Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-02/04-01/05**
Date: **15 April 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

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"

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

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

The Office of the Prosecutor
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Victims and Witnesses Unit

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Other

I. Introduction

1. 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 Pre-Trial Chamber II ("Chamber") appointed the undersigning Counsel as counsel for the Defence.[1] In the same decision, 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.

2. The Prosecution,[2] the undersigning Counsel,[3] the State of Uganda[4] and the Office of Public Counsel for Victims (the "OPCV")[5] submitted their observations on the admissibility of the Case on 18 November 2008 as ordered by the Chamber.

3. In its "Decision on the admissibility of the case under article 19(1) of the Statute" rendered on 10 March 2009 ("the impugned Decision"),[6] the Chamber determined that "at this stage the Case is admissible under article 17 of the Statute".

4. On 30 March 2009, the undersigning Counsel for the Defence ("Counsel") filed a document encompassing forty pages[7] 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 had been filed on 16 March 2009 ("Defence Notice of Appeal")[8] pursuant to articles 19(6), 82(1)(a) and 83(2)(a) of the Rome Statute ("the Statute") and rule 154(1) of the Rules of Procedure and Evidence ("the Rules").

[1] ICC-02/04-01/05-320.
[2] ICC-02/04-01/05-352.
[3] ICC-02/04-01/05-350 (hereinafter "Defence Observations")
[4] ICC-02/04-01/05-354-Anx2.
[5] ICC-02/04-01/05-349.
[6] ICC-02/04-01/05-377.
[7] ICC-02/04-01/05-390.
[8] ICC-02/04-01/05-379.

5. On 9 April 2009, the Appeals Chamber rejected this document and ordered the Defence to refile, by 4 pm on Monday, 20 April 2009, a document in support of the appeal that complies with the page limit stipulated in regulation 37(1) of the Regulations of the Court.[9]
6. Pursuant to articles 19(6), 82(1)(a) and 83(2)(a) of the Statute, rule 154(1) of the Rules and regulations 37(1) and 64(2) of the Regulations of the Court ("Regulations"), the undersigning Counsel hereby refiles the document in support of the appeal.
7. With respect to the remainder of the procedural history, reference is made to paragraphs 2 through 25 of the Defence Notice of Appeal.

II. The Law

8. With respect to the applicable law, Counsel refers to paragraphs 26 through 31 of the Defence Observations dated 18 November 2008 and paragraphs 26 through 30 of the Defence Notice of Appeal dated 16 March 2009.

III. Grounds of Appeal

A. FIRST GROUND OF APPEAL:

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

9. Counsel 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

[9] ICC-02/04-01/05-393.

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

10. At the outset, Counsel respectfully draws the Appeals Chamber's attention to the Chamber's Decision of 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."[10] *(emphasis added)*

11. Counsel submits that the Chamber erred by finding that the appointment of a counsel in these proceedings was not mandatory but discretionary.[11] Article 67(1) of the Statute enshrines the right to counsel. Pursuant to rule 121(1) of the Rules 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, the defendants' right to participate through counsel guaranteed by article 67(1) of the Statute 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.[12] 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 defendants had an absolute right to counsel under the

[10] Decision of 21 October 2008, p. 8.
[11] Impugned Decision, para. 31.
[12] ICC-02/04-01/05-333.

Statute, Rules and Regulations, the Chamber already erred by finding that Counsel's appointment was discretionary.

12. Furthermore, the Chamber repeatedly emphasized in paragraphs 24, 30 and 31 of the impugned Decision that Counsel was appointed to represent "the interests of the Defence". The Chamber further noted that Counsel was "vested with a limited mandate".[13]

13. This interpretation of the scope of Counsel's mandate, however, stands in stark contrast to the lean wording of the Chamber's Decision of 21 October 2008, whereby Counsel was appointed "to represent [the] persons" for whom an arrest warrant has been issued.[14]

14. 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 Defence Observations.[15]

15. 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 of the impugned Decision, 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.

16. In this context, Counsel stresses that in prior decisions, whereby Chambers appointed ad hoc counsel in *situations*, these counsel were assigned to

[13] Impugned Decision, para. 32.
[14] Decision of 21 October 2008, p. 8.
[15] See Defence Observations, paras. 32-40.

represent "the interests of the defence".[16] While the same wording is reflected in the Chamber's impugned Decision in its description of the scope of Counsel's mandate,[17] this wording is, however, not used in the original assignment, i.e. the Decision of 21 October 2008. In another decision it was clarified that *ad hoc* counsel in *situations* were not entitled to challenge the jurisdiction or the admissibility of the case.[18]

17. 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 appointed to represent the four defendants in the *case* ICC-02/04-01/05 rather 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 of Counsel's appointment by the Registrar in accordance with Pre-Trial Chamber's Decision of 21 October 2008 and request for conditional stay/suspension of the proceedings" filed on 28 October 2008 that the foreseeable conflict of interest resulting from the representation of four defendants in the same criminal proceedings provokes unavoidable breache of article 12 of the Code of Professional Conduct for counsel.[19] Accordingly, it endangered the rights of each of the defendants to be represented effectively under the rule of law.

18. 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. Reference is made to paragraphs 34 through 38 of the Defence Observations, where Counsel's concrete conflict between the

[16] ICC-02/05-12; ICC-01/04-21.
[17] Impugned Decision, paras. 24, 30, 31.
[18] ICC-01/04-93, p. 4.
[19] ICC-02/04-01/05-326, paras.15, 42

mode of his assignment and the Code of Professional Conduct for counsel due to the lack of the required consultations between Counsel and his clients under article 12(1)(a) was discussed in detail. The Chamber entirely failed to address this concrete conflict and the resulting consequences in its impugned Decision.

19. 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. In this context, Counsel refers to the arguments set forth in paragraph 39 of the Defence Observations, which the Chamber omitted to address and discuss in the impugned Decision.

20. 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".[20] These reasons were then provided on 10 March 2009.[21] 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 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 of 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.[22] Counsel submitted

[20] ICC-02/04-02/05-344.
[21] ICC-02/04-01/05-378.
[22] ICC-02/04-01/05-350.

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.[23] 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.

21. 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 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.

22. 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 paragraph 33 of the Reasons of the Presidency from 10 March 2009, the Presidency therefore noted the following:

[23] *Ibid*, para. 40.

> "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."

23. 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: namely, the conflict arising from the wording of Counsel's appointment in the Chamber's Decision of 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.

24. 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.

25. Counsel 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) of the Statute 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.

26. In paragraph 15 of the impugned 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."[24]

27. In this context, the Chamber referred to jurisprudence of all three Pre-Trial Chambers.[25]

28. 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").[26] The Chamber discussed this ruling in paragraph 20 of the impugned Decision.

[24] Impugned Decision, para. 15.
[25] Impugned Decision, paras. 16 – 19.
[26] ICC-01/04-169 (reclassified as public pursuant to Decision ICC-01/04-538-PUB-Exp).

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

> "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)*

30. 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. Since the Chamber has not directed the Registry to take any measures to publicise the proceedings to the Defendants,[27] 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.

31. 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.

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

32. 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.

33. 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.

34. In addition, reference is made to Counsel's arguments put forward in paragraphs 42 through 44 of the Defence Observations, which the Chamber failed to address in its impugned Decision.

35. 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.[28]

36. Accordingly, it is submitted that the Trial Chamber erred in finding that the Appeals Chamber's determinations as to the conditions warranting the exercise of a Chamber's *proprio motu* powers under article 19(1) of the Statute 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.

[28] ICC-02/04-01/05-US-EXP, p. 2.

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.

37. Counsel submits that the Chamber misconstrued the defendant's rights under article 19(2) of the Statute to challenge the admissibility more than once. The Chamber erroneously interpreted the threshold of article 19(4) of the Statute. Furthermore, Counsel 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 articles 19(2) and 67(1)(d) of the Statute.

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

> "(…) 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. (…)"

39. 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.[29] 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) 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 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, Counsel holds the opinion that it is necessary to contrast two situations. In the first situation, the

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

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 the master of his strategy and can choose whether to raise substantive arguments in response to *proprio motu* review, or whether he wishes to reserve them for a later challenge of the admissibility. In the second scenario, the defendant has not been able to effectively participate in the first proceeding concerning admissibility, and when arrested, if he seeks to challenge the 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 in fact be the situation of each of the defendants here in this case.

40. 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.

41. 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.[30] 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.

[30] ICC-02/04-01/05-350, paras. 46 - 51.

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

> **"(**…) 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."

43. 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.

44. 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.

45. 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.

46. 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.[31] It is therefore entirely likely that the defendants are not aware of their right to challenge admissibility, or the appropriate mechanisms for doing so.

47. 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 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.

48. 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 authorization 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

[31] *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>.

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.[32] 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.

49. The Chamber was aware of this situation, since all these issues have already been raised in the Defence Observations.[33]

IV. Relief Sought

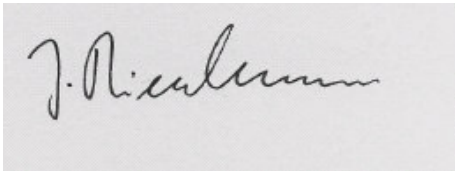
50. Therefore, pursuant to articles 19(6), 82(1)(a) and 83(2)(a) of the Statute, Counsel respectfully requests the Appeals Chamber

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.

[32] ICC-01/04-01/06-1175, para. 3; ICC-01/04-01/06-442.
[33] ICC-02/04-01/05-350, paras. 46 – 51.

Respectfully submitted.



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Counsel for the Defence, Mr. Jens Dieckmann

Dated this 15 April 2009

At The Hague, The Netherlands