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International Criminal Court

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No.: **ICC-02/04-01/05**
Date: **30 March 2009**

THE APPEALS CHAMBER

Before: **Judge Sang-Hyun Song, President of the Court**
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka
Judge Daniel David Ntanda Nsereko

SITUATION IN UGANDA
IN THE CASE OF
THE PROSECUTOR
v. JOSEPH KONY, VINCENT OTTI, OKOT ODHIAMBO, DOMINIC ONGWEN

Public Document

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"

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

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

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Ms. Fatou Bensouda

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Amicus Curiae
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Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

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I. Introduction

1. Pursuant to articles 19(6), 82(1)(a) and 83(2)(a) of the Rome Statute ("the Statute"), rule 154(1) of the Rules of Procedure and Evidence ("the Rules") and regulation 64(2) of the Regulations of the Court ("Regulations"), the undersigning Counsel for the Defence hereby files this document in support of the "Defence Appeal against 'Decision on the admissibility of the case under article 19(1) of the Statute' dated 10 March 2009" which was filed on 16 March 2009**.**

II. Outline of the Proceedings

2. On 8 July 2005, Pre-Trial Chamber II ("the Chamber")issued the warrant of arrest for Joseph KONY, as amended on 27 September,[1] as well as the warrants of arrest for Vincent OTTI,[2] Okot ODHIAMBO,[3] and Dominic ONGWEN[4] in the case of *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* ("the Case").

3. On the same day, the request for arrest and surrender of Joseph KONY, as amended on 27 September 2005,[5] and the requests for arrest and surrender of Vincent OTTI,[6] Okot ODHIAMBO,[7] and Dominic ONGWEN[8] to the Republic of Uganda were issued.

4. On 22 November 2006, the Chamber designated Honorable Judge Mauro Politi as Single Judge in the Situation in Uganda as well as in the Case.

5. On 29 June 2007, the Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement Juba, Sudan was signed.

[1] ICC-02/04-01/05-53.
[2] ICC-02/04-01/05-54.
[3] ICC-02/04-01/05-56.
[4] ICC-02/04-01/05-57.
[5] ICC-02/04-01/05-29-US-EXP, reclassified as public pursuant to Decision ICC-02/04-01/05-135.
[6] ICC-02/04-01/05-13-US-EXP, reclassified as public pursuant to Decision ICC-02/04-01/05-135.
[7] ICC-02/04-01/05-15-US-EXP, reclassified as public pursuant to Decision ICC-02/04-01/05-135.
[8] ICC-02/04-01/05-16-US-EXP, reclassified as public pursuant to Decision ICC-02/04-01/05-135.

6. An "Annexure to the Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement" was issued on 19 February 2008.

7. On 29 February 2008, the Chamber issued a "Request for information from the Republic of Uganda on the Status of the execution of the Warrants of Arrest",[9] and the Registrar filed her report on the execution of this request on 28 March 2008.[10] Attached to this First Report was the Response of the Acting Solicitor General of the Republic of Uganda.[11]

8. On 18 June 2008, the Chamber issued its "Request for further information from the Republic of Uganda on the status of execution of the Warrants of Arrest".[12] The Registrar filed her report on the execution of this request on 10 July 2008.[13] Attached to this Second Report was the Response of the Acting Solicitor General of the Republic of Uganda.[14]

9. On 21 October 2008, in its decision initiating proceedings under article 19(1) of the Statute, requesting observations and appointing counsel for the Defence ("Decision of 21 October 2008"), the Chamber appointed the undersigning Counsel as counsel for the Defence ("Counsel"), "within the context and for the purposes of the present proceedings".[15] Further, the Chamber invited the Republic of Uganda, the Prosecutor, the Counsel and the victims who have already communicated with the Court with respect to the Case, or their legal representatives, to submit their observations on the admissibility of the Case by 10 November 2008.

10. On 28 October 2008, Counsel requested the Presidency to review and clarify the mandate of Counsel. Additionally, Counsel requested an

[9] ICC-02/04-01/05-274.
[10] ICC-02/04-01/05-286.
[11] ICC-02/04-01/05-286-Anx2.
[12] ICC-02/04-01/05-299.
[13] ICC-02/04-01/05-305.
[14] ICC-02/04-01/05-305-Anx2.
[15] ICC-02/04-01/05-320.

order for a conditional stay/suspension of the proceedings ("Request for Review").[16]

11. On the same day, Counsel submitted his "Request for conditional stay of proceedings" to the Chamber.[17]

12. In its decision from 31 October 2008, the Chamber rejected Counsel's request for stay or suspension of the proceedings.[18] On Counsel's alternative request, the Chamber decided to re-classify the transcripts of the hearings held on 3 and 6 October 2005 as "confidential *ex parte*" and ordered the Prosecution to disclose specific material. Furthermore, the Chamber extended until 18 November 2008 the time limit for the Republic of Uganda, the Prosecutor, the Defence and the victims having communicated with the Court with respect to the Case to submit observations in the proceedings.[19]

13. On 31 October 2008, the Uganda Victim's Foundation and the Redress Trust filed an application for leave to submit observations to the the Chamber pursuant to rule 103 of the Rules.[20]

14. On 3 November 2008, the Prosecution confidentially submitted the material as ordered by the the Chamber in its Decision from 31 October 2008.[21]

15. On the 7 November 2008, the Presidency issued its "Order concerning the Application of Mr. Jens Dieckmann of 28 October 2008 for judicial review of the decision of the Chamber of 21 October 2008 and the conditional stay/suspension of the proceedings",[22] whereby the Presidency ordered the Registrar to describe the consultative role played

[16] ICC-02/04-01/05-326.
[17] ICC-02/04-01/05-325.
[18] ICC-02/04-01/05-328.
[19] Ibid., p. 4.
[20] ICC-02/04-01/05-330.
[21] ICC-02/04-01/05-329-Conf.
[22] ICC-02/04-01/05-337.

by the Registrar in the instant appointment, in accordance with regulation 76(1) of the Regulations of the Court, by 10 November 2008.

16. On 9 November 2008, Counsel filed his "Request for leave to appeal the 'Decision on Defence Counsel's Request for conditional stay of proceedings' from 31 October 2008".[23]

17. On 10 November 2008, the Chamber rendered its "Decision on application for leave to submit observations under Rule 103 dated 7 November 2008.

18. On 11 November 2008, the Presidency issued its "Decision on the Application of Mr. Jens Dieckmann of 28 October 2008 for judicial review of the decision of the Chamber of 21 October 2008 and the conditional stay/suspension of the proceedings",[24] whereby the Presidency dismissed Counsel's application on the basis of "reasons to be given shortly".

19. On 12 November 2008, the Chamber ordered the Prosecutor to file redacted versions of documents in the record up to 14 November 2008 at the latest.[25]

20. On 13 November 2008, the Chamber rendered its "Decision on the Defence Request for Leave to Appeal the 31 October 2008 Decision",[26] whereby the Chamber rejected Counsel's request.

21. The Prosecution,[27] the undersigning Counsel,[28] Uganda[29] and the Office of Public Counsel for Victims (the "OPCV")[30] submitted their observations on the admissibility of the Case on 18 November 2008.

[23] ICC-02/04-01/05-339.
[24] ICC-02/04-01/05-344.
[25] ICC-02/04-01/05-345.
[26] ICC-02/04-01/05-346.
[27] ICC-02/04-01/05-352.
[28] ICC-02/04-01/05-350.
[29] ICC-02/04-01/05-354-Anx2.
[30] ICC-02/04-01/05-349.

22. On the same day, the Uganda Victims Foundation and Redress submitted their observations under rule 103 of the Rules (the "*Amici curiae* Submissions").

23. On 27 February 2009, the Presidency issued its "Order Concerning the Observations of the Registrar of 10 November 2008 in the Application of Mr. Jens Dieckmann of 28 October 2008 for judicial review of his appointment by the Registrar as defence counsel, in accordance with the decision of Pre-Trial Chamber II of 21 October 2008".[31]

24. On 10 March 2009, the Presidency delivered its "Reasons for the Decision on the Application of Mr. Jens Dieckmann of 28 October 2008 for judicial review of his appointment by the Registrar as defence counsel, in accordance with the decision of Pre-Trial Chamber II of 21 October 2008" ("Reasons of the Presidency").[32]

25. In its "Decision on the admissibility of the case under article 19(1) of the Statute" rendered on 10 March 2009 ("the Decision"),[33] the Chamber determined that "at this stage the Case is admissible under article 17 of the Statute".

26. 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 on the admissibility of the case under article 19(1) of the Statute" of the Chamber in the case of *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* dated 10 March 2009.

[31] ICC-02/04-01/05-373.
[32] ICC-02/04-01/05-378.
[33] ICC-02/04-01/05-377.

III. The Law

27. Article 19 of the Statute provides in the relevant parts that

> 1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.
> 2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:
> (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
> (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
> (c) A State from which acceptance of jurisdiction is required under article 12.
> 3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.
> 4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).
>
> (…)
>
> 6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.

28. Article 67(1)(b) and (d) of the Statute read:

> 1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees in full equality:
>
> (…)
>
> (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
>
> (…)
>
> (d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;
>
> (…)

29. Article 82(1)(a) of the Statute reads as follows:

> (1) Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:
>
> (a) A decision with respect to jurisdiction or admissibility;

30. Article 83(2)(a) of the Statute sets forth that

> If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:
>
> (a) Reverse or amend the decision or sentence;

31. Rule 22(3) of the Rules provides that

> [i]n the performance of their duties, Counsel for the defence shall be subject to the Statute, the Rules, the Regulations, the Code of Professional Conduct of

> Counsel adopted in accordance with rule 8 and any other document adopted by the Court that may be relevant to the performance of their duties.

32. Rule 154(1) of the Rules stipulates that

> an appeal may be filed under article 81, paragraph 3 (c) (ii), or article 82, paragraph 1 (a) or (b), not later than five days from the date upon which the party filing the appeal is notified of the decision.

33. This Rule is supplemented by regulation 64(1) through (4) of the Regulations. Regulation 64(2) *inter alia* provides that

> the appellant shall file a document in support of the appeal, with reference to the appeal, within 21 days of notification of the relevant decision. The document in support of the appeal shall set out the grounds of appeal and shall contain the legal and/or factual reasons in support of each ground of appeal.

34. Regulation 76(1) of the Regulations reads:

> A Chamber, following consultation with the Registrar, may appoint counsel in the circumstances specified in the Statute and the Rules and where the interests of justice so require.

35. Article 12 of the Code of Professional Conduct for counsel regulates possible impediments to representation of clients:

> 1. Counsel shall not represent a client in a case:
>
> (a) If the case is the same as or substantially related to another case in which counsel or his or her associates represents or formerly represented another client and the interests of the client are incompatible with the interests of the former client, unless the client and the former client consent after consultation;
>
> (…)

2. In the case of paragraph 1 (a) of this article, where consent has been obtained after consultation, counsel shall inform the Chamber of the Court seized with the situation or case of the conflict and the consent obtained. Such notice shall be provided in a manner consistent with counsel's duties of confidentiality pursuant to article 8 of this Code and rule 73, sub-rule 1 of the Rules of Procedure and Evidence. ([…)"

36. Articles 14, 15 and 16 of the Code of Professional Conduct for counsel read:

Article 14

1. The relationship of client and counsel is one of candid exchange and trust, binding counsel to act in good faith when dealing with the client. In discharging that duty, counsel shall act at all times with fairness, integrity and candour towards the client.
2. When representing a client, counsel shall:
   (a) Abide by the client's decisions concerning the objectives of his or her representation as long as they are not inconsistent with counsel's duties under the Statute, the Rules of Procedure and Evidence, and this Code; and
   (b) Consult the client on the means by which the objectives of his or her representation are to be pursued.

Article 15

1. Counsel shall provide the client with all explanations reasonably needed to make informed decisions regarding his or her representation.
2. When counsel is discharged from or terminates the agreement, he or she shall convey as promptly as possible to the former client or replacement counsel any communication that counsel received relating to the representation, without prejudice to the duties which subsist after the end of the representation.
3. When communicating with the client, counsel shall ensure the confidentiality of such communication.

Article 16

1. Counsel shall exercise all care to ensure that no conflict of interest arises. Counsel shall put the client's interests before counsel's own interests or those of any other person, organization or State, having due regard to the provisions of the Statute, the Rules of Procedure and Evidence, and this Code.
2. Where counsel has been retained or appointed as a common legal representative for victims or particular groups of victims, he or she shall advise his or her clients at the outset of the nature of the representation and the potential conflicting interests within the group. Counsel shall exercise all care to ensure a fair representation of the different yet consistent positions of his or her clients.
3. Where a conflict of interest arises, counsel shall at once inform all potentially affected clients of the existence of the conflict and either:
   (a) Withdraw from the representation of one or more clients with the prior consent of the Chamber; or
   (b) Seek the full and informed consent in writing of all potentially affected clients to continue representation.

IV. Grounds of Appeal

A. FIRST GROUND OF APPEAL:

The Chamber misconstrued the nature and scope of Counsel's mandate.

37. The Defence submits that throughout the impugned Decision the Chamber misconstrued the nature and scope of 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". As will be shown below, this interpretation inextricably contradicts the wording of the Chamber's Decision

delivered on 21 October 2008. This misconstruction ultimately leads to a violation of the defendants' rights under Article 67(1)(b) of the Statute.

38. First, the Defence respectfully draws the Appeals Chamber's attention to the Chamber's Decision from 21 October 2008, in which it stated:

> CONSIDERING that, in the present circumstances, where none of the persons for whom an arrest warrant has been issued is yet represented by a defence counsel, appointment of a counsel for the defence to represent those persons within the context and for the purposes of the present proceedings is in the interest of justice.[34] *(emphasis added)*

It must be noted that after studying the wording of this Decision of 21 October 2008 and after analysing ICC case law concerning the terms of other defence appointments in the situation phase and case, Counsel requested the Presidency to clarify the scope of his mandate on 28 October 2008.[35] On the same day, Counsel additionally requested the Chamber to issue an order for a conditional stay/suspension of the proceedings.[36] Hence, within seven days of his assignment Counsel informed both the Presidency and the Chamber about his concerns arising from the ambiguous wording of his appointment. Both requests were dismissed.[37] Counsel still contends that the terms of the mandate as outlined in the Decision of the 21 October 2008, are very broad and indeed ambiguous.

39. Counsel hereby takes issue with the Chamber's interpretation of the nature and scope of Counsel's mandate expressly articulated in paragraphs 24, 30 and 31 of the impugned Decision.

[34] Decision of 21 October 2008, p. 8.
[35] ICC-02/04-01/05-326.
[36] ICC-02/04-01/05-325.
[37] ICC-02/04-01/05-328; ICC-02/04-01/05-344.

40. First and foremost, the Defence submits that the Chamber erred by finding that the appointment of a counsel in these proceedings was not mandatory but discretionary.[38] Article 67(1) of the Statute enshrines the right to counsel. Pursuant to rule 121 (1) a person subject to a warrant of arrest shall enjoy the rights set forth in article 67 of the Statute. Since the admissibility proceedings were being conducted on a public basis, under article 67(1) of the Statute, the right of the defendants to participate through counsel was automatically triggered. Moreover, under rule 103, the defence has an automatic right to respond to *amicus curiae* briefs. The defendants right to counsel was thus triggered by the Chamber's decision to allow *amicus* participation dated 5 November 2008[39]. Finally, under regulation 24(1), the defence has the right to file a response to any document filed by a participant. Since the Chamber permitted the victims to file observations in its Decision of 21 October 2008, the defendants had a right to file a response pursuant to regulation 24. When read in conjunction with article 67(1) of the Statute, this again translates to a right to counsel and effective representation to facilitate their ability to file such a response. In light of the fact that the defendant's had an absolute right to counsel under the Statute, Rules and Regulations, the Chamber already erred by finding that Counsel's appointment was discretionary.

41. Furthermore, the Chamber repeatedly emphasized that Counsel was appointed to represent the interests <u>of the Defence</u>:

> 24. The arguments of the Defence seem to stem from a partial and inaccurate view of the relevance of the Chamber's determination of admissibility at this stage, as well as from a misconstruction of the function and role of counsel appointed to <u>represent the interests of the</u>

[38] Decision, paragraph 31
[39] ICC-02/04-01/-5-333

> Defence in the absence of the persons sought by the Court. (…)[40] *(emphasis added)*
>
> 30. (…) Furthermore, such arguments appear to be the result of a misconstruction of the function and role of counsel appointed to represent the interests of the defence in the absence of the persons sought by the Court under regulation 76 (1) of the Regulations.[41] *(emphasis added)*
>
> 31. Given a scenario which makes it necessary or appropriate for the Chamber to proceed on its own motion notwithstanding the absence of the persons sought by the Court, the appointment of a counsel tasked with representing the interests of the defence within the scope of the proceedings, whilst not mandatory, appears to be the procedurally appropriate way to ensure that fairness of the proceedings be preserved. (…)[42] *(emphasis added)*

The Chamber further noted that Counsel was "vested with a limited mandate".[43]

42. This interpretation of the scope of Counsel's mandate, however, stands in stark contrast to the lean wording of the Chamber's decision dated 21 October 2008, whereby Counsel was appointed "to represent [the] persons" for whom an arrest warrant has been issued.[44]

43. Counsel respectfully submits that the Chamber did not adequately address the issues and concerns related to the scope of Counsel's appointment raised in the "Submission of observations on the admissibility of the case under article 19(1) of the Statute" ("Defence Observations").

[40] Decision, paragraph 24
[41] Decision, paragraph 30
[42] Decision, paragraph 31
[43] Decision, paragraph 32
[44] Decision of 21 October 2008, p. 8.

44. In fact, the ambiguous language used by the Chamber in the impugned Decision demonstrates that it did not get to the core of the matter at issue repeatedly raised by Counsel in prior submissions, when noting in paragraph 32 of the impugned Decision that:

> What matters, in a procedural context such as the one currently before the Chamber, is that the suspect be given a chance to submit arguments assisting the Chamber in its task, thus contributing to the interests of justice. (emphasis added)

If, as indicated by the Chamber in paragraphs 24, 30 and 31, Counsel was indeed appointed to represent the *general* interests of the defence, this assignment would not have enabled the four *individual* suspects to submit arguments through Counsel.

45. In this context, Counsel stresses that in prior decisions, whereby Chambers appointed *ad hoc* counsel in *situations*, these counsel were assigned to represent "the interests of the defence".[45] While the same wording is reflected in the Chamber's impugned decision in its description of the scope of Counsel's mandate, this wording is, however, not used in the original assignment. In further decisions it was clarified that *ad hoc* counsel in *situations* were not entitled to challenge jurisdictions or the admissibility of the case.[46]

46. In accordance with the wording of the Decision of 21 October 2008, whereby Counsel was appointed to represent the persons for whom an arrest warrant has been issued, it was Counsel's understanding that he was rather appointed to represent the four defendants in the *case* ICC-

[45] ICC-02/05-12; ICC-01/04-21.
[46] ICC-01/04-93, p. 4.

02/04-01/05 than in the *situation*. Thus, all defendants are in fact his clients within the meaning of article 2(2) of the Code of Professional Conduct for counsel, which provides that "[i]n this code… 'client' refers to all assisted or *represented* by counsel" *(emphasis added)*. In light of the wording of article 12(1)(a) of the Code of Professional Conduct for counsel, Counsel therefore submitted in his Request for Review that the foreseeable conflict of interest resulting from the representation of four defendants in the same criminal proceedings provokes unavoidable breaches of articles 12, 14, 15 and 16 of the Code of Professional Conduct for counsel.[47] Accordingly, it endangered the rights of each of the defendants to be represented effectively under the rule of law. With regard to article 12 Code of Professional Conduct for counsel, Pre-Trial Chamber I has previously recognized the potential conflict which could arise through providing assistance to two persons in the same case. Pre-Trial Chamber I therefore ordered the OPCD and OPCV to provide different members of their respective Offices *to assist* the different defence teams.[48]

47. Counsel reiterates that he could not effectively perform his duty to represent *all four* named defendants without violating his obligations under the Code of Professional Conduct for counsel. The Rules of Procedure and Evidence expressly envisage that counsel must exercise their functions in accordance with the Code of Professional Conduct for counsel. This obligation is set out in a legal instrument, which is hierarchically superior to the Regulations of the Court. Regulation 76 must therefore be construed in a manner, which is consistent with rule 22(3). Under article 67(1)(b) of the Statute and in the light of rule 121 (1) the defendants have a right to be represented effectively in these

[47] ICC-02/04-01/05-326
[48] ICC-01/04-01/07-647.

proceedings. A counsel who is appointed in a manner, which is unavoidable and provokes severe violations of the Code of Professional Conduct for counsel, cannot represent the interest of his client effectively.

48. In the Defence Observations, Counsel drew the Chamber's attention to the fact that he did not have any contact to any of the four defendants.[49] Even if he had been provided with sufficient time to devise a means of contacting the defendants, Counsel would not have been in a position to contact any of the four defendants individually. Further, Counsel was unaware and unable to enquire whether any of the defendants would agree with the establishment of such a contact. Under the present circumstances, Counsel could neither clarify if the individual interests of his clients were incompatible nor if his four clients consented to a representation of the other co-defendants by Counsel pursuant to article 12(1)(a) of the Code of Professional Conduct for counsel. Hence, the required consultations between Counsel and his clients under article 12(1)(a) have not taken place.

49. Consultations with the clients pursuant to article 12(1)(a) of the Code of Professional Conduct for counsel prior to the submission of the instant observations would have been all the more necessary since, according to reports provided by the media and other public sources, the LRA's position on the ICC appears to be ambiguous and controversial. Whilst several media reports state that "the LRA" wishes for the arrest warrants issued by the ICC to be withdrawn,[50] Counsel was not in a position to

[49] ICC-02/04-01/05-350, para. 37.
[50] *Julian Amutuhaire,* "Uganda: ICC urged to support local justice to promote peace", 19 April 2008, Communicating Justice, available at: <http://www.communicatingjustice.org/en/stories/23042008_uganda_icc_urged_support_local_justice_promote_peace>. See also *Katy Glassborow* , "Uganda says peace not at odds with ICC", 15 Apr 2008, Insitute for War and Peace Reporting (IWPR), available at:

verify whether these statements indeed reflect the position of all four defendants in the present proceedings.

50. In this context Counsel refers to the another decision of the Chamber, namely its "Decision on victims' applications for participation a/0192/07 to a/0194/07, a/0196/07, a/0200/07, a/0204/07, a/0206/07, a/0209/07, a/0212/07, a/0216/07, a/0217/07, a/0219/07 to a/0221/07, a/02228/07 to a/0230/07, a/0234/07, a/0235/07, a/0237/07, a/0324/07 and a/0326/07 under rule 89" [51] rendered on the same day the impugned Decision was issued, i.e. on 10 March 2009. In this decision, the Chamber ruled that defence counsel, separately assigned for these particular proceedings, will only receive redacted versions of the selected victim files.[52] The Chamber also noted that "all persons against whom warrants of arrest have been issued in the Situation still remain at large and may therefore pose a threat to the applicants and their families"[53]. Since the risk cited by the Chamber emanated from the suspects and not the counsel herself, the Chamber thus appears to presume that the transmission of applications to a counsel appointed pursuant to regulation 76 will trigger an obligation on that counsel to consult with her clients. This order is evidently based on the assumption that the assigned defence counsel is appointed to represent the individual defendants instead of the general interests of the defence. By ruling only to disclose redacted versions of victims files the Chamber evidently assumes that this assigned defence counsel will have to communicate with her four clients and will also have to discuss disclosure before giving submissions.[54]

<http://www.isn.ethz.ch/isn/Current-Affairs/Security-Watch/Detail/?ots591=4888CAA0-B3DB-1461-98B9-E20E7B9C13D4&lng=en&id=88679>.
[51] ICC-02/04-01/05-375,
[52] Ibid, page 10
[53] Ibid, page 7
[54] Ibid, pages 7, 8

51. Since Counsel was not appointed to represent the interests of the LRA *as such*, he would have risked jeopardising the interests of any or all of his four clients who did not wish for the case to be investigated and prosecuted in Uganda, if Counsel had introduced substantive observations concerning whether the criteria for admissibility pursuant to article 17 of the Statute were met. Counsel's trepidation in this regard was supported by media reports concerning divergent views within the LRA camp and possible antipathy between the defendants.[55] It was thus possible that one or several of the defendants might have been concerned that they might face a partial and unfair trial if prosecuted in Uganda. Alternatively, some defendants might have wished to cooperate with the Prosecutor of the ICC in order to attract leniency in sentencing. Consequently, the defendants in favour of the case being investigated and prosecuted at the ICC would ultimately have been deprived of their right to present their observations on the admissibility of the Case under article 19(1) of the Statute, if the Pre-Trial Chamber II were to decide at this stage that the Case is inadmissible under article 17 of the Statute.

52. Further, it needs to be taken into account that by its "Decision on the Application of Mr. Jens Dieckmann of 28 October 2008 for judicial review of the decision of Pre-Trial Chamber II of 21 October 2008 and the conditional stay/suspension of the proceedings" delivered on 11 November 2008, the Presidency dismissed Counsel's application on the basis of "reasons to be given shortly".[56] These reasons were then provided on 10 March 2009.[57] Hence, prior to the deadline for the submission of the Defence Observations, i.e. 18 November 2008, Counsel was not in a position to assess whether his application was dismissed by

[55] See *Tim Cocks*, "Uganda's LRA boss denies killing deputy-activist", 9 November 2007, Reuters, available at: <http://www.alertnet.org/thenews/newsdesk/L08509381.htm> concerning allegations that Kony had Otti under house arrest due to internal disagreements.
[56] ICC-02/04-02/05-344.
[57] ICC-02/04-01/05-378.

the Presidency for a lack of jurisdiction, or whether the Presidency considered that the appointment of a single counsel for four defendants did not create a potential conflict of interest. Therefore, Counsel had no choice but to interpret the scope of his mandate in the light of the Decision from 21 October 2008, as well as the binding rules of the Code of Professional Conduct for counsel. Counsel did so in paragraphs 32 through 40 of the Defence Observations filed on 18 November 2008.[58] Counsel submitted his observations in these proceedings subject to the explicit condition that nothing in his observations should be construed as exercising or waiving the defendants' right to challenge the admissibility of the case pursuant to article 19(2) of the Statute.[59] He explicitly refrained from exercising any right of his four clients in absence of any communication or instruction. Due to the specific circumstances of the case, Counsel defined his major duty as Defence Counsel under the Code of Professional Conduct for counsel as being to ensure that each and every one of the four defendants retained all options for their individual future defence. Consequently, Counsel refrained from positively raising substantive arguments concerning the admissibility of the case that might have been prejudicial to any of the defendants in relation to these proceedings.

53. If Counsel had been instructed by the Chamber in response to his first submission from 28 October 2008 that the Chamber had in fact intended to appoint Counsel to represent the *interests of the Defence* rather than the individual *persons*, Counsel would have been enabled to submit and would indeed have submitted his observations as to the merits of these proceedings including an analysis of the fulfillment of the requirements set out in articles 17 and 19 of the Statute. In other words, if the Chamber

[58] ICC-02/04-01/05-350.
[59] *Ibid*, para. 40.

had clarified at an early stage that Counsel was appointed to represent the interest of the Defence only, Counsel would not have refrained from making a submission on the merits.

54. It is noteworthy that the Presidency acknowledged the fact that Counsel encountered himself in a situation where a question of professional ethics was at stake without there being a system in place at this Court through which counsel could seek advice or a ruling on a matter of professional ethics. In its … Reasons of the Presidency from 10 March 2009, the Presidency therefore noted the following:

> 33. As to the argument of the applicant that the texts of the Court do not provide for any mechanism pertaining to the Court for counsel to seek advice or a ruling on matters of professional ethics, the Presidency notes that, in contrast to counsel acting at the national level who have the ability to consult their national bar associations or other relevant bodies on matters of professional ethics, no similar system is provided for at the Court. Noting the terms of rules 16 and 20, the Registrar is requested to explore institutional mechanisms whereby counsel may seek advice on questions of professional ethics and update the Presidency thereon.

55. Counsel expresses his highest appreciation for this request of the Presidency directed to the Registrar. The Presidency evidently realized and acknowledged the conflict in which the Counsel found himself throughout the instant proceedings: the conflict arising from the wording of Counsel's appointment in the Chamber's Decision from 21 October 2008 on the one hand and the professional ethics of defence counsel on the other hand. If an institutional mechanism whereby counsel may seek advice or a ruling on matters of professional ethics had existed, Counsel would have had an opportunity to get timely advice on the questions of professional ethics raised in the instant document and in

the previous submissions filed since Counsel's appointment on 21 October 2008.

56. Accordingly, it is respectfully submitted that the Chamber erred in finding in the impugned Decision that Counsel was appointed to represent the interests of the Defence.

B. SECOND GROUND OF APPEAL:

The Chamber has improperly used its discretion to convocate admissibility proceedings in the absence of the defendants.

57. The Defence maintains that the Chamber erroneously exercised its discretion when initiating the admissibility proceedings under article 19(1) of the Statute in the instant case. In particular, Counsel holds the opinion that in consequence of the Chamber's misinterpretation of the scope of its discretion, the Chamber has improperly used its discretion to advocate admissibility proceedings in the absence of the defendants, when finding in paragraph 21 of the impugned Decision that the Appeals Chamber's determinations in the *Ntaganda* case as to the conditions warranting the exercise of a Chamber's *proprio motu* powers under article 19(1) are not relevant to the instant proceedings. As will be shown below, the Chamber's erroneous exercise of its discretion resulted in a violation of the Defendants rights under article 67(1) of the Statute.

58. In paragraph 15 of its Decision, the Chamber noted that:

> It has already become the established practice of the Court to wield its power under article 19 (1) at a number of specific procedural stages.[60]

[60] Decision, para. 15.

In this context, the Chamber referred to jurisprudence of all three Pre-Trial Chambers.[61]

59. In its analysis of the Appeals Chamber's practice, the Chamber particularly referred to an Appeals Chamber's decision on an appeal seeking to reverse the decision of the Prosecutor's application for a warrant of arrest against Mr *Bosco Ntaganda* dated 13 July 2006 ("*Ntaganda* Appeals Chamber Decision").[62] The Chamber discussed this ruling in paragraph 20 of the impugned Decision when stating:

> In its decision dated 13 July 2006, the Appeals Chamber stated that the use of the word "may" in article 19(1), second sentence, of the Statute indicated that a Chamber was vested with discretion as to whether making a determination of the admissibility of a case and that it "accept[ed] that the Pre-Trial Chamber may on its own motion address admissibility." By the same token, however, it qualified its statement by pointing out that, within the context of *ex parte* Prosecutor only proceedings triggered by an application for a warrant of arrest, the Pre-Trial Chamber should exercise its discretions on the matter "only when … appropriate in the circumstances of the case bearing in mind the interests of the suspect." Elaborating on the issue, the Appeals Chamber listed a number of instances in which such appropriateness would be satisfied: namely, "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."

Discussing the relevance of this Appeals Chamber decision to the instant proceedings, the Chamber noted the following in paragraph 21:

[61] Decision, paras. 16 – 19.
[62] ICC-01/04-169 (reclassified as public pursuant to Decision ICC-01/04-538-PUB-Exp).

> The Chamber wishes to clarify that the judgement by the Appeals Chamber referred to the very specific procedural scenario of a Prosecutor's application for a warrant of arrest, by its nature triggering ex parte proceedings where the suspect is not represented. Such a scenario profoundly differs from the one at stake in the Proceedings where a counsel for the defence has been appointed, the relevant State is participant and *amici curiae* observations have been submitted. Accordingly, the determinations by the Appeals Chamber as to the conditions warranting the exercise of a Chamber's *proprio motu* powers under article 19(1) are not of direct relevance to the Proceedings. (…) *(emphasis added)*

60. Counsel hereby challenges this finding and submits that the situation of the defendant in the *Ntaganda* case is indeed comparable with the situation of the defendants in the instant proceedings. Although, the Chamber appointed a counsel for the four defendants in the instant case, Counsel was not in a position to effectively submit observations on the admissibility of the case under article 19(1) of the Statute for the reasons outlined in paragraphs 37 through 54. Since the Chamber has not directed the Registry to take any measures to publicise the proceedings to the Defendants,[63] it is still unknown whether the Defendants actually know about these proceedings. Therefore, Counsel submits that the Defendant's interests are not sufficiently protected in these proceedings under article 19 (1) of the Statute as required by jurisprudence of the Appeals Chamber. In this regard, Counsel respectfully draws the Appeals Chamber's attention to paragraphs 48 through 50 of the *Ntaganda* Appeals Chamber Decision:

> 48. The use of the word "may" indicates that a Chamber is vested with discretion as to whether the Chamber makes a determination of the admissibility of a case. In the circumstances of the present case, however,

[63] See also Defence Observations, para. 48.

the exercise of Pre-Trial Chamber I's discretion under article 19 (1), second sentence, of the Statute in the impugned decision was erroneous, because by deciding that it had to make an initial determination of the admissibility of the case before it could issue a warrant of arrest, the Pre-Trial Chamber did not give sufficient weight to the interests of Mr. Bosco Ntaganda.

49. This follows from the following consideration: the proceedings before Pre-Trial Chamber I in relation to the Prosecutor's application for warrants of arrest were held "ex parte, Prosecutor only." This meant that those persons against whom warrants of the arrest were sought did not have a right to make submissions to the Pre-Trial Chamber and did not even know about the proceedings. The Pre-Trial Chamber sought to address the interests of the suspects by pointing out that:

> "Such determination (of the admissibility of the case) is without prejudice to subsequent determinations on jurisdiction or admissibility concerning such cases pursuant to article 19 (1), (2) and (3) of the Statute."

50. This assertion protects the interests of the suspect insufficiently: if the Pre-Trial Chamber makes a determination that the case against a suspect is admissible without the suspect participating in the proceedings, and the suspect at a later stage seeks to challenge the admissibility of the case pursuant to article 19(2) of the Statute, he or she comes before a Pre-Trial Chamber that has already decided the very same issue to his or her detriment. A degree of pre determination is inevitable. (…)

Moreover, in the instant proceedings, the defendants are not only confronted with submissions of the Prosecution and victims represented by counsel but additionally with submissions of *amici curiae* and the State of Uganda. Thus, the equality of arms guaranteed in article 67(1) of the Statute is even more at stake than in the *Ntaganda* case.

61. Furthermore, Counsel respectfully submits that given that article 67(1) of the Statute enshrines the right of the defendant to participate in the proceedings, an express provision in the Statute would be required in order to derogate from the general rule that the proceedings must be in the presence of the defendant.

62. Article 19(1) of the Statute provides that the Court "may, on its own motion, determine the admissibility of a case in accordance with article 17". Whilst the Statute thus foresees that the Chamber may *proprio motu* determine the admissibility of a case, it does not envisage that the Chamber may do so in an *in absentia* context.

63. Whilst article 61(2) of the Statute and rule 126 of the Rules explicitly provide that the confirmation hearing, and potentially, admissibility and jurisdictional issues related to the confirmation hearing, may be convened in the absence of the defendant, the Chamber must first follow the procedures set out in rule 123 and rule 125. These procedures require the Chamber to ascertain whether the defendant has a counsel and to notify their decision to convene the hearing to the defendant.

64. Counsel further observes that the Appeals Chamber has held that the fact that the Statute provides that the Chamber has a discretionary power to *proprio motu* determine the admissibility of a case, does not mean that it is always appropriate for the Chamber to do so.[64] The Appeals Chamber noted that it would only be appropriate to determine admissibility *prior* to the surrender or arrest of the defendant in a limited number of circumstances. According to the Appeals Chamber such circumstances "may include instances where a case is based on established jurisprudence of the Court, uncontested facts that render a

[64] ICC-01/04-169 (reclassified as public pursuant to Decision ICC-01/04-538-PUB-Exp).

case clearly inadmissible, or an ostensible cause impelling the exercise of proprio motu review".[65]

65. The current proceedings represent the first public admissibility proceedings before the ICC, and in terms of prior relevant precedent, the *Ntangada* Appeals Chamber Decision only addressed the gravity criterion of admissibility.[66] It is thus clear that the present proceedings are not governed by "established jurisprudence" or "established practice of the Court" as noted by the Chamber in paragraph 15 of the impugned Decision. In terms of whether the facts can be considered 'uncontested', in light of the inability of Counsel to seek instructions from the defendants as to their version of the 'facts', it is impossible to verify whether the 'facts' are uncontested.

66. 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.[67] The ability of the Prosecutor to continue its investigations is in no way impeded. The only impediment to the commencement of the case appears to be the inability of national authorities to arrest the defendants. This impediment will exist irrespective of whether the ICC confirms its admissibility, as the ICC does not have its own police force, and is therefore dependent on national authorities to effectuate the arrest. Uganda also entered into an extradition agreement with the Democratic Republic of Congo (DRC) in 2007 concerning the arrest and extradition of the LRA leaders from the

[65] Ibid., at para. 52.
[66] Ibid., at para. 54.
[67] ICC-02/04-01/05-US-EXP, p. 2.

territory of the DRC,[68] and is therefore not dependent on the ICC cooperation regime to facilitate their arrest. To the contrary, publicizing and reaffirming the ICC's primacy over the case could simply render it more difficult for national authorities to effectuate the defendant's arrest and surrender, as the LRA have on multiple occasions stated that their reluctance to accede to peace negotiations is due to the outstanding ICC arrest warrants.[69]

67. The defendants also face the same risk referred to by the Appeals Chamber that if the Prosecutor files, as they are entitled to do as of right, an appeal against the Pre-Trial Chamber's decision, the issues may be subject to final adjudication before the defendants have any opportunity to be heard in relation to the matter.

68. Accordingly, it is submitted that the Trial Chamber erred in finding that the Appeals Chamber's determinations as to conditions warranting the exercise of a Chamber's *proprio motu* powers under article 19(1) are not of direct relevance to the Proceedings. If it had not erred and had instead acknowledged the relevance of the Appeals Chamber's determinations to the instant proceedings, the Chamber would have suspended the proceedings.

[68] *The State House of the Republic of Uganda*, "Uganda And DRC Sign Joint Bilateral Agreement", 9 September 2007, available at <http://www.statehouse.go.ug/news.detail.php?newsId=1314&category=News%20Release>.
[69] "Ugandan rebels to appeal ICC warrants", The Hague, IWPR, AR No. 160, 12 March 2008.

C. THIRD GROUND OF APPEAL:

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, 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.

69. The Defence submits that the Chamber misconstrued the defendant's rights to challenge the admissibility more than once due to article 19(2) of the Statute. The Chamber erroneously interpreted the threshold of article 19(4) of the Statute. Furthermore, the Defence continues to hold the opinion that the Chamber underestimated the negative impact of the non-existing contact and communication between the appointed Counsel and the four persons with warrants for arrest. As will be shown below, this constituted a violation of the Defendant's rights under article 19(1) and 67(1)(d) of the Statute.

70. In paragraph 27 of the impugned Decision the Chamber noted that:

> **27**. (…) article 19(4) lays down the principle that a state or the accused may bring a challenge only once, but nevertheless provides that "in exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of a trial"; (…)

In paragraphs 30 and 32 of the impugned Decision, the Chamber further held:

> **30.** The overall regime governing the determination of the admissibility of a case deprives of any merit the Defence's arguments that a

> determination of the admissibility of the case by the Chamber at this stage would necessarily result in exposing the persons sought in the case to a "heightened risk of judicial predetermination" in the context of possible future challenges to the admissibility of the Case.
>
> (…)
>
> **32.** (…) What matters, in a procedural context such as the one currently before the Chamber, is that the suspect be given a chance to submit arguments assisting the Chamber in its task, thus contributing to the interests of justice. It flows from the very nature and purpose of the appointment of a counsel under regulation 76 (1) of the Regulations that the relevance and validity of the arguments raised by the latter be confined to the purpose of the assessment to be made by the Chamber at this stage and, accordingly, should not prejudice the arguments which the defence may put forward at a later stage. (…)

71. First of all, it is respectfully submitted that in its reasons, the Chamber disregarded the fact that neither the Statute nor any other legal instrument of the ICC contain a specific definition under what "*exceptional circumstances*" the Court may grant leave for a challenge under article 19(4) of the Statute. Therefore, the undersigning Counsel would have put at risk the guaranteed right of the Defendants to challenge the admissibility under article 19(2) of the Statute, if he had provided any observation as to the merits. Future defence counsel for the four Defendants might be instructed by their respective client to challenge the admissibility of the case. In such a situation, future counsel would have had to present evidence in support of the existence of "exceptional circumstances" due to the fact that the undersigning Counsel has already challenged admissibility without any prior instructions from the defendants. It was this situation Counsel tried to prevent when noting in the Defence Submission that 'giving observations to the merit of articles 17 and 19(1) of the Statute would heighten risk of judicial predetermination'.

72. In this context, Counsel refers to the respective analysis of Christopher K. Hall in the Commentary on the Rome Statute of the International Criminal Court:

> Such *(exceptional) circumsta*nces are not spelled out but it would be consistent with judicial economy and with due process to limit "exceptional circumstances" in a challenge to admissibility to adopt a standard similar to that in article 84 (1) (a) of the Statute for revision of convictions or sentences which would require that the challenge be based on newly discovered information, that the failure to discover that information was not the fault of the State making the new challenge and that the information be sufficiently important so that the decision on the ruling on admissibility would have been different. … Therefore, the closer a case was to trial the more exceptional the circumstances would have to be to permit a second challenge to admissibility under article 17 (1) (a) or (b).[70]

73. This analysis supports Counsels view that in its Decision the Chamber does not sufficiently reflect the high burden of proof and the restrictive criteria, which have to be taken into account at a later stage of the proceedings in a further challenge, should be submitted.

74. Therefore, the lack of clarification and its negative impact on Counsel's ability to respond properly and effectively violates the rights of the defendants under article 67(1)(d) of the Statute. Accordingly, Counsel had to refrain from giving substantial observations representing the true interests of his clients to prevent a potential exercise of eminent rights of the defendants under the Statute. Counsel has to underline in this context, that his efforts to receive clarification in due time were

[70] Otto Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court, 2nd ed,. 2008, Article 19, margin number 22.

motivated by his obligation to act in accordance with the Code of Professional Conduct for counsel and with its incorporation of the highest professional standards for.

75. Furthermore, the participation of a court-appointed counsel in the present proceedings does not ameliorate the concerns set out in the Appeals Chamber's decision in the *Ntaganda* case.[71] The 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. This judicial pre-determination will have occurred, albeit the defence challenges were formulated in a precipitous and under-resourced manner, without the benefit of instructions from the defendants. Even if the defendants do retain the right to challenge admissibility at a future stage as of right under article 19(4), 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 conflicts of interest. As regards the Chamber's finding that the Statute expressly contemplates multiple admissibility challenges and that as such, *proprio motu* determinations are not *ipso facto* prejudicial with an inherent risk of predetermination. The Defence holds the opinion that it is necessary to contrast two situations. In the first situation - the defendant has appointed and instructed a counsel to participate in each admissibility challenge and review without any reservation. In this situation, the defendant does not risk predetermination since he is master of his strategy and can choose whether to raise substantive arguments in

[71] ICC-01/04-169-US-EXP, subsequently reclassified as public on 23 September 2008.

response to *proprio motu* review, or whether he wishes to reserve them for a later challenge to admissibility. In the second scenario, the defendant has not been able to effectively participate in the first proceedings concerning admissibility, and when arrested, if he seeks to challenge admissibility at a later stage, may find that the chamber has already ruled on several issues without the benefit of receiving the defendant's position on these issues. This would be the situation of each of the defendants here in this case.

76. If the Chamber had clarified prior to 18 November 2008 that Counsel was not supposed to represent the individual persons in the meaning of "clients" under article 2 of the Code of Professional Conduct for counsel, but was rather appointed to represent the general interests of the defence, Counsel would have been able to submit observations on the merits of articles 17 and 19 of the Statute.

D. FOURTH GROUND OF APPEAL:

The Chamber erred in finding that Counsel had adequate time and resources to effectively participate in the current admissibility proceedings.

77. Counsel finally maintains that the defence lacked adequate time and resources to effectively participate in the current admissibility proceedings. Counsel has already raised this issue in the Defence Observations in support of his request for the suspension of the proceedings.[72] However, the Chamber did not accept Counsel's arguments. As will be shown below, this caused a violation of article 67(1)(d) of the Statute.

[72] ICC-02/-4-01/-5-350, paras. 46 - 51.

78. In paragraph 32 of the impugned Decision, the Chamber *inter alia* noted

> **32.** … The appointment of a counsel for the defe*nce under* the authority of this regulation, vested with a limited mandate, has indeed become the established practice of the court whenever the person sought in the case is absent and the interest of justice require that the defence be nevertheless represented in a specific phase of the proceedings. This constitutes an adequate response to the defence's argument that the Proceedings would violate article 67(1)(d) of the Statute.

79. Counsel respectfully resubmits that the fairness of the current proceedings is put at risk by a vast inequality of arms. Notwithstanding the fact that article 67(1)(d) of the Statute grants *each* defendant the right to counsel, the four defendants in the current case have only been designated one counsel between the four of them, and no supporting staff.

80. Moreover, in contrast to the Prosecution and OPCV which have been working on the case for over a year, counsel for the defence had to acquaint himself with the relevant documents in the instant case filed and/or produced prior to his assignment, the legal system in Uganda and factual reports concerning the peace negotiations between the Ugandan government and the LRA delegation within a very limited period of time.

81. As discussed above, it was and still is impossible for Counsel to gauge the interests of the defendant in a vacuum. Counsel has been unable to benefit from instructions from the Defendants in order to focus his research and inquiries. In stark contrast to the position taken by the Chamber *vis-à-vis* the right of victims to effectively participate in the

proceedings, the Chamber has not directed the Registry to take any measures to publicise the proceedings to the defendants or persons who may be in contact with the defendants.

82. In this regard, representatives of the LRA met with the Registry in March 2008 in order to seek legal and procedural advice as to how they could contest the ICC arrest warrants. Whilst the advice provided by the Registry has not been publicly disseminated, in an interview in Uganda after this meeting, the Registrar of the Court apparently stated that warrants would have to be enforced, and that the ICC would not withdraw them, even if the defendants were prosecuted under the Uganda judicial system.[73] It is therefore entirely likely that the defendants are not aware of their right to challenge admissibility, or the appropriate mechanisms for doing so.

83. In terms of the time available to Counsel to file his observations, the Chamber rejected Counsel's request to order that the deadline should only commence to run upon the receipt of either the Presidency's decision or the decision on the request for access to relevant documents. The Chamber only granted Counsel an additional seven days to submit his observations. Counsel was therefore unable to focus on admissibility observations due to the fact that he was pursuing related remedies before the Presidency. At the same time, Counsel only received a

[73] *Simon Kasyate*, "LRA Leader Joseph Kony Will Be Arrested, Says ICC", The Monitor, 30 May 2008, (stating "Speaking to Daily Monitor at the ICC field office in Kololo, a Kampala suburb last week, Ms Silvana Arbia said the 'warrants of arrest were served to the concerned states for their enforcement' an obligation they must fulfill. She described her firm stance as 'the very simple and unique position taken by the ICC.' The ICC made the same position to an LRA delegation that visited its headquarters in The Hague in May 2008. 'A warrant is an order of the chamber of the ICC. And this order has to be enforced, that is all,' said Ms Arbia of what the ICC told the LRA delegation. Asked if the ICC would reconsider its position if the government of Uganda gave it assurance of an alternative judicial system that would not allow for impunity of the LRA leaders, the registrar replied in the negative."), available at <http://allafrica.com/stories/200805300004.html>.

significant portion of the requested transcripts on 14 November 2008, 5pm. The disclosure batch contained 77.8 MB and 29 documents in total. Counsel was therefore not able to thoroughly review and analyse the reasons as to why the Chamber initially found the case to be admissible.

84. The proper adversarial balance in the proceedings was further disturbed by the fact that the Pre-Trial Chamber granted the Uganda Victim's Foundation and the Redress Trust authorisation to file *amici curiae* briefs in the proceedings, without first allowing the defence and the Prosecution to file observations as to whether it was appropriate for them to do so. Whilst neither the Rules nor the Regulations expressly specify the procedure which should be followed in examining whether an *amicus curiae* request should be granted, the practice of the Chambers thus far has been to permit the parties to file observations concerning whether the applicant meets the requisite criteria to be authorized to file an *amicus curiae* brief.[74] Moreover, regulation 24(1) expressly provides the defence with the right to file a response to any (non ex-parte) document filed by a participant in the case. Notwithstanding the fact that under regulation 34(b) Counsel had 21 days to file its response, the Chamber issued its decision only five days after the request was notified to the parties.

85. The Chamber was aware of this situation, since all these issues have already been raised in the Defence Observations.[75]

[74] ICC-01/04-01/06-1175, at para. 3; ICC-01/04-01/06-442.
[75] ICC-02/-4-01/-5-350, paras 46 – 51.

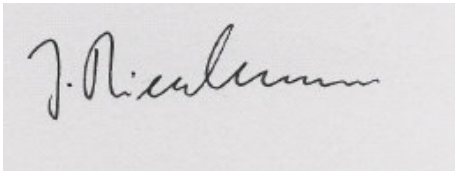
V. Relief Sought

86. Therefore, pursuant to articles 19(6), 82(1)(a) and 83(2)(a) of the Statute, Counsel respectfully requests the Appeals Chamber

a) to reverse the "Decision on the admissibility of the case under article 19(1) of the Statute" dated 10 March 2009,

b) or, in the alternative, to direct the Chamber to re-decide the admissibility of the case under article 19 (1) of the Statute in a manner which properly respects the defendants' right to effectively participate in the proceedings.

Respectfully submitted.



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Counsel for the Defence, Mr. Jens Dieckmann

Dated this 30 March 2009

At The Hague, The Netherlands