ANNEX II

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Date: **10 February 2006**

PRE-TRIAL CHAMBER I

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

Under Seal
Ex Parte, Prosecution Only

Decision on the Prosecutor's Application for Warrants of Arrest, Article 58

The Office of the Prosecutor:
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PRE-TRIAL CHAMBER I of the International Criminal Court ("the Chamber" and "the Court" respectively) has been seized of the Prosecutor's Application for Warrants of Arrest, Article 58 ("the Prosecution's Application") filed on 13 January 2006 pursuant to article 58 of the Statute of the Court ("the Statute") in the context of the investigation of the situation in the Democratic Republic of the Congo (DRC). Having examined the written and oral submissions of the Prosecution, the Chamber

RENDERS THIS DECISION.

I. Introduction

I.1 Background

1. The Prosecutor's Application for Warrants of Arrest, Article 58 ("Prosecution's Application") filed by the Prosecution on 13 January 2006, requested the issuance of warrants of arrest for Mr Thomas Lubanga Dyilo and Mr Bosco Ntaganda.

2. The Decision concerning Supporting Materials in Connection with the Prosecution's Application for Warrants of Arrest pursuant to article 58 ("Decision concerning Supporting Materials"), filed by the Chamber on 20 January 2006, invited the Prosecution to submit supporting materials and convened a hearing on the said Application to be held on 2 February 2006.

3. The Prosecution's Submission of Further Information and Materials ("Prosecution's Submission") was filed by the Prosecution on 25 January 2006.

4. The Prosecution's Submission of Further Information and Materials ("Prosecution's Further Submission") was filed by the Prosecution on 27 January 2006.

5. The Decision concerning the hearing on 2 February 2006, filed by the Chamber on 31 January 2006, informed the Prosecution of the agenda of the hearing.

6. On 2 February 2006 a hearing was held *ex parte* with the Prosecution and in closed session to deal with matters arising from the Prosecution's Application.

I.2 Preliminary Comments

7. On 20 January 2006, the Chamber filed its Decision concerning Supporting Materials, in which the Chamber invited the Prosecution to provide supporting materials relating to the Prosecution's Application. The Chamber notes that in the Prosecution's Further Submission the Prosecution made the following statements:

> In no case, however, are the respective addressees of such "invitations" required to act upon them. Accordingly, the Prosecution interprets the "invitation" by the Pre-Trial Chamber by its literal meaning.[1]
>
> In addition, in support of the Prosecution's terminological interpretation of the notion of "summary of evidence and any other information", article 58 of the Rome Statute does not provide for submission of "supporting materials" or any materials in addition to the summary. Whilst the notion of "supporting materials", "supporting documentation", or "supporting documents" is known as a concept in both the Rome Statute and the Rules of Procedure and Evidence, it is not used in the context of the procedures following an application by the Prosecution for arrest warrants. The silence of the law allows for the only conclusion that the legislator has deliberately chosen, at the stage of the arrest warrant application, to require the Pre-Trial Chambers to trust the Prosecution's summary.[2]
>
> The analysis confirms the Prosecutor's submission that it falls entirely within the discretion of the Prosecutor to decide what he believes necessary to be submitted to the Pre-Trial Chamber. Accordingly, the Prosecutor has a choice in what to present to the Pre-Trial Chamber.[3]

8. The Chamber notes that according to article 58 (1) of the Statute the Chamber must decide whether to grant or reject the Prosecution's Application for the issuance of a warrant of arrest on the basis of (i) "the Application" and (ii) "the evidence or other information submitted by the

[1] *Prosecution's Further Submission*, para.13.
[2] *Ibid.*, para.19.
[3] *Ibid*, para 23

Prosecutor". Hence, in the Chamber's view, the materials which might be submitted by the Prosecution in support of a request for a warrant of arrest are not confined to the Prosecution's Application. The Chamber also notes that, according to article 58 (2) of the Statute, the Prosecution's Application itself shall contain, *inter alia*, "[a] summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes".

9. The Chamber agrees with the Prosecution that the Chamber's invitation to submit further materials did not impose any procedural obligation on the Prosecution and thus it falls within the discretion of the Prosecution to decide what to present to the Chamber in order to convince it (i) that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and (ii) that the arrest of the person appears necessary. However, the Chamber would emphasise that unless it is intimately convinced that the two above-mentioned conditions have been met, it will decline to issue any warrant of arrest.

10. The Prosecution claims that at this stage the legislator has chosen to require the Chamber "to trust the Prosecution's summary".[4] In the Chamber's view, however, the legislator has chosen at this stage to require under article 58 (1) the Chamber to review not only the Prosecution's Application but also "the evidence or other information submitted by the Prosecutor" in order to satisfy itself that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and that his arrest appears necessary.

[4] *Prosecution's Further Submission*, para 19.

11. In the Chamber's view, the review which article 58 (1) of the Statute requires that the Chamber undertake is consistent with the fact that, apart from other collateral consequences of being the subject of a case before the Court, the fundamental right of the relevant person to his liberty is at stake. Accordingly, the Chamber emphasises that it will not take any decision limiting such a right on the basis of applications where key factual allegations are fully unsupported.

12. As required by article 21 (3) of the Statute, the Chamber considers this to be the only interpretation consistent with the "reasonable suspicion" standard provided for in article 5 (1) (c) of the European Convention on Human Rights[5] and the interpretation of the Inter-American Court of Human Rights in respect of the fundamental right of any person to liberty under article 7 of the American Convention on Human Rights.[6]

I.3 Preliminary Observations

13. Before discussing the substance of the Prosecution's Application, the Chamber would make several preliminary observations.

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[5] According to the European Court of Human Rights, the reasonableness of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary deprivation of liberty. See ECHR, *Case of Fox, Campbell and Hartley* v. *United Kingdom*, "Judgment", 30 August 1990, Application No. 12244/86;12245/86;12383/86, paras. 31-36, ECHR, *Case of K.-F* v *Germany*, "Judgment", 27 November 1997, Application No. 144/1996/765/962, para. 57, ECHR, *Case of Labita* v. *Italy*, "Judgment", 6 April 2000, Application No. 26772/95, paras. 155-161, ECHR, *Case of Berktay v Turkey*, (available in French only) "Judgment", 1 March 2001, Application No. 22493/93, para 199; ECHR, *Case of O'Hara* v. *United Kingdom*, "Judgment", 16 October 2001, Application No 37555/97, paras. 34-44

[6] See for instance, IACHR, *Case of Bamaca Velasquez* v. *Guatemala*, "Judgment", 25 November 2000, Series C No. 70, paras. 138-144; IACHR, *Case of Loayza-Tamayo* v. *Perú*, "Judgment", 17 September 1997, Series C No. 33, paras 49-55; and IACHR, *Case of Gangaram-Panday* v. *Suriname*, "Judgment", 21 January 1994, Series C No 16, paras. 46-51.

14. First, in discussing whether the Chamber has an intimate conviction that the "reasonable grounds to believe" standard and the appearance standard required by article 58 (1) of the Statute have been met, the Chamber, although under no obligation to do so, will often refer to the evidence and information provided in the Prosecution's Application, the Prosecution's Submission and the Prosecution's Further Submission. However, the Chamber wishes to emphasise that the intimate conviction of the Chamber in relation to any given finding is not reached only on the basis of the specific evidence and information expressly discussed.

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.

16. However, the Chamber considers that it is not bound by the Prosecution's legal characterisation 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 characterisation of the relevant conduct.

17. Third, the Chamber notes that article 19 (1) of the Statute provides that:

> 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.

18. The Chamber recalls the practice of Pre-Trial Chamber II in its decisions on the Prosecution's requests for warrants of arrest for Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen, which grants the Prosecution's requests only after finding that the cases fall within the jurisdiction of the Court and appear admissible.[7] In this regard, 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.

19. As the Prosecution rightly points out, the Chamber notes that, in the present case, its review of the jurisdiction and admissibility of the cases against Mr Thomas Lubanga Dyilo and Bosco Ntaganda is *ex officio* insofar as the Prosecution raised no issue of jurisdiction or admissibility in the Prosecution's Application.[8] The Chamber also notes that rule 58 (2) 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, may take appropriate measures for the proper conduct of the proceedings and may hold a hearing. Furthermore, the Chamber recalls its decision of 20 January 2006 to receive and maintain the Prosecution's Application under seal and to conduct proceedings in connection with the Prosecution's Application *ex parte* and in closed session.[9]

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[7] "Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005", 13 October 2005, ICC-02/04-01/05-53, para 38; "Warrant of Arrest for Vincent Otti", 13 October 2005, ICC-02/04-01/05-54 para. 38; "Warrant of Arrest for Raska Lukwiya", 13 October 2005, ICC-02/04-01/05-55, para 26; "Warrant of Arrest for Okot Odhiambo", 13 October 2005, ICC-02/04-01/05-56, para. 28; and "Warrant of Arrest for Dominic Ongwen", 13 October 2005, ICC-02/04-01/05-57, para. 26.

[8] *Prosecution's Submission*, para. 3, footnote 5.

[9] *Decision concerning Supporting Materials*, p 4.

20. In the present context, the Chamber holds that the *ex officio* 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 must be made *ex parte* with the exclusive participation of the Prosecution and on the basis of the evidence and information provided by the Prosecution in the Prosecution's Application, in the Prosecution's Submission, in the Prosecution's Further Submission and at the hearing of 2 February 2006. Furthermore, such determination is without prejudice to subsequent determinations on jurisdiction or admissibility concerning such cases pursuant to article 19 (1), (2) and (3) of the Statute.

II. Analysis of the jurisdiction and admissibility in the cases against Mr Thomas Lubanga Dyilo and Mr Bosco Ntaganda

II.1 Whether the cases against Mr Thomas Lubanga Dyilo and Mr Bosco Ntaganda fall within the jurisdiction of the Court

21. The Chamber recalls that in its decision of 17 January 2006, it defined the concept of a case as including "specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects."[10] It is therefore the Chamber's view that a case arising from the investigation of a situation will fall within the jurisdiction of the Court only if the specific crimes of the case do not exceed the territorial, temporal and possibly personal parameters defining

10 "Decision on the Application for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5 and VPRS-6" (the "Decision on Applications for Participation"), filed by PTC I on 18 January 2006, para. 65

the situation under investigation and fall within the jurisdiction of the Court.

22. In this regard, the Chamber recalls that in its decisions of 21 April 2005[11] and 17 January 2006,[12] it found:

(i) that the situation in the territory of the DRC since 1 July 2002 was referred to the Prosecutor on 3 March 2004 by the President of the DRC in accordance with articles 13 (a) and 14 of the Statute;

(ii) that on receiving that letter, the Prosecutor decided, on 16 June 2004, to initiate an investigation into the DRC situation;

(iii) that the Prosecution states that it had sent letters of notification to the States Parties and other States which within the terms of such provision could exercise jurisdiction over the crimes concerned; and

(iv) that, according to the Prosecution, no information pursuant to article 18 (2) of the Statute was received.[13]

23. Accordingly, the situation under investigation from which the cases against Mr Thomas Lubanga Dyilo and Mr Bosco Ntaganda arise has been defined as encompassing the territory of the DRC since 1July 2002.[14] As the Prosecution's Application refers to conduct that allegedly took place

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[11] Decision to Hold Consultation under Rule 114 (the "Rule 114 Decision"), filed by PTC I on 21 April 2004, pages 2 and 3.
[12] *Decision on Applications for Participation*, para. 84.
[13] The Chamber notes the letter of 21 July 2004 sent by the Ministry of Foreign Affairs of the Republic of Rwanda to the Prosecution under article 18 (2) of the Statute, stating that "[REDACETD] (Exhibit No. HNE 5-01/04-US, p. 2).
[14] *Decision on Applications for Participation*, paras. 65 and 68.

between July 2002 and December 2003 in certain camps and areas located in the region of Ituri in the territory of the DRC,[15] the Chamber finds that the cases against Mr Thomas Lubanga Dyilo and Mr Bosco Ntaganda fall within the DRC situation currently under investigation.

24. As the Chamber pointed out in paragraph 85 of its decision of 17 January 2006:

> To fall within the Court's jurisdiction, a crime must meet the following conditions: it must be one of the crimes mentioned in article 5 of the Statute, that is to say, the crime of genocide, crimes against humanity and war crimes; the crime must have been committed within the time period laid down in article 11 of the Statute; and the crime must meet one of the two alternative conditions described in article 12 of the Statute.

25. With regard to the first condition, the Chamber finds[16] that there are reasonable grounds to believe that between July 2002 and December 2003 there was an armed conflict in the region of Ituri and that the alleged crimes underlying the cases against Mr Thomas Lubanga Dyilo and Mr Bosco Ntaganda (the alleged policy/practice of the *Union des Patriotes Congolais* (the "UPC")/*Forces Patriotiques pour la Libération du Congo* (the "FPLC") of enlisting into the FPLC, conscripting into the FPLC and using to participate actively in hostilities children under the age of fifteen) were committed in connection with that armed conflict. In addition, the Chamber observes that enlisting into the FPLC, conscripting into the FPLC or using to participate actively in hostilities children under the age of fifteen constitutes a war crime under either article 8 (2) (e) (vii) of the Statute if the conflict is of a non-international character or article 8 (2) (b) (xxvi) of the Statute if the conflict is of an international character. Hence, in the Chamber's view the first condition has been met.

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[15] *Prosecution's Application*, pp. 5 and 6.
[16] See *infra*, section III.3.1.

26. Considering that "[t]he Statute entered into force for the RDC on 1 July 2002, in conformity with article 126 (1) of the Statute, the DRC having ratified the Statute on 11 April 2002,"[17] the second condition would be met pursuant to article 11 of the Statute if the crimes underlying the cases against Mr Thomas Lubanga Dyilo and Mr Bosco Ntaganda were committed after 1 July 2002. As the cases against Mr Thomas Lubanga Dyilo and Mr Bosco Ntaganda referred to crimes committed between July 2002 and December 2003, the Chamber considers that the second condition has also been met.

27. Regarding the third condition, in its decision of 17 January 2006 the Chamber found that under article 12 (2) of the Statute one of the following two alternative criteria must be met: (a) the relevant crime was committed in the territory of a State Party or a State which has made a declaration under article 12 (3) of the Statute; or (b) the relevant crime was committed by a national of a State Party or a State which has made a declaration under article 12 (3) of the Statute.[18] The Chamber notes that the crimes underlying the cases against Mr Thomas Lubanga Dyilo and Mr Bosco Ntaganda were allegedly committed in the region of Ituri on the territory of the DRC, and that the third condition has also been met.

28. The Chamber therefore finds that, on the basis of the evidence and information provided by the Prosecution in the Prosecution's Application, in the Prosecution's Submission, in the Prosecution's Further Submission and at the hearing of 2 February 2006, the cases against Mr Thomas Lubanga Dyilo and Mr Bosco Ntaganda fall within the jurisdiction of the Court.

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[17] *Decision on Applications for Participation*, para. 88.
[18] *Ibid* , paras. 91 and 93.

II.2 Admissibility of the cases against Mr Thomas Lubanga Dyilo and Mr Bosco Ntaganda

29. The Chamber considers that the admissibility test of a case arising from the investigation of a situation has two parts. The first part of the test relates to national investigations, prosecutions and trials concerning the case at hand insofar as such case would be admissible only if those States with jurisdiction over it have remained inactive in relation to that case[19] or are unwilling or unable, within the meaning of article 17 (1) (a) to (c), 2 and 3 of the Statute. The second part of the test refers to the gravity threshold which any case must meet to be admissible before the Court.[20] Accordingly, the Chamber will treat them separately.

II.2.1 Whether those States with jurisdiction over the cases against Mr Thomas Lubanga Dyilo and Mr Bosco Ntaganda have remained inactive or are unwilling or unable to proceed in relation to those cases.

30. Concerning the first part of the admissibility test, the Chamber notes that according to article 17 (1) (a) to (c) the first requirement for a case arising from the investigation of a situation to be declared inadmissible is that at least one State with jurisdiction over the case is investigating, prosecuting or trying that case, or has done so.

31. Having defined the concept of case as including "specific incidents during which one or more crimes within the jurisdiction of the Court seem to have

[19] Interpretation *a contrario* of article 17, paras. 1 (a) to (c) of the Statute.
[20] Article 17 (1) (d) of the Statute.

been committed by one or more identified suspects,"[21] the Chamber considers that it is *a conditio sine qua non* for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court.

32. The Chamber also notes that when a State with jurisdiction over a case is investigating, prosecuting or trying it, or has done so, it is not sufficient to declare such a case inadmissible. The Chamber observes on the contrary that a declaration of inadmissibility is subject to a finding that the relevant State is not unwilling or unable to genuinely conduct its national proceedings in relation to that case within the meaning of article 17 (1) (a) to (c), (2) and (3) of the Statute.

33. Turning to the particular circumstances of the cases at hand, the Prosecution states in relation to the case against Mr Thomas Lubanga Dyilo that:

> On 19 March 2005, Thomas LUBANGA DYILO was arrested and detained by the DRC authorities together with other leaders of Ituri-based military groups. The warrant of arrest, dated 19 March 2005, issued by the competent examining magistrate in the DRC, and the provisional detention of Thomas LUBANGA DYILO are legally based on charges of genocide pursuant to Article 164 of the DRC Military Criminal Code and crimes against humanity pursuant to Articles 166 to 169 of the same code. On 29 March 2005, the DRC authorities issued another arrest warrant against Thomas LUBANGA DYILO, alleging crimes of murder, illegal detention and torture.[22]
>
> Since 19 March 2005, Thomas LUBANGA DYILO is detained by the DRC authorities in Kinshasa in the *Centre Pénitentiaire et de Rééducation de Kinshasa*. From the information available to the Prosecutor, though his detention was renewed a number of times, it is unclear for how long the detention of Thomas LUBANGA DYILO will continue. Recent information provided to the OTP indicates that it cannot be excluded that Thomas LUBANGA DYILO will be released in near future, possibly within three to four weeks, thus prior to the commencement of his trial before this Court.[23]

[21] *Decision on Applications for Participation*, para. 65
[22] *Prosecution's Application*, para. 184.
[23] *Ibid.*, para. 187

34. The Prosecution also states in relation to the case against Mr Bosco Ntaganda that:

> Since 12 April 2005, Bosco NTAGANDA is under a DRC arrest warrant, issued by the Prosecutor of the Tribunal de Grande Instance of Bunia. The arrest warrant details charges of joint criminal enterprise, arbitrary arrest, torture and complicity of assassination pursuant to Articles 156 to 158, 67, 44 and 45 of the DRC Criminal Code. To date, the arrest warrant against Bosco NTAGANDA has not been executed.

35. The Chamber notes that despite the national proceedings conducted by DRC against Mr Thomas Lubanga Dyilo and Mr Bosco Ntaganda, the Prosecution alleges that the cases against them are admissible because:

> In its letter of referral, the Government of the DRC has stated "... les autorités compétentes ne sont malheureusement pas en mesure de mener des enquêtes sur les crimes mentionnés ci-dessus ni d'engager les poursuites nécessaires sans la participation de la Cour Pénale Internationale." Since then, the Government of the DRC, being well aware of the investigations of the OTP, has not informed the OTP otherwise. Accordingly none of the conditions of Article 17(1) of the Statute apply.[24]

36. In the Chamber's view, when the President of the DRC sent the letter of referral[25] to the Office of the Prosecutor on 3 March 2004, it appears that the DRC was indeed unable to undertake the investigation and prosecution of the crimes falling within the jurisdiction of the Court committed in the situation in the territory of DRC since 1 July 2002.[26] In the Chamber's view, this is why the self-referral of the DRC appears consistent with the ultimate purpose of the complementarity regime, according to which the Court by no means replaces national criminal jurisdictions, but it is complementary to them.[27]

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[24] *Ibid*, para 186. See also *Prosecution's Submissions*, para. 21.

[25] *Prosecution's Application*, Annex 1.

[26] *Prosecution's Application*, para. 186 and Annex 1; and *Prosecution's Submission*, paras. 20 and 21 See also MONUC, "Special Report on the events in Ituri, January 2002 – December 2003, S/2004/573", 16 July 2004, report cited in the *Prosecution's Application* at para. 35, footnote 9 and para. 41, footnote 11, available at: http://www.monuc.org/downloads/S_2004_573_2004_English.pdf, and see particularly paras. 31 and 159-161 of the report. In this regard, the Chamber notes that the self-referral or statement by the government of a State that it is unable to investigate or prosecute is not binding for the Court.

[27] *Holmes, J T.*, "The Principle of Complementarity", in *Lee, R S* (Ed.), "The International Criminal Court: The Making of the Rome Statute", (Kluwer Law International, 1999), pp. 41-78, pp. 73-74.

37. However, for the purpose of the admissibility analysis of the cases against Mr Thomas Lubanga Dyilo and Mr Bosco Ntaganda, the Chamber observes that since March 2004 the DRC national judicial system has undergone certain changes, particularly in the region of Ituri where a *Tribunal de Grande Instance* has been re-opened in Bunia.[28] This has resulted *inter alia* in the issuance of two warrants of arrest by the competent DRC authorities for Mr Thomas Lubanga Dyilo in March 2005[29] for several crimes, some possibly within the jurisdiction of the Court, committed in connection with military attacks from May 2003 onwards and during the so-called Ndoki incident in February 2005.[30] Furthermore, on 26 March[31] and 12 April 2005[32] the *Tribunal de Grande Instance* of Bunia issued two warrants of arrest against Mr Bosco Ntaganda for crimes against humanity, membership of a joint criminal enterprise, arbitrary arrest, torture, and complicy in murder. Moreover, as a result of the DRC proceedings against Mr Thomas Lubanga Dyilo, he has been held in the *Centre Pénitentiaire et de Rééducation de Kinshasa* since 19 March 2005.[33] Therefore, in the Chamber's view, the Prosecution's general statement that the DRC national judicial

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[28] See Human Rights Watch Briefing Paper, *Making Justice Work Restoration of the Legal System in Ituri, DRC*, report cited by the *Prosecution's Application* at para. 197, footnote 35, and in particular see introduction of such briefing paper, available at: http://hrw.org/backgrounder/africa/drc0904/. See also the references made in the *Prosecution's Application* (paras. 196 and 197) to the trials of Prince Mugabo (UPC Senior Commander) and of Mr Rafiki Saba Aimable Musangaya (head of the UPC Security and Information Department at the relevant time).

[29] *Prosecution's Submission*, Annex 1, pp. 16 and 17, containing a copy of the DRC warrants of arrest issued against Mr Thomas Lubanga Dyilo on 19 March 2005 and on 29 March 2005.

[30] *Prosecution's Submission*, Annex 1 and Annex 3, pp. 6-9.

[31] *Transcript of the Hearing of 2 February 2006*, p. 6, lines 17-25, whereby the Prosecution affirms that, to the best of its knowledge, the crimes against humanity listed in the 26 March 2005 arrest warrant for Mr Bosco Ntaganda were allegedly committed in connection with incidents that took place before the 1 July 2002. See also Exhibit No HNE 4-01/04-US.

[32] *Prosecution's Submission*, Annex 2 containing a copy of the warrant of arrest issued for Mr Bosco Ntaganda by the *Tribunal de Grande Instance* of Bunia on 12 April 2005

[33] *Prosecution's Application*, para. 187; and *Prosecution's Submission*, Annex 1.

system continues to be unable in the sense of article 17 (1) (a) to (c) and 3, of the Statute does not wholly correspond to the reality any longer.[34]

38. However, the Chamber recalls that for a case arising from the investigation of a situation to be inadmissible, national proceedings must encompass both the person and the conduct which is the subject of the case before the Court. In this regard, the Prosecution submits that the DRC proceedings against Mr Thomas Lubanga Dyilo and Mr Bosco Ntaganda do not encompass the conduct that constitutes the basis of the Prosecution's Application.[35]

39. The Chamber observes that the warrants of arrest issued by the competent DRC authorities against Mr Thomas Lubanga Dyilo and Mr Bosco Ntaganda contain no reference to their alleged criminal responsibility for the alleged UPC/FPLC's policy/practice of enlisting into the FPLC, conscripting into the FPLC and using to participate actively in hostilities children under the age of fifteen between July 2002 and December 2003.[36]

40. As a result, in the Chamber's view, the DRC cannot be considered to be acting in relation to the two specific cases before the Court (which are limited to Mr Thomas Lubanga Dyilo's and Mr Bosco Ntaganda's alleged responsibility for the UPC/FPLC's alleged policy/practice of enlisting into the FPLC, conscripting into the FPLC and using to participate actively in hostilities children under the age of fifteen between July 2002 and December 2003). Furthermore, the Chamber is not aware of any other State

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[34] The Chamber notes the Prosecution's allegations that the DRC authorities are not pursuing the investigations against Mr Thomas Lubanga Dyilo and Mr Bosco Ntaganda (*Transcript of the Hearing of 2 February 2006*, p. 6, lines 12 to 16 and p. 7, lines 19 to 22).

[35] *Prosecutor's Submission*, paras. 18 and 19.

[36] *Prosecution's Submission*, Annex 1, pp. 16 and 17, and Annex 2. The Chamber also notes the Prosecution's explanation in the sense that the crimes referred to in the *Prosecution's Application* are also crimes under the national laws of the DRC (*Transcript of the Hearing of 2 February 2006*, p. 9, lines 5 to 10)

with jurisdiction over the cases against Mr Thomas Lubanga Dyilo and Mr Bosco Ntaganda investigating, prosecuting or trying them, or having done so.

41. Concerning the first part of the admissibility test, the Chamber therefore holds that, on the basis of the evidence and information provided by the Prosecution in the Prosecution's Application, in the Prosecution's Submission, in the Prosecution's Further Submission and at the hearing of 2 February 2006, no State with jurisdiction over the cases against Mr Thomas Lubanga Dyilo and Mr Bosco Ntaganda is acting, or has acted, in relation to those cases. Accordingly, in the absence of any acting State, the Chamber need not make any analysis of unwillingness or inability.

II.2.2 Whether the cases against Mr Thomas Lubanga Dyilo and Mr Bosco Ntaganda meet the gravity threshold provided for in article 17 (1) (d) of the Statute

42. Concerning the second part of the admissibility test, the Chamber notes that according to article 17 (1) (d) of the Statute, any case not presenting sufficient gravity to justify further action by the Court shall be declared inadmissible. 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".[37] Hence, the fact that a case addresses one of the

[37] Para. 4 of the preamble and articles 1 and 5 of the Statute. See also *Von Hebel, H /Robinson, D.*, "Crimes within the Jurisdiction of the Court", in *Lee, R.S.*, (Ed.), "The International Criminal Court: The Making of the Rome Statute", (Kluwer Law International, 1999), pp. 79-126, p. 104.

most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court.

II.2.2.1 The gravity threshold under article 17 (1) (d) of the Statute

43. Considering that the Statute is an international treaty by nature, the Chamber will use the interpretative criteria provided in articles 31 and 32 of the Vienna Convention on the Law of Treaties (in particular the literal, the contextual and the teleological criteria)[38] in order to determine the content of the gravity threshold set out in article 17 (1) (d) of the Statute. As provided for in article 21 (1) (b) and (1) (c) of the Statute, the Chamber will also use, if necessary, the "applicable treaties and the principles and rules of international law" and "general principles of law derived by the Court from national laws of legal systems of the world".

Literal Interpretation

44. The Chamber notes that a literal interpretation makes the application of article 17 (1) (d) of the Statute mandatory. The Chamber also notes that the use of the term "shall" in the *chapeau* of article 17 (1) of the Statute leaves the Chamber no discretion as to the declaration of the inadmissibility of a case once it is satisfied that the case "is not of sufficient gravity to justify further action by the Court."

[38] Article 31 (1) of the Vienna Convention on the Law of Treaties.

Contextual Interpretation

45. According to a contextual interpretation, the Chamber observes that the gravity threshold provided for in article 17 (1) (d) of the Statute must be applied at two different stages: (i) at the stage of initiation of the investigation of a situation, the relevant situation must meet such a gravity threshold and (ii) once a case arises from the investigation of a situation, it must also meet the gravity threshold provided for in that provision. In this regard, the Chamber would emphasise that the scope of the present decision is limited to the determination of the content of the gravity threshold under article 17 (1) (d) of the Statute when it must be applied to a case arising from the investigation of a situation.

46. Furthermore, in the Chamber's view, the fact that the gravity threshold of article 17 (1) (d) of the Statute is in addition to the gravity-driven selection of the crimes included within the material jurisdiction of the Court indicates that the relevant conduct must present particular features which render it especially grave.

47. The Chamber holds that the following two features must be considered. First, the conduct which is the subject of a case must be either systematic (pattern of incidents) or large-scale. If 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. Second, 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. In the Chamber's view, this factor is particularly relevant to the Prosecution's

Application due to the social alarm in the international community caused by the extent of the practice of enlisting into armed groups, conscripting into armed groups and using to participate actively in hostilities children under the age of fifteen.[39]

Teleological Interpretation

48. According to a teleological interpretation, the Chamber observes that the preamble of the Statute emphasises that the activities of the Court must seek "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."[40] The Chamber also notes that the preamble and article 1 of the Statute make clear that the Court can by no means replace national criminal jurisdictions, but it is complementary to them,[41] and that the drafters of the Statute emphasised "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes"[42] and affirmed the need to ensure their effective prosecution "by taking measures at the national level and by enhancing international cooperation".[43]

49. In the Chamber's view, the analysis of the additional gravity threshold provided for in article 17 (1) (d) of the Statute against the backdrop of the preamble of the Statute leads to the conclusion that such an additional gravity threshold is a key tool provided by the drafters to maximise the Court's deterrent effect. As a result, the Chamber must conclude that any

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[39] See *inter alia* "World Youth Report 2005, Report of the Secretary-General, Economic and Social Council, General Assembly", United Nations A/60/61. E/2005/7, Annex, paras. 26-33. See also Special Court for Sierra Leone, *The Prosecutor Against Charles Ghankay also known as Charles Ghankay Macarthur Dapkpana Taylor*, Indictment, 7 March 2003, No. SCSL-03-1-I-001, para. 47; and Special Court for Sierra Leone, *The Prosecutor Against Sam Hinga Norman*, Indictment, 7 March 2003, No. SCSL-03-08-PT-002, para. 24.

[40] Para. 5 of the preamble to the Statute.

[41] Para. 10 of the preamble and article 1 of the Statute.

[42] Para. 6 of the preamble to the Statute.

[43] Para. 4 of the preamble to the Statute.

retributory effect of the activities of the Court must be subordinate to the higher purpose of prevention.

50. In the Chamber's opinion, the teleological interpretation of the additional gravity threshold provided for in article 17 (1) (d) of the Statute leads to the conclusion that other factors, in addition to the gravity of the relevant conduct, must be considered when determining whether a given case meets such a threshold.

51. 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.

52. In the Chamber's view, this additional factor comprises three elements. First, the position of the persons against whom the Prosecution requests the initiation of a case through the issuance of a warrant of arrest or a summons to appear (the most senior leaders).

53. Second, the roles such persons play, through acts or omissions, when the State entities, organisations or armed groups to which they belong commit systematic or large-scale crimes within the jurisdiction of the Court. Third, 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 (those suspected of being most responsible).

54. The Chamber considers that the application of these three factors results from the fact that those persons who, in addition to being at the top of the

State entities, organisations or armed groups allegedly responsible for the systematic or large-scale commission of crimes within the jurisdiction of the Court, play a major role by acts or omissions in the commission of such crimes are the ones who can most effectively prevent or stop the commission of those crimes.

55. In the Chamber's opinion, 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.

Applicable Principles and Rules of International Law

56. The application of these factors is also supported by the applicable principles and rules of international law. In this regard, although a number of low and mid-level perpetrators were indicted and prosecuted by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) during their early years, United Nations Security Council resolution 1534 of 26 March 2004 says *inter alia*:

> "4. Calls on the ICTY and ICTR Prosecutors to review the case load of the ICTY and ICTR respectively in particular with a view to determining which cases should be proceeded with and which should be transferred to competent national jurisdictions, as well as the measures which will need to be taken to meet the Completion Strategies referred to in resolution 1503 (2003) and urges them to carry out this review as soon as possible and to include a progress report in the assessments to be provided to the Council under paragraph 6 of this resolution;
>
> 5. Calls on each Tribunal, in reviewing and confirming any new indictments, to ensure that any such 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)."

57. Accordingly, ICTY rule 28 (A) of the Rules of Procedure and Evidence provides that:

> "On receipt of an indictment for review from the Prosecutor, the Registrar shall consult with the President. The President shall refer the matter to the Bureau which shall determine whether the indictment, prima facie, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal. If the Bureau determines that the indictment meets this standard, the President shall designate one of the permanent Trial Chamber Judges for the review under Rule 47. If the Bureau determines that the indictment does not meet this standard, the President shall return the indictment to the Registrar to communicate this finding to the Prosecutor."

58. Moreover, rule 11 *bis* (C) of the ICTY Rules of Procedure and Evidence provides that:

> [i]n determining whether to refer the case in accordance with paragraph (A), the Referral Bench shall, in accordance with Security Council resolution 1534 (2004), consider the gravity of the crimes charged and the level of responsibility of the accused.[44]

59. In addition, none of the indictments regarding any of the most senior leaders of the State entities, organisations or armed groups involved in the crisis situations in the former Yugoslavia or in Rwanda are confined to isolated instances of criminal activity. On the contrary, all include either systematic criminal activities which occurred in a number of areas during the period relevant to the indictment,[45] or large-scale criminality which may have taken place in one given area within a short time period (such as

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[44] This rule has already been applied in a number of cases to refer cases back to national Courts. See *inter alia* ICTY, *Prosecutor v. Radovan Stankovic*, "Decision on referral of case under rule 11 bis", 17 May 2005, Case No. T 6-23/2-PT, para. 3, ICTY, *Prosecutor v. Mitar Rasevic, Savo Todovic*, "Decision on Referral of Case under rule 11 bis with confidential annexes I and II", 8 July 2005, Case No. IT-97-25/1-PT, para. 3, ICTY, *Prosecutor v. Dragomir Milosevic*, "Decision on referral of case pursuant to rule 11 bis", 8 July 2005, Case No IT-98-29/1-PT, para. 3, ICTY, *Prosecutor v. Zeljko Mejakic, Momcilo Gruban, Dusan Fustar, Dusko Knesevic*, "Decision on Prosecutor's motion for referral of case pursuant to rule 11 bis", 20 July 2005, Case No. IT-02-65-PT, para. 3, ICTY, *Prosecutor v Gojko Jankovic*, "Decision on referral of case under rule 11 bis with confidential annex", 22 July 2005, Case No. IT 96-23/2-PT, para. 3, ICTY, *Prosecutor v Rahim Ademi and Mirko Norac*, "Decision for referral to the authorities of the Republic of Croatia pursuant to Rule 11 bis", 14 September 2005, Case No. IT-04-78-PT, para. 3.

[45] See for instance, ICTR, *Prosecutor v Jean Kambanda*, Amended Indictment, 17 October 1997, Case No. ICTR-97-23-DP, paras. 3.1-3.20, ICTY, *Prosecutor v Radovan Karadzic*, Amended Indictment, 31 May 2000, Case No. IT-95-5/18-PT, paras. 18, 19, 22 and 28; and ICTY, *Prosecutor v Momcilo Krajisnik*, Amended Consolidated Indictment, 7 March 2002, Case No. IT-00-39& 40-PT, paras. 24 and 29.

the execution of at least 7,000 Bosnian Muslims in Srebrenica between 11 and 18 July 1995)[46] or, most frequently, both.[47]

60. In this regard, the Chamber recalls that, unlike the ICTY[48] and ICTR[49] which since their establishment in 1993 and 1994 have been dealing with one crisis situation, the Court is "a permanent institution"[50], which as a result of its broad personal, temporal and territorial jurisdiction,[51] has already initiated the investigation of three different situations (that have taken place since 1 July 2002 in the territories of the Democratic Republic of the Congo, Northern Uganda and Darfur, Sudan)[52] and is currently undertaking the preliminary examination of the situation in the Central African Republic.[53]

61. In the Chamber's view, it is in this context that one realises the key role of the additional gravity threshold set out in article 17 (1) (d) of the Statute in

[46] ICTY, *Prosecutor v Radislav Krstic*, Amended Indictment, 27 October 1999, Case No. IT-98-33-PT, para. 24
[47] See, for example ICTY, *Prosecutor v Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic, Vlajko Stojiljkovic*, Second Amended Indictment, 29 October 2001, Case. No. IT-99-37-PT, para. 63.
[48] The Chamber observes that, according to article 1 of the Statute of the International Criminal Tribunal for the former Yugoslavia ("the ICTY"), the ICTY has been dealing with one crisis situation (although with several interlinked manifestations) since its establishment by the United Nations Security Council Resolution 827 of 25 May 1993. During the last thirteen years, it has initiated cases against a hundred and sixty one persons, of which to date it has completed the cases against forty-eight persons and thirty five persons have had their indictments withdrawn or have died (see http://www.un.org/icty/glance-e/index.htm). The ICTY is expected to end its activities by the end of 2010 (seventeen years after its establishment), which is why the Security Council has encouraged the ICTY to refer cases back to the national Courts under rule 11 bis of the ICTY Rules of Procedure and Evidence (United Nations Security Council Resolution 1534 of 26 March 2004).
[49] The Chamber also notes that, according to article 1 of the Statute of the International Criminal Tribunal for Rwanda ("the ICTR"), the ICTR has dealt with one crisis situation since its establishment by United Nations Security Council Resolution 955 of 8 November 1994. During the last twelve years, it has initiated cases against eighty one persons, of which to date it has completed the cases against twenty seven persons and three persons have had their indictments withdrawn or have died (see http://65 18.216.88/default.htm). It is expected that the ICTR will finish its activities by the end of 2010 (sixteen years after its establishment), for which the Security Council has encouraged the ICTR to refer cases back to the national Courts under rule 11 bis of the ICTR Rules of Procedure and Evidence (United Nations Security Council Resolution 1534 of 26 March 2004).
[50] Article 1 of the Statute.
[51] See *supra*, section II.1.
[52] See http //www.icc-cpi.int/cases.html.
[53] See "Decision Assigning the Situation in Central African Republic to Pre-Trial Chamber III", 19 January 2005, No. ICC-01/05-1, pp. 1 and 4.

ensuring the effectiveness of the Court in carrying out its deterrent function and maximizing the deterrent effect of its activities.

Conclusion

62. The Chamber observes that the Prosecution has already adopted some of the factors that the Chamber considers part of the core content of the gravity threshold provided for in article 17 (1) (d) of the Statute. In this regard, the Chamber notes that the Prosecution's Policy Paper of September 2003 comes to the following conclusion:

> "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."[54]

63. The Chamber agrees with the Prosecution that these factors, together with the others referred to above, must direct the shaping of any case before the Court arising from the investigation of a situation. However, in the Chamber's view, the adoption of these factors is not discretionary for the Prosecution because they are a core component of the gravity threshold provided for in article 17 (1) (d) of the Statute.

64. In conclusion, the Chamber considers that any case arising from an investigation before the Court will meet the gravity threshold provided for in article 17 (1) (d) of the Statute if the following three questions can be answered affirmatively:

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[54] *Paper on Some Policy Issues before the Office of the Prosecutor*, p. 7, available at http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf

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?

II.2.2.2 The case against Mr Thomas Lubanga Dyilo

65. In order to determine whether the case against Mr Thomas Lubanga Dyilo meets the gravity threshold provided for in article 17 (1) (d) of the Statute, the Chamber must decide whether the above three questions are answered affirmatively.

66. With regard to the requirement that the conduct which constitutes the basis of the Prosecution's Application for the issuance of a warrant of arrest for Mr Thomas Lubanga Dyilo be systematic or large-scale, the Chamber considers that such conduct is not limited to the six specific individual cases referred to in pages 30 to 40 of the Prosecution's Application. On the contrary, in the Chamber's view, the case against Mr Thomas Lubanga Dyilo includes his alleged responsibility in the UPC/FPLC's alleged policy/practice of enlisting into the FPLC, conscripting into the FPLC and using to participate actively in hostilities children under the age of fifteen from July 2002 to December 2003.[55]

67. The Chamber considers that, as discussed below,[56] there are reasonable grounds to believe that such policy/practice took place; that as a result of such policy/practice, hundreds of children under the age of fifteen were enlisted or conscripted into the FPLC, and/or used by the FPLC to participate actively in hostilities from July 2002 to December 2003. Furthermore, the Chamber is aware of the social alarm caused to the international community by the extent of the practice of enlisting and conscripting into armed groups and using to participate actively in hostilities children under the age of fifteen.[57] For these reasons the Chamber finds that the first requirement of the gravity threshold provided for in article 17 (1) (d) has been met.

68. Concerning the question of whether Mr Thomas Lubanga Dyilo's position in the UPC and the FPLC was such as to make him fall within the category of the most senior leaders of the DRC situation, the Chamber finds, as

[55] *Prosecutor's Application*, paras. 73-74, 78, 80, 87, 107, 123, 146 and 151.
[56] See *infra* section III.3.1.
[57] See *supra*, footnote 39.

discussed below,[58] that there are reasonable grounds to believe: (1) that Mr Thomas Lubanga Dyilo has been the president of the UPC since its foundation on 15 September 2000; and (2) that in early or mid-September 2002, Mr Thomas Lubanga Dyilo founded the FPLC as the military wing of the UPC, that he immediately became its Commander-in-Chief, and that he remained in that position throughout the rest of 2002 and 2003.

69. The Chamber also finds that there are reasonable grounds to believe that Mr Thomas Lubanga Dyilo exercised *de facto* authority which corresponded to his positions as the first and only president of the UPC and Commander-in-Chief of the FPLC,[59] which included *inter alia* the authority to negotiate, sign and implement ceasefires or peace agreements[60] and to participate in negotiations relating to controlling access of MONUC and other UN personnel to Bunia or other parts of the territory of Ituri in the hands of the UPC/FPLC[61] during the second half of 2002 and in 2003.[62]

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[58] See *infra* section III.2.

[59] *Idem*

[60] *Prosecution's Application*, para. 45.

[61] According to the *Prosecution's Application*, para. 59: "From the beginning, and at all relevant times to the crimes described below, Thomas LUBANGA DYILO was the FPLC Commander-in-Chief. Accordingly, in August 2002, Thomas LUBANGA DYILO was presented to representatives of MONUC as the "Commander-in-Chief". Furthermore, according to Human Rights Watch, "Ituri: Covered in Blood. Ethnically Targeted Violence in Northeastern DR Congo", July 2003, report cited in the *Prosecution's Application* at para. 35, footnote 10, see in particular p. 40, Mr Thomas Lubanga Dyilo declared *persona non grata* a UN officer from the Office of Coordination for Humanitarian Affairs (OCHA) who had protested against the arrest and intimidation of humanitarian workers.

[62] In this regard, the Chamber notes that, to date, the only case brought to the Referral Bench under rule 11 bis of the ICTY Rules of Procedure and Evidence whose referral to national authorities has been rejected is the one against the accused Mr Dragomir Milosevic. The Prosecution's request for a referral was rejected because, in addition to the allegations contained in the indictment against him – that the Sarajevo Romanija Corps' ("SRK") shelling and sniping campaign against the inhabitants of Sarajevo resulted in the killing and wounding of thousands of civilians – Mr Dragomir Milosevic had, according to the Prosecution, significant authority insofar as:

> According to the Indictment, "during his period as Corps Commander of the SRK [Dragomir Milosevic] was in a position of superior authority to approximately 18.000 military personnel, formed into 10 brigades." In his position as SRK commander, Dragomir Milosevic allegedly negotiated, signed and implemented an anti-sniping agreement, local ceasefire agreements, and participated in negotiations relating to heavy weapons and controlling access of UNPROFOR and other UN personnel to territory

70. Furthermore, as discussed below,[63] the Chamber considers that there are reasonable grounds to believe that Mr Thomas Lubanga Dyilo was the man with ultimate control of the policies/practices adopted and implemented by the UPC/FPLC during the relevant period, including enlistment into the FPLC, conscription into the FPLC and use by the FPLC to participate actively in hostilities of children under the age of fifteen. The Chamber therefore finds that the second requirement of the gravity threshold provided for in article 17 (1) (d) of the Statute has been met.

71. As to whether Mr Thomas Lubanga Dyilo falls within the category of most senior leaders suspected of being most responsible, the Chamber has already found that there are reasonable grounds to believe that he was the man who had ultimate control over the UPC/FPLC's alleged policy/practice of enlisting into the FPLC, conscripting into the FPLC and using to participate actively in hostilities children under the age of fifteen. Accordingly, in the Chamber's view, his role could not have been more relevant.

72. Conversely, the Chamber considers that there are reasonable grounds to believe that the UPC/FPLC, although a well-organised political/military group in the region of Ituri at the relevant time,[64] was only a regional group not operating outside the region of Ituri.[65] Furthermore, the Chamber considers that there are reasonable grounds to believe that

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around Sarajevo (ICTY, *Prosecutor v Dragomir Milosevic*, "Decision on referral of case pursuant to rule 11 bis", 8 July 2005, Case No. IT-98-29/1-PT, para. 10. See also para. 9, 24).

[63] See *infra* section III.2.

[64] *Prosecution's Application*, paras. 49 and 65; and *Prosecution's Further Submission*, paras. 29 and 31.

[65] *Prosecution's Application*, para. 70; and *Transcript of the Hearing of 2 February 2006*, p. 25, lines 7 and 8.

during the relevant time there were in addition to the UPC/FPLC a number of other regional armed groups involved in the armed conflict in Ituri.[66]

73. The Chamber is also mindful that some of the reports cited in the Prosecution's Application, Prosecution's Submission and/or Prosecution's Further Submission point out (1) the alleged responsibility of regional armed groups other than the UPC/FPLC in the commission of crimes within the jurisdiction of the Court in the conflict in Ituri,[67](2) the alleged responsibility of certain national armed groups operating throughout a substantial part of the territory of the DRC in the commission of crimes within the jurisdiction of the Court in the conflict in Ituri[68] and (3) the alleged direct or indirect intervention of some non-DRC actors in the conflict in Ituri.[69] Moreover, the Chamber is also aware that allegations of crimes within the jurisdiction of the Court in the territory of the DRC after 1 July 2002 contained in the reports cited in the Prosecution's Application and/or in the Prosecution's Submission do not stop in Ituri but cover other areas of the DRC, particularly eastern DRC.[70]

74. In any event, given the existence of reasonable grounds to believe that Mr Thomas Lubanga Dyilo occupied the highest position of the UPC and the FPLC,[71] that he played a unique role in the adoption and

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[66] See *Prosecution's Application*, para. 41; and *Prosecution's Further Submission*, paras. 34-35 and Annex 10.
[67] *Prosecution's Further Submission*, Annex 10.
[68] *Idem*. See also Human Rights Watch, "Ituri: Covered in Blood. Ethnically Targeted Violence in Northeastern DR Congo", July 2003, report cited in the Prosecution's Application at para. 35, footnote 10, available at: http://www.hrw.org/reports/2003/ituri0703/, and see particularly pages 36-38 of the report.
[69] MONUC "Special Report on the events in Ituri, January 2002 – December 2003, S/2004/573", 16 July 2004, report cited in the *Prosecution's Application* at para. 35, footnote 9 and para. 41, footnote 11, available at: http://www.monuc.org/downloads/S_2004_573_2004_English.pdf, and see particularly p. 12-13, paras. 27 and 28 of the report. *Prosecution's Further Submission*, Annex 10
[70] *Prosecution's Application*, para. 204. See also, United Nations Secretary General, "Fourteenth Report of the Secretary General on the United Nations Organisation Mission in the Democratic Republic of the Congo", S/2003/1098, 17 November 2003, report cited by the Prosecution in the *Prosecution's Application*, para. 43, footnote 15, see in particular pp. 12-13, paras 43 to 46.
[71] See infra section III.2

implementation of the UPC/FPLC's alleged policy/practice of enlisting into the FPLC, conscripting into the FPLC and using to participate actively in hostilities children under the age of fifteen,[72] and that the UPC/FPLC played an important role in the Ituri conflict which was particularly relevant in the DRC situation in the second half of 2002 and in 2003,[73] the Chamber considers that Mr Thomas Lubanga Dyilo falls within the category of most senior leaders suspected of being most responsible for the crimes within the jurisdiction of the Court allegedly committed in the DRC situation.

75. Hence, on the basis of the evidence and information provided by the Prosecution in the Prosecution's Application, in the Prosecution's Submission, in the Prosecution's Further Submission and at the hearing of 2 February 2006, the Chamber finds that the case against Mr Thomas Lubanga Dyilo meets the gravity threshold provided for in article 17 (1) (d) of the Statute.

76. Accordingly, since the case against Mr Thomas Lubanga Dyilo satisfies the two parts of the admissibility test, the Chamber considers that on the basis of the evidence and information provided by the Prosecution in the Prosecution's Application, in the Prosecution's Submission, in the Prosecution's Further Submission and at the hearing of 2 February 2006, the case is admissible.

[72] See infra section III.2.
[73] *Prosecution's Further Submission,* paras 34 and 35 and Annex 10.

II.2.2.3 The case against Mr Bosco Ntaganda

77. In order to determine whether the case against Mr Bosco Ntaganda meets the gravity threshold provided for in article 17 (1) (d) of the Statute, the Chamber relies on the findings set out in the previous section concerning: (1) the alleged systematic or large-scale nature of the conduct constituting the basis of the Prosecution's Application and the social alarm caused to the international community by that type of conduct; and (2) the alleged role of the UPC/FPLC in the overall DRC situation, and in the Ituri conflict in particular.

78. As to whether Mr Bosco Ntaganda falls within the category of the most senior leaders of the DRC situation, the Chamber notes that Mr Bosco Ntaganda was appointed Deputy Chief of the General Staff in charge of military operations of the FPLC on 3 September 2002[74] and that he held this position until December 2003.[75]

79. According to the FPLC organisational chart provided by the Prosecution[76], during the period relevant to the Prosecution's Application (July 2002 to December 2003) Mr Bosco Ntaganda ranked third in the hierarchy of the FPLC, directly subordinate to the FPLC Chief of General Staff (Mr Floribert Kisembo), who was in turn directly subordinate to the FPLC Commander-in-Chief, Mr Thomas Lubanga Dyilo.[77] Not until the very end of the period (8 December 2003) was Mr Bosco Ntaganda appointed by

[74] *Prosecution's Application*, para. 28.
[75] *Prosecution's Application*, para. 28; *Prosecution's Further Submission*, para. 37 and Annex 9.
[76] *Prosecution's Further Submission*, Annexes 7, 8, and 9.
[77] *Prosecution's Further Submission*, Annex 9.

Mr Thomas Lubanga as FPLC Chief of General Staff, thus replacing Mr Floribert Kisembo in that position.[78]

80. According to the Prosecution's Application,[79] the FPLC structure was a "very typical military command structure,"[80] which resembled the structure of traditional armies,[81] and Mr Thomas Lubanga Dyilo was from its creation in September 2002 *de jure and de facto* Commander-in-Chief or Supreme Commander.[82]

81. In the framework of the alleged strict FPLC military hierarchy, the Prosecution alleges that Mr Floribert Kisembo, the FPLC Chief of General Staff, occupied the second level of the chain of command and was the immediate superior of Mr Bosco Ntaganda in a way that reflects the regular military structure.[83]

82. Furthermore, the Chamber recalls its finding that there are reasonable grounds to believe that the FPLC was exclusively the military wing of the broader political movement called UPC.[84] In this regard, the Chamber considers that, in light of the two UPC organisational charts and subsequent explanations of the Prosecution, there are reasonable grounds to believe that in the period between September 2002 and March 2003 at least, the UPC Executive Committee was comprised of a number of high-ranking UPC officials (the *Secrétaires Nationaux*, the *Directeur du Cabinet du Président*, the *Secrétaires Nationaux Adjoints*, and the *Secrétaires*

[78] *Idem*. See also *Transcript of the Hearing of 2 February 2006*, p. 42, line 7.
[79] *Prosecution's Application* para. 60.
[80] *Transcript of the Hearing of 2 February 2006*, p. 37, lines 10-11.
[81] *Prosecution's Application* para. 60; and *Transcript of the Hearing of 2 February 2006*, p 38, lines 22-24.
[82] *Transcript of the Hearing of 2 February 2006*, p. 24, lines 10-11, p. 27, lines 11-25, p. 38, lines 1-3, and p. 40, lines 11-18.
[83] *Prosecution's Further Submission*, para. 37.
[84] See *supra*, section II.2.2.2 and *infra* section III.2.

Nationaux à la Présidence)[85] who were *de jure* and *de facto* subordinated to the UPC President (Mr Thomas Lubanga Dyilo).[86]

83. According to the Prosecution, Mr Bosco Ntaganda did not hold any official position or play any official role within the UPC at the relevant time[87] but merely supported the authority of his Commander-in-Chief within the FPLC Mr Thomas Lubanga Dyilo.[88]

84. Moreover, the Chamber recalls its earlier findings that although there are reasonable grounds to believe that the UPC/FPLC played an important role in the Ituri conflict during the second half of 2002 and in 2003, the UPC/FPLC was merely a regional group operating only in the Ituri region.[89] The Chamber also recalls the allegations contained in the reports cited in the Prosecution's Application, the Prosecution's Submission and the Prosecution's Further Submission concerning the alleged involvement of other regional and national actors and even some non-DRC actors in the DRC situation, and particularly in the Ituri conflict, and in the crimes within the jurisdiction of the Court committed there.[90]

85. In the Chamber's view, and according to the evidence and information presented by the Prosecution, there are reasonable grounds to believe that

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[85] *Prosecution's Further Submission*, Annexes 7, 8.

[86] According to the *Prosecution's Application*, para. 52: "Thomas LUBANGA DYILO at all times fully exercised the powers entrusted with by the UPC Statute. He did not share that power with anybody. Privy to all information, soon provided by the UPC Security and Information Department, led by Rafiki SABA AIMABLE MUSANGANYA, Thomas LUBANGA DYILO was in full control of the UPC and its members. If and when deemed necessary by him, he imposed disciplinary measures. Thomas LUBANGA DYILO normally signed the UPC's decrees, and took most of the decisions without even consulting the other members of the UPC's executive. The "national secretaries" of the UPC, equivalent to the positions of "ministers", could not take decisions without his approval".

[87] *Prosecution's Further Submissions*, Annexes 7 and 8; and *Transcript of the Hearing of 2 February 2006*, p. 50, lines 5-10

[88] *Transcript of the Hearing of 2 February 2006*, p. 50, lines 10-14

[89] See *supra*, section II.2.2.2.

[90] *Idem*

Mr Bosco Ntaganda, as Deputy Chief of General Staff for military operations, was the immediate superior of the FPLC sector commanders and had *de jure* and *de facto* authority over the FPLC training camp commanders and the FPLC field commanders.[91] 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.[92] 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.

86. 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,[93] Mr Bosco Ntaganda (as FPLC Deputy Chief of General Staff subordinated to both the FPLC Chief of General Staff and the FPLC Commander-in-Chief) did not have *de jure* or *de facto* authority to negotiate, sign and implement ceasefires or peace agreements,[94] or participate in

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[91] *Prosecution's Further Submission*, Annex 9; and *Transcript of the Hearing of 2 February 2006*, p. 38, lines 8-21.

[92] According to the Prosecution: "Mr Bosco Ntaganda was a very hands-on commander, meaning he deployed with his subordinate commanders to the field and to parts in a whole variety of military operations of the FPLC", *Transcript of the Hearing of 2 February 2006*, p. 38, lines 4-7. See also Statement of witness [REDACTED], contained in the *Prosecution's Further Submission*, Annex 1, paras. 45-47; Statement of witness [REDACTED], contained in the *Prosecution's Further Submission*, Annex 5, paras. 53-71; and Statement of witness [REDACTED], contained in the *Prosecution's Further Submission*, Annex 6, paras. 48-49.

[93] See *supra*, section II.2.2.2. See also ICTY, *Prosecutor v Dragomir Milosevic*, "Decision on referral of case pursuant to rule 11 bis", 8 July 2005, Case No. IT-98-29/1-PT, paras. 9, 10, and 24.

[94] According to the *Prosecution's Application*, para. 45: "Thomas LUBANGA DYILO signed the *Acte d'Engagement* in Dar-Es-Salaam on 16 May 2003, committing to the reactivation of the Ituri peace process, which had hereto been stalled by UPC recalcitrance. Later that month, the UPC and FNI signed a cease-fire agreement. On 14 May 2004, Thomas LUBANGA DYILO and the leaders of six other Ituri armed groups, as "representatives of the politico-military movements of Ituri", signed the *Acte d'Engagement* of Kinshasa, agreeing to disarm". By contrast,

negotiations relating to controlling access of MONUC and other UN personnel to Bunia or other parts of the territory of Ituri in the hands of the UPC/FPLC during the second half of 2002 and in 2003.[95]

87. In addition, the Chamber considers that, unlike the evidence and information concerning Mr Thomas Lubanga Dyilo,[96] the evidence and information provided by the Prosecution 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;[97] (2) had *de jure* or *de facto* autonomy to change such policies/practices;[98] or (3) had *de jure* or *de facto* autonomy to prevent the implementation of such policies/practices.[99]

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the Prosecution does not allege any such *de facto* authority and/or involvement in relation to ceasefire and/or peace agreements of Mr Bosco Ntaganda, nor can one find evidence of it in the materials and evidence provided by the Prosecution. Furthermore, the Chamber notes that among the reports cited in the *Prosecution's Application* one can find statements of the following kind: "Another witness in Kigali saw Lubanga and a high level delegation of UPC officials, including Jean Baptiste Dhetchuvi, Richard Lonema, Commander Kisembo, and Rafiki Saba Aimable, arrive in the Rwandan capital on December 30, 2002" (See Human Rights Watch, "Ituri: Covered in Blood. Ethnically Targeted Violence in Northeastern DR Congo", July 2003, report cited in the *Prosecution's Application* at para. 35, footnote 10, see in particular p. 12)

[95] *Prosecution's Application*, para. 59. Among the reports cited by the Prosecution one can find allegations of the following kind concerning Mr Thomas Lubanga Dyilo: "UPC authorities have also intimidated and in one case expelled UN personnel. On November 2002, UPC President Lubanga declared *persona non grata* a UN officer from the Office of Coordination for Humanitarian Affairs (OCHA) who had protested against the arrest and intimidation of humanitarian workers. The official reasons for his expulsion were "arrogance, malicious intervention, spreading false rumors and discourteous language to UPC officials", charges which Lubanga declared to be "very serious for the security of the territory controlled by the UPC" " (See Human Rights Watch, "Ituri: Covered in Blood. Ethnically Targeted Violence in Northeastern DR Congo", July 2003, report cited in the *Prosecution's Application* at para. 35, footnote 10, see in particular p. 40). By contrast, one cannot find this type of allegations in relation to Mr Bosco Ntaganda in the *Prosecution's Application*, the *Prosecution's Submission*, the *Prosecution's Further Submission* or in the evidence and information presented by the Prosecution in support of the *Prosecution's Application*.

[96] See *supra*, section II.2.2.2.

[97] For instance, unlike Mr Thomas Lubanga Dyilo who is the first signatory among the UPC *membres fondateurs* of the Statute that created the UPC on 15 September 2000, Mr Bosco Ntaganda is neither a *membre fondateur* nor a *membre co-fondateur* of the UPC. See No. HNE 6-01/04-US, p. 9 Furthermore, according to the Prosecution, Mr Bosco Ntaganda did not hold any official position or play any official role within the UPC at the relevant time, but he just supported the authority of Mr Thomas Lubanga Dyilo, who exercised effective control over the FPLC as shown in a variety of ways, including by issuing orders, instructions and directives, and by disciplining officers and troops under his commmand See *Prosecution's Application*, para. 68 and *Transcript of the Hearing of 2 February 2006*, p. 50, lines 5-14.

[98] Hearing of 2 February 2002, p. 37, lines 21-25 and p. 38, lines 1-3. See also, *Prosecution's Application*, para. 68.

[99] *Idem*.

88. The Chamber also notes that the Prosecution's Application refers to (1) Mr Thomas Lubanga Dyilo, the person allegedly to have had ultimate control over the adoption and implementation of the policies/practices of the UPC/FPLC during the relevant period and (2) Mr Bosco Ntaganda, who occupied the third level of the command structure of the military wing of the broader UPC/FPLC movement. In the Chamber's view, the fact that the latter is considered in the Prosecution's Application runs counter to the logic of the Prosecution's stated commitment to focus "its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organization allegedly responsible for those crimes."[100]

89. Under these circumstances, the Chamber finds that, on the basis of the evidence and information provided by the Prosecution in the Prosecution's Application, in the Prosecution's Submission, in the Prosecution's Further Submission and at the hearing of 2 February 2006, Mr Bosco Ntaganda does not fall within the category of the most senior leaders of the DRC situation and, therefore, that the case against him does not meet the gravity threshold provided for in article 17 (1) (d) of the Statute. The Chamber therefore finds that the case against Mr Bosco Ntaganda is inadmissible. Accordingly, the Chamber does not consider it possible to issue a warrant of arrest for Mr Bosco Ntaganda, and for this reason no further question concerning the Prosecution's Application in relation to Mr Bosco Ntaganda need be analysed.

[100] *Paper on Some Policy Issues before the Office of the Prosecutor*, p. 7 (available at http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf).

III. Whether the requirements under article 58 (1) of the Statute for the issuance of a warrant of arrest for Mr Thomas Lubanga Dyilo are met

90. The Prosecution requests that a warrant of arrest be issued for Mr Thomas Lubanga Dyilo.[101] The Chamber notes that article 58 (1) of the Statute provides that:

> At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:
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> (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
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> (b) The arrest of the person appears necessary:
>
> (i) To ensure the person's appearance at trial,
>
> (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or
>
> (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

91. In the Chamber's view, the term "committed", as used in article 58 (1) of the Statute, cannot be construed as encompassing only what, within the meaning of article 25 (3) (a) of the Statute, constitutes the commission *stricto sensu* of a crime by a person "as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible". Were that the case, the Chamber could issue warrants of arrest or summons to appear only for individuals alleged to be principals to the crime as a result of having committed individually, jointly with another person or other persons or through another person or other persons, one or more crimes within the jurisdiction of the Court. In

[101] *Prosecution's Application*, para. 216.

practice, that interpretation would render any of the other modes of liability provided for in the Statute inapplicable.

92. Accordingly, in the Chamber's view, the term "committed" in article 58 (1) of the Statute includes:

(i) the commission *stricto sensu* of a crime by a person "as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible";

(ii) any other forms of accessory, as opposed to principal, liability provided for in article 25 (3) (b) to (d) of the Statute;

(iii) an attempt to commit any of the crimes provided for in articles 6 to 8 of the Statute;[102]

(iv) direct and public incitement to commit genocide (the only preparatory act punishable under the Statute);[103] and

(v) the responsibility of commanders and other superiors under article 28 of the Statute.

93. Accordingly, the Chamber considers that the Prosecution's Application for the issuance of a warrant of arrest for Mr Thomas Lubanga Dyilo can be granted only if the three following questions are answered affirmatively:

[102] Article 25 (3) (f) of the Statute
[103] Article 25 (3) (e) of the Statute.

(i) Are there reasonable grounds to believe that at least one crime within the jurisdiction of the Court has been committed?

(ii) Are there reasonable grounds to believe that Mr Thomas Lubanga Dyilo has incurred criminal liability for such crimes under any of the modes of liability provided for in the Statute?

(iii) Does the arrest of Mr Thomas Lubanga Dyilo appear to be necessary under article 58 (1) of the Statute?

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

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

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

95. According to the Prosecution's Application, Mr Thomas Lubanga Dyilo is criminally responsible for the UPC/FPLC's policy/practice of enlisting into the FPLC, conscripting into the FPLC and using to participate actively in hostilities children under the age of fifteen between July 2002 and

December 2003.[104] This practice took place in the context of the conflict in the region of Ituri which had started by mid-2002 at the latest and continued through 2003.[105] According to the Prosecution, the armed conflict in Ituri was not of international character[106] and several regional groups were involved.[107]

96. The Chamber finds that there are reasonable grounds to believe that during the time relevant to the Prosecution's Application, a protracted armed conflict within the meaning of article 8 (2) (f) of the Statute took place between the UPC/FPLC, the *Front Nationaliste Intégrationniste* (the "FNI") and other organised armed groups.

97. In the Chamber's view, there are reasonable grounds to believe that, at the very least, the UPC/FPLC[108] and the FNI[109] had a hierarchical structure which allowed them to act under a responsible command with operational and disciplinary powers (sufficient level of internal organisation). The Chamber also considers that there are reasonable grounds to believe that both groups resorted to armed violence of a certain intensity during a prolonged period.[110] Furthermore, in the Chamber's opinion there are reasonable grounds to believe that both armed groups controlled parts of the territory of Ituri, which enabled them to plan and carry out concerted military operations.[111] Moreover, the Chamber considers that there are reasonable grounds to believe that Mr Thomas Lubanga Dyilo was aware

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[104] *Prosecution's Application*, pp. 5 and 6.
[105] *Prosecution's Application*, paras. 40-47.
[106] *Prosecution's Application*, para 42.
[107] *Prosecution's Application*, para. 41.
[108] *Prosecution's Application*, paras. 49-56; and *Prosecution's Further Submission*, paras. 28-31 and Annexes 7 to 9.
[109] *Prosecution's Further Submission*, para. 35 and Annex 10.
[110] *Prosecution's Further Submission*, Annex 10.
[111] Concerning the UPC, see *Prosecution's Application*, para. 39, *Prosecution's Further Submission*, para. 27 and Annex 10. Concerning the FNI, see *Prosecution's Further Submission*, para 35 (iv) and Annex 10

of the factual circumstances that established the existence of an armed conflict.[112]

98. The Chamber finds that there are also reasonable grounds to believe that the alleged UPC/FPLC's policy/practice of enlisting into the FPLC, conscripting into the FPLC and using to participate actively in hostilities children under the age of fifteen took place in the context of and in association with the ongoing conflict in Ituri. In the Chamber's view, the evidence and information submitted by the Prosecution provide reasonable grounds to believe that such a practice was closely related to the ongoing hostilities as the existence of the conflict played a substantial role in the decision to implement such a policy/practice and in the ability of the UPC/FPLC to carry it out.[113]

99. The Chamber would emphasise that, on the basis of the evidence and information brought by the Prosecution, there are reasonable grounds to believe that the Uganda People's Defence Force (the "UPDF") may have directly[114] or indirectly[115] intervened in the conflict in Ituri, in the context of

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[112] Transcript of Video Materials contained in *Prosecution's Application*, Annex 6, p. 9.

[113] *Ibid.*, p. 10; and *Prosecution's Application*, para. 78.

[114] See *Prosecution's Further Submission*, Annex 10, where it is stated that in March 2003 "FNI/FRPI assist UPDF in driving UPC from Bunia". See also the witness Statement of witness of [REDACTED] (*Prosecution's Further Submission*, Annex 5), para. 61. Furthermore, according to the MONUC, hundreds of Lendu villages had been completely destroyed during attacks by Ugandan army helicopters together with Hema militia on the ground (see MONUC, "Special Report on the events in Ituri, January 2002 - December 2003, S/2004/573", 16 July 2004, report cited in the *Prosecution's Application* at para. 35, footnote 9 and para. 41, footnote 11, available at: http://www.monuc.org/downloads/S_2004_573_2004_English.pdf, and see particularly p. 5, para. 5 of the report). Moreover, according to Human Rights Watch, Ugandan troops joined the UPC in ousting Governor Molondo and APC forces from Bunia (see Human Rights Watch, "Ituri: Covered in Blood. Ethnically Targeted Violence in Northeastern DR Congo", July 2003, report cited in the *Prosecution's Application* at para. 35, footnote 10, available at: http://www.hrw.org/reports/2003/ituri0703/, and see particularly p. 6 of the report).

[115] According to MONUC, the UPC, PUSIC, FPDC, FNI, FRPI, MLC were armed and political groups all founded with the support of Uganda (see MONUC's "Special Report on the events in Ituri, January 2002 - December 2003, S/2004/573", 16 July 2004, report cited in the *Prosecution's Application* at para. 35, footnote 9 and para. 41, footnote 11, see particularly pp. 47-53 of the report). In the same MONUC's report it is, *inter alia*, stated that the local problems would never have turned out into massive slaughter without the involvement of external factors notably the Ugandan support in 1998 when the rebels took over Ituri (p. 8, para. 18) and that the Ugandan military trained thousand Hema youths in Ituri and Uganda (p. 10, para. 21 of the report). According to Human

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

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

100. According to the Prosecution's Application, between July 2002 and December 2003, the UPC/FPLC implemented a policy/practice of enlisting into the FPLC, conscripting into the FPLC, and using to participate actively in hostilities children under the age of fifteen.[116]

101. The Chamber finds that there are reasonable grounds to believe that during the relevant time repeated acts of enlistment into the FPLC of children under the age of fifteen who were trained in the FPLC training camps in Bule, Centrale, Rwampara, Mandro, Bogoro, Sota and Irumu were carried out by members of the FPLC.[117]

102. In the Chamber's opinion, there are reasonable grounds to believe that during the relevant time repeated acts of conscription into the FPLC of children under the age of fifteen who were trained in the FPLC training

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Rights Watch, Ugandans were basically holding the role of directing the various groups and their attacks (see Human Rights Watch Report on Ituri: "Covered in Blood. Ethnically Targeted Violence in Northeastern DR Congo", July 2003, report cited in the *Prosecution's Application* at para. 35, footnote 10, see particularly p. 21 of the report, see also Human Rights Watch report "The Curse of Gold. Democratic Republic of Congo", April 26, 2005, report cited in the *Prosecution's Application* at para. 35, footnote 10, see particularly pp 37 and 38 of the report).

[116] *Prosecution's Application*, paras. 71-102.

[117] *Prosecution's Application*, paras. 78 and 85-87, and Annex 5; Statement of witness [REDACTED], contained in *Prosecution's Further Submission*, Annex 1, paras. 20-29; and views of onlookers in the Video Materials contained in Annex 6 to the *Prosecution's Application*

camps in Bule, Centrale, Rwampara, Mandro, Bogoro, Sota and Irumu were carried out by members of the FPLC.[118]

103. The Chamber also considers that there are reasonable grounds to believe that during the relevant time children under the age of fifteen were repeatedly used to participate actively in hostilities by members of the FPLC in Libi and Mbau in October 2002,[119] in Largu at the beginning of 2003,[120] in Lipri[121] and Bogoro[122] in February and March 2003, in Bunia in May 2003[123] and in Djugu[124] and Mongwalu[125] in June 2003.

104. In the Chamber's view, there are also reasonable grounds to believe that those members of the FPLC who repeatedly enlisted into the FPLC, conscripted into the FPLC and used to participate actively in hostilities children under the age of fifteen knew that such persons were under the age of fifteen.[126]

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[118] *Prosecution's Application*, para. 88 and Annex 5; Statement of witness [REDACTED], contained in the *Prosecution's Further Submission*, Annex 2, paras. 19-34, Statement of witness [REDACTED], contained in the *Prosecution's Further Submission*, Annex 3, paras. 20-31; Statement of witness [REDACTED], contained in the *Prosecution's Further Submission*, Annex 4, paras. 21-36; Statement of witness [REDACTED], contained in the *Prosecution's Further Submission*, Annex 5, paras. 21-40; and Statement of witness [REDACTED], contained in the *Prosecution's Further Submission*, Annex 6, paras. 20-36.

[119] Statement of witness [REDACTED], contained in the *Prosecution's Further Submission*, Annex 4, paras. 41-50.

[120] Statement of witness [REDACTED], contained in the *Prosecution's Further Submission*, Annex 6, paras. 46-54.

[121] Statement of witness [REDACTED], contained in the *Prosecution's Further Submission*, Annex 1, paras. 40-47; Statement of witness [REDACTED], contained in the *Prosecution's Further Submission*, Annex 2, paras 42-50; Statement of witness [REDACTED], contained in the *Prosecution's Further Submission*, Annex 3, paras. 39-44; and Statement of witness [REDACTED], contained in the *Prosecution's Further Submission*, Annex 4, paras. 47-53.

[122] Statement of witness [REDACTED], contained in the *Prosecution's Further Submission*, Annex 2, para. 51

[123] Statement of witness [REDACTED], contained in *Prosecution's Further Submission*, Annex 5, paras. 65-67; and Statement of witness [REDACTED], contained in the *Prosecution's Further Submission*, Annex 6, paras. 55-57.

[124] Statement of witness [REDACTED], contained in the *Prosecution's Further Submission*, Annex 5, paras 68-69.

[125] *Idem*

[126] Statement of witness [REDACTED], contained in the *Prosecution's Further Submission*, Annex 1, paras. 20-23, 41 and 45; Statement of witness [REDACTED], contained in the *Prosecution's Further Submission*, Annex 2, paras. 19-21, and 43-46 and 51; Statement of witness [REDACTED], contained in the *Prosecution's Further Submission*, Annex 3, paras. 20-22 and 43; Statement of witness [REDACTED], contained in the *Prosecution's Further Submission*, Annex 4, paras. 22, 26, 27 and 51; Statement of witness [REDACTED], contained in the *Prosecution's Further Submission*, Annex 5, paras. 23, 39 and 43-45; and Statement of witness [REDACTED], contained in the *Prosecution's Further Submission*, Annex 6, paras. 20-21, 48 and 51

105. The Chamber is of the opinion that each individual instance of enlistment into the FPLC, conscription into the FPLC or use to participate actively in hostilities of children under the age of fifteen gives rise to a crime within the jurisdiction of the Court. However, the Chamber considers that it is advisable to treat (1) all instances of enlistment into the FPLC as a continuous war crime of enlistment of children under the age of fifteen into the FPLC; (2) all instances of conscription into the FPLC as a continuous war crime of conscription of children under the age of fifteen into the FPLC; and (3) all instances of use to participate actively in hostilities of children under the age of fifteen by members of the UPC/FPLC as a continuous war crime of use to participate actively in hostilities of children under the age of fifteen.

106. Accordingly, the Chamber concludes that there are reasonable grounds to believe that:

(i) a continuous war crime of enlistment of children under the age of fifteen punishable under either article 8 (2) (b) (xxvi) of the Statute or article 8 (2) (e) (vii) of the Statute has been committed;

(ii) a continuous war crime of conscription of children under the age of fifteen punishable under either article 8 (2) (b) (xxvi) of the Statute or article 8 (2) (e) (vii) of the Statute has been committed; and

(iii) a continuous war crime of using children under the age of fifteen to participate actively in hostilities punishable under either article 8 (2) (b) (xxvi) of the Statute or article 8 (2) (e) (vii) of the Statute has been committed.

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

107. The Prosecution alleges that Mr Thomas Lubanga Dyilo and a number of other FPLC officers are responsible as co-perpetrators under article 25 (3) (a) of the Statute of the war crimes of enlisting into the FPLC, conscripting into the FPLC and using to participate actively in hostilities children under the age of fifteen years from July 2002 to December 2003.[127] According to the Prosecution:

> Based on the intent shared by Thomas Lubanga Dyilo, Bosco Ntaganda and all other joint perpetrators to recruit children under the age of fifteen and to use them in combat, they, in pursuing their common goal, coordinated their efforts, enjoying joint control over the execution of their common plan.[128]

108. In the Chamber's view, there are reasonable grounds to believe that Mr Thomas Lubanga Dyilo is criminally responsible under article 25 (3) (a) of the Statute for the above-mentioned crimes. The Chamber finds that there are reasonable grounds to believe that Mr Thomas Lubanga Dyilo has been the President of the UPC since its foundation[129] on 15 September 2000.[130] Furthermore, the Chamber considers that there are reasonable grounds to believe that in early or mid-September 2002, Mr Thomas Lubanga Dyilo founded the FPLC as the military wing of the UPC,[131] that he immediately became its Commander-in-Chief,[132] and that he remained in that position until the end of 2003 at least.[133]

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[127] *Prosecution's Application*, pp. 5 and 6 and paras. 103-106.
[128] *Ibid* , para. 104.
[129] According to art. 1 of the UPC Statute, Exhibit No. HNE6-01/04-US-Exp, p. 1, the UPC was created in Bunia on 15 September 2000. See also p. 9 of the UPC Statute where Mr Thomas Lubanga Dyilo appears as the first signatory among the *membres fondateurs* of the UPC.
[130] *Prosecution's Application*, paras. 18 and 19 and *Prosecution's Further Submission*, Annexes 7 and 8
[131] *Prosecution's Application*, paras. 21, 57 and 58; and *Prosecution's Further Submission*, Annex 9
[132] *Prosecution's Application*, paras. 21 and 59; and *Prosecution's Further Submission*, Annex 9
[133] *Idem*

109. The Chamber also finds that there are reasonable grounds to believe that Mr Thomas Lubanga Dyilo exercised *de facto* authority which corresponded to his positions as the first and only President of the UPC and the Commander-in-Chief of the FPLC.[134] Indeed, it is the Chamber's opinion that there are reasonable grounds to believe that Mr Thomas Lubanga Dyilo was the man who had the final say about the adoption and implementation of the policies/practices of the UPC/FPLC - a hierarchically organised armed group[135] - during the period relevant to the Prosecution's Application,[136] including enlisting into the FPLC, conscripting into the FPLC and using to participate actively in hostilities children under the age of fifteen.[137] Furthermore, the Chamber finds that there are reasonable grounds to believe that Mr Thomas Lubanga Dyilo was aware of his unique role within the UPC/FPLC and actively used it.[138]

110. In the Chamber's view, there are reasonable grounds to believe that, given the alleged hierarchical relationship between Mr Thomas Lubanga Dyilo and the other members of the UPC[139] and the FPLC[140], the concept of indirect perpetration which, along with that of co-perpetration based on joint control of the crime referred to in the Prosecution's Application[141], is provided for in article 25 (3) (a) of the Statute, could be also applicable to

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[134] *Prosecution's Application*, paras. 52, 68 and 105; and *Transcript of the Hearing of 2 February 2006*, p. 24, lines 10 and 11.
[135] *Prosecution's Application*, paras. 49-56; and *Prosecution's Further Submission*, paras. 28-31 and Annexes 7 to 9.
[136] *Prosecution's Application*, paras. 52, 68 and 105; and *Transcript of the Hearing of 2 February 2006*, p. 24, lines 1-16.
[137] *Idem*. See also Transcript of Video Materials contained in Annex 6 to the *Prosecution's Application*, pp 7, 8 and 10.
[138] Transcript of Video Materials contained in Annex 6 to the *Prosecution's Application*, pp. 7 and 13.
[139] *Prosecution's Application*, para. 52; and *Prosecution's Further Submission*, Annexes 7 and 8.
[140] *Prosecution's Application*, para. 68; and *Prosecution's Further Submission*, Annex 9.
[141] *Prosecution's Application*, paras. 103-106.

Mr Thomas Lubanga Dyilo's alleged role in the commission of the crimes set out in the Prosecution's Application.

III.3 Does the arrest of Mr Thomas Lubanga Dyilo appear necessary under article 58 (1) of the Statute?

111. Under article 58 (1) of the Statute, the Chamber may issue a warrant of arrest for Mr Thomas Lubanga Dyilo only if it is satisfied that "his arrest [...] appears necessary: (i) to ensure the person's appearance at trial; (ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings, or (iii) where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances."

112. According to the Prosecution, the arrest of Mr Thomas Lubanga Dyilo is necessary because, since he has been in prison since March 2005, there is information that he may be released within the next three to four weeks[142] and, "due to the wide variety of his national and international contacts, including, *inter alia*, to Uganda and Rwanda, [he] will easily be in a position to flee and disappear."[143] The Prosecution also claims that the arrest of Mr Thomas Lubanga Dyilo is necessary because some witnesses in trials before the *Tribunal de Grande Instance* of mid or high-ranking UPC members have been killed or threatened,[144] and although Mr Thomas Lubanga Dyilo is currently under detention, he is still in a position to obstruct or endanger the investigation or the Court proceedings because of

[142] *Prosecution's Application*, para. 187.
[143] *Ibid.*, para. 191.
[144] *Ibid* , paras. 196 and 197.

his unmonitored contacts with persons outside the *Centre Pénitentiaire et de Rééducation de Kinshasa.*[145]

113. In the Chamber's view, it appears that Mr Thomas Lubanga Dyilo may be released within the coming weeks. First, according to DRC law, in addition to the required monthly extension of his provisional detention,[146] after twelve consecutive months of provisional detention a military judge of the competent court must confirm that detention.[147] Second, the Chamber notes the recent criticism of some of the DRC proceedings by Human Rights Watch, including in particular the criticism of the DRC proceedings against Mr Thomas Lubanga Dyilo for his alleged involvement in the killing of nine peacekeepers in February 2005.[148]

114. In the Chamber's opinion, if Mr Thomas Lubanga Dyilo is released he appears to have the incentive and means to attempt to evade an appearance before the Court for trial. First, Mr Thomas Lubanga Dyilo appears to have expressed publicly concerns about the investigation of the DRC situation and the prospect of being prosecuted at the Court.[149] Second, Mr Thomas Lubanga Dyilo, as the only President of the UPC since its foundation in 2000, appears to have a variety of national and international contacts that could allow him to at least attempt to evade an appearance before the Court for trial.

115. The Chamber notes that, according to the Prosecution, the six victims-witnesses of the specific cases referred to in the Prosecution's Application

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[145] *Ibid*, para. 198.
[146] *Prosecution's Submission*, Annex 1.
[147] Article 209 of the DRC Law Num. 023/2002 of 18 November 2002 on the Code of Military Justice.
[148] See Human Rights Watch, *Democratic Republic of Congo – Elections in sight Don't Rock the Boat?*, December 2005, cited by the Prosecution at para. 11 of the *Prosecution's Submission*, see in particular pp. 15 and 16.
[149] *Prosecution's Application*, para. 188.

are currently [REDACTED].[150] The Chamber considers that it appears that some witnesses in trials held before the *Tribunal de Grande Instance* in Bunia against mid or high ranking UPC members have been killed or threatened,[151] and that Mr Thomas Lubanga Dyilo, although currently under provisional detention, may be in a position to hold unmonitored external communications.[152]

116. Hence, the Chamber considers that, on the basis of the evidence and information provided by the Prosecution in the Prosecution's Application, in the Prosecution's Submission, in the Prosecution's Further Submission and at the hearing of 2 February 2006, and without prejudice to subsequent determinations under article 60 of the Statute and rule 119 of the Rules, the arrest of Mr Thomas Lubanga Dyilo appears at this stage necessary pursuant to article 58 (1) (b) of the Statute both to ensure his appearance at trial and to ensure that he does not obstruct or endanger the investigation or the court proceedings.

IV. Should the Prosecution be the organ of the Court responsible for making and transmitting the request for cooperation seeking arrest and surrender of Mr Thomas Lubanga Dyilo to the relevant State authorities?

117. The Prosecution requests in paragraph 217 of the Prosecution's Application that:

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

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[150] *Prosecution's Further Submission*, para. 4.
[151] "Observations on the Protection of Victims and Human Rights Organisations in Eastern Democratic Republic of Congo", filed by Human Rights Watch and Redress on 30 June 2005, pp. 10 and 15
[152] *Transcript of the Hearing of 2 February 2006*, p. 17, lines 5-11.

118. According to the Prosecution:

> [...] the organ to make the request should be the organ that is in the best position to secure its effective execution. This properly reflects the flexibility built into Articles 58(1) and 89(1) of the Statute and Rule 176(2) of the Rules of Procedure and Evidence, and will best promote the object and purpose of the Statute.[153]

119. Furthermore, the Prosecution alleges that it is the organ of the Court best positioned to secure effective execution of the request for cooperation seeking arrest and surrender for the following reasons:

(i) there is a cooperation agreement between the Prosecution and the DRC which *inter alia* deals with the confidentiality of the cooperation requests for arrest and surrender;[154]

(ii) when transmitting the cooperation requests for arrest and surrender, the Prosecution can rely on existing relationships resulting from arrangements and agreements which it has established in the course of its investigations with States, organisations and individuals for the provision of confidential information;[155]

(iii) the Prosecution is the sole organ of the Court privy to the full set of relevant information and therefore best able to ensure that all aspects of providing security to both victims and witnesses and to its staff are fully considered;[156]

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[153] *Prosecution's Application*, para. 210.
[154] *Ibid* , para. 211 (i).
[155] *Ibid.*, para. 211 (ii).
[156] *Ibid.*, para. 211 (iii).

(iv) the Prosecution knows the whereabouts of Mr Bosco Ntaganda and continues to monitor his movements closely.[157]

120. Finally, the Prosecution submits that the approach adopted by Pre-Trial Chamber II, whereby the Prosecution can transmit a cooperation request for arrest and surrender only under specific and compelling circumstances, has no basis in the Statute or the Rules.[158] Even if the Chamber disagrees with the Prosecution on this point, the Prosecution submits that the "specific and compelling circumstances" standard has been met here.[159]

121. At the outset, the Chamber observes that:

> [...] The Prosecution does not dispute that the Pre-Trial Chamber has the authority to make a request for cooperation seeking arrest and surrender, in addition to issuing the warrants of arrest, and that in those circumstances the Registry would be the appropriate organ of the Court to transmit that request under Rule 176(2) of the Rules of Procedure and Evidence.[160]

122. In the Chamber's view, the Prosecution is requesting that the Chamber authorise it to make and transmit the cooperation request for arrest and surrender to the relevant national authorities because it is the organ of the Court best positioned to secure its effective execution.

123. The Chamber considers that, although articles 58 (5) and 89 (1) of the Statute use the generic term "Court", they must be interpreted within the context of the provisions regulating the procedural activities taking place at the stage of issuance of a warrant of arrest and at the stage of execution

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[157] *Ibid* , para 211 (iv).
[158] *Ibid.*, para. 213.
[159] *Ibid.*, para. 214
[160] *Prosecution's Application*, para. 210

of a cooperation request for arrest and surrender once the relevant person has been arrested by the requested State.

124. First, the Chamber observes that at this stage, according to article 58 (1) and (6) of the Statute, the Pre-Trial Chamber is the only organ of the Court which is competent to issue and amend warrants of arrest.

125. Second, the Chamber notes that, according to rule 117 (2) of the Rules under the heading "Detention in the custodial State", as soon as the relevant person is arrested in the requested State he may address the Pre-Trial Chamber "for the appointment of counsel to assist with proceedings before the Court and the Pre-Trial Chamber shall take a decision on such request".

126. Third, the Chamber observes that, according to article 59 (5) of the Statute, and rule 117 (4) of the Rules, the Pre-Trial Chamber is the competent organ of the Court to be notified of any request for interim release made by the arrested person to the national authorities of the requested State. The Chamber also notes that, according to the said provisions, the Pre-Trial Chamber is also the competent organ of the Court to make recommendations on such requests to the competent authority of the requested State.

127. Fourth, the Chamber observes that, according to article 59 (6) of the Statute and rule 117 (5) of the Rules, the Pre-Trial Chamber is the competent organ of the Court to request periodic reports on the status of the interim release of the relevant person in the requested State pending surrender to the Court.

128. Fifth, the Chamber notes that, according to rule 117 (3) of the Rules under the heading "Detention in the custodial State", any challenge made by the arrested person pending surrender to the Court as to whether the warrant of arrest was properly issued in accordance with article 58 (1) (a) and (b), of the Statute must be made to, and decided upon by, the Pre-Trial Chamber.

129. Sixth, the Chamber observes that according to article 89 (2) of the Statute "the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility", and according to article 19 of the Statute, the only competent organ to make a determination of the admissibility of the case at this stage is the Pre-Trial Chamber.

130. Seventh, the Chamber notes that, according to rule 184 of the Rules, the requested State shall inform the Registrar of the fact that the person sought is available for surrender, and the Registry shall be the competent organ of the Court to make arrangements for surrender of the person to the Court.

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

132. The Chamber recalls the decision of Pre-Trial Chamber II of 12 July 2005 stating that:

> [...] unlike rule 55 (D) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, referred to by the Prosecutor in his submissions, rule 176, sub-rule 2, of the Rules is not explicit as to any discretion of the Chamber regarding the organ to be entrusted with the transmission of the requests for cooperation and the receipt of the responses thereto.[161]

133. In the context of the present Prosecution's Application, the Chamber considers that it need not decide whether the Statute and the Rules leave any room for the Chamber to authorise the Prosecution to transmit a particular cooperation request for arrest and surrender in case of "specific and compelling circumstances."[162] In this regard, the Chamber considers that, since Mr Thomas Lubanga Dyilo is currently being detained in the *Centre Pénitentiaire et de Rééducation de Kinshasa*, no specific and compelling circumstances exist.

134. The Chamber takes note of the Prosecution's assertion that it is the sole organ of the Court privy to the full set of relevant information and therefore best able to ensure that all aspects of providing security to both victims and witnesses and to its staff are fully considered, and that it has built certain relationships in the DRC that would facilitate the execution of the cooperation request for the arrest and surrender of Mr Thomas Lubanga Dyilo.

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[161] "Decision on the Prosecution's Application for Warrants of Arrest under Article 58", 12 July 2005, No ICC-02/04-01/05-1-US-Exp, p. 6.

[162] Pre-Trial Chamber II answered this question in the affirmative on p 6 of its "Decision on the Prosecution's Application for Warrants of Arrest under article 58, 12 July 2005, No. ICC-02/04-01/05-1-US-Exp".

135. In this regard, the Chamber considers that it is necessary for the protection and privacy of witnesses and victims within the meaning of article 57 (3) (c), of the Statute that the Prosecution, insofar as it is not prevented from doing so by its confidentiality obligations, transmit to the Pre-Trial Chamber and the Registrar as soon as practicable any information related to the potential risks that the transmission of the cooperation request for the arrest and surrender of Mr Thomas Lubanga Dyilo may cause to victims and witnesses.

136. Furthermore, the Chamber considers that it would be beneficial for the expeditious execution of the cooperation request for arrest and surrender of Mr Thomas Lubanga Dyilo that the Prosecution, insofar as it is not prevented from doing so by its confidentiality obligations, transmit as soon as practicable to the Pre-Trial Chamber and to the Registrar any information that, in the Prosecution's view, would facilitate the expeditious execution by the DRC authorities of such a cooperation request.

V. Should the Prosecution be authorised to disclose information relating to the warrant of arrest for Mr Thomas Lubanga Dyilo to the competent representatives of such entities that are able and willing to assist in the arrangements necessary for arrest and surrender?

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

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

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

138. At the hearing of 2 February 2006, the Prosecution further elaborated upon its request as follows:

> We wish to inform the Pre-Trial Chamber that the specific entities would include, probably *inter alia*, for Thomas Lubanga Dyilo, the authorities of the Democratic Republic of Congo, and possibly MONUC, MONUC based on the fact that the DRC authorities may request MONUC to assist.[163]

139. The Chamber recalls its decision of 20 January 2006 to receive and maintain the Prosecution's Application under seal and to conduct proceedings in connection with the Prosecution's Application *ex parte* and in closed session[164] because:

> [...] the Prosecution assures to the Chamber that public knowledge of the Prosecution's Application prior to any decision might (i) result in Mr Thomas Lubanga Dyilo and/or Mr Bosco Ntaganda's hiding, fleeing, and/or obstructing or endangering the investigations or the proceedings of the Court; and (ii) put the physical well-being of Mr Thomas Lubanga Dyilo at risk.[165]

140. The Chamber is not aware of any change of circumstances in the current situation of Mr Thomas Lubanga Dyilo since the filing of the Prosecution's Application as he remains in provisional detention at the *Centre Pénitentiaire et de Rééducation de Kinshasa*. Furthermore, the Chamber has already found that he appears to have the incentive and means to attempt to evade appearing before the Court for trial. As a result, the Chamber has decided that the present decision and the warrant of arrest for Mr Thomas Lubanga Dyilo, as with previous decisions taken in connection with the Prosecution's Application, shall be issued under seal and shall remain under seal until otherwise provided for by the Chamber.

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[163] *Transcript of the Hearing of 2 February 2006*, T-01-04-8-Conf-Exp-EN, p. 80, lines 21-25 and p. 81, line 1.
[164] *Decision concerning Supporting Materials*, p. 4.
[165] *Ibid*, pp. 3 and 4.

141. The Chamber has already found that, assisted by the Registry in accordance with rule 176 (2) and rule 184 of the Rules, it must be regarded as the only organ of the Court competent to make and transmit a cooperation request for arrest and surrender,[166] and that in the present case Mr Thomas Lubanga Dyilo is currently in provisional detention in the *Centre Pénitentiaire et de Rééducation de Kinshasa*.[167]

142. In the Chamber's view, the procedure set out above for making and transmitting the cooperation request for arrest and surrender of Mr Thomas Lubanga Dyilo requires that the Registrar be authorised to inform, if necessary prior to the transmittal of such cooperation request, the following of the existence of a warrant of arrest for Mr Thomas Lubanga Dyilo: (1) those DRC authorities who are competent to receive a cooperation request for arrest and surrender from the Court in order to ensure the successful execution of the warrant of arrest; (2) the persons involved in the transfer of Mr Thomas Lubanga Dyilo to the premises of the Court in The Hague; and (3) the Under-Secretary-General of the United Nations for Peacekeeping Operations and the Special Representative of the Secretary-General of the United Nations for the Democratic Republic of the Congo for protection purposes.

143. The Chamber considers that granting authorisation to the Prosecution to disclose information about the existence of the warrant of arrest to the competent representatives of any other undetermined entity would defeat the purpose of issuing the warrant of arrest under seal. In the Chamber's view, should the Prosecution consider that it would further the execution

[166] See *supra*, section IV.
[167] *Idem*

of the Court's cooperation request for arrest and surrender to give notice of that cooperation request to a specific person, other than those referred to in paragraph 142, the Prosecution can request the Chamber to authorise giving notice to such person(s).

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

144. According to article 57 (3) (e) of the Statute, the Pre-Trial Chamber may:

> Where a warrant of arrest or a summons to appear has been issued under article 58, and having due regard to the strength of the evidence and rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of the States pursuant to article 93 (1) (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of the victims.

145. Moreover, according to article 93 (1) (k) of the Statute:

> States Parties shall in accordance with the provisions in this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions: [...] (k) the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties.

146. The Chamber notes that, although a first reading of article 57 (3) (e) of the Statute might lead to the conclusion that cooperation requests for the taking of protective measures under such a provision can be aimed only at guaranteeing the enforcement of a future penalty of forfeiture under article 77 (2) of the Statute, the literal interpretation of the scope of such provision is not clear, because of the reference to the "ultimate benefit of the victims".

147. The Chamber also observes that rule 99 (1) of the Rules, in the subsection dealing with reparations to victims, states that:

> The Pre-Trial Chamber, pursuant to article 57 (3) (e), [...] may on its own motion [...] determine whether measures should be requested.[168]

148. The Chamber considers that, in light of rule 99 of the Rules, the contextual interpretation of article 57 (3) (e) of the Statute makes clear that the Chamber may, pursuant to article 57 (3) (e) of the Statute, seek the cooperation of States Parties to take protective measures for the purpose of securing the enforcement of a future reparation award.

149. The teleological interpretation of article 57 (3) (e) of the Statute reinforces the conclusion arising from a contextual interpretation. Indeed, since forfeiture is a residual penalty pursuant to article 77 (2) (a) of the Statute, it will be contrary to the "ultimate benefit of victims" to limit to guaranteeing the future enforcement of such a residual penalty the possibility of seeking the cooperation of the States Parties to take protective measures under article 57 (3) (e) of the Statute. As the power conferred on the Court to grant reparations to victims is one of the distinctive features of the Court, intended to alleviate, as much as possible, the negative consequences of their victimisation, it will be in the "ultimate interest of victims" if, pursuant to article 57 (3) (e), the cooperation of States Parties can be sought in order to take protective measures for the purpose of securing the enforcement of a future reparation award.[169]

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[168] Rule 99 (1) of the Rules.

[169] The Chamber notes that orders for the identification and freezing of the assets of a person against whom a warrant of arrest has been issued is not a new feature of the Court, but it is a measure that has already been issued in the context of the ICTY, although given the lack of a reparation scheme as the one embraced by the Rome Statute, the ultimate purpose of such measure has been to assure that the accused not use such assets to evade arrest (see "Decision on Review of Indictment and Application for Consequential Orders", issued by Judge David Hunt, in the case of *Prosecutor v. Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic and Vlajko Stojiljkovic*, Case No. IT-02-54, 24 May 1999, para. 26). The Chamber notes that in this last decision, Judge Hunt ordered:

> "[...] that each of the States Members of the United Nations [...] make inquiries to discover whether any of the accused have assets located in their territory, and [if so], adopt provisional measures to freeze those assets, without prejudice to the rights of third parties, until the accused are taken into custody."

150. In the Chamber's view, the reparation scheme provided for in the Statute is not only one of the Statute's unique features. It is also a key feature.[170] In the Chamber's opinion, the success of the Court is, to some extent, linked to the success of its reparation system.[171] In this context, the Chamber considers that early tracing, identification and freezing or seizure of the property and assets of the person against whom a case is launched through the issuance of a warrant of arrest or a summons to appear is a necessary tool to ensure that, if that person is finally convicted, individual or collective reparation awards ordered in favour of victims will be enforced. Should this not happen, the Chamber finds that by the time an accused person is convicted and a reparation award ordered, there will be no property or assets available to enforce the award.

151. In the Chamber's view, existing technology makes it possible for a person to place most of his assets and moveable property beyond the Court's reach in only a few days. Therefore, if assets and property are not seized or frozen at the time of the execution of a cooperation request for arrest and

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[170] *Donat-Cattin, D.*, "Article 75. Reparations to Victims", in *Triffterer, O* (Ed.), "Commentary on the Rome Statute of the International Criminal Court", (Nomos, Baden-Baden, 1999), pp. 965-978, p. 966

[171] Reparations to victims of gross violations of human rights in the context of State responsibility has since long been a key component of human rights bodies. As the InterAmerican Court of Human Rights has put it in the case of *Trujillo Oroza v. Bolivia* [2002] IACHR 92, Judgment of 27 February 2002, para. 60:

> "As the Court has indicated, Article 63(1) of the American Convention codifies a rule of common law that is one of the fundamental principles of contemporary international law on State responsibility. Thus, when an unlawful act occurs that can be attributed to a State, the latter's international responsibility is immediately engaged for the violation of an international norm, with the resulting obligation to make reparation and to ensure that the consequences of the violation cease."

See also *inter alia* the judgments of the InterAmerican Court of Human Rights in IACHR, *Case of Cantoral-Benavides* v. *Perú*, "Judgment", 3 December 2001, Series C No. 88, para. 40; IACHR, *Case of Cesti-Hurtado* v *Perú*, "Judgment", 31 May 2001, Series C No. 77, para. 35; and IACHR, *Case of Villagrán Morales*, "Judgment", 26 May 2001, Series C No. 77, para. 39.

Concerning the European Court of Human Rights, see for instance ECHR, *Case of Papamichalopoulos and Others* v. *Greece*, Judgment, 31 October 1995, Application No. 14556/89, para. 36.

The importance of the role of reparations to victims of gross violations of human rights is also stressed in the "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power", adopted by United Nations General Assembly Resolution 40/34, 29 November 1985, fortieth session, United Nations document A/RES/40/34.

surrender, or very soon thereafter, it is likely that the subsequent efforts of the Pre-Trial Chamber, the Prosecution or the victims participating in the case will be fruitless.

152. In the Chamber's view, this will also occur in the case of Mr Thomas Lubanga Dyilo against whom the Chamber has already found the existence of reasonable grounds to believe that he is criminally responsible for the alleged UPC/FPLC's policy/practice of enlisting into the FPLC, conscripting into the FPLC and using to participate actively in hostilities children under the age of fifteen between July 2002 and December 2003 (*fumus boni iuris*). In the Chamber's view, although he has been in detention in the *Centre Pénitentiaire et de Rééducation de Kinshasa* since 19 March 2005,[172] it appears that Mr Thomas Lubanga Dyilo is in a position to have unmonitored satellite phone communications with persons outside the *Centre* and that he can receive external phone calls.[173] Furthermore, as shown by his concern about the Court's investigation of the DRC situation and the network of national and international contacts he has built up since becoming President of the UPC, the Court finds that Mr Thomas Lubanga Dyilo has the incentive and means to place his property and assets beyond the Court's reach as soon as he becomes aware of the issuance of the issuance of a warrant of arrest for him (*periculum in mora*).

153. In the Chamber's view, cooperation requests pursuant to articles 57 (3) (e) and 93 (1) (k) of the Statute for the taking of protective measures to secure the enforcement of future reparation awards should be transmitted

[172] *Prosecution's Application*, para. 187; and *Prosecution's Submission*, paras. 3, 13 and 14, and Annex 1 containing the two warrants of arrest issued by the DRC against Mr Thomas Lubanga Dyilo and the 16 decisions of prorogation of its provisional detention.
[173] *Prosecution's Application*, para. 198. See also *Transcript of the Hearing of 2 February 2006*, p. 16, lines 15-25 and p. 17, lines 1-11.

simultaneously with cooperation requests for arrest and surrender if the warrants of arrest are not issued under seal.

154. However, in the present case, the warrant of arrest for Mr Thomas Lubanga Dyilo is issued under seal. Therefore, save for the DRC, the Registrar shall wait for further instructions from the Chamber after a decision to unseal the warrant of arrest for Mr Thomas Lubanga Dyilo is made before transmitting cooperation requests to the States Parties in order for the latter to identify, trace, and freeze or seize the property and assets belonging to Mr Thomas Lubanga Dyilo at the earliest opportunity, without prejudice to the rights of third parties.

155. In this regard, the Chamber notes that the Prosecution has made no application to this effect.[174] Therefore, in requesting measures under article 57 (3) (e) of the Statute, the Chamber will act *proprio motu*, as provided for in rule 99 (1) of the Rules. However, the Chamber is of the view that, as the organ of the Court primarily in charge of the investigation of the DRC situation, the Prosecution should take this matter into consideration in view of future applications for a warrant of arrest or a summons to appear. It is the Chamber's view that the effectiveness of the reparation system would greatly benefit from the Prosecution's due consideration of this matter during the investigation stage.

[174] The Chamber notes, however, that at the hearing of 2 February 2006, the Prosecution affirmed that the Prosecution is paying attention to these matters in the course of its investigation (*Transcript of the Hearing of 2 February 2006*, p 86, lines 7 and 8).

FOR THESE REASONS,

DECIDES to issue a warrant of arrest for Mr Thomas Lubanga Dyilo for his alleged responsibility under article 25 (3) (a) of the Statute for:

(i) the war crime of enlistment of children under the age of fifteen, punishable under either article 8 (2) (b) (xxvi) or article 8 (2) (e) (vii), of the Statute;

(ii) the war crime of conscription of children under the age of fifteen, punishable under either article 8 (2) (b) (xxvi) or article 8 (2) (e) (vii) of the Statute; and

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

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

DECIDES to reject the Prosecution's request to issue a warrant of arrest for Mr Bosco Ntaganda because, on the basis of the evidence and information provided by the Prosecution in the Prosecution's Application, in the Prosecution's Submission, in the Prosecution's Further Submission and at the hearing of 2 February 2006, the case against him is inadmissible.

DECIDES that the Chamber shall prepare a request for cooperation seeking the arrest and surrender of Mr Thomas Lubanga Dyilo and containing the information

and documents required by article 91 (2) of the Statute, and that the Registrar shall transmit such request to the competent DRC authorities in accordance with rule 176 (2) of the Rules.

DECIDES to authorise the Registrar to inform, if necessary prior to the transmittal of the cooperation request for the arrest and surrender of Mr Thomas Lubanga Dyilo, the following of the existence of a warrant of arrest for Mr Thomas Lubanga Dyilo:

(i) those DRC authorities competent to receive a cooperation request for arrest and surrender from the Court in order to ensure the successful execution of the warrant of arrest;

(ii) the persons involved in the transfer of Mr Thomas Lubanga Dyilo to the premises of the Court in The Hague; and

(iii) the Under-Secretary-General of the United Nations for Peacekeeping Operations and the Special Representative of the Secretary-General of the United Nations for the Democratic Republic of the Congo for protection purposes.

DECIDES that the Chamber shall prepare cooperation requests for all States Parties in order for the latter to identify, trace and freeze or seize the property and assets belonging to Mr Thomas Lubanga Dyilo at the earliest opportunity, without prejudice to the rights of third parties; that the Registrar shall transmit such cooperation request to the competent DRC authorities along with the cooperation request for arrest and surrender in accordance with rule 176 (2) of the Rules; and that the Registrar shall wait for further instructions from the Chamber after a decision to unseal the warrant of arrest for Mr Thomas Lubanga Dyilo is made before transmitting cooperation requests to the other States Parties;

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

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

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

/signed/
Judge Claude Jorda
Presiding Judge

/signed/
Judge Akua Kuenyehia

/signed/
Judge Sylvia Steiner

Done this Friday 10 February 2006

At The Hague

The Netherlands