwilling to carry out this duty, the case becomes admissible before the International Criminal Court with a corresponding duty placed upon its organs to exercise its criminal jurisdiction, the Prosecutor to investigate and prosecute[61] and the court to try[62] the case under the provisions of the Statute, provided always that the crime falls within the jurisdiction of the Court. The range of the jurisdiction of States Parties and that of the Court is coextensive. The Court as an organic entity is put in the position of an overseer of the investigatory, prosecutorial and judicial processes of national authorities with regard to crimes falling within the jurisdiction of the Court, ready to assume jurisdiction in case of inability or unwillingness on the part of a State to carry out its duties under the Statute.

[61] See articles 53 (1), (2), 54 (1) (b) of the Statute.
[62] See articles 61 (1), (7), (11), 64, 74 and 76 of the Statute.

32. The construction by the Pre-Trial Chamber of article 5 of the Statute as imposing a gravity requirement for the justiciability of a case to that laid down by article 17 has no legal foundation. In the context of article 5 (1) of the Statute the term "the most serious crimes of concern to the international community as a whole" is descriptive of the offences criminalized thereunder, namely a) the crime of genocide, b) crimes against humanity, c) war crimes d) the crime of aggression (to be defined[63]). Any doubt on the subject is dispelled by the provisions of article 1 of the Statute stating that the "most serious crimes of international concern" are those referred to therein. It is implicit from the provisions of article 5 that the four crimes singled out thereunder are not the only crimes of concern to the international community, but those of its greatest concern. The travaux préparatoires[64] lend confirmation to this interpretation of article 5 inasmuch as they disclose that suggestions for the inclusion in the list of the crimes justiciable under the Statute other than those included were rejected. They examined *inter alia* whether drug trafficking and the crime of terrorism, no doubt crimes of international concern, should be included in the Statute;[65] but decided at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court to exclude them,[66] confining "the most serious crimes of concern to the international community as a whole"(article 5 (1) of the Statute) to those identified in the Statute.

33. The second sentence of article 5 (1) of the Statute makes it abundantly clear that "the Court has jurisdiction" over all the crimes that are defined in the Statute. It reads:

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[63] See articles 5 (2), 121 and 123 of the Statute.
[64] The relevance of the preparatory works for the interpretation of a treaty derives from article 32 (1) of the Vienna Convention on the Law of Treaties (1155 United Nations Treaty Series 18232, signed on 23 May 1969 and entered into force on 27 January 1980).
[65] See *Report of the Preparatory Committee on the Establishment of an International Criminal Court* in United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June – 17 July 1998, *Official Records Volume III* (A/CONF.183/13 (Vol. III), Reports and other documents, pages 14 to 22, specifically pages 21 ("crimes of terrorism") and 22 ("crimes involving the illicit traffic in narcotic drugs and psychotropic substances"); see before *International Law Commission*, Forty-sixth session, 2 May-22 July 1994, (A/CN.4/L.491/Rev.1) Revised Draft Statute for an International Criminal Court, article 20 and Annex; *Report of the International Law Commission on the work of its forty-sixth session*, 2 May-22 July 1994, General Assembly, Official Records, Forty-ninth Session, Supplement No. 10 (A/49/10), paragraphs 59 and 60.
[66] See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June – 17 July 1998, *Official Records Volume II* (A/CONF.183/13 (Vol. II), Summary records of the plenary meetings and of the meetings of the Committee of the Whole, pages 268 to 273, in particular the statements of Japan (page 270, paragraph 32), Sweden (page 270, paragraph 40), Syrian Arab Republic (page 271, paragraph 45), Norway (page 271, paragraph 50).

> "The Court has jurisdiction in accordance with this Statute with respect to the following crimes (a) [...] (b) [...] (c) [...] (d) [...]."

The jurisdiction of the Court under article 5 is not dependant upon any gravity requirement or threshold in relation to conduct criminalized by articles 6, 7 and 8 of the Statute. The jurisdiction of the Court embraces every act or species of conduct made a crime thereunder. A gravity requirement for purposes of admissibility is only set down in article 17 (1) (d) of the Statute. This interpretation of article 5 tallies with the avowed aims of the founders of the Statute to criminalize internationally conduct that has torn the world apart during the 20th Century involving crimes threatening the peace, the security and the well-being of the world.[67] The crimes over which jurisdiction subject to complementarity is vested in the International Criminal Court have the attributes of the abhorrent conduct that the Statute criminalizes universally; crimes that have scarred humanity.

34. The Pre-Trial Chamber in its decision identified, as explained above, two elements of gravity that should necessarily be satisfied in addition to everything else in order for a crime to qualify as sufficiently grave to become the subject-matter of investigation, prosecution and trial. The facts founding the charge must in their words "[..] present particular features which render it especially grave"[68]. The criminal conduct must, as the court stated, a) be "systematic (pattern of incidents) or large-scale"[69] and b) it must cause "social alarm"[70] to the world at-large. The ingredients of the offences punishable under the Statute are explicitly laid in articles 6, 7, and 8 and are to an extent exemplified by the Elements of Crimes. Where the legislator intended to make the existence of a system or the scale of crimes an element of the offence, he did so by express words as in the case of crimes against humanity, where a systematic attack directed against the civilian population is in itself an ingredient of the offence. Whenever systematic conduct is made a definitive element of a crime, anyone committing crimes that constitute part of the system is criminally responsible. The culprit need not be himself/herself either the person who evolved or initiated the system or who

[67] See paragraph 2 of the Preamble of the Statute.
[68] Paragraph 46 of the decision of the Pre-Trial Chamber.
[69] Paragraph 47 of the decision of the Pre-Trial Chamber.
[70] Paragraph 47 of the decision of the Pre-Trial Chamber.

himself/herself committed crimes on a large scale. Any person who commits a crime within the context of the system is guilty of the offence and criminally liable under the provisions of the Statute. The causing of social alarm to the international community is an element unknown to the law that can find no justification anywhere in the Statute. The alarm of the international community from the commission of the grave crimes universally criminalized by the Statute is manifested by the Statute itself, intended to ban from the face of the earth the offences that constitute its subject-matter.

35. The definition of the crimes amenable to the jurisdiction of the Court is in no way correlated to the part played by the perpetrator in their overall planning, initiation and execution or the position held by the offender in the leadership of a State or organization that planned them. Responsibility for the commission of a crime is individual as affirmed by article 25 of the Statute. Individual responsibility may appropriately be treated as the hallmark of the Statute rendering each one committing crimes falling within its provisions liable to prosecution. From the head of a State downwards every person is personally accountable for the commission of every crime categorized in the Statute. In short, individual responsibility is the centre piece of the Statute criminalizing internationally conduct that so much injured humanity. Article 25 (2) of the Statute declares that "[a] person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute." Liability is not limited to any category of persons guilty of conduct that constitutes a crime under the Statute. Article 27 of the Statute in plain terms declares that official capacity is irrelevant both with regard to the commission of the crime and in respect of the punishment for it. Moreover, subject to the provisions of article 33 of the Statute superior orders are no defence. This article would be superfluous and in fact contradictory to the Statute if the compass of the jurisdiction of the Court was confined to crimes committed by the top leadership of the State or organization that plan them. By the reasoning of the Pre-Trial Chamber, in an autocratic or monocratic State or organization where you have one man rule only the monocrat or autocrat would be liable to prosecution and trial for the crimes outlawed by the Statute.

36. The mental element (mens rea) that must accompany the commission of a crime under the Statute articulated in article 30 is in no way related to the position of the culprit in the organization or entity that plans the prohibited conduct. Likewise, the grounds itemized under article 31 of the Statute, excluding criminal responsibility, are totally independent of the position of the perpetrator in the command structure of an organization or entity. On the contrary, persons in a position of command or superiors may be guilty of crimes committed by their subordinates where they fail to take reasonable measures within their power to prevent or repress their commission as laid down in article 28 of the Statute.

37. Article 9 (1) of the Statute provides that:

> Elements of Crime shall assist the Court in the interpretation and application of articles 6, 7, and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

The ingredients of the war crimes allegedly committed by Mr. Bosco Ntaganda, namely conscripting and enlisting in armed forces and using children under fifteen in an armed conflict not of an international character as defined by article 8 (2) (e) (vii) of the Statute do not associate criminal responsibility with the position held by the culprit in any group, entity or organization. The Elements of Crimes exegetically state that the perpetrator should be aware of the factual circumstances establishing the crimes and not that he/she should be ultimately responsible for their ordering or orchestration.[71]

38. Article 31 (1) of the Vienna Convention on the Law of Treaties[72] stipulates that words used in a section of a treaty or convention must be given the meaning they ordinarily bear in the context in which they appear; unless established that the parties to the treaty intended to ascribe a different meaning to them.[73] It is in the context of admissibility of a case that paragraph 1 (d) of article 17 is emplaced. As indicated, the International Criminal Court is vested with jurisdiction subject to the principle of complementarity to try every crime defined by articles 6, 7, or 8. Article 17 (1) (d) of the

[71] See Elements of Crimes, Article 8 (2) (e) (vii), element 5.
[72] 1155 United Nations Treaty Series 18232, signed on 23 May 1969 and entered into force on 27 January 1980.
[73] See article 31 (4) of the Vienna Convention on the Law of Treaties (1969).

Statute establishes an exception to the rule where "the case is not of sufficient gravity to justify further action by the Court".

39. "Gravity" in its ordinary sense denotes weightiness.[74] The gravity of a case is not postulated in the abstract but by reference to what the Court need not concern itself with. Moreover, it is qualified by the word "sufficient", meaning "enough, adequate"[75]. "Sufficient" is an adjective determinative of a given level, quality or quantity. In the context we are dealing with, it signifies a case of sufficient weightiness to merit consideration by the Court. Sub-paragraph (d) of paragraph 1 of article 17 does not link or correlate the weightiness of a case with any objective criteria of seriousness on any scale of gravity. Its ambit is confined to cases that merit no "further action by the Court". The word "further" in its ordinary meaning signifies "an addition to"[76] something. The word precedes the term "action by the Court" meaning "additional action by the Court". Some action must have preceded the proceedings before the Court contemplated by article 17 (1) (d) of the Statute. In this case, there is no indication that any action was taken by the International Criminal Court against Mr. Bosco Ntaganda, unless the investigation of the case against Mr. Ntaganda is in itself regarded as prior action by the Court. For that to be possible, the word "Court" in the context of article 17 (1) (d) of the Statute should be construed as embracing all the organs of the Court and not just the judiciary; a proposition not free from doubt. If that interpretation is adopted, one would have to juxtapose the fact of the investigation itself with the processing of the case before the judicial authorities of the Court and decide that no further action need be taken in the matter. Neither the Pre-Trial Chamber in its decision nor the Prosecutor in support of the appeal referred to the implications of the word "further" in the context of article 17 (1) (d) of the Statute. The impression is left that they equated "further" with "any" action by the Court. Even if we attach that meaning to the word through a purposive interpretation of article 17 (1) (d) of the Statute in context, which conceivably might not be ruled out,

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[74] The French term used is in article 17 (1) (d) is "grave" denoting "Qui a de l'importance, du poids" or "susceptible de conséquences sérieuses, de suites fâcheuses, dangereuses" (Le Grand Robert de la Langue Française, Dictionnaires le Robert, Paris, 2001, page 1506).
[75] *Soanes C., Stevenson A.*. (Editors), Concise Oxford Dictionary, Oxford University Press, Eleventh Edition, at page 1441.
[76] See *Soanes C., Stevenson A.*. (Editors), Concise Oxford Dictionary, Oxford University Press, Eleventh Edition, page 577.

the implications of article 17 (1) (d) would not be materially different; for in that situation, the case would have to be such as to qualify as a matter unworthy of consideration by the Court.

40. Which cases are unworthy of consideration by the International Criminal Court? The answer is cases insignificant in themselves; where the criminality on the part of the culprit is wholly marginal; borderline cases. A crime is insignificant in itself if, notwithstanding the fact that it satisfies the formalities of the law, i.e. the insignia of the crime, bound up with the mens rea and the actus reus, the acts constituting the crime are wholly peripheral to the objects of the law in criminalising the conduct. Both, the inception and the consequences of the crime must be negligible. In those circumstances the Court need not concern itself with the crime nor will it assume jurisdiction for the trial of such an offence, when national courts fail to do so. Any other construction of Article 17 (1) (d) of the Statute would neutralize its avowed objects and purposes and to a large extent empty it of content. The subject-matter must be minimal, so much so that it can be ignored by the Court.

41. The interpretation accorded by the Pre-Trial Chamber to article 17 (1) (d) of the Statute puts in reality the judiciary in the position of defining the crimes that are subject to its jurisdiction. They make the Court the arbiter of which crimes come within the ambit of the Statute for purposes of investigation and trial. If justiciable crimes were circumscribed in the way indicated by the Pre-Trial Chamber, this would not only apply to crimes investigated by the Prosecutor but also to crimes over which the Court may exercise complementary jurisdiction. The jurisdiction of national courts of States Parties and the complementary jurisdiction of the International Criminal Court are coincidental. If crimes within the ambit of the jurisdiction of the Court were limited as suggested by the Pre-Trial Chamber to those who planned or directed the execution of the grave crimes universally criminalized by the Statute the complexion of the Statute would be wholly different; there would be no reason to impose a duty upon States Parties to bring to justice everyone offending against the provisions of the Statute. Had the makers of the Statute intended to limit the jurisdiction of the Court to the principal perpetrators of the offences criminalized therein, the Statute would be differently worded and its objects and

purposes differently defined. The decision of the Pre-Trial Chamber defies fundamental aims of the Statute, expressed in every relevant provision of it, not to suffer or leave unpunished the perpetrators of the crimes defined therein. This is wherefrom the deterrent effect of the Statute derives, holding each and sundry from the head of the State downwards liable for the grave crimes that form the subject-matter of the Statute. Had it been the intention of the law-makers to limit justiciable crimes under the Statute to the most serious ones, they would have established the necessary criteria for their classification.

IV. REMEDIES

42. The powers of the Appeals Chamber in relation to appeals under article 82 (1) (a) of the Statute are specified in rule 158 (1) of the Rules of Procedure and Evidence. They reflect the nature of the jurisdiction of the appeals court to review by reference to its correctness the decision under appeal. These powers are "to confirm, reverse or amend the decision appealed." To "reverse" signifies the following of a course opposite to that taken. And in the context of judicial proceedings the word bears a special meaning, a term of art, bestowing power to "set aside, revoke, annul"[77], "overturn"[78]. In light of the reasons founding my decision, I associate myself with the order of the Appeals Chamber reversing the decision given whereby the case was dismissed as inadmissible.

43. No doubt the reversal of the decision on admissibility demolishes the foundation upon which the dismissal of the application for a warrant of arrest was based. That decision too should be set aside as it is implicitly set aside by the second order of the Appeals Chamber. The question is what next.

44. I cannot associate myself with the second order made by the Appeals Chamber, whereby the application for a warrant of arrest against the suspect is "remanded to the Pre-Trial Chamber for completion of the review limited to the requirements stipulated in

[77] *Brown L.* (Editor in chief), The Shorter Oxford English Dictionary, Oxford University Press, 2002, Fifth Edition, Volume 2, N-Z, page 2566.
[78] *Garner B. A.* (Editor in chief), Eighth Edition, Thomsen West, 2004, page 1344.

article 58 (1) of the Statute. Should the Pre-Trial Chamber issue a warrant of arrest, it should identify the appropriate organ responsible for the preparation and transmission of the request for arrest and surrender." I entertain serious doubts whether it is at all open to the Appeals Chamber to send the case back for either reconsideration or further consideration. Rule 158 (1) of the Rules of Procedure and Evidence does not confer in terms power to do so.

45. Where it was intended to bestow power upon the Appeals Chamber to remit a factual issue for consideration back to the court that issued the decision under appeal, this was done expressly as in the case of the second part of article 83 (2) of the Statute with respect to appeals under article 81 (1) and (2) of the Statute. The same holds true as to the issuance of an order for a new trial (article 83 (2) (b) of the Statute). I shall not probe the matter further nor shall I offer a concluded opinion on the subject; an issue not debated before the Appeals Chamber at any length.

46. Appellate jurisdiction imports per se power to make a judgment or issue an order as the first instance court is empowered to make or grant. Furthermore, this is implicit from the powers vested in the Appeals Chamber by rule 158 (1) and explicit from the provisions of rule 149 of the Rules of Procedure and Evidence. The facts relevant to the issue of a warrant of arrest are uncontested. The Appeals Chamber is in an equally good position as the Pre-Trial Chamber to draw conclusions from them.

47. The Pre-Trial Chamber correctly stated that, at the preliminary stage revolving around the issue of a warrant of arrest, it is bound by the facts put forward by the Prosecutor in support thereof. Relying on such facts, the pre-trial court made a number of findings relevant to the jurisdiction of the Court to the effect that there are reasonable grounds to believe that the crimes under consideration fall within the jurisdiction of the Court. To these findings of the Pre-Trial Chamber, I have alluded earlier in my judgment.[79]

48. In my judgment the Appeals Chamber is bound to complete the inquiry and determine the application for the issuance of a warrant of arrest. This is an incident of the

[79] See *supra*, paragraph 21 and footnote 41.

appellate process. Therefore, I dissent from the decision of the majority that the case should be sent back to the Pre-Trial Chamber for the determination of the application for the issue of a warrant of arrest.

Judge Georghios M. Pikis

Dated this 13th day of July 2006
At The Hague, The Netherlands