

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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PRE-TRIAL CHAMBER I

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

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
v. THOMAS LUBANGA DYILO**

Under seal

**Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the
Incorporation of Documents into the Record of the Case against Mr Thomas
Lubanga Dyilo**

The Office of the Prosecutor
Mr Luis Moreno Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Ekkerhard Withopf, Senior Trial Lawyer
Ms Lyne Décarie, Trial Lawyer

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 case against Mr Thomas Lubanga Dyilo is acting, or has acted, in relation to such case. Accordingly, in the absence of any acting State, the Chamber need not make any analysis of unwillingness or inability.

II.2.2 Whether the case against Mr Thomas Lubanga Dyilo meets the gravity threshold provided for in article 17 (1) (d) of the Statute

41. 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".³⁵ Hence, the fact that a case addresses one of the most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court.

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

42. 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,

³⁵ 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.

the contextual and the teleological criteria)³⁶ 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

43. 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.”

Contextual Interpretation

44. 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.

³⁶ Article 31 (1) of the Vienna Convention on the Law of Treaties.

45. 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.
46. 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.³⁷

Teleological Interpretation

47. 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."³⁸ The Chamber also

³⁷ 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 Dapkpama 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.

³⁸ Para. 5 of the preamble to the Statute.

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,³⁹ and that the drafters of the Statute emphasised “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”⁴⁰ and affirmed the need to ensure their effective prosecution “by taking measures at the national level and by enhancing international cooperation”.⁴¹

48. 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 retributory effect of the activities of the Court must be subordinate to the higher purpose of prevention.
49. 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.
50. 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.

³⁹ Para. 10 of the preamble and article 1 of the Statute

⁴⁰ Para. 6 of the preamble to the Statute.

⁴¹ Para. 4 of the preamble to the Statute.

51. 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).
52. 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).
53. The Chamber considers that the application of these three elements 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.
54. 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

55. The application of these elements 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 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)."

56. 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."

57. 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.⁴²

58. 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,⁴³ or large-scale criminality which may have taken place in one given area within a short time period (such as the execution of at least 7,000 Bosnian Muslims in Srebrenica between 11 and 18 July 1995)⁴⁴ or, most frequently, both.⁴⁵
59. In this regard, the Chamber recalls that, unlike the ICTY⁴⁶ and ICTR⁴⁷

⁴² 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. IT-96-23/2-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 Knezevic*, "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.

⁴³ 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.

⁴⁴ ICTY, *Prosecutor v. Radislav Krstic*, Amended Indictment, 27 October 1999, Case No. IT-98-33-PT, para. 24.

⁴⁵ See, for example ICTY, *Prosecutor v. Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic, Vlastko Stojiljkovic*, Second Amended Indictment, 29 October 2001, Case No. IT-99-37-PT, para. 63.

⁴⁶ 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).

⁴⁷ 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

which since their establishment in 1993 and 1994 have been dealing with one crisis situation, the Court is “a permanent institution”⁴⁸, which as a result of its broad personal, temporal and territorial jurisdiction,⁴⁹ 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)⁵⁰ and is currently undertaking the preliminary examination of the situation in the Central African Republic.⁵¹

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

Conclusion

61. 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.”⁵²

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).

⁴⁸ Article 1 of the Statute.

⁴⁹ See *supra*, section II.1.

⁵⁰ See <http://www.icc-cpi.int/cases.html>.

⁵¹ 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.

⁵² *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.

62. 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.
63. 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:
- 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

64. 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.
65. 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 2003.⁵³
66. The Chamber considers that, as discussed below,⁵⁴ 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.⁵⁵ For these reasons the

⁵³ *Prosecutor's Application*, paras. 73-74, 78, 80, 87, 107, 123, 146 and 151.

⁵⁴ See *infra* section III.3.1.

⁵⁵ See *supra*, footnote 39.

Chamber finds that the first requirement of the gravity threshold provided for in article 17 (1) (d) has been met.

67. 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 discussed below,⁵⁶ 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.
68. 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,⁵⁷ which included *inter alia* the authority to negotiate, sign and implement ceasefires or peace agreements⁵⁸ 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/FPLC⁵⁹ during the second half of 2002 and in 2003.⁶⁰

⁵⁶ See *infra* section III.2.

⁵⁷ *Idem*.

⁵⁸ *Prosecution's Application*, para. 45.

⁵⁹ 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.

⁶⁰ 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

69. Furthermore, as discussed below,⁶¹ 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.
70. 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.
71. 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,⁶² was only a regional

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 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).

⁶¹ See *infra* section III.2.

⁶² *Prosecution's Application*, paras. 49 and 65; and *Prosecution's Further Submission*, paras. 29 and 31.

group not operating outside the region of Ituri.⁶³ Furthermore, the Chamber considers that there are reasonable grounds to believe that 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.⁶⁴

72. 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,⁶⁵ (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 Ituri⁶⁶ and (3) the alleged direct or indirect intervention of some non-DRC actors in the conflict in Ituri.⁶⁷ 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.⁶⁸

73. In any event, given the existence of reasonable grounds to believe that Mr Thomas Lubanga Dyilo occupied the highest position of the UPC and

⁶³ *Prosecution's Application*, para. 70; and *Transcript of the Hearing of 2 February 2006*, p. 25, lines 7 and 8.

⁶⁴ See *Prosecution's Application*, para. 41; and *Prosecution's Further Submission*, paras. 34-35 and Annex 10.

⁶⁵ *Prosecution's Further Submission*, Annex 10.

⁶⁶ *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.

⁶⁷ 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.

⁶⁸ *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.

the FPLC,⁶⁹ that he played a unique role in the adoption and 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,⁷⁰ 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 2003,⁷¹ 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.

74. 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.
75. 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.

⁶⁹ See *infra* section III.2.

⁷⁰ See *infra* section III.2.

⁷¹ *Prosecution's Further Submission*, paras. 34 and 35 and Annex 10.