Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-02/04-01/05 OA3**
Date: **7 May 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

Prosecution Response to Defence Appeal against "Decision on the admissibility of the case under article 19(1) of the Statute"

Source: **Office of the Prosecutor**

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The Office of the Prosecutor

Ad hoc Counsel for the Defence
Mr Jens Dieckmann

Legal Representatives of Victims

Legal Representatives of Applicants

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

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Redress Trust

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Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. Introduction

1. Ad-Hoc Counsel for the Defence ("the Appellant") has appealed against a decision of Pre-Trial Chamber II dated 10 March 2009,[1] in which the Chamber found that there was no reason to revisit its previous determination that the case against *Joseph Kony et al* is admissible. The Prosecution now responds to the Defence's Appeal Brief, dated 15 April 2009,[2] and submits that none of the grounds presented by the Appellant meets the criteria warranting the intervention of the Appeals Chamber.

2. The Appellant does not challenge the conclusion of the Pre-Trial Chamber regarding the admissibility of the case. Rather, he only raises a series of alleged procedural irregularities. Furthermore, the Appellant fails to identify how any of the alleged errors impacted on the Appealed Decision to the prejudice of the defence. Rather, in many instances the Appellant either repeats submissions which he made before the Pre-Trial Chamber or fails to develop his arguments.

3. In addition, while the proceedings were initiated by the Pre-Trial Chamber, *proprio motu*, under Article 19(1), the Chamber ultimately concluded that "there is no reason for the Chamber to review the positive determination of the admissibility of the Case made [when issuing the warrants of arrest]."[3] Given that the Chamber did not decide anew upon the substantive question of admissibility, and the Appellant neither disputes the substantive admissibility of the case nor demonstrates that any of the alleged procedural errors impacted on the Decision, this appeal fails to fulfil the requirements, and certainly the intent, of Article 82(1)(a).

II. Procedural and Factual Background

4. On 8 July 2005, Pre-Trial Chamber II ("the Chamber") issued a warrant of arrest for Joseph KONY, as amended on 27 September,[4] as well as the warrants of arrest for Vincent OTTI,[5] Okot ODHIAMBO,[6] and Dominic ONGWEN[7] in the case of *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen* ("the Case"). None of the above persons have been arrested, though all purportedly know that they are the subject of this case and that their arrest is sought.

[1] ICC-02/04-01/05-377 ("the Appealed Decision").
[2] ICC-02/04-01/05-394 ("the Appeal Brief").
[3] Appealed Decision, para. 52.
[4] ICC-02/04-01/05-53.
[5] ICC-02/04-01/05-54.
[6] ICC-02/04-01/05-56.
[7] ICC-02/04-01/05-57.

5. On 21 October 2008 the Chamber initiated proceedings under Article 19(1), *proprio motu*, to consider the admissibility of the Case.[8] In the same Decision, the Chamber appointed counsel for the Defence ("Counsel"), "within the context and for the purposes of the present proceedings",[9] and invited the Prosecutor, Counsel, the Republic of Uganda, and the victims and/or their legal representatives to submit observations on the admissibility of the Case by 10 November.[10]

6. On 28 October 2008, Counsel requested the Presidency to review and clarify his mandate and to issue an order conditionally staying or suspending the proceedings.[11] The same day, Counsel requested that the Chamber order for a conditional stay/suspension of the proceedings.[12]

7. On 31 October 2008, the Chamber rejected Counsel's request for stay or suspension of the proceedings, but granted Counsel's alternative request for access to certain documents and also granted a fixed extension of time for the submission of observations.[13]

8. On 9 November 2008, the Appellant filed his "Request for leave to appeal the 'Decision on Defence Counsel's Request for conditional stay of proceedings' from 31 October 2008".[14] The Chamber denied this application on 13 November 2008.[15]

9. On 11 November 2008, the Presidency dismissed Counsel's application on the basis of "reasons to be given shortly",[16] The Presidency subsequently delivered its reasons on 10 March 2009.[17]

10. The Prosecution,[18] Counsel,[19] Uganda[20] and the Office of Public Counsel for Victims ("OPCV")[21] submitted observations on the admissibility of the case on 18 November 2008.

11. With leave of the Chamber,[22] *amicus curiae* also filed submissions on 18 November 2008.[23] Uganda responded to the *amicus curiae* submissions on 18 February 2009.[24]

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[8] ICC-02/04-01/05-320 ("Decision of 21 October 2008").
[9] Decision of 21 October 2008, p. 8.
[10] *Idem*.
[11] ICC-02/04-01/05-326. In particular, see para. 42.
[12] ICC-02/04-01/05-325.
[13] ICC-02/04-01/05-328 ("Decision of 31 October 2008 on stay of proceedings").
[14] ICC-02/04-01/05-339.
[15] ICC-02/04-01/05-346, paras.15-16.
[16] ICC-02/04-01/05-344.
[17] ICC-02/04-01/05-378.
[18] ICC-02/04-01/05-352.
[19] ICC-02/04-01/05-350 ("Defence Observations").
[20] ICC-02/04-01/05-354-Annex2.
[21] ICC-02/04-01/05-349.
[22] ICC-02/04-01/05-333, 5 November 2008.

12. On 10 March, 2009, having considered the submissions of the invited participants and the amicus curiae filings, the Chamber issued the "Decision on the admissibility of the case under article 19(1) of the Statute" ("the Appealed Decision").[25]

13. First, the Chamber stated that it had appropriately opened an inquiry, *proprio motu*, into the admissibility of the Case. It also explained that its consideration of the issue did not foreclose later challenges to admissibility under Article 19.[26] The Chamber further rejected the Appellant's argument that a decision in the absence of the suspects posed a risk of prejudging the case against them.[27]

14. On the merits, the Chamber found that it had no reason to review the positive determination of admissibility that it has previously made, as it concluded that, at this point in time, the Case remained the same as at the time of the issuance of the Warrants.[28]

15. On 30 March 2009, the Appellant filed a document in support of appeal against the Appealed Decision.[29] On 8 April 2009, the Chamber rejected the initial brief and ordered the Appellant to re-file it pursuant to Regulation 37(1).[30] On 15 April 2009, the Appellant filed this appeal brief ("Appeal Brief").[31] The Prosecution responds to the Appeal Brief pursuant to Regulation 64(4).

III. Whether the requirements for an appeal under Article 82(1)(a) are met by the current appeal

16. The Appellant, appearing on behalf of "the Defence", brings the current appeal under, *inter alia*, Articles 82(1)(a) and 83(2)(a) of the Rome Statute.[32] Article 82(1)(a) allows a party to appeal, without prior authorization, from "[a] decision with respect to jurisdiction or admissibility".[33] Article 83(2) provides that "[i]f the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision

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[23] ICC-02/04-01/05-353.
[24] ICC-02/04-01/05-369.
[25] ICC-02/04-01/05-377.
[26] Appealed Decision, paras. 21-29.
[27] Appealed Decision. paras. 30-32.
[28] Appealed Decision, para. 52.
[29] ICC-02/04-01/05-390 OA3. The Appellant had filed his notice of appeal on 16 March 2009, ICC-02/04-01/05-379 OA3.
[30] ICC-02/04-01/05-393 OA3.
[31] ICC-02/04-01/05-394 OA3.
[32] Appeal Brief, para. 6.
[33] "The word "decision" refers to determinations or rulings made by a Pre-Trial or Trial Chamber, not to all statements that are made in the reasoning." (ICC-01/04-01/06-1433 OA11, 11 July 2008, Dissenting Opinion of Judge Song, para. 3).

[...], or that the decision [...] appealed from was materially affected by error of fact or law or procedural error, it may (a) Reverse or amend the decision".

17. The Appellant ultimately does not challenge any substantive findings regarding the admissibility of the case, i.e. he does not suggest that the Pre-Trial Chamber's adherence to its prior ruling was factually or legally erroneous. And while the Appellant does seem to contend that the Chamber committed various procedural errors in the admissibility proceeding, he does not identify how these alleged errors materially affected the ultimate decision or why reversal of the decision is appropriate. The Prosecution reiterates that an Appellant must identify the alleged error, present arguments in support of its claim, and must also demonstrate how the error impacts on the decision.[34]

18. In this case, the Appellant has consistently failed to show that any of the alleged errors invalidate the Pre-Trial Chamber's substantive determination on admissibility. As a result, and given that the substance of the Decision is not disputed or impugned, the Prosecution submits that the Appeals Chamber may dismiss the appeal as it fails to fulfil the requirements, and certainly the intent, of Article 82(1)(a).

IV. On the merits, Counsel's claims should be dismissed.

19. The Appellant raises four grounds of appeal against the Decision:

- The Chamber misconstrued the nature and scope of Counsel's mandate ("First Ground of Appeal");[35]
- The Chamber has improperly used its discretion to start admissibility proceedings in the absence of the defendants ("Second Ground of Appeal");[36]
- The Chamber erred in finding that a determination of the admissibility of the Case by the Chamber under article 19(1) of the Statute at a stage, when none of the persons sought by the Court is in custody, (a) would not jeopardize their right to bring a

[34] See e.g. *Prosecutor v. Katanga*, ICC-01/04-01/07-194 OA3, 14 February 2008, para. 12. See further e.g. *Prosecutor v. Brdjanin*, IT-99-36-A, Appeal Judgement, 3 April 2007, para. 9. In general, the arguments must be limited to the errors alleged by the Appellant (*Prosecutor v. Krajisnik*, IT-00-39-A, Appeal Judgement, 17 March 2009, para. 12).

[35] Under its First Ground of Appeal, the Appellant argues that "the Chamber misconstrued the nature and scope of the Counsel's mandate and misinterpreted his function and role, in particular when noting in paragraphs 24, 30 and 31 that Counsel was appointed to represent 'the interests of the Defence'" (Appeal Brief, para. 9; see also paras 10-24).

[36] Under its Second Ground of Appeal, the Defence argues that the Chamber wrongly exercised its discretionary right to review *proprio muto* the admissibility of the case pursuant to Article 19(1), as the requirements set out in the *Ntaganda* Appeals Chamber Judgment are not met (Appeal Brief, paras. 25-36).

challenge pursuant to article 19(2) of the Statute at a later stage;[37] and (b) would not constitute predetermination ("Third Ground of Appeal");[38] and

- The Chamber erred in finding that Counsel had adequate time and resources to effectively participate in the current admissibility proceedings ("Fourth Ground of Appeal").[39]

20. The arguments presented by the Appellant in relation to each of these four grounds of appeal are unfounded. The Appellant's claims thus should be dismissed.

A. The Pre-Trial Chamber's appointment of counsel did not constitute an error that materially affected the Decision.

21. As his first ground of appeal, the Appellant contends that the Pre-Trial Chamber erred in appointing "counsel for the defence to represent [the suspects] within the context and for the purposes of the [admissibility] proceeding". Specifically, the Appellant claims that (a) the Chamber erred by failing to appreciate that the appointment of counsel in these proceedings was mandatory, not discretionary; [40] (b) Counsel was unable to consult with his clients;[41] and (c) had Counsel submitted observations on their behalf he might have made arguments contrary to the interests or preferences of one or more of the suspects.[42] Further, the Appellant argues that had he known he was representing only the interests of the "Defence" and not the suspects themselves he would have submitted observations on the merits of the admissibility issue.[43]

22. This ground of appeal does not arise from the Appealed Decision. The Appealed Decision has no bearing on the appointment of Counsel or on the determination of the nature and scope of Counsel's mandate; it merely explains the "purpose of the appointment of counsel for the Defence in the absence of the persons sought".[44] The Pre-Trial Chamber appointed Counsel for the Defence in its Decision of 21 October 2008.[45] The Appellant submitted a request for review of Counsel's appointment to the Presidency of the Court

[37] Appeal Brief, paras. 37-39 ("First Error under the Third Ground of Appeal"). Nevertheless, the Appellant does not develop in detail this alleged error in the Appeal Brief.
[38] Appeal Brief, paras. 38-39 ("Second Error under the Third Ground of Appeal"). The Appellant argues that it exists a heightened of judicial predetermination concerning any future challenges to admissibility.
[39] Appeal Brief, paras. 41-49.
[40] Appeal Brief, para. 11.
[41] Appeal Brief, para. 18, which refers to the Defence Observations, paras. 34-38.
[42] Appeal Brief, paras. 17 and 20.
[43] Appeal Brief, para. 21.
[44] Appealed Decision, paras. 30-32. See in particular title prior to para. 30.
[45] ICC-02/04-01/05-320, p. 8.

under Regulation 76(1),[46] which was dismissed.[47] The Appellant also requested the Pre-Trial Chamber to stay the proceedings concerning admissibility, pending the outcome of the Presidency's review,[48] which was similarly rejected.[49] The Appellant's application for leave to appeal the Chamber's decision rejecting the stay of proceedings[50] was also denied by the Chamber.[51] This matter has thus been exhaustively litigated in the proper forum, and the Appellant has not demonstrated how it arises out of, or impacts upon, the Appealed Decision.

23. Furthermore, much of the Appellant's claim in respect of this ground depends on arguments that are not articulated in the Appeal Brief. For example, the Appellant contends that the Chamber erred because it "did not adequately address the issues and concerns [...] raised in the Defence Observations",[52] but he does not specify what those issues and concerns were, much less why the Chamber's failure to observe them constitutes legal or factual error. He also seeks to incorporate by reference arguments from his submissions before the Pre-Trial Chamber without elaboration.[53] The Prosecution recalls that the Appeals Chamber has previously expressed its disapproval of incorporation by reference of arguments made in other documents, holding that "[t]he arguments of a participant to an appeal must be fully contained within that participant's filing in relation to that particular appeal."[54] Thus, to the extent that Counsel's argument relies on points not stated in the Brief, it should be summarily rejected.

24. On the merits, the Appellant's claim also does not demonstrate any entitlement to relief.

25. On the first point, the Chamber's purported error in not appreciating that appointment of counsel was mandatory, the Chamber appointed Counsel because it found that representation in these circumstances – namely that none of the suspects had been apprehended or was otherwise represented in the Court – was "in the interest of justice".[55] The Chamber also suggested in its decision that the appointment of counsel, "whilst not

[46] ICC-02/04-01/05-326, 28 October 2008.
[47] ICC-02/04-01/05-344, 11 November 2008. The reasoning for the decision of 11 November is provided in the Presidency's decision of 10 March 2009 (ICC-02/04-01/0-378).
[48] ICC-02/04-01/05-325.
[49] ICC-02/04-01/05-328.
[50] ICC-02/04-01/05-339, 9 November 2008.
[51] ICC-02/04-01/05-346, 13 November 2008.
[52] Appeal Brief, para. 14.
[53] Appeal Brief, para. 18 (which refers to the Defence Observations, paras. 34-38).
[54] See ICC-01/04-01/06-774 OA6, 14 December 2006, para. 29, going on to state that "The filing must, in itself, enable the Appeals Chamber to understand the position of the participant on the appeal, without requiring reference to arguments made by that participant elsewhere. The practice followed by the appellant [...] could also lead, in reality, to a circumvention of the page limits that are stipulated in the Regulations of the Court."
[55] Decision of 21 October 2008, p. 8; see also Appeals Decision, para. 32. The appointment was made pursuant to Regulation 76(1), which states that the Chamber "following consultation with the Registrar, may appoint counsel in the circumstances specified in the Statue and the Rules or where the interests of justice so require".

mandatory, appears to be the procedurally appropriate way to ensure that fairness of the proceedings be preserved",[56] noting that it "has indeed become the established practice of the Court whenever the person sought in the case is absent and the interests of justice require that the defence nevertheless be represented".[57] However it is irrelevant that the Chamber did not find a mandatory obligation to appoint counsel. It recognized that appointment is both "the procedurally appropriate way" and "the established practice of the Court". Even if the finding was erroneous, it had no impact on the Decision as Counsel was indeed appointed. Reversal is warranted if the Chamber commits an error which impacts on the decision, not if the Chamber provides the wrong rationale as explanation for conduct the correctness of which Counsel does not dispute.

26. The second point, regarding Counsel's inability to consult with his clients, also has no bearing on the legitimacy of his appointment. Counsel was not forced to accept the appointment over his objection; Article 13 of the Code of Professional Conduct specifically allows counsel to refuse to enter into a representation agreement. Nor does he now claim that another attorney or attorneys had greater access to the suspects and should have been appointed in his stead. As the Pre-Trial Chamber had previously ruled, albeit in a different context, there may well be instances where in the early stages of proceedings appointed Counsel cannot contact the person represented, yet this does not *per se* prevent counsel from being able to contribute to the overall fairness of the proceedings.[58] Finally, the Appellant does not demonstrate that his appointment to represent the suspects rendered the ensuing proceedings unfair or wrongly and adversely affected the outcome of the admissibility determination.

27. His third point, that he could not represent the four suspects concurrently because their interests may have been different, is equally unfounded. Counsel in other proceedings have been in a similar position before, having been appointed to represent the defence for a discrete stage of the proceedings in a case involving multiple suspects and without being able to contact those suspects. Such counsel have participated before various chambers of this Court, including the Appeals Chamber,[59] without any Chamber considering that this violated the rights of the suspects or the fairness of the proceedings.

28. The Statute and Rules contain various instances in which the appointment of counsel to represent the interests of the defence is contemplated before a suspect has appeared before

[56] Appealed Decision, para. 31.
[57] Appealed Decision. para. 32.
[58] See ICC-02/04-01/05-316, 7 October 2008, p. 7.
[59] See e.g. ICC-02/04-01/05-371 OA2, 23 February 2009.

the Court.[60] Such an appointment is not intended to replace the appointment and instruction of counsel by an individual suspect or accused.[61] Rather, it is intended as an additional safeguard at these early stages of the proceedings, and in the absence of personally appointed and instructed counsel. Appointment of a single lawyer to represent the interests of the Defence in these circumstances, accordingly, is not a legal or procedural error that affected the fairness of the admissibility proceeding or the reliability of the decision.

29. Finally, there is no merit to the Appellant's related argument that had he known he represented the interests of "the defence" rather than the four suspects he would have been in a position to make submissions on admissibility. The Prosecution submits that as from the moment of the issuance of a warrant of arrest or a summons to appear, there is no meaningful distinction between the interests of the defence and the interests of the persons against whom a warrant has been issued.[62] However even to the extent that the Appellant considers that such a distinction could or must be drawn, Counsel could have filed submissions by "the defence" under the terms of the appointment, along with an explicit statement that he did not present the views and interests of the four suspects. Additionally, it is not clear what submissions "the defence" would have made; certainly the Appellant does not explain in concrete terms what he would have done had only he known to present the views of "the defence," much less how those submissions might have influenced the Chamber's ultimate determination. Thus, this claim does not demonstrate that the proceedings were unfair, or infected with a procedural error, sufficient to materially affect the decision or its reliability.

B. The Chamber did not Err in Conducting an Admissibility Assessment in the Absence of the Suspects

30. The Appellant appears to contend that the Pre-Trial Chamber abused its discretion in conducting the admissibility proceedings, and suggests that the Chamber may not conduct any proceeding unless the suspect/accused is present. The argument depends in part on points that are incorporated by reference from pleadings filed in the Pre-Trial Chamber and not articulated in this appeal.[63] As set out above,[64] unarticulated arguments

[60] See e.g. Article 56(1)(d).
[61] In this regard, the references by the Appellant to Article 67(1)(d) are misplaced: Appeal Brief, para. 11; see also paras. 25, 32, 37, 41 and 43.
[62] See for instance ICC-02/04-01/05-316, 7 October 2008, p. 7, where the Chamber has referred to the "interests of the defence [...] where there has not yet been ... an arrest ... of the person/persons sought".
[63] See Appeal Brief, para. 34.

incorporated from other pleadings must be disregarded. As to the arguments that the Appellant does spell out, none demonstrates that the proceedings were unfair, or infected with a procedural error, sufficient to materially affect the decision or its reliability.

31. The Prosecution recalls that the Appellant has the burden to demonstrate that the Chamber either disregarded the principles set out by the Appeals Chamber in the *Ntaganda* Appeals Chamber Judgment[65] or did not properly apply them. The Appellant fails to do so and ignores that the Appealed Decision did apply the principles underlying the *Ntaganda* Appeals Chamber Judgment.[66]

32. The Appeals Chamber in *Ntaganda* underlined the need for exceptional circumstances to exercise the Chambers' discretionary right to review the admissibility of cases "[…] when deciding on an application for a warrant of arrest in ex parte Prosecutor proceedings".[67] In particular, the Appeals Chamber cited three possible (and non exhaustive) situations that would allow the exercise of the right encompassed in Article 19(1) by the Chambers: "instances where a case is based on the established jurisprudence of the Court, uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of *proprio motu* review".[68]

33. The Appealed Decision concluded that "[b]orrowing the language used by the Appeals Chamber in its decision dated 13 July 2006, albeit in respect of a procedural context other than the one of the proceedings, […] the lack of clarity as to the judicial authority ultimately vested with the power to decide venue where the Case should proceed amount to 'an ostensible cause impelling the exercise of *proprio motu* review'".[69]

34. The Prosecution submits that the Chamber in this case stayed within the boundaries of the *Ntaganda* Appeals Chamber Judgment. The Appellant fails to address the Chamber's plain application of the *Ntaganda* doctrine.[70] Consequently, in the absence of any identifiable error on the reasoning and conclusions of the Chamber, the Second Ground of Appeal must be dismissed.

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[64] See para. 23, and footnote 54, above.
[65] ICC-01/04-169 OA, 13 July 2006 ("*Ntaganda* Appeals Chamber Judgment").
[66] Appealed Decision, paras. 40-44.
[67] *Ntaganda* Appeals Chamber Judgment, para. 52.
[68] *Ibid.*, para. 53, and quoted in para. 20 of the Appealed Decision.
[69] Appealed Decision, para. 44.
[70] Appealed Decision, paras. 40-44; in particular, with regard to the third scenario referred to in the *Ntaganda* Appeals Chamber Judgment, para. 53. The Appellant fails to address the Chamber's reasoning by simply stating "As to the issue of whether an ostensible cause impels the exercise of *proprio motu* review, Counsel reiterates that the Pre-Trial Chamber has already decided that the case is admissible in connection with its decision on the issuance of the arrest warrants". See Appeal Brief, para. 35. Furthermore, the Appellant inappropriately refers to prior submissions in para. 34 of the Appeal Brief.

35. Finally, as with the other claims, there is no cognizable prejudice to the suspects from the decision to examine admissibility. Before this most recent proceeding, the Chamber had accepted that the case was admissible. Nothing in the admissibility proceeding or the Appealed Decision changed that result.

C. The Chamber did not err in concluding that its admissibility determination would not jeopardize the rights of the suspects to challenge admissibility or constitute predetermination.

36. As its third ground for appeal, the Appellant argues that the Chamber's assessment of admissibility prejudiced the suspects. He first asserts that "the Chamber misconstrued the defendant's rights under article 19(2) of the Statute to challenge admissibility more than once",[71] because "the Chamber will already have ruled on defence oriented challenges to admissibility".[72] Further he argues that "even if" the suspects have a literal right under the Statute to contest admissibility on their own behalf, the right is "rather illusory and not effective".[73]

37. Although the Appellant asserts that the rights of the suspects to bring a challenge under Article 19(2) have been compromised,[74] the Appellant fails to provide any reasoning to substantiate this general assertion.[75] Indeed, the Appellant raises this argument despite the fact that the Pre-Trial Chamber had previously and expressly ruled, on 31 October 2008, that "the current proceedings were initiated by the Chamber on its own motion and, accordingly, are without prejudice to the rights of the accused to challenge the admissibility pursuant to article 19(2)(a) of the Statute".[76]

38. The Appellant's apparent assertion to the contrary notwithstanding, it is beyond dispute that the suspects retain the unquestioned and very real right to bring a future admissibility challenge should they choose to do so. Under Article 19, the suspects have a statutory

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[71] Appeal Brief, para. 37.
[72] Appeal Brief, para. 39.
[73] Appeal Brief, para. 39.
[74] "[…] Chamber misconstrued the defendant's rights under article 19(2) of the Statute to challenge the admissibility more than once [and] [t]he Chamber erroneously interpreted the threshold of article 19(4) of the Statute" - Appeal Brief, para. 37.
[75] The reference to Article 19(4) in paragraph 39 of the Appeal Brief does neither assist to clarify nor to develop the alleged error with regard to the applicability of Article 19(2). "[…] Even if the defendants do retain the right to challenge admissibility at a future stage as a right under article 19(4) of the Statute, this right will be rather illusory and not effective, if – on the one hand – the Chamber has already ruled on the types of arguments that the defendants could make during an earlier *proprio motu* review, and – on the other hand – the counsel appointed during this earlier *proprio motu* review had been unable to sufficiently raise defence arguments due to concerns regarding conflict of interest." Indeed, this sentence relates more to the argument of judicial pre-determination.
[76] Decision of 31 October 2008, p.7, (paras. 3-5).

right to at least one opportunity to challenge admissibility on their own behalf.[77] They have not lost that opportunity because of the Chamber's *proprio motu* consideration of admissibility; and the mere act of providing observations on admissibility proceedings initiated by another participant or the Chamber cannot be equated with bringing a substantive challenge to admissibility.

39. Accordingly, the Chamber correctly found that "it appears beyond controversy that the accused will always be entitled to raise a challenge under article 19(2) of the Statute, whether or not the Chamber has exercised its powers under article 19(1)".[78] Their future right to contest admissibility is not illusory, it is manifestly and unquestionably real.[79]

40. The Appellant next complains that "[t]he defendants will face a heightened risk of judicial pre-determination concerning any future challenges to admissibility, since the Chamber will already have ruled on defence oriented challenges to admissibility".[80] The Prosecution notes that the Appeals Chamber has previously stated that, in some circumstances, a precipitous ruling on admissibility in the absence of the suspect or accused may raise concerns over pre-determination.[81] But there is no reason to assume that the Chamber's determination in this proceeding will bias the Chamber against a future admissibility challenge.

41. The Chamber, addressing Counsel's concern, explained that "[b]y its very nature, the determination of the admissibility of a case is subject to change as a consequence of a change in circumstances. This idea underlies the whole regime of complementarity at the pre-trial stage [...]."[82] Article 19 expressly allows for the possibility of successive challenges by different parties or States (without conditioning those challenges on the existence of new facts), and further contemplates the possibility of challenges by different parties relying on new arguments without requiring a change in the factual scenario.[83] Further, the Chambers of this Court are constituted by professional judges. The

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[77] Article 19(2) provides that "[c]hallenges to the admissibility of a case [...] may be made by: (a) An accused or a person for whom a warrant of arrest or summons to appear has been issued [...]". Article 19(4) provides that "any person [...] referred to in paragraph 2" may challenge admissibility of a case once; it further authorizes successive challenges to admissibility by a single person if the successive challenge(s) is authorized by the Court.
[78] Appealed Decision, para. 26.
[79] The Prosecution notes that if, hypothetically, a future Chamber were to erroneously dismiss a suspect's admissibility challenge because of these proceedings, that decision could itself be appealed as a matter of right.
[80] Appeal Brief, para. 39.
[81] *Ntaganda* Appeals Chamber Judgment, para. 50.
[82] Appealed Decision, para. 27. See also para. 28.
[83] Article 19 (2) and (3) do not ask for "exceptional circumstances" or "new facts" as Article 19(4) and (10) do, in order for the persons mentioned in article 19(2)(a), States and Prosecutor to challenge the admissibility of the case.

speculative projection of potential future unfairness is inadequate to establish any unfairness affecting the reliability of this admissibility judgment.

D. Reversal is not warranted on the ground that Counsel had inadequate time and resources to effectively participate in the current admissibility proceedings

42. The Appellant contends that inadequate resources and time deprived the suspects of equality of arms in the context of the admissibility proceeding. This claim is without merit for several reasons.

43. At the outset, the Prosecution notes that many of the Appellant's arguments merely repeat claims that were made before the Pre-Trial Chamber, without demonstrating how the Chamber's rejection constituted an error warranting the intervention of the Appeals Chamber.[84] The Appeals Chamber has previously rejected such a practice,[85] and the Prosecution submits that it should ignore such arguments in this instance.

44. The issue of the resources available to Counsel was the subject of a separate request, dated 28 October 2008 and requesting a stay of proceedings, "for alternative relief [...] in order to assist [counsel] in preparing its requested observations on admissibility".[86] In its Decision of 31 October 2008, the Pre-Trial Chamber granted the request for access to documents in its entirety,[87] and also partially granted the request for additional time to submit observations.[88] Counsel received the relevant documents prior to filing the Defence Observations, on 3 and 14 November 2008. However Counsel did not submit any further request for additional time and resources. Rather, in the substantive Observations Counsel made a general claim that he "lacks adequate time and resources to

[84] See Appeals Brief, paras. 45-48; which essentially reproduce the Defence Observations, paras. 48-51. In addition, the Appeals Brief, at paras. 32-33 and 39 reproduces (in whole or in part) the Defence Observations (paras. 41 and 44).
[85] See e.g. "[T]he Appeals Chamber considers that the nature of this appeal is corrective and limited to the specific grounds of appeal raised. It is not a rehearing of the original request for interim release. For that reason, [...] it is not appropriate either merely to repeat evidence that was before the Pre-Trial Chamber [...] without making any specific link as to how such material affects the Appeals Chamber's determination of the issues raised on appeal." - *Prosecutor v. Lubanga*, Judgment on Interim Release Appeal, ICC-01/04-01/06-824 OA7, 13 February 2007, Para. 71. The jurisprudence of the ICTY and ICTR supports this approach. The *ad hoc* tribunals have repetitively considered as a ground for summary dismissal those submissions on Appeal which are a mere repetition of "[...] arguments that did not succeed at trial without any demonstration that the Trial Chamber's rejection of them constituted an error warranting the intervention of the Appeals Chamber"; see *Krajisnik* Appeal Judgment, para. 24; *Martić* Appeal Judgement, para. 14; *Strugar* Appeal Judgement, para. 16; *Halilović* Appeal Judgement para. 12; *Blagojević and Jokić* Appeal Judgement, para. 10; *Brđanin* Appeal Judgement, para. 16; *Galić* Appeal Judgement, paras. 10 and 303; *Simić* Appeal Judgement, para. 12; *Gacumbitsi* Appeal Judgement, para. 9.
[86] ICC-02/04-01/05-325, para. 19.
[87] ICC-02/04-01/05-328, p. 8.
[88] ICC-02/04-01/05-328, p. 9. The deadline was extended from 10 November 2008 to 18 November 2008.

effectively participate in the current admissibility proceedings",[89] and requested that the Pre-Trial Chamber "suspend the present proceedings pending proper implementation of the defendants' right to effectively participate in the proceedings."[90]

45. If the documents in question contained relevant information which impacted on the proceedings and which Counsel was unable to consider and incorporate within the allotted time, then he should have made a request for a further extension of time on that basis, or seek any other relief that he deemed appropriate from the Pre-Trial Chamber. The Appellant's failure to seek a remedy which was available before the Pre-Trial Chamber cannot be corrected by the Appeals Chamber's consideration of belated grievances.[91]

46. Further, the Appellant has not established how the suspects suffered any concrete prejudice attributable to his allegedly inadequate time and resources to prepare his submissions. Although he claims to have received certain documents only a few days before his Observations were due,[92] even five months after their receipt the Appellant still does not identify anything in those documents that would have influenced his Observations or affected the Appealed Decision.

47. There is also no prejudice apparent on the face of the proceedings, since the Chamber's decision will be revisited in the future if any or all of the suspects, the Prosecution, or any appropriate State challenges admissibility. Moreover, Counsel chose not to submit Observations on the merits because he was unable to confer with the suspects and ascertain their views, not because he purportedly lacked sufficient time and resources. In the absence of any such prejudice or impact on the Decision, this ground of appeal must also be dismissed.

[89] ICC-02/04-01/05-350, paras. 46-51.
[90] ICC-02/04-01/05-350, para. 53.
[91] As the ICTY Appeals Chamber has held, "[t]he obligation is on the complaining party to bring the difficulties to the attention of the Trial Chamber forthwith so that the latter can determine whether any assistance could be provided under the Rules or Statute to relieve the situation", *Prosecutor v Tadic*, Judgement, Case No. IT-94-1-A, A. Ch., 15 July 1999, para. 55.
[92] Appeal Brief, para. 47; see also Defence Observations, para. 50.

V. Relief Sought

48. For the reasons referred to above, the Prosecution respectfully submits that the Defence's Appeal be rejected in its entirety.

Fatou Bensouda, Deputy Prosecutor
on behalf of
Luis Moreno-Ocampo, Prosecutor

Dated this 7th day of May, 2009
At The Hague, The Netherlands