



Original: **English**

No.: **ICC-02/04-01/05**

Date: **3 June 2009**

**THE APPEALS CHAMBER**

**Before:** Judge Daniel David Ntanda Nsereko, Presiding Judge  
 Judge Sang-Hyun Song  
 Judge Akua Kuenyehia  
 Judge Erkki Kourula  
 Judge Anita Ušacka

**SITUATION IN UGANDA**

***IN THE CASE OF  
THE PROSECUTOR***

***v. JOSEPH KONY, VINCENT OTTI, OKOT ODHIAMBO, DOMINIC  
ONGWEN***

**Public Document**

**Response to “Observations of victims on the refiled document in support of  
 ‘Defence Appeal against ‘Decision on the admissibility of the case under  
 article 19 (1) of the Statute’ dated 10 March 2009’ filed on 15 April 2009 and on  
 the Prosecution Response thereto filed on 7 May 2009”**

**Source:** Jens Dieckmann, Counsel for the Defence

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**

**The Office of the Prosecutor**

Mr. Louis Moreno Ocampo  
Ms. Fatou Bensouda

**Counsel for the Defence**

Mr. Jens Dieckmann

**Legal Representatives of Victims**

Ms Paolina Massidda  
Ms Sarah Pellet

**Legal Representatives of Applicants**

Ms Paolina Massidda

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

Ms. Paolina Massidda

**The Office of Public Counsel for the  
Defence**

**States Representatives**

The Government of the Republic of  
Uganda

**Amicus Curiae**

The Uganda Victims' Foundation  
Redress Trust

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**REGISTRY**

**Registrar**

Ms. Silvana Arbia

**Deputy Registrar**

Mr. Didier Preira

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## **I. Outline of the Proceedings**

1. In its “Decision on the admissibility of the case under article 19(1) of the Statute” rendered on 10 March 2009 (“the Decision”),<sup>1</sup> Pre-Trial Chamber II (“the Chamber”) determined that “at this stage the Case is admissible under article 17 of the Statute”.
2. On 16 March 2009, the undersigning Counsel for the Defence filed an appeal pursuant to articles 19(6), 82(1)(a) and 83(2)(a) of the Statute and rule 154(1) of the Rules against the Decision dated 10 March 2009.
3. On 8 April 2009, the Appeals Chamber issued an “Order on the re-filing of the document in support of the appeal and Directions on the filing of observations”.<sup>2</sup>
4. On 15 April 2009, Counsel for the Defence refiled his document in support of the appeal (the “Refiled document in support of the Appeal”).<sup>3</sup>
5. On 7 May 2009, the Prosecution filed its “Response to Defence Appeal against ‘Decision on the admissibility of the case under article 19(1) of the Statute’ (the “Prosecution Response”).<sup>4</sup>
6. On 28 May 2009, the Office of Public Counsel for Victims (“OPCV”) submitted its “Observations of victims on the refiled document in support of ‘Defence Appeal against ‘Decision on the admissibility of the case under article 19 (1) of the Statute’ dated 10 March 2009’ filed on 15 April 2009 and on the Prosecution Response thereto filed on 7 May 2009” (the “OPCV Observations”).<sup>5</sup>

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<sup>1</sup> ICC-02/04-01/05-377.

<sup>2</sup> ICC-02/04-01/05-393.

<sup>3</sup> ICC-02/04-01/05-394.

<sup>4</sup> ICC-02/04-01/05-401.

<sup>5</sup> ICC-02/04-01/05-403.

## II. Discussion

7. In its observations, the OPCV primarily contends that the Refiled document in support of the Appeal does not meet the requirements of article 82(1)(a) of the Rome Statute.<sup>6</sup> The admissibility of the Refiled document in support of the Appeal is contested by the OPCV on the basis that Counsel challenges the procedural foundations of the impugned Decision rather than its substantive conclusions.<sup>7</sup>
8. In this respect, Counsel respectfully submits that this argument is flawed as the Appeals Chamber of this honourable Court has already confirmed that a procedural error constitutes a valid ground of appeal to admissibility decisions. Particular reference is made to the Appeals Chamber's "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" in the *Ntaganda* case ("*Ntaganda* Appeal's Judgement") from 13 July 2006.<sup>8</sup> The Prosecution had sought extraordinary review of the Pre-Trial Chamber's Decision from 31 March 2006, arguing that the interpretation of article 82(1)(d) of the Rome Statute leaves a *lacunae* to be filled by the provisions of article 21(1)(c) of the Rome Statute introducing general principles of law. The Appeals Chamber, although considering the Prosecution's request as ill-founded, went on to elaborate on the existence of the *lacunae* in the above mentioned provisions.
9. This approach of the Appeals Chamber can also be found in paragraphs 13 through 18 of the Appeals Chamber's "Judgement on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status

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<sup>6</sup> OPCV Observations, paras. 12-15.

<sup>7</sup> OPCV Observations, paras. 13-15.

<sup>8</sup> ICC-01/04-168.

Conference on 10 June 2008” rendered on 21 October 2008 in the situation in the Democratic Republic of the Congo,<sup>9</sup> as well as in paragraphs 38 and 54 of the Appeals Chamber’s “Judgement on the Prosecutor’s Appeal against the decision of the Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, article 58’” delivered on 13 July 2006 in *The Prosecutor v. Thomas Lubanga Dyilo*.<sup>10</sup>

10. In paragraphs 20 and 21 of the OPCV Observations, the OPCV analyses – “in the alternative” – the provisions governing the appointment of counsel in the pre-trial stage and questions whether the appointment of counsel in admissibility proceedings is required by the Statute and Rules.
11. In this regard, it is respectfully submitted that by granting the victims the right to submit observations, Pre-Trial Chamber II triggered the right of the Defence to respond under rule 91(2) of the Rules of Procedure and Evidence. Similarly, by granting external participants the right to file an *amicus* brief, the Chamber also triggered the right of the Defence to file a response under rule 103(2). In order for such rights to be interpreted in an effective manner they must equate to a right to legal representation, otherwise the right to participate would be illusory.
12. Moreover, contrary to the submission of the OPCV, these rules granting the Defence a right to participate do not make the exercise of these rights contingent on the question as to whether the defendants have voluntarily surrendered or been arrested. The OPCV contends that rule 121(1) of the Rules “makes it clear that only a suspect who is surrendered or who voluntarily appears” shall enjoy the rights set out in article 67 of the Statute.<sup>11</sup> Counsel submits that the OPCV’s

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<sup>9</sup> ICC-01/04-01/06 OA 13.

<sup>10</sup> ICC-01/04-169 23-092008 8/49 CB PT OA.

<sup>11</sup> OPCV Observations, para . 21.

narrow interpretation of rule 121(1) of the Rules is neither supported by the Statute nor the Rules. Rule 121(1) of the Rules does not exclude the applicability of the rights set forth in article 67 of the Statute to persons not yet appearing before the Court. In fact, both the Inter-American Court of Human Rights<sup>12</sup> and the European Court of Human Rights<sup>13</sup> have consistently found that the right to a fair trial and to be represented by counsel apply at any stage of the proceedings.

### **III. Relief Sought**

13. For the foregoing reasons, Counsel respectfully requests the Appeals Chamber

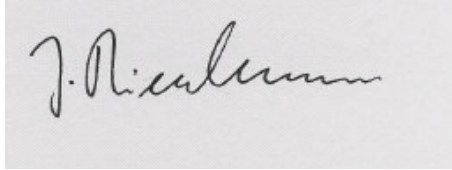
- a) to dismiss the OPCV Observations in their entirety; and
- b) to reverse the “Decision on the admissibility of the case under article 19(1) of the Statute” dated 10 March 2009; and
- c) to suspend the present proceedings under article 19(1) of the Rome Statute pending proper implementation of the defendants’ right to effectively participate in the proceedings.

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<sup>12</sup> Inter-American Court of Human Rights, Case of *Baena-Ricardo et al. v. Panama*, Judgment, 2 February 2001, paras. 124 and 127.

<sup>13</sup> Commission’s report in the case of *Nielsen v. Denmark*, 15 March 1961, Yearbook of the Convention, vol. 4, pp. 548-550; *Deweert v. Belgium*, Judgment, Application No. 6903/75, 27 February 1980, para. 56.

Respectfully submitted.

A rectangular box containing a handwritten signature in black ink. The signature appears to be 'J. Dieckmann' written in a cursive, flowing style.

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Counsel for the Defence, Mr. Jens Dieckmann

Dated this 3 June 2009

At The Hague, The Netherlands