

1 International Criminal Court
2 Appeals Chamber
3 Presiding Judge Daniel David Ntanda Nsereko
4 Situation in Uganda
5 Case The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo,
6 Dominic Ongwen - ICC-02/04-01/05
7 Delivery of judgment
8 Open Session
9 Wednesday, 16 September 2009
10 (The hearing starts at 10:40 a.m.)

11 THE COURT USHER: All rise. The International Criminal Court is now
12 in session. Please be seated.

13 THE PRESIDING JUDGE: Good morning. Court Officer, would you please
14 call the case.

15 THE COURT OFFICER: (Interpretation) Thank you, your Honour.
16 Situation in Uganda, in the case of the Prosecutor against Joseph Kony,
17 Vincent Otti, Okot Odhiambo and Dominic Ongwen, ICC 02/04-01/05.

18 THE PRESIDING JUDGE: Thank you. The participants to please
19 introduce yourselves, starting with the Office of the Prosecutor.

20 MR. GUARIGLIA: Good morning, your Honour. It's Fabricio Guariglia,
21 Senior Appeals Counsel in the Office of the Prosecutor, and today with me is
22 Mr. Ekkehard Withopf, Senior Trial Lawyer in charge of the Kony case.

23 MR. DIECKMANN: Yes, thank you, your Honour. This is Jens Dieckmann,
24 Attorney at Law from Germany as counsel for the Defence.

25 MS. MASSIDDA: Thank you. Good morning, your Honour. Victims in

1 this proceeding are represented by Ms. Sarah Pellet, Acting Counsel, and by
2 myself Paolina Massidda, Principal Counsel, Office of Public Counsel for
3 Victims. Thank you.

4 THE PRESIDING JUDGE: This morning I shall summarise the judgment of
5 the Appeals Chamber in the appeal of the Defence against the decision of
6 Pre-Trial Chamber II of 10 March 2009 on the admissibility of the case against
7 Mr. Joseph Kony and others.

8 The Appeals Chamber decides the appeal unanimously as follows:

9 The decision of the Pre-Trial Chamber entitled "Decision on the
10 admissibility of the case and Article 19(1) of the Statute" is confirmed and
11 the appeal is dismissed.

12 I shall now summarise the reasons founding the decision. I should,
13 however, emphasise that the written judgment, which will be filed and notified
14 to the parties shortly after this hearing, is the authentic version and not
15 this summary.

16 Now as to the procedural history of this case, on 21 October 2008
17 Pre-Trial Chamber II decided to initiate proceedings under Article 19(1) of
18 the Statute. In that same decision Pre-Trial Chamber II also appointed
19 Mr. Jens Dieckmann as counsel for the Defence under Regulation 76(1) of the
20 Regulations of the Court. In addition, the Pre-Trial Chamber invited the
21 Prosecutor, counsel for the Defence, the Government of Uganda and the victims
22 to make submissions and observations on the admissibility of their case.

23 On 18 November 2008 the Prosecutor made submissions with respect to
24 the admissibility of the case, noting that he had to date not identified any
25 national proceeding related to the current case. In its observations, the

1 Government of Uganda stated that the case was still admissible. The victims,
2 represented by the Office of Public Counsel for Victims, also asserted that
3 there was no reason to initiate admissibility proceedings and that the case
4 continued to be admissible.

5 On 18 November 2008, counsel for the Defence also filed his
6 submissions. However, he did not make any submissions on the substantive
7 issue of the admissibility of the case. He stated that he understood his
8 mandate to be to represent the four persons subject to the warrants of arrest
9 as individuals and he contended that in the absence of any contact with and
10 instructions from the suspects he was unable to represent them without
11 violating the terms of the Code of Professional Conduct for counsel. In
12 addition he requested the Pre-Trial Chamber to suspend the proceedings,
13 because in his view the rights of the persons subject to the warrants of
14 arrest were not properly safeguarded in the proceedings.

15 On 10 March 2009, the Pre-Trial Chamber rendered the impugned
16 decision. It decided, among other things, that there was no reason for the
17 Chamber to review the positive determination of admissibility of the case made
18 at the time of the issuance of the warrants of arrest. Consequently, in its
19 decision the case remained admissible.

20 On 16 March 2009, counsel for the Defence notified his intention to
21 appeal the impugned decision under Article 82(1)(a) of the Statute.

22 Following an order of the Appeals Chamber, counsel for the Defence on
23 15 April 2009 re-filed his document in support of the appeal in which he
24 prayed that the Appeals Chamber reverse the impugned decision, or in the
25 alternative direct the Pre-Trial Chamber to redetermine the admissibility of

1 the case under Article 19(1) of the Statute in a manner which properly
2 respects the Defendants's right to effectively participate in the proceedings.

3 Before addressing the merits of this appeal there are some
4 preliminary issues to be dealt with, so the Appeals Chamber will first rule on
5 the application of both the Prosecutor and the victims that the appeal should
6 be dismissed in limine on the basis that the appeal does not meet the
7 requirements of Article 82(1)(a) of the Statute. They base their argument on
8 the fact that counsel for the Defence does not challenge the substantive
9 findings of the Pre-Trial Chamber on the issue of admissibility, but that
10 instead it dwells on certain alleged procedural errors.

11 To the Prosecutor and to the victims, an appeal under the provision
12 cannot be based on mere procedural errors. The Appeals Chamber has previously
13 held in a number of cases that the absence of statutory grounds does not
14 preclude a party from raising any grounds, be they substantive or procedural,
15 that may be germane to the legal correctness or procedural fairness of a
16 Chamber's decision.

17 An appellant may therefore raise procedural errors in an appeal
18 brought under Article 82(1)paragraph of the Statute. Counsel for the Defence
19 is thus entitled to rely on procedural errors as the basis for impugning the
20 Pre-Trial's decision. His failure to attack its findings on the admissibility
21 does not, per se, render the appeal inadmissible.

22 The second matter arising from the submissions of the Prosecutor and
23 of the victim is whether counsel for the Defence was obliged to set out in the
24 document in support of the appeal not only the alleged errors, but also how
25 such errors materially affected the Pre-Trial Chamber's determination of

1 admissibility. Regulation 84(2) of the Regulations of the Court obliges an
2 appellant to do so.

3 The Appeals Chamber agrees that as part of the reasons in support of
4 a ground of Appeal, the Appellant must not only set out the alleged error, but
5 must also indicate precisely how the error materially affected the impugned
6 decision.

7 With respect to grounds 1, 2 and 3 of the present appeal, the Appeals
8 Chamber determines that although counsel for the Defence could have stated his
9 argument more clearly, the document in support of the appeal satisfies the
10 minimum requirements of Regulation 64(2) of the Regulations of the Court. The
11 Appeals Chamber will, therefore, consider the merits of these grounds of
12 appeal.

13 As his fourth ground of appeal, counsel for the Defence alleges lack
14 of time and resources to participate adequately in the proceedings before the
15 Pre-Trial Chamber, apparently raising a procedural error that affects the
16 fairness or reliability of the proceedings. The Appeals Chamber finds that
17 the arguments of counsel for the Defence under these grounds -- under this
18 ground are too vague and inadequate to demonstrate how the alleged errors
19 materially affected the ruling regarding admissibility of the case in the
20 impugned decision. Consequently, the Appeals Chamber rejects the first ground
21 of appeal in limine and does not consider its merits.

22 Turning to the merits of the appeal on the first ground. As his
23 first ground of appeal, counsel for the Defence submits that the Pre-Trial
24 Chamber misconstrued the nature and scope of his mandate purportedly leading
25 to a breach of the suspects' right under Article 67(1)(b) of the Statute. In

1 the impugned decision, the Pre-Trial Chamber explained that it had appointed a
2 counsel tasked with representing the interests of the Defence within the scope
3 of the proceedings. It also said that appointment of counsel pursuant to
4 Regulation 76(1) of the Regulations of the Court was an established practice
5 of the Court whenever the persons sought in the case were absent and the
6 interests of justice required that the Defence be represented.

7 The Prosecutor in his response to the submission of the Defence
8 refutes those submissions on the basis that counsel for the Defence was
9 mandated by the Pre-Trial Chamber to represent the interests of the Defence
10 generally. In his view, the fact that counsel for the Defence was unable to
11 contact his clients had no bearing on the impugned decision.

12 The victims in their submission fully agree with the arguments of the
13 Prosecutor. In addition, they set out the scheme of the legal provisions
14 dealing with the representation of a person through counsel and counsel
15 representing the interests of the Defence. They argue that the rights of the
16 accused set out in Article 67 of the Statute are not applicable to persons who
17 are still at large.

18 The Appeals Chamber understands that the principal submission of
19 counsel for the Defence under the first ground of appeal is that the Pre-Trial
20 Chamber, in its decision of 21 October 2008, appointed him to represent the
21 four suspects as individuals, but it later misconstrued this mandate in the
22 impugned decision.

23 In addressing this ground of appeal, the Appeals Chamber deems it
24 necessary to first clarify the difference in the mandate of counsel appointed
25 to represent suspects as individuals, as his clients, as opposed to the

1 mandate of counsel appointed to represent the interests of the Defence
2 generally.

3 The Appeals Chamber notes that the legal instruments of the Court
4 provide for at least two types of counsel for the Defence. Article 67(1)(d)
5 of the Statute provides inter alia for the right of an accused person to
6 conduct the Defence through counsel of the accused's choosing.

7 Under this form of representation, a client-and-counsel relationship
8 exists and counsel acts for and as agent of the client. On the other hand,
9 Article 56(2)(d) of the Statute provides for another type of representation.
10 Here, the mandate of counsel is to attend and represent the interests of the
11 Defence. This representation is of a sui generis nature. It must be
12 understood differently from the mandate of counsel who has been appointed to
13 represent suspects as individuals.

14 In circumstances where the suspects are at large, and counsel
15 appointed to represent their interests generally, such counsel cannot speak on
16 their behalf. He does not act for or act as their agent. A
17 client-and-counsel relationship does not exist between him and the suspects.

18 Counsel's mandate is limited to merely assuming the Defence
19 perspective, with a view to safeguarding the interests of the suspects,
20 insofar as counsel can in the circumstances identify them.

21 In the instant case, the Appeals Chamber is, you know, for the
22 following reasons, of the view that counsel for the Defence was appointed to
23 represent the interests of the Defence generally, and not to represent the
24 four suspects as individuals or as clients.

25 Firstly, the Appeals Chamber notes that the Pre-Trial Chamber

1 appointed the counsel who was located in Europe and who had no apparent means
2 of communicating with the suspects who are believed to be in the Democratic
3 Republic of The Congo. The Pre-Trial Chamber also imposed a relatively short
4 time limit for the submission of observations. In doing so, it is apparent
5 that the Chamber did not expect counsel for the Defence to contact the four
6 persons sought by the Court or to seek instructions from them.

7 Furthermore, the underlying presumption of the Code of Conduct is
8 that a relationship between counsel and his client, or his or her client
9 exists. This enables counsel to abide by the client's decisions concerning
10 the objectives of his or her representation. However, in the absence of any
11 contact or communication between counsel for the Defence and the four
12 suspects, the Pre-Trial Chamber could not have envisaged that the former
13 should actually represent or act on behalf of the latter; hence, its statement
14 that counsel for the defence was vested with a limited mandate.

15 The Pre-Trial Chamber further made this clear by emphasising in the
16 impugned decision that the submissions of counsel for the Defence should not
17 prejudice the arguments which the Defence may put forward at a later stage.
18 Thus, in the Appeals Chamber's view, the Pre-Trial Chamber did not misconstrue
19 the mandate of Mr. Dieckmann, who it had appointed as counsel for the Defence
20 to represent the interests of the Defence in the proceedings leading to the
21 impugned decision.

22 Another issue arising under the first ground of appeal is whether the
23 Pre-Trial Chamber was under specific obligation to appoint counsel to
24 represent the persons in respect of whom warrants of arrest have been issued.
25 Counsel for the Defence submits that such a right arises from Article 67(2) of

1 the Statute read with Rule 121(1) of the Rules of Procedure and Evidence.

2 The Appeals Chamber is not persuaded by these arguments. The plain
3 meaning of this provision clearly shows that the person referred to in the
4 second sentence of the provision refers to persons appearing before the
5 Pre-Trial Chamber and not to those for whom warrants of arrest or summons to
6 appear have been issued and who have not yet appeared before the Court.

7 The provision is part of Rule 121 entitled "Proceedings Before the
8 Confirmation Hearing" and is not related to the issuance of a warrant of
9 arrest or summons to appear as such.

10 Lastly, it should be noted in passing that the rationale for Rule
11 121(1) making Article 67 applicable to a person appearing before the Pre-Trial
12 Chamber at the Pre-Trial stage is that the person has to undergo a proceeding
13 akin to a trial; namely, the confirmation hearing.

14 Additionally, and contrary to the contention of counsel for the
15 Defence, the international recognised human rights standards do not
16 necessarily extend all the rights enshrined in Article 67 of the Statute to
17 persons who have not yet been surrendered to the Court or appeared voluntarily
18 before it.

19 The Appeals Chamber, therefore, finds that the Pre-Trial Chamber was
20 not obliged to appoint counsel to represent the four suspects and no error in
21 this respect can be identified.

22 Second and third grounds of Appeal. Counsel for the Defence submits,
23 as his second ground of appeal, that the Pre-Trial Chamber improperly
24 exercised its discretion to initiate admissibility proceedings in the absence
25 of the four suspects. Related to this submission, counsel for the Defence

1 avers as his third ground of appeal that the Pre-Trial Chamber erred in
2 finding that its determination of the admissibility of the case under Article
3 19(1) of the Statute, at a stage when none of the suspects were in custody,
4 did not jeopardise their rights to bring a challenge pursuant to Article 19(2)
5 of the Statute at a later stage and did not constitute a risk of
6 pre-determination.

7 As the two grounds of appeal are closely linked they will be dealt
8 with together. In the impugned decision, the Pre-Trial Chamber stated that,
9 "the authority to decide whether the determination of admissibility should be
10 made and, in the affirmative, at what specific stage of the proceedings such
11 determination should occur resides exclusively with the relevant Chamber."
12 Referring to the Appeals Chamber judgment of 13 July 2006, the Pre-Trial
13 Chamber found that the determinations of the Appeals Chamber as to the
14 conditions warranting the exercise of a Chamber's proprio motu powers under
15 Article 19(1) are not of direct relevance to the proceedings.

16 In his submissions, counsel for the Defence refers to the Appeals
17 Chamber judgment of 13 July 2006, and argues that the procedural situation
18 leading to that judgment is comparable to the instant proceedings.

19 He also avers that the Pre-Trial Chamber misconstrued the defendants'
20 right under Article 19(4) to challenge the admissibility more than once. He
21 argues that the four suspects in this case are in the same position as they
22 would have been without appointed counsel. In his opinion the appointment of
23 counsel does not ameliorate the concerns expressed in the judgment of 13 July
24 2006, namely, that proprio motu proceedings would pre-determine a future
25 challenge to the admissibility of the case before the same Chamber. Counsel

1 for the Defence submits that the risk of pre-determination could only be
2 avoided if the suspect fully instructed counsel as to the strategy to be
3 followed. This, however, was not the case in the present proceedings.

4 The Prosecutor's arguments on the merits of the second ground of
5 appeal are twofold. First of all, he is of the opinion that the Pre-Trial
6 Chamber correctly identified an ostensible cause justifying the exercise of
7 its discretion according to the terms of the judgment of 13 July 2006.
8 Secondly, the Prosecutor submits that there is no "cognizable prejudice to the
9 suspects from the decision to examine admissibility," as the impugned decision
10 did not change the Pre-Trial Chamber's previous finding that the case is
11 admissible.

12 As to the third ground of appeal, the Prosecutor argues that
13 according to the law and the terms of the impugned decision, the suspects will
14 not lose their right to challenge the admissibility of the case.

15 The victims endorse the arguments of the Prosecutor with respect to
16 the second and third grounds of appeal. They point out that the decision of
17 the Pre-Trial Chamber on admissibility of a case under Article 19(1) of the
18 Statute is a discretionary one.

19 The first question that the Appeals Chamber must address under these
20 grounds of appeal is the scope of its powers to review the exercise of
21 discretion by the first-instance Chamber. In its judgment, the Appeals
22 Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion
23 to make a determination proprio motu on the admissibility of a case merely
24 because the Appeals Chamber, if it had the power, might have made a different
25 ruling. To do so would be to usurp powers not conferred on it and to render

1 nugatory powers specifically vested in the Pre-Trial Chamber.

2 In the case of a proprio motu determination under the second sentence
3 of Article 19(1) of the Statute, the Appeals Chamber will not interfere with
4 the Pre-Trial Chamber's exercise of discretion to determine admissibility,
5 save where it is shown that that determination was vitiated by an error of
6 law, an error of fact, or a procedural error, and then only if the error
7 materially affected the determination. This means, in effect, that the
8 Appeals Chamber will interfere with the discretionary decision only under
9 limited conditions.

10 In the present case, counsel for the Defence's major complaint of
11 alleged error is of a procedural nature; that is, the timing of the exercise
12 of the discretion, and its consequent effect on the rights of the persons
13 sought by the Court. In support of his contention he relies, in the main, on
14 an earlier decision of the Appeals Chamber, namely, the judgment of 13 July
15 2006. In that decision the Chamber considered that the exercise of Pre-Trial
16 Chamber I's discretion in that case was erroneous "because by deciding that
17 [Pre-Trial Chamber I] had to make an initial determination on the
18 admissibility of the case before it could issue a warrant of arrest, the
19 Pre-Trial Chamber did not give sufficient weight to the interests of Mr. Bosco
20 Ntaganda."

21 The prejudice to the suspect that the Appeals Chamber identified in
22 the judgment of 13 July 2006 as likely to result does not arise in the instant
23 case. The judgment of 13 July 2006 concerned a decision on admissibility that
24 the Pre-Trial Chamber had rendered in the context of proceedings that were
25 held in camera and in which only the Prosecutor participated. This is not the

1 case here. The proceedings that led to the impugned decision were public.
2 Not only the Prosecutor, but also the Government of Uganda and the victims
3 participated in the proceedings. The Pre-Trial Chamber also appointed counsel
4 for the Defence in order to facilitate submissions to the Chamber on the
5 defence perspective.

6 Furthermore, the Pre-Trial Chamber decision was based, in the main,
7 on the gravity of the case under Article 17(1) of the Statute. Arguably, the
8 Chamber determines the gravity of a case only once in the course of the
9 proceedings because the facts underlying the assessment of gravity are
10 unlikely to change and a party may therefore be unable to raise the same issue
11 again in the future admissibility challenges. Again, this is not the case in
12 the instant case. Gravity was not an issue. The issue was whether there were
13 ongoing domestic proceedings which rendered the case inadmissible pursuant to
14 Article 17(1)(a) of the Statute. Thus, the Pre-Trial Chamber's decision to
15 hold admissibility proceedings at the time that it did, did not, in the
16 context of the judgment of 13 July 2006, impair the right of the four suspects
17 to challenge subsequently the admissibility of the case.

18 As for the issue of pre-determination, alluded to by the Appeals
19 Chamber in the judgment of 13 July 2006, and canvassed by counsel for the
20 Defence, as likely to ensue from the Pre-Trial Chamber's decision, the Appeals
21 Chamber holds that no such prejudice is likely to happen in the instant case.
22 This is so because the factual scenario on which the Pre-Trial Chamber based
23 its determination on admissibility was identical to the factual scenario
24 prevailing at the time when the Chamber issued the warrants of arrest, namely,
25 "total inaction on the part of the relevant national authorities," and that,

1 "accordingly, there is no reason for the Chamber to review the positive
2 determination of the admissibility of the case made at [the arrest warrant]
3 stage."

4 The Pre-Trial Chamber clarified further that the purpose of the
5 proceedings "remains limited to dispelling uncertainty as to who has ultimate
6 authority to determine the admissibility of the case: it is for the Court,
7 and not for Uganda, to make such determination." Thus, there is no indication
8 that the Pre-Trial Chamber made any determination that could potentially
9 prejudice a subsequent challenge to the admissibility of the case brought by
10 any of the four suspects.

11 In light of the above, the Appeals Chamber is not persuaded that the
12 Pre-Trial Chamber exercised its discretion erroneously.

13 In the present case, it is appropriate therefore to confirm the
14 impugned decision and dismiss the appeal. No error has been identified that
15 would materially affect the impugned decision.

16 This concludes the summary of this judgment. I now declare the
17 session closed. Thank you.

18 THE COURT USHER: All rise.
19 (The hearing concludes at 11:10 a.m.)