Cour Pénale Internationale

International Criminal Court

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No.: **ICC-02/04-01/05**
Date: **28 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 AND DOMINIC ONGWEN

Public Document

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: **Office of Public Counsel for Victims**

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

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The Uganda Victims' Foundation
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REGISTRY

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Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. PROCEDURAL HISTORY

1. On 8 July 2005, Pre-Trial Chamber II, seized of the situation in Uganda, issued the warrant of arrest (amended on 27 September 2005) and the request for arrest and surrender of Joseph Kony[1]. The same day, the Pre-Trial Chamber also issued the warrants of arrest and the requests for arrest and surrender of Vincent Otti[2], Okot Odhiambo[3] and Dominic Ongwen.[4]

2. On 21 October 2008, the Pre-Trial Chamber issued the "Decision initiating proceedings under article 19, requesting observations and appointing Counsel for the Defence"[5] (the "Decision"), inviting "*victims who have been admitted to participate in the case or their legal representatives*", as well as "*those applicants who have submitted applications to be admitted to participate with respect to the case or their legal representatives*", to submit observations on the admissibility of the case.[6]

3. On 18 November 2008, the Office of Public Counsel of Victims (the "OPCV" or the "Office"), as legal representative, submitted observations on behalf of victims pursuant to article 19(3) of the Rome Statute.[7]

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[1] See the "Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005", No. ICC-02/04-01/05-53, 27 September 2005. See also the "Request for Arrest and Surrender of Joseph Kony issued on 8 July 2005 as amended on 27 September 2005", No ICC-02/04-01/05-29 (reclassified as public on 2nd February 2007 pursuant to Decision No. ICC-02/04-01/05-135), 27 September 2005.

[2] See the "Warrant of Arrest for Vincent Otti", No ICC-02/04-01/05-54, 8 July 2005. See also the "Request for Arrest and Surrender of Vincent Otti", No. ICC-02/04-01/05-13 (reclassified as public on 2nd February 2007 pursuant to Decision No. ICC-02/04-01/05-135), 8 July 2005.

[3] See the "Warrant of Arrest for Okot Odhiambo", No. ICC-02/04-01/05-56, 8 July 2005. See also "Request for Arrest and Surrender of Okot Odhiambo, No ICC-02/04-01/05-15 (reclassified as public on 2nd February 2007 pursuant to Decision No. ICC-02/04-01/05-135), 8 July 2005.

[4] See the "Warrant of Arrest for Dominic Ongwen", No. ICC-02/04-01/05-57, 8 July 2005. See also "Request for Arrest and Surrender of Dominic Ongwen", No ICC-02/04-01/05-16 (reclassified as public on 2nd February 2007 pursuant to Decision No. ICC-02/04-01/05-135), 8 July 2005.

[5] See the "Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence", No ICC-02/04-01/05-320, 21 October 2008.

[6] *Idem*, p. 7.

[7] See the "Observations on behalf of victims pursuant to article 19(1) of the Rome Statute with 55 Public Annexes and 45 Redacted Annexes", No ICC-02/04-01/05-349, 18 November 2008.

4. On 10 March 2009, Pre-Trial Chamber II issued its "Decision of the admissibility of the case under article 19(1) of the Statute" (the "Impugned Decision"),[8] determining that "*at this stage the Case is admissible under article 17 of the Statute*".[9]

5. On 16 March 2009, the *ad hoc* Counsel for the Defence appealed the Decision[10] and on 30 March 2009 he submitted a document in support of the said appeal[11].

6. 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".[12]

7. On 15 April 2009, the *ad hoc* Counsel for the Defence refiled its document in support of the appeal (the "Refiled document in support of the Appeal").[13]

8. 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").[14]

9. In compliance with the Directions of the Appeals Chamber dated 8 April 2009[15] the Office hereby submits observations on behalf of victims on the Refiled document in support of the Appeal, as well as on the Prosecution Response.

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[8] See the "Decision of the admissibility of the case under article 19(1) of the Statute", No. ICC-02/04-01/05-377, 10 March 2009.
[9] *Idem*, p. 27.
[10] See the "Defence Appeal against 'Decision of the admissibility of the case under article 19(1) of the Statute' dated 10 March 2009", No. ICC-02/04-01/05-379, 16 March 2009.
[11] See the "Document in support of 'Defence Appeal against "Decision of the admissibility of the case under article 19(1) of the Statute" dated 10 March 2009'", No. ICC-02/04-01/05-390, 30 March 2009.
[12] See the "Order on the re-filing of the document in support of the appeal and Directions on the filing of observations", No. ICC-02/04-01/05-393, 8 April 2009.
[13] See the "Refiled document in support of 'Defence Appeal against "Decision of the admissibility of the case under article 19(1) of the Statute" dated 10 March 2009'", No. ICC-02/04-01/05-394, 15 April 2009 (the "the Refiled document in support of the Appeal").
[14] See the "Prosecution Response to Defence Appeal against 'Decision on the admissibility of the case under article 19(1) of the Statute'", No. 02/04-01/05-401, 7 May 2009 (the "Prosecution Response").

10. The Office submits these observations on behalf of victims a/0010/06, a/0064/06, a/0081/06, a/0082/06, a/0084/06 to a/0087/06, a/0090/06, a/0094/06, a/0095/06, a/0097/06 to a/0100/06, a/0103/06, a/0104/06, a/0111/06 to a/0113/06, a/0116/06 to a/0124/06, a/0127/06, a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07, as well as any other victims having communicated with the Court in respect of the proceedings under article 19(3) of the Rome Statute.[16]

II. OBSERVATIONS ON BEHALF OF VICTIMS

A. Observations on the Prosecution Response

11. The Office generally concurs with the observations put forward by the Prosecution in its response.

B. Observations on the Refiled document in support of the appeal

1. Primary submission

12. Primarily, the Office contends that the Defence is not challenging in any way the conclusion of Pre-Trial Chamber II with regard to the admissibility of the case and that accordingly the requirements establishes by article 82(1)(a) of the Rome Statute are not met and the appeal should be dismiss in its entirety.

13. Indeed, article 82(1)(a) of the Rome Statute provides that "[either] *party may appeal* […] [a] *decision with respect to jurisdiction or admissibility*" without seeking prior authorisation from the Chamber having issued the said decision. However, in the present instance, the Defence does not challenge any substantive findings of the Pre-

[15] See the "Order on the re-filing of the document in support of the appeal and Directions on the filing of observations", *supra* note 12, p. 4.
[16] See the "See the "Observations on behalf of victims pursuant to article 19 1 of the Rome Statute with 55 Public Annexes and 45 Redacted Annexes", *supra* note 7, paras. 15 and 50.

Trial Chamber. Rather, the four grounds put forward by the *ad hoc* Counsel deal with the procedural methods put forward by the Chamber to reach its decision. Moreover, as put forward by the Prosecutor, "*the Appellant has consistently failed to show that any of the alleged errors invalidate the Pre-Trial Chamber's substantive determination on admissibility*".[17]

14. Furthermore, the Office cannot but note that the method used by the *ad hoc* Counsel is the one known as "forum shopping".[18] Indeed, regarding the first and the third grounds of appeal, the very same arguments were put forward by the *ad hoc* Counsel before the Presidency and before Pre-Trial Chamber II, which, as shown by the table attached to the present observations, both rejected his claims.[19] With regards to the second and the fourth grounds of appeal, they were both rejected by Pre-Trial Chamber II.[20] Having exhausted his remedies, the *ad hoc* Counsel is now taking advantage of the possibility offered by article 82(1) of the Rome Statute. However this attempt clearly fails to fulfil the requirements of the said article.[21] Moreover, at best the *ad hoc* Counsel is seeking a reconsideration of previous decisions rejecting his claims. In this respect, the Appeals Chamber has already stated that:

> "*the nature of* [an interlocutory] *appeal is corrective and limited to the specific grounds of appeal raised. It is not a rehearing of the original request* […]. *For that reason* […] *it is not appropriate either merely to repeat evidence that was before the Pre-Trial Chamber* […] *without making specific link as to how such material affects the Appeals Chamber's determination of the issues raised in appeal*".[22]

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[17] See the Prosecution Response, *supra* note 14, par. 18.
[18] See GARNER (B.A.)(Ed.), Black's Law Dictionary, West Publishing Company, St. Paul, 2000, p. 525: "*Forum-Shopping: The practice of choosing the most favorable jurisdiction or court in which a claim might be heard. - A plaintiff might engage in forum-shopping, for example, by filing suit in a jurisdiction with a reputation for high jury awards or by filing several similar suits and keeping the one with the preferred judge*".
[19] See the Annex attached to the present submission.
[20] *Idem.*
[21] See *supra* paras. 12 and 13.
[22] See the "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'" (Appeals Chamber), No. ICC-01/04-01/06-824 OA7, 13 February 2007, par. 71.

15. The Office contends that this ruling is applicable *mutatis mutandis* to the present appeal. Therefore, the Office concurs with the Prosecution that the appeal does not fulfil the requirements of article 82(1)(a)[23] of the Rome Statute and as such should be dismissed *in limine* without any need to address the merit of the four grounds.

2. In the alternative

16. In the alternative, the Office respectfully submits the following observations with regard to the four grounds of appeal as advanced by the *ad hoc* Counsel for the Defence.

17. According to the *ad hoc* Counsel for the Defence "[t]*he Chamber misconstrued the nature and scope of Counsel's mandate*"[24] (the "First Ground") and "[t]*he Chamber erred in finding that Counsel had adequate time and resources to effectively participate in the current admissibility proceedings*"[25] (the "Fourth Ground"). Although these arguments constitute two distinct grounds according to the *ad hoc* Counsel, the Office contends that they both deal with the issue arising out of the appointment of the Counsel by Pre-Trial Chamber II. Therefore, the Office deems it appropriate to provide observations on these two grounds jointly in order to avoid having to repeat yet the same legal arguments.

18. The Office first recalls that the First Ground was put forward before Pre-Trial Chamber II at two occasions and as well as before the Presidency.[26] Both forums rejected the arguments of the *ad hoc* Counsel.[27] As for the Fourth Ground, it was put before Pre-Trial Chamber II at length and rejected by this latter.[28]

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[23] See the Prosecution Response, *supra* note 14, par. 18.
[24] See the "the Refiled document in support of the Appeal", *supra* note 13, pp. 4-10.
[25] *Idem*, pp. 16-19.
[26] See the Annex attached to the present submission.
[27] See *supra* par. 14.
[28] See the Annex attached to the present submission. See also *supra* par. 14.

19. The Office concurs with the arguments put forward by the Prosecution in its Response with regards to these two grounds[29].

20. In addition, the Office notes that if it is true that Counsel are bound by the Code of Conduct, the articles quoted by the *ad hoc* Counsel only apply when the suspects have been surrendered to the Court and article 67(1) of the Rome Statute is therefore triggered[30].

21. However, the Office does not question the fact that article 67(1) of the Rome Statute "*enshrines the right to counsel*".[31] Yet rule 121(1) of the Rule of Procedure and Evidence makes it clear that only a suspect who is surrendered or who voluntarily appears "*shall enjoy upon arrival to the Court the same rights set forth in article 67*".[32] At the current stage of the proceedings, namely the pre-trial stage, where the suspect is still at large, the only provisions which makes it mandatory for the Court to appoint a counsel are articles 55 and 56(2)(d) of the Rome Statute and rule 47(2) of the Rules of Procedure and Evidence. In the present instance, one cannot but observe that the current proceedings with regard to the admissibility of the case are not covered by either provision and that the appointment of the *ad hoc* Counsel pursuant to regulation 76 of the Regulations of the Court does indeed contribute to the fairness of the proceedings vis-à-vis the persons sought by the Court since it enables that the interests of the Defence are taken into account.

22. Incidentally, the Office notes that both article 56(2)(d) of the Rome Statute and rule 47(2) of the Rules of Procedure and Evidence clearly states that in these instances, a counsel has to be appointed respectively to "*represent the interests of the*

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[29] See the Prosecution Response, *supra* note 14, paras. 21-29 and paras. 42-47. See also *supra* par. 11.
[30] See the "the Refiled document in support of the Appeal", *supra* note 13, par. 11.
[31] *Ibid.*, par. 11.
[32] See FRIMAN (H.), "Investigation and Prosecution", in LEE (R.S.) (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and* Evidence, Transnational Publishers, Inc., 2001, p. 253.

defence" and to "*protect the rights of the defence.*" Therefore, these provisions make it clear that in the absence of the persons sought by the Court, the appointment of Counsel is limited to the protection of the rights of the Defence and not to the representation of individuals or clients.

23. In addition, the persons sought by the Court being at large, it would be peculiar, to say the least, for Pre-Trial Chamber II to require the *ad hoc* Counsel to represent the interests of these persons nominatively. Should the view consistently taken by the *ad hoc* Counsel be accepted, it would deprive the very same Defence of the rights to voice its concerns on a very sensitive issue such as admissibility of the case from the time the warrant of arrest has been issued until the person sought is surrendered to the Court.

24. As a consequence, the Office contends that Pre-Trial Chamber II rightly pointed out that the appointment of an *ad hoc* Counsel at this stage is not mandatory but rather discretionary[33]. Moreover, the Office is of the view that the First and the Fourth Grounds do not arise from the Impugned Decision since this latter deals with the admissibility of the case rather than with the scope of the mandate of the *ad hoc* Counsel or the time and resources allocated to the Counsel.

25. According to the *ad hoc* Counsel for the Defence "[t]*he Chamber has improperly used its discretion to convocate admissibility proceedings in the absence of the defendants*"[34] (the "Second Ground") and "[t]*he 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, would not jeopardize their right to bring a challenge pursuant to article 19(2) of the Statute at a later stage, and would not constitute a predetermination*"[35] (the "Third Ground"). Although these arguments

[33] See the "Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence", *supra* note 5, p. 8.
[34] See the "the Refiled document in support of the Appeal", *supra* note 13, pp. 11-13.
[35] *Idem*, pp. 14-16.

constitute two distinct grounds in the submissions of the *ad hoc* Counsel, the Office contends that they both deal with the issue arising out of convocation of admissibility proceedings *proprio motu* by Pre-Trial Chamber II. Therefore, the Office deems it appropriate to provide observations on these two grounds jointly in order to avoid having to repeat yet the same legal arguments.

26. The Office first recalls that the Second Ground was put before Pre-Trial Chamber II and rejected by this latter.[36] As for the Third Ground, it was put forward before Pre-Trial Chamber II at two occasions and as well as before the Presidency.[37] Both forums rejected the arguments of the *ad hoc* Counsel.[38]

27. The Office concurs with the arguments put forward by the Prosecution in its Response with regards to these two grounds[39].

28. As noted by Pre-Trial Chamber II in its Decision, "*pursuant to article 19(1) of the Statute, the Court may, on its own motion, determine the admissibility of a case in accordance with article 17*".[40] Indeed, the obligation for the Court to satisfy itself that it has jurisdiction over the case is directly linked to two important principles established in the Rome Statute, namely that the Court is governed by the principle of complementarity[41] and that the Court is the sole arbiter of its own jurisdiction.[42]

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[36] See the Annex attached to the present submission. See also *supra* par. 14.
[37] See the Annex attached to the present submission.
[38] See *supra* par. 14.
[39] See the Prosecution Response, *supra* note 14, paras. 30-41. See also *supra* par. 11.
[40] See the "Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence", *supra* note 5, p. 5. See also the "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'" (Appeals Chamber), 13 July 2006, No. ICC-01/04-169, par. 52: "[t]*he Appeals Chamber accepts that the Pre-Trial Chamber may on its own motion address admissibility*".
[41] See paragraph 10 of the Preamble of the Rome Statute and the first article of the same text.
[42] See ICTY, *The Prosecutor v. Dusko Tadic a/k/a "Dule"*, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction" (Appeals Chamber), Case No. IT-94-1-AR-72, 2 October 1995, paras. 14-22.

29. Furthermore, the Office contend that the triggering of this possibility opened to the Chamber on its own motion pursuant to article 19(1) of the Rome Statute cannot but reinforce the interests of Justice.

30. Moreover, the possibility for the Chamber to determine the admissibility of a case before it is discretionary by nature since article 19(1) of the Rome Statute clearly establishes that "[t]*he Court shall satisfy itself that it has jurisdiction in any case brought before it*". It further states that ""[t]*he Court may, on its own motion, determine the admissibility of a case in accordance with article 17*". As a result, it can be argued that the choice of the Chamber over the specific procedure or procedural steps necessary to lead the proceedings in this regard is covered by the discretion of the Chamber, including the appointment of a counsel in the absence of the suspects.

31. With regard to the appeals standards to be met when dealing with discretionary decisions, in particular the appointment of a defence counsel, the Appeals Chamber of the International Criminal Tribunal for ex-Yugoslavia (the "ICTY") held the following:

> "*In order to challenge a discretionary decision, appellants must demonstrate that 'the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of the discretion,' or that the Trial Chamber '[gave] weight to extraneous or irrelevant considerations, ... failed to give weight or sufficient weight to relevant considerations, or ... made an error as to the facts upon which it has exercised its discretion,' or that the Trial Chamber's decision was 'so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.' In practice, this array of factors boils down to the following simple algorithm: a Trial Chamber's exercise of discretion will be overturned if the challenged decision was (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion. Absent an error of law or a clearly erroneous factual finding, then, the scope of appellate review is quite limited: even if the Appeals Chamber does not* [agree with the impugned decision] *the* [impugned] *decision* […] *will stand unless it was so unreasonable as to force the*

> *conclusion that the Trial Chamber failed to exercise its discretion judiciously*".[43]

32. The Appeals Chamber of the ICTY further stated that "[i]*t is well established in the jurisprudence of the Tribunal that an interlocutory appeal challenging the exercise of discretion by a Trial Chamber is not a hearing* de novo. *In reviewing the exercise of a Trial Chamber's discretion, the issue is not whether the Appeals Chamber agrees with the decision of the Trial Chamber but whether the Trial Chamber has abused its discretion in reaching that decision*".[44] And this reasoning was confirmed by the Appeals Chamber of the Special Court for Sierra Leone which held that:

> "[a*] Trial Chamber's exercise of discretion will be overturned if the challenged decision was (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion. If we are satisfied that there has been such a serious misunderstanding of the facts that the decision must be overturned, the case will still have to be remitted to the Trial Chamber Judge to hear evidence* [again]. *In determining whether the Trial Chamber has erred in its appreciation of the facts in bail appeals we do not sit to re-hear the application: we adopt a judicial review standard and will only quash the decision if satisfied that it is logically perverse or evidentially unsustainable*".[45]

33. However, neither the Second nor the Third Ground advanced by the *ad hoc* Counsel in its Refiled document in support of the Appeal demonstrates that the Impugned Decision was "(i) *based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion*".

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[43] See ICTY, *The Prosecutor v. Slobodan Milosevic*, Appeals Chamber, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, Case No. IT-02-54-AR73.7, 1st November 2004, par. 10. The decision is available at the following address: http://www.icty.org/x/cases/slobodan_milosevic/acdec/en/041101.pdf.

[44] See ICTY, *The Prosecutor v. Sefer Halilovic*, Appeals Chamber, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, Case No. IT-01-48-AR73.2, 19 August 2005, par. 5. The decision is available at the following address: http://www.icty.org/x/cases/halilovic/acdec/en/050819.htm.

[45] SCSL, *Prosecutor v. Samuel Hinga Norman et al*, Appeals Chamber, Appeal Against Decision Refusing Bail, Case No. SCSL-04-14-AR65, 11 March 2005, par. 20. The decision is available at the following address: http://www.sc-sl.org/LinkClick.aspx?fileticket=gcYjozQ1q9U%3d&tabid=193.

34. As a consequence, the Office contends that Pre-Trial Chamber II rightly used its discretion in opening admissibility of proceedings in the absence of the defendants and that in doing so it did not jeopardised their prospective admissibility challenges since pursuant to article 19(2)(a) of the Rome Statute this convocation is without prejudice of the right of the suspect/accused to challenge the admissibility once they are surrendered to the Court.

FOR THE FOREGOING REASONS,

The Office respectfully requests the Appeals Chamber to dismiss the Defence's Appeal *in limine*.

In the alternative, the Office respectfully requests the Appeals Chamber to confirm the "Decision of the admissibility of the case under article 19(1) of the Statute".

Paolina Massidda
Principal Counsel
Office of Public Counsel for Victims

Done in English

Dated this 28th day of May 2009

At The Hague (The Netherlands)