**Cour Pénale Internationale**

**International Criminal Court**

Original: English

No. **ICC-02/04-01/05 OA 3**
**Date: 16 September 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**

**Judgment**
**on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009**

**Decision/Order/Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:**

**The Office of the Prosecutor**
Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

**Counsel for the Defence**
Mr Jens Dieckmann

**The Office of Public Counsel for Victims**
Ms Paolina Massidda, Principal Counsel

**States Representatives**
The Government of the Republic of Uganda

**REGISTRY**

**Registrar**
Ms Silvana Arbia
**Deputy Registrar**
Mr Didier Preira

The Appeals Chamber of the International Criminal Court,

In the appeal of the Defence against the "'Decision on the admissibility of the case under article 19 (1) of the Statute' dated 10 March 2009" (ICC-02/04-01/05-379),

After deliberation,

Unanimously,

*Delivers* the following

# JUDGMENT

The decision of Pre-Trial Chamber II of 10 March 2009 entitled "Decision on the admissibility of the case under article 19 (1) of the Statute" is confirmed. The appeal is dismissed.

## REASONS

## I. KEY FINDINGS

1. The mandate of counsel appointed to represent the interests of the defence is a *sui generis* appointment and, as such, must be understood differently from the mandate of defence counsel who has been appointed to represent a person as an individual. In circumstances where the suspects are at large and counsel is appointed to represent their interests in proceedings, such counsel cannot speak on their behalf. Counsel will have to assume the defence perspective, in particular generally to safeguard the interests of the defence.

2. The Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion to rule *proprio motu* on the admissibility of a case merely because the Appeals Chamber, if it had the power, might have decided differently. To do so would be to usurp powers not conferred on it and to render nugatory powers specifically vested in the Pre-Trial Chamber.

# II. PROCEDURAL HISTORY

## A. Proceedings before the Pre-Trial Chamber

3. On 8 July 2005,[1] the Pre-Trial Chamber issued warrants for the arrest of the four suspects.[2] In the decision leading to the issuance of the warrants of arrest (hereinafter: "Decision on Warrants of Arrest"), the Pre-Trial Chamber determined that the case against the persons "appears to be admissible"[3].

4. On 29 February 2008, the Pre-Trial Chamber requested the Government of the Republic of Uganda (hereinafter: "Government of Uganda") to provide information on the status of the execution of the warrants of arrest, noting the Agreement on Accountability and Reconciliation[4] and the Annexure[5] thereto which had been agreed upon between the Government of Uganda and the Lord's Resistance Army/Movement; the Chamber requested further information on 8 June 2008.[6]

5. In its response of 27 March 2008, the Government of Uganda explained that "[t]he establishment of the special division of the High Court and the enactment of the relevant legislation shall take place after the signing of the final peace agreement"[7]. With respect to the impact of these developments on the execution of the arrest warrants, the Government of Uganda stated:

> The special division of the High Court is not meant to supplant the work of the International Criminal Court and accordingly those individuals who were

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[1] The warrant of arrest for Joseph Kony was amended on 27 September 2005.
[2] A warrant for the arrest of Raska Lukwiya was issued too, but proceedings against him were terminated by decision of the Pre-Trial Chamber on 11 July 2007 (ICC-02/04-01/05-248).
[3] "Decision on the Prosecutor's application for warrants of arrest under article 58", 8 July 2005 (ICC-02/04-01/05-1-US-Exp, unsealed pursuant to decision dated 13 October 2005 (ICC-01/04-01/05-52), p. 2.
[4] See Annex A to "Prosecution's Observations regarding the Admissibility of the Case against Joseph KONY, Vincent OTTI, Okot ODHIAMBO and Dominic ONGWEN" 18 November 2008 (ICC-02/04-01/05-352).
[5] See Annex B to "Prosecution's Observations regarding the Admissibility of the Case against Joseph KONY, Vincent OTTI, Okot ODHIAMBO and Dominic ONGWEN" 18 November 2008 (ICC-02/04-01/05-352).
[6] "Request for Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest", 29 February 2008 (ICC-02/04-01/05-274); "Request for Further Information from the Republic of Uganda on the Status of the Execution of the Warrants of Arrest", 18 June 2008 (ICC-02/04-01/05-299).
[7] Annex 2 to "Report by the Registrar on the Execution of the 'Request for Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest'", 28 March 2008 (ICC-02/04-01/05-286), p. 2.

> indicted by the International Criminal Court will [*sic*] have to be brought before the special division of the High Court for trial.[8]

6. In its response to the further request for information by the Pre-Trial Chamber, the Government of Uganda explained that the final peace agreement had not been signed by Joseph Kony.[9]

7. On 21 October 2008 Pre-Trial Chamber II decided to initiate proceedings under article 19 (1) of the Statute (hereinafter: "Decision of 21 October 2008").[10] In the Decision of 21 October 2008, Pre-Trial Chamber II also appointed Mr. Jens Dieckmann as Counsel for the Defence under regulation 76 (1) of the Regulations of the Court (hereinafter: "Counsel for the Defence"). In addition, the Pre-Trial Chamber invited the Prosecutor, Counsel for the Defence, the Government of Uganda and victims to make submissions and observations on the admissibility of the case.

8. On 28 October 2009, Counsel for the Defence, while not declining his appointment, requested the Presidency to review the decision of the Registrar relating to his appointment.[11] He also applied to the Pre-Trial Chamber for a conditional stay of the proceedings pending the outcome of the request to the Presidency.[12] On 31 October 2008, the Pre-Trial Chamber rejected the application for conditional stay.[13] On 11 November 2008, the Presidency also dismissed the request for a review of the Registrar's decision.[14]

9. On 18 November 2008, the Prosecutor made submissions with respect to the admissibility of the case, noting that he had "to date, ... not identified any national

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[8] Annex 2 to "Report by the Registrar on the Execution of the 'Request for Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest'" 28 March 2008 (ICC-02/04-01/05-286), p. 3.
[9] Annex 2 to "Report by the Registrar on the Execution of the 'Request for Further Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest'" 10 July 2008 (ICC-02/04-01/05-305).
[10] See "Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence", 21 October 2009 (ICC-02/04-01/05-320).
[11] "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", 28 October 2008 (ICC-02/04-01/05-326).
[12] "Request for conditional stay of proceedings", 28 October 2008 (ICC-02/04-01/05-325).
[13] See "Decision on the Defence Counsel's 'Request for conditional stay of proceedings'", 31 October 2008 (ICC-02/04-01/05-328).
[14] See "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 the Pre-Trial Chamber II of 21 October 2008", 11 November 2008 (ICC-02/04-01/05-344-Corr). The reasons for the Presidency's decision were filed on 10 March 2009 (ICC-02/04-01/05-378).

proceeding related to the current case. Accordingly, the Prosecution maintains its position, which it has stated in the past, that the absence of national proceedings defines the admissibility of the present case."[15] In its observations, the Government of Uganda stated that the case was still admissible. The victims represented by the Office of Public Counsel for Victims also asserted that there was no reason to initiate admissibility proceedings and that the case continued to be admissible.[16]

10. On 18 November 2008, the Uganda Victims' Foundation and the Redress Trust, who were granted leave to submit observations as *amici curiae*[17], made such submissions on the legal and factual background of the implementation of the Agreement on Accountability and Reconciliation and the Annexure.[18]

11. On 18 November 2008, Counsel for the Defence filed the "Submission of observations on the admissibility of the Case under article 19 (1) of the Statute" (hereinafter: "Submissions of 18 November 2008)[19]. However, Counsel for the Defence did not make any submissions on the substantive issue of the admissibility of the case, but stated that he understood his mandate to be to represent the four persons subject to the warrants of arrest and contended that such representation was contrary to the terms of the Code of Professional Conduct for counsel of 2 December 2005 (ICC-ASP/4/Res.1; hereinafter: "Code of Conduct"). In addition, he requested the Pre-Trial Chamber to suspend the proceedings because the rights of the persons subject to the warrants of arrest were not properly safeguarded in the proceedings.[20]

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[15] "Prosecution's Observations regarding the Admissibility of the Case against Joseph KONY, Vincent OTTI, Okot ODHIAMBO and Dominic ONGWEN", 18 November 2008 (ICC-02/04-01/05-352), para. 9.

[16] Observations by the Republic of Uganda: Annex 2 to "Report of the Registrar on the execution of the request to the Republic of Uganda for observations on the initiation of proceedings pursuant to Article 19 of the Rome Statute", 18 November 2008 (ICC-02/04-01/05-354); "Observations on behalf of victims pursuant to article 19(1) of the Rome Statute with 55 Public Annexes and 45 Redacted Annexes", 18 November 2008 (ICC-02/04-01/05-349).

[17] See "Decision on application for leave to submit observations under Rule 103", 5 November 2008 (ICC-02/04-01/05-333).

[18] See "Amicus Curiae submitted pursuant to the Pre-Trial Chamber II 'Decision on application for leave to submit observations under Rule 103' dated 5 November 2008", 18 November 2008 (ICC-02/04-01/05-353).

[19] "Submission of observations on the admissibility of the Case under article 19 (1) of the Statute", 18 November 2008 (ICC-02/04-01/05-350).

[20] "Submission of observations on the admissibility of the Case under article 19 (1) of the Statute", 18 November 2008 (ICC-02/04-01/05-350).



12. On 10 March 2009, the Pre-Trial Chamber rendered the "Decision on the admissibility of the case under article 19(1) of the Statute" (ICC-02/04-01/05-377; hereinafter: the "Impugned Decision"). In that decision, the Pre-Trial Chamber decided as follows:

> 52. Pending the adoption of all relevant texts and the implementation of all practical steps, the scenario against which the admissibility of the Case has to be determined remains therefore the same as at the time of the issuance of the Warrants, that is one of total inaction on the part of the relevant national authorities; accordingly, there is no reason for the Chamber to review the positive determination of the admissibility of the Case made at that stage.
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> FOR THESE REASONS, THE CHAMBER HEREBY
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> **DETERMINES** that at this stage the Case is admissible under article 17 of the Statute.

## B. Proceedings before the Appeals Chamber

13. On 16 March 2009, Counsel for the Defence filed an appeal against the Impugned Decision under article 82 (1) (a) of the Statute.[21] Counsel for the Defence prays that the Appeals Chamber reverse the Impugned Decision. In addition, he requests the Appeals Chamber to "suspend the present proceedings under article 19 (1) of the Rome Statute pending proper implementation of the defendants' rights to effectively participate in the proceedings."[22]

14. On 30 March 2009, Counsel for the Defence filed the "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'" (ICC-02/04-01/05-390). On 9 April 2009, the Appeals Chamber's "Order on the re-filing of the document in support of the appeal and Directions on the filing of observations" (ICC-02/04-01/05-393; hereinafter: "Order of 9 April 2009") was registered. The Appeals Chamber ordered Counsel for the Defence to re-file this document by 15 April 2009 to comply with the page limit requirement under regulation 37 of the Regulations of the Court. The Government of Uganda and the victims were also invited to make observations on the appeal.

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[21] "Defence Appeal against 'Decision on the admissibility of the case under article 19 (1) of the Statute' dated 10 March 2009", 16 March 2009 (ICC-02/04-01/05-379).
[22] "Defence Appeal against 'Decision on the admissibility of the case under article 19 (1) of the Statute' dated 10 March 2009", 16 March 2009 (ICC-02/04-01/05-379), para. 31.

15. On 15 April 2009, Counsel for the Defence filed the "Refiled document in support of 'Defence Appeal against "Decision on the admissibility of the case under article 19(1) of the Statute"'" (ICC-02/04-01/05-394; hereinafter: "Document in Support of the Appeal"). Counsel for the Defence prays that the Appeals Chamber reverse the Impugned Decision "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."[23]

16. On 7 May 2009, the Prosecutor filed the "Prosecution Response to Defence Appeal against 'Decision on the admissibility of the case under article 19(1) of the Statute'" (ICC-02/04-01/05-401; hereinafter: "Response to the Document in Support of the Appeal"), requesting the Appeals Chamber to reject the appeal in its entirety.

17. On 28 May 2009, the victims filed the "Observations of victims on the refiled document in support of 'Defence Appeal against "Decision on the admissibility of the case under article 19(1) of the Statute" dated 10 March 2009' filed on 15 April 2009 and the Prosecution Response thereto filed on 7 May 2009" (ICC-02/04-01/05-403; hereinafter: "Victims' Observations"). The Government of Uganda did not file any observations.

18. On 3 June 2009, Counsel for the Defence filed the "Response to the 'Observations of victims on the refiled document in support of "Defence Appeal against 'Decision on the admissibility of the case under article 19(1) of the Statute' dated 10 March 2009' filed on 15 April 2009 and the Prosecution Response thereto filed on 7 May 2009" (ICC-02/04-01/05-404; hereinafter: "Defence Response to Observations"). The Prosecutor did not file a response to the Victims' Observations.

## III. REASONS FOR THE ORDER OF 9 APRIL 2009

19. As noted in paragraph 14 above, on 9 April 2009 the Chamber ordered Counsel for the Defence to re-file the document in support of the appeal, which was 40 pages long. The reasons for this order are set out below.

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[23] Document in Support of the Appeal, para. 50.

20. Regulation 37 (1) of the Regulations of the Court provides as follows:

> A document filed with the Registry shall not exceed 20 pages, unless otherwise provided in the Statute, the Rules, these Regulations or ordered by the Chamber.

21. No other page limit was applicable in the instant case. In the "Appeals Chamber's Decision on the 'Prosecutor's Request for an Extension of the Page Limit'"[24] the Appeals Chamber decided that the page limit of 100 pages laid down in regulation 38 (1) (c) of the Regulations of the Court for a challenge to the admissibility or jurisdiction of the Court under article 19 (2) of the Statute is applicable to the document in support of an appeal arising therefrom. The present appeal, however, arose from a *proprio motu* decision of the Pre-Trial Chamber on admissibility under article 19 (1) of the Statute, and not from a challenge to admissibility. In such circumstances, regulation 38 (1) (c) of the Regulations of the Court has no application. The document in support of the appeal originally submitted by Counsel for the Defence therefore did not comply with regulation 37 (1) of the Regulations of the Court.

22. Regulation 29 (1) of the Regulations of the Court provides that:

> In the event of non-compliance by a participant with the provisions of any regulation, or with an order of a Chamber made thereunder, the Chamber may issue any order that is deemed necessary in the interests of justice.

23. In the absence of any explanation by Counsel for the Defence for the non-compliance with regulation 37 (1) of the Regulations of the Court or any request for an extension of the page limit, the Appeals Chamber deemed it necessary in the interests of justice to order the re-filing of the document in support of the appeal.

# IV. MERITS

## A. First and fourth grounds of appeal

24. As his first ground of appeal, Counsel for the Defence submits that the Pre-Trial Chamber misconstrued the nature and scope of his mandate, purportedly leading to a breach of the suspects' rights under article 67 (1) (b) of the Statute. As his fourth

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[24] See *Prosecutor v. Thomas Lubanga Dyilo,* 16 November 2006 (ICC-01/04-01/06-703); reasons for the decision were given on 17 November 2006 (ICC-01/04-01/06-717).

ground of appeal, Counsel for the Defence submits that the proceedings leading to the Impugned Decision were unfair because he did not have adequate time and resources to participate effectively in the proceedings. As both grounds relate to the issue of the appointment and mandate of Counsel for the Defence and to his alleged inability to represent the four suspects effectively, the two grounds will be dealt with together.

*1. Relevant part of the Impugned Decision*

25. In the Impugned Decision, the Pre-Trial Chamber explained that it had appointed "counsel tasked with representing the interests of the defence within the scope of the proceedings".[25] The Pre-Trial Chamber referred to the judgment of the Appeals Chamber of 13 July 2006 entitled "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'" (ICC-01/04-146; hereinafter: "Judgment in DRC OA") and the admonition of the Appeals Chamber that the interests of the suspects must be "borne in mind". In the view of the Pre-Trial Chamber, "the appointment of a counsel for the Defence precisely allows these interests to be taken into account, in spite of the absence of the persons sought".[26] The Pre-Trial Chamber further explained that "[w]hat matters ... is that the suspect be given a chance to submit arguments assisting the Chamber in its task, thus contributing to the interests of justice."[27] The Pre-Trial Chamber went on to state that:

> 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 purposes 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. The appointment of a counsel for the defence 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 interests 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.[28]

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[25] Impugned Decision, para. 31.
[26] Impugned Decision, para. 31.
[27] Impugned Decision, para. 32.
[28] Impugned Decision, para. 32.[Emphasis supplied]

26. This passage is consistent with the Pre-Trial Chamber's Decision of 21 October 2008, where it determined as follows:

> CONSIDERING that, in order to preserve the fairness of the proceedings, the Prosecutor and the persons for whom the Warrants have been issued shall also be given the opportunity to submit written observations on the matter;
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> NOTING regulation 76(1) of the Regulations, which provides that the Chamber "following consultation with the Registrar, may appoint counsel in the circumstances specified in the Statute and the Rules or where the interests of justice so require";
>
> 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 interests of justice;
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> ...
>
> APPOINTS Mr Jens Dieckmann as counsel for the Defence, within the context and for the purposes of the present proceedings;[29]

*2. Submissions of Counsel for the Defence*

**(a) First ground of appeal**

27. The Appeals Chamber understands the principal argument of Counsel for the Defence to be that the Impugned Decision violated the right to legal representation of the four suspects under article 67 (1) of the Statute because he was unable to represent the four suspects properly in the admissibility proceedings. In the submission of Counsel for the Defence, the Pre-Trial Chamber failed to address this issue in the Impugned Decision and instead misconstrued his mandate.[30]

28. In the submission of Counsel for the Defence, the four suspects had a right to be legally represented in the admissibility proceedings.[31] He argues that article 67 (1) of the Statute was applicable to the admissibility proceedings before the Pre-Trial Chamber because "[p]ursuant 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" and because the

[29] "Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence" 21 October 2009 (ICC-02/04-01/05-320), pp. 7, 8.
[30] Document in Support of the Appeal, para. 9.
[31] Document in Support of the Appeal, para. 11.

proceedings were held in public.[32] Counsel for the Defence submits furthermore that the four suspects had a right to legal representation under rule 103 of the Rules of Procedure and Evidence because the Pre-Trial Chamber allowed an *amicus curiae* to make submissions, and under regulation 24 (1) of the Regulations of the Court because the Pre-Trial Chamber allowed victims to make observations, to which the defence was entitled to respond.[33] In the submission of Counsel for the Defence, the Pre-Trial Chamber failed to appreciate the right of the four suspects to legal representation because it found that the appointment of counsel was discretionary.[34]

29. Counsel for the Defence argues that his appointment as counsel was insufficient to safeguard the right to legal representation of the four suspects because, in the absence of any instruction, he was unable to represent them without breaching the Code of Conduct.[35] Counsel for the Defence explains that without any guidance from the Pre-Trial Chamber as to his mandate, he felt obliged under the Code of Conduct not to make any submissions on the substantive issue of admissibility in order not to pre-empt any possible line of defence of the four suspects in any future proceedings.[36]

30. Counsel for the Defence avers that the Pre-Trial Chamber failed to address adequately his inability to represent the four suspects.[37] In his view, instead of addressing the arguments he had raised, the Pre-Trial Chamber incorrectly construed his mandate and concluded in the Impugned Decision that Counsel for the Defence was appointed to represent the interests of the defence generally. However, this interpretation of the mandate of Counsel for the Defence was, in his submission, contrary to the Decision of 21 October 2008.[38] He notes furthermore that if his mandate had been to represent the interests of the defence generally, the four individual suspects could not have submitted their arguments through counsel,[39] implying a breach of their purported right to legal representation.

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[32] Document in Support of the Appeal, para. 11.
[33] Document in Support of the Appeal, para. 11.
[34] Document in Support of the Appeal, para. 11.
[35] Document in Support of the Appeal, paras 18 et seq.
[36] See Document in Support of the Appeal, paras. 20, 21.
[37] Document in Support of the Appeal, paras 14 and 18.
[38] Document in Support of the Appeal, paras 12 and 13.
[39] Document in Support of the Appeal, para. 15.

**(b) Fourth ground of appeal**

31. Under the fourth ground of appeal, Counsel for the Defence notes, first of all, "a vast inequality of arms"[40] that resulted from the fact that one counsel, with no supporting staff, had to defend four suspects. Secondly, he submits that he did not have as much time as the Prosecutor and the Office of Public Counsel for Victims to familiarise himself with the case.[41] In the view of Counsel for the Defence, this problem was compounded by the lack of instructions from the four suspects, who may have been unaware of the admissibility proceedings.[42] Counsel for the Defence recalls that he had requested[43] that the time limit for the submission of his observations should only commence upon the issuance of the Presidency's decision on his request for a review of his appointment or a decision granting him access to additional documents. The Pre-Trial Chamber, however, rejected this request and granted him an extension of only seven days for the submission of his observations.[44]

32. Finally, Counsel for the Defence submits that the proceedings were unfair because the Prosecutor and Counsel for the Defence were not allowed to make submissions as to whether it would be appropriate for the *amici curiae* to make observations in the proceedings.[45]

*3. Submissions of the Prosecutor*

**(a) Submissions regarding the admissibility of the appeal**

33. The Prosecutor submits that the appeal should be dismissed *in limine*, because Counsel for the Defence does not challenge any substantive finding that relates to the admissibility of the case as such; he raises only procedural errors.[46] In the contention of the Prosecutor, Counsel for the Defence also fails to identify how these alleged procedural errors would invalidate the Pre-Trial Chamber's admissibility determination.[47] In the view of the Prosecutor, an appellant "must identify the alleged error, present arguments in support of its claim, and must also demonstrate how the

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[40] Document in Support of the Appeal, para. 43.
[41] See Document in Support of the Appeal, para. 44.
[42] See Document in Support of the Appeal, paras 45 and 46.
[43] See Document in Support of the Appeal, para. 44.
[44] See Document in Support of the Appeal, para. 47.
[45] See Document in Support of the Appeal, para. 48.
[46] See Response to the Document in Support of the Appeal, para. 17.
[47] See Response to the Document in Support of the Appeal, para. 17.

error impacts on the [impugned] decision."[48] Therefore, the Prosecutor argues, Counsel for the Defence failed "to fulfil the requirements, and certainly the intent, of Article 82(1)(a)" and he urges the Appeals Chamber to dismiss the appeal.[49]

**(b) First ground of appeal**

34. On the merits, the Prosecutor avers that the first ground of appeal does not arise from the Impugned Decision because that decision did not have a bearing on the appointment of counsel. In the Prosecutor's view, Counsel for the Defence has not demonstrated how the matter has impacted on the Impugned Decision.[50]

35. The Prosecutor also contends that any arguments that were not expressly mentioned in the Document in Support of the Appeal, but in earlier submissions of Counsel for the Defence, should be rejected summarily. In the view of the Prosecutor, this should include the more substantive arguments of Counsel for the Defence regarding the potential conflict between his mandate and his obligations under the Code of Conduct; these arguments were contained in a filing before the Pre-Trial Chamber, but not in the re-filed Document in Support of the Appeal.[51]

36. The overall argument of the Prosecutor with respect to the substance of the first ground of appeal is that Counsel for the Defence was mandated by the Pre-Trial Chamber to represent the interests of the defence generally. With respect to the submission of Counsel for the Defence that the Pre-Trial Chamber erred when it stated that appointment of counsel was not mandatory in the present case, the Prosecutor argues that it is irrelevant whether the obligation to appoint counsel was mandatory because, in any event, the Pre-Trial Chamber appointed counsel to represent the interests of the defence. Thus, the error, if any, did not have an impact on the Impugned Decision.

37. In the opinion of the Prosecutor, the argument of Counsel for the Defence that he was not able to contact his clients does not have a bearing on the Impugned

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[48] Response to the Document in Support of the Appeal, para. 17.
[49] See Response to the Document in Support of the Appeal, para. 18.
[50] See Response to the Document in Support of the Appeal, para. 22.
[51] See Response to the Document in Support of the Appeal, para. 23.

Decision either. In addition, he argues that Counsel for the Defence was not forced to accept the appointment, referring thereby to article 13 of the Code of Conduct.[52]

38. According to the Prosecutor, the argument that Counsel for the Defence was not able to defend the four suspects at the same time is not valid. In this respect, he refers the Appeals Chamber to other proceedings before this Court where one counsel represented several accused "in the interests of the defence" without any Chamber, including the Appeals Chamber, questioning this practice.[53] To the Prosecutor, the appointment of counsel to represent the interests of the defence "is not intended to replace the appointment and instruction of counsel by an individual suspect or accused"[54].

39. Finally, the Prosecutor argues that once warrants of arrest have been issued, there is no meaningful distinction between "interests of the defence" and the "interests of the persons against whom a warrant of arrest has been issued".[55] In any case, Counsel for the Defence has failed to demonstrate how his failure to make submissions in the interests of the defence materially affected the Impugned Decision.

### (c) Fourth ground of appeal

40. In relation to the fourth ground of appeal, the Prosecutor submits that Counsel for the Defence already made the same arguments in the pre-trial proceedings and recalls the judgment of the Appeals Chamber of 13 February 2007[56], where the Appeals Chamber, in the view of the Prosecutor, rejected a practice of merely repeating arguments on appeal "that were made before the Pre-Trial Chamber, without demonstrating how the Chamber's rejection constituted an error warranting the intervention of the Appeals Chamber."[57] The Prosecutor recalls that Counsel for the Defence had made general allegations regarding lack of time and resources in his

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[52] See Response to the Document in Support of the Appeal, para. 26.
[53] See Response to the Document in Support of the Appeal, para. 27.
[54] Response to the Document in Support of the Appeal, para. 28.
[55] See Response to the Document in Support of the Appeal, para. 29.
[56] "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'", ICC-01/04-01/06-824.
[57] Response to the Document in Support of the Appeal, para. 43.

observations to the Pre-Trial Chamber, but failed to make a further request for extension. This failure to do so should not be corrected by the Appeals Chamber.[58]

41. Furthermore, the Prosecutor argues that Counsel for the Defence has failed to demonstrate how the purported lack of time and resources has led to any prejudice to the defence.[59] He submits that in any event, the decision on admissibility could be revisited at a later stage of the proceedings, ruling out any prejudice.[60]

*4. Submissions of the victims and responses thereto*

42. The victims support the arguments of the Prosecutor that the appeal should be dismissed summarily, emphasising that "the Defence is not challenging in any way the conclusion of the Pre-Trial Chamber with regard to the admissibility of the case and that accordingly the requirements establishe[d] by article 82 (1) (a) of the Rome Statute are not met and the appeal should be dismissed in its entirety."[61] The victims contend further that Counsel for the Defence is "forum shopping", as he had raised the same arguments before the Pre-Trial Chamber and the Presidency.[62] In the view of the victims, the appeal should be dismissed summarily without consideration of its merits.[63]

43. Counsel for the Defence refutes the argument of the victims that the appeal should be summarily dismissed and recalls that in previous cases the Appeals Chamber accepted that procedural errors may be raised as grounds for interlocutory appeals.[64]

44. As to the merits of the first and fourth grounds of appeal, the victims agree fully with the arguments of the Prosecutor.[65] In addition, they set out the scheme of the legal provisions dealing with representation of a person through counsel and counsel representing the interests of the defence. They argue that the rights of the accused set

[58] Response to the Document in Support of the Appeal, paras 44 and 45.
[59] Response to the Document in Support of the Appeal, para. 46.
[60] Response to the Document in Support of the Appeal, para. 47.
[61] Victims' Observations, para. 12.
[62] Victims' Observations, para. 14.
[63] Victims' Observations, para. 15.
[64] Defence Response to Observations, paras 8 to 9.
[65] See Victims' Observations, para. 19.

out in article 67 (1) of the Statute are not applicable to persons who are still at large.[66] Finally, they stress that the issues raised under the first and fourth grounds do not arise from the Impugned Decision.[67]

45. Counsel for the Defence in his response stresses that rule 121 (1) of the Rules of Procedure does not exclude the applicability of article 67 of the Statute to persons who are still at large. Such an interpretation, to his mind, is also supported by internationally recognised human rights, as interpreted by regional human rights bodies.[68] Finally, he argues that the right to legal representation has to be effective, a consideration neglected by the Pre-Trial Chamber in that it did not allow Counsel for the Defence to make submissions under rules 91 (1) and 103 (2) of the Rules of Procedure and Evidence.[69]

*5. Determination by the Appeals Chamber*

**(a) Admissibility of the first and fourth grounds of appeal**

46. Both the Prosecutor and the victims pray that the appeal should be dismissed in its entirety. They argue that the appeal does not meet the requirements of article 82 (1) (a) of the Statute, which authorises parties to the proceedings to appeal a decision of the Pre-Trial Chamber "with respect to jurisdiction or admissibility." They base their argument on the fact that Counsel for the Defence does not challenge the substantive findings of the Pre-Trial Chamber on the issue of admissibility, but instead dwells on certain alleged procedural errors. These errors apparently arise out of the Decision of 21 October 2008 and out of the proceedings leading up to the Impugned Decision. To the Prosecutor and the victims, an appeal under the provision cannot be based on mere procedural errors. In this respect, article 82 (1) (a) of the Statute does not, as does article 81 (1), spell out the grounds on which appeals under the provision may be based. Nevertheless, absence of statutory grounds does not preclude a party from raising any grounds, either substantive or procedural, that may be germane to the legal correctness or procedural fairness of the Chamber's decision. The Appeals Chamber has previously had occasion to address this issue in its Judgment in DRC OA. In that case, the Prosecutor, acting under article 82 (1) (a), appealed a decision of Pre-Trial

[66] See Victims' Observations, para. 21 to 24.
[67] See Victims' Observations, para. 24.
[68] See Defence Response to Observations, para. 12.
[69] See Defence Response to Observations, para. 11.

Chamber I on the ground, *inter alia*, that that Chamber had erred procedurally in failing to give him adequate notice to address the admissibility issues in the case and in selectively evaluating the information that the Prosecutor had submitted to it. Holding as acceptable the procedure adopted by the Prosecutor, the Appeals Chamber stated as follows:

> 32. Neither the Statute nor the Rules of Procedure and Evidence provide for what grounds can be raised on appeal pursuant to article 82 (1) (a) of the Statute.
>
> 33. Article 81 (1) (a) and (b) of the Statute, which provides for appeal against decisions of acquittal or conviction, specifies three categories of grounds of appeal that may be raised by the Prosecutor and four grounds of appeal that may be raised by the convicted person or the Prosecutor acting on behalf of such a person. In the absence of specification of any grounds the parties are at liberty to raise any relevant ground of appeal including the grounds as specified under article 81 (1) (a) and (b).
>
> 34. The Prosecutor in his document in support "submits that it is appropriate to import into Article 82 the categories of error in Article 81 that can be meaningfully transposed to interlocutory appeals, namely the core errors in Article 81 (1) (a): procedural error, error of fact or error of law" [...]

47. Other decisions of the Appeals Chamber on interlocutory appeals also make reference to the grounds of appeal listed in article 81 (1) of the Statute.[70] These decisions indicate that an appellant may raise procedural errors in an appeal brought under article 82 (1) (a) of the Statute. Accordingly, in this case, Counsel for the Defence is entitled to rely on procedural errors as the basis for impugning the Pre-Trial Chamber's decision; his failure to attack its findings on admissibility does not *per se* render the appeal inadmissible.

48. The second matter arising from the submissions of the Prosecutor and of the victims is whether Counsel for the Defence was obliged to set out in the Document in Support of the Appeal not only the alleged errors, but also how such errors materially affected the Pre-Trial Chamber's determination of admissibility. Regulation 64 (2) of the Regulations of the Court stipulates that the document in support of an appeal brought under rule 154 of the Rules of Procedure and Evidence (which includes

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[70] See "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence'", 13 October 2006 (ICC-01/04-01/06-568), para. 19; see also Judge Pikis' dissenting (separate on this point) opinion, making article 81 (1) (a) and (b) applicable to all appeals under article 82 (1) (para. 24 of the dissenting opinion).

appeals under article 82 (1) (a) of the Statute) "shall set out the grounds of appeal and shall contain the legal and/or factual reasons in support of each ground of appeal." Decisions of the Appeals Chamber indicate that the Chamber will use its power under rule 158 of the Rules of Procedure and Evidence to reverse an impugned decision only if the decision was materially affected by an error.[71] Regulation 64 (2) of the Regulations of the Court must be read in light of these decisions. Accordingly, as part of the reasons in support of a ground of appeal, an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision.

49. In the present case, the Appeals Chamber notes that Counsel for the Defence contends under the first ground of appeal that the Impugned Decision was purportedly rendered in violation of the four suspects' right to counsel. In his view, the Pre-Trial Chamber failed to address issues relating to the proper representation of the four suspects in the Impugned Decision and misconstrued his mandate. The essence of his submissions under the first ground of appeal is that the Pre-Trial Chamber should not have ruled on the admissibility of the case in the absence of proper representation by counsel. Although he could have stated his arguments more clearly in the Document in Support of the Appeal, Counsel for the Defence satisfied the minimum requirements of regulation 64 (2) of the Regulations of the Court. There is, therefore, no reason for the Appeals Chamber not to consider the merits of the first ground of appeal.

50. As his fourth ground of appeal, Counsel for the Defence raises generally the purported lack of time and resources to participate adequately in the proceedings before the Pre-Trial Chamber, apparently raising a procedural error or a ground that affects the fairness or reliability of the proceedings. The arguments of Counsel for the Defence under this ground are vague. First, Counsel for the Defence notes "a vast

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[71] See "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence'", 13 October 2006 (ICC-01/04-01/06-568); "Judgment on the appeals of the Defence against the decision entitled 'Decisions on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/012706' of Pre-Trial Chamber II", 23 February 2009 (ICC-02/04-124 and ICC-02/04-01/05-371), para. 40.

inequality of arms"[72] that resulted from the fact that one counsel, with no supporting staff, had to defend four suspects. Secondly, he submits that he did not have as much time as the Prosecutor and the Office of Public Counsel for Victims to familiarise himself with the case.[73] In his view, this problem was compounded by the lack of instructions from the four suspects, who may have been unaware of the admissibility proceedings.[74] Counsel for the Defence recalls that he had requested that the time limit for the submission of his observations should only commence upon the issuance of the Presidency's decision on his request for a review of his appointment or a decision granting him access to additional documents.[75] The Pre-Trial Chamber rejected this request and granted on its own motion an extension of seven days for the submission of his observations.[76] Finally, Counsel for the Defence submits that the proceedings were unfair because the Prosecutor and Counsel for the Defence were not allowed to make submissions as to whether it would be appropriate for the *amici curiae* to make observations in the proceedings.[77]

51. Although Counsel for the Defence thus alleges that he did not have adequate time and resources to participate in the proceedings, he does not make any submissions as to how this alleged lack of adequate time and resources materially affected the ruling regarding the admissibility of the case in the Impugned Decision. Counsel for the Defence does not even explain how his submissions to the Pre-Trial Chamber would have been any different, had it not been for the alleged errors, or which arguments he was unable to make because of the alleged lack of time and resources. Similarly, as to the argument that Counsel for the Defence should have been given an opportunity to make submissions as to whether it was appropriate to allow observations from *amici curiae*, he does not make any link between this alleged error and the Impugned Decision. Consequently the Appeals Chamber rejects the fourth ground of appeal *in limine,* without further consideration of the merits of the arguments.

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[72] Document in Support of the Appeal, para. 43.
[73] See Document in Support of the Appeal, para. 44.
[74] See Document in Support of the Appeal, paras 45 and 46.
[75] See Document in Support of the Appeal, para. 44.
[76] See Document in Support of the Appeal, para. 47.
[77] See Document in Support of the Appeal, para. 48.

### (b) Purported misconstruction of mandate of Counsel for the Defence

52. The principal submission of Counsel for the Defence under the first ground of appeal is that the Pre-Trial Chamber, by virtue of the Decision of 21 October 2008, appointed him to represent the four suspects individually, but that the Pre-Trial Chamber misconstrued his mandate in the Impugned Decision. This gives rise to two issues. The first issue, discussed in the present section, comprises two questions: (1) the difference in the mandate of counsel appointed to represent suspects individually, as his clients, as opposed to the mandate of counsel appointed to represent more generally the interests of the defence, (2) and whether the Pre-Trial Chamber misconstrued the mandate of Counsel for the Defence in the instant case.

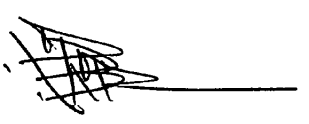
53. The Appeals Chamber notes that the legal instruments of the Court provide for, at least, two types of counsel for the defence. Article 67 (1) (d) of the Statute provides *inter alia* for the right of an accused person "to conduct the defence ... through counsel of the accused's choosing". An important characteristic of defence counsel under article 67 (1) (d) of the Statute is that counsel represents the individual entitled to legal assistance. Under this form of representation a client and counsel relationship exists, and counsel acts for and as agent of the client. Regulation 74 (2) of the Regulations of the Court describes this relationship between defence counsel and the person entitled to legal assistance as follows:

> When represented by defence counsel, the person entitled to legal assistance shall, subject to article 67, paragraph 1 (h), act before the Court through his or her Counsel, unless otherwise authorised by the Chamber.

54. Chapter 2 of the Code of Conduct, entitled "Representation by counsel", also lays down rules and principles for such representation. Notably, article 14 of the Code of Conduct ("Performance in good faith of a representation agreement") provides:

> 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.

55. The legal instruments of the Court also provide for another form of counsel for the defence. Notably, article 56 (2) (d) of the Statute provides that in the context of a unique investigative opportunity, "measures ... to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence" (article 56 (1) (b) of the Statute) may include:

> Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing *another counsel to attend and represent the interests of the defence.* [Emphasis added.]

56. The mandate of "counsel to attend and represent the interests of the defence" is of a *sui generis* nature and must be understood differently from the mandate of counsel who has been appointed to represent suspects as individuals. In circumstances where the suspects are at large and counsel is appointed to represent their interests generally in proceedings, such counsel cannot speak on their behalf. A client and counsel relationship does not exist between them, and counsel does not act for or as agent of the suspects. Counsel's mandate is limited to merely assuming the defence perspective, with a view to safeguarding the interests of the suspects in so far as counsel can, in the circumstances, identify them. The provisions of the Code of Conduct regarding representation are therefore not directly applicable to such counsel.

57. In the instant case, the Appeals Chamber is, for the following reasons, of the view that Counsel for the Defence was appointed to represent the interests of the defence generally, and not to represent the four suspects individually as clients.

58. As reflected in paragraphs 25 and 26 above, the Pre-Trial Chamber in the Impugned Decision and in the Decision of 21 October 2008 stated that the four persons sought must be given a chance to make submissions to the Court, and that the appointment of Counsel for the Defence was apparently seen as a means to achieve this goal.



59. These statements, however, must be seen in the procedural and legal context in which they were made. The Chamber appointed counsel who was located in Europe and who had no apparent means of communicating with the suspects, who are believed to be in the Democratic Republic of the Congo and imposed a relatively short time-limit for the submission of observations. In doing so, it is apparent that the Pre-Trial Chamber did not expect Counsel for the Defence to contact the four persons sought by the Court or to seek instructions from them. Furthermore, as stated above, the underlying presumption of the Code of Conduct is that a relationship between counsel and his or her client exists. This enables counsel to "[a]bide by the client's decisions concerning the objectives of his or her representation" (article 14 (2) (a) of the Code of Conduct). However, in the absence of any contact or communication between Counsel for the Defence and the four suspects, the Pre-Trial Chamber could not have envisaged that the former should actually represent, or act on behalf of, the latter; hence its statement that Counsel for the Defence was "vested with a limited mandate".

60. Another contextual element that clarifies the mandate of Counsel for the Defence is the practice of the Pre-Trial Chamber to appoint counsel to represent the interests of the defence generally as long as the suspects are at large and cannot be contacted. On 7 October 2008, only a few days before appointment of Counsel for the Defence, the Pre-Trial Chamber declined to grant leave to appeal to another appointed counsel, Michiel Pestman, to appeal the decision to appoint him (Michiel Pestman) as counsel for the four suspects.[78] The Pre-Trial Chamber reasoned that as counsel was appointed to represent the interests of the defence generally, contact between the persons and counsel was not necessary as such, because even without such contact, counsel could make submissions that would contribute to the interests of justice.

61. Thus, despite some unfortunately ambiguous formulations in the Impugned Decision and the Decision 21 October 2008 regarding the ability of the four suspects to make submissions in the admissibility proceedings, it is clear from the legal and

[78] "Decision on the Defence Request for leave to appeal dated 24 September 2008 and extension of time-limit for submission of observations on applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07", 7 October 2008 (ICC-02/04-01/05-316) – request for leave to appeal the following decision: "Decision on legal representation, appointment of counsel for the defence, criteria for redactions of applications for participation, and submission of observations on applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07", 17 September 2008 (ICC-02/04-01/05-312).

procedural context that Counsel for the Defence was not appointed to speak for, or on behalf of, the four individual suspects in the sense that his submissions would be attributed to them, potentially also in later proceedings. The Pre-Trial Chamber made this clear by emphasising in the Impugned Decision that the submissions of Counsel for the Defence "should not prejudice the arguments which the defence may put forward at a later stage."[79]

62. Thus, in the instant case the Pre-Trial Chamber did not misconstrue the mandate of Mr. Dieckmann whom it had appointed as Counsel for the Defence to represent the interests of the defence in the proceedings leading to the Impugned Decision.

### (c) Purported obligation of the Pre-Trial Chamber to appoint counsel to represent the four suspects

63. In the preceding section, the Appeals Chamber has explained that in the instant case, Counsel for the Defence was appointed to represent the interests of the defence generally, but that he was not expected to represent the four suspects as individuals. The second issue arising under the first ground of appeal is, therefore, whether the Pre-Trial Chamber was under a specific obligation to appoint counsel to represent the persons in respect of whom warrants of arrest have been issued.

64. Article 19 (1) of the Statute is silent on the issue of whether suspects have a right to legal representation in admissibility proceedings, particularly in circumstances where they have not yet appeared before the Court.

65. Counsel for the Defence submits, however, that such a right arises from article 67 (1) of the Statute read with rule 121 (1) of the Rules of Procedure and Evidence. The Appeals Chamber is not persuaded by these arguments. Article 67 (1) (d) provides that the accused person shall have the right to be present *at the trial* and provides for a right to legal assistance. The first and second sentences of rule 121 (1) of the Rules of Procedure and Evidence extend these rights to persons who appear before the Pre-Trial Chamber pursuant to a warrant of arrest or summons to appear. The first two sentences of rule 121 (1) read as follows:

> A person subject to a warrant of arrest or a summons to appear under article 58 shall appear before the Pre-Trial Chamber, in the presence of the

[79] Impugned Decision, para. 32.

> Prosecutor, promptly upon arriving at the Court. Subject to the provisions of articles 60 and 61, the person shall enjoy the rights set forth in article 67.

66. The plain meaning of this provision clearly shows that the "person" referred to in the second sentence of the provision refers to persons appearing before the Pre-Trial Chamber, and not to those for whom warrants of arrest or summons to appear have been issued, but who have not yet appeared before the Court. The provision is part of rule 121 entitled "Proceedings before the confirmation hearing" and is not related to the issuance of a warrant of arrest or a summons to appear as such. Lastly, the reason rule 121 (1) makes article 67 applicable to a person appearing before the Pre-Trial Chambers at the pre-trial stage is that the person has to undergo a proceeding akin to a trial, namely the confirmation hearing. Furthermore, and contrary to the contention of Counsel for the Defence,[80] internationally recognised human rights standards do not necessarily extend all the rights enshrined in article 67 of the Statute to persons who have not yet been surrendered to the Court or appeared voluntarily before it. The decisions of the Inter-American Court of Human Rights and of the European Court of Human Rights on which Counsel for the Defence relies are related to procedural contexts different from the instant case.[81]

67. Counsel for the Defence submits further that the four suspects were entitled to legal representation because the Pre-Trial Chamber allowed *amici curiae* to make submissions in the proceedings, noting that rule 103 (2) of the Rules of Procedure and Evidence provides that the "Prosecutor and the defence shall have the opportunity to respond to the observations" of *amici curiae*. The Appeals Chamber is not persuaded by this argument. Rule 103 (2) determines who may respond to submissions of *amici curiae*, but does not extend that right to persons who are not participating in proceedings and who have not been surrendered to the Court. Similarly, regulation 24 (1) of the Regulations of the Court provides that the Prosecutor and the defence may file a response to any document. This, however, is not a basis from which a right to individual legal representation could be derived.

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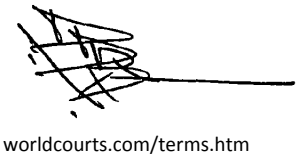
[80] See Defence Response to Victims' Observations, para. 12.

[81] The European Court of Human Rights' case of *Deweer v. Belgium*, judgment, application no. 6903/75, 27 February 1980, concerned the suspect's waiver of his right to a trial; the Inter-American Court of Human Rights' case of *Baena-Ricardo et al. v. Panama,* judgment, 2 February 2001, concerned dismissal proceedings of government employees without a hearing. The European Commission of Human Rights report in Nielsen v. Denmark, 15 March 1961, *Yearbook of the Convention*, vol. 4, concerned the question of whether the conduct of an expert witness during the trial violated fair trial guarantees.





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

## B. Second and third grounds of appeal

69. Counsel for the Defence submits as his second ground of appeal that the Pre-Trial Chamber has improperly exercised its discretion to initiate admissibility proceedings in the absence of the four suspects. Related to this submission, Counsel for the Defence avers as his third ground of appeal that the Pre-Trial Chamber erred in finding that its determination of the admissibility of the case under article 19 (1) of the Statute at a stage when none of the suspects were in custody did not jeopardise their right to bring a challenge pursuant to article 19 (2) of the Statute at a later stage, and did not constitute a risk of predetermination. As the two grounds of appeal are closely linked, they will be dealt with together.

### *1. Context and relevant part of the impugned decision*

70. The context that led the Pre-Trial Chamber to determine the admissibility of the case *proprio motu* has been summarised above at paragraphs 3 et seq. In the Impugned Decision, the Pre-Trial Chamber stated that "the authority to decide whether the determination of admissibility should be made, and, in the affirmative, at what specific stage of the proceedings such determination should occur, resides exclusively with the relevant Chamber."[82] With reference to the Appeals Chamber Judgment in DRC OA, the Pre-Trial Chamber found that the "determinations of 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."[83]

### *2. Submissions of Counsel for the Defence*

#### (a) Second ground of appeal

71. In his submissions, Counsel for the Defence refers to the Judgment in DRC OA. Counsel for the Defence argues that the Pre-Trial Chamber wrongly interpreted that judgment and its impact on the instant proceedings. He submits that the procedural

[82] See Impugned Decision, para. 14.
[83] See Impugned Decision, para. 21.

situation leading to the judgement is comparable to the instant proceedings.[84] He reiterates his argument arising in the first ground of appeal that the four suspects had a right to participate in the proceedings.[85] Finally, Counsel for the Defence argues that "[a]s 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"[86].

**(b) Third ground of appeal**

72. Counsel for the Defence submits that the Pre-Trial Chamber erred in its finding that its determination of the admissibility of the case in the absence of the four suspects would not jeopardise their right to mount a challenge under article 19 (2) of the Statute at a later stage. He also avers that the Pre-Trial Chamber misconstrued the defendants' right under article 19 (4) to challenge admissibility more than once.[87] He argues that the Pre-Trial Chamber underestimated the negative impact of the lack of contact and communication between court-appointed counsel and the suspects.[88] According to Counsel for the Defence, the four suspects in this case are in the same position as they would have been without appointed counsel.[89] In his opinion, the appointment of counsel does not ameliorate the concerns raised in the Judgment in DRC OA, namely that *proprio motu* proceedings would predetermine a future challenge to the admissibility of the case before the same Chamber.[90] Counsel for the Defence submits that the risk of predetermination can only be avoided if the suspect has fully instructed counsel as to the strategy to be followed; this, however, was not the case in the present proceedings.[91]

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[84] See Document in Support of the Appeal, para. 30.
[85] See Document in Support of the Appeal, paras 32 and 33.
[86] Document in Support of the Appeal, para. 35.
[87] See Document in Support of the Appeal, para. 37.
[88] See Document in Support of the Appeal, para. 37.
[89] See Document in Support of the Appeal, para. 39
[90] See Document in Support of the Appeal, para. 39.
[91] See Document in Support of the Appeal, para. 39.

*3. Submissions of the Prosecutor*

**(a) Second ground of appeal**

73. The Prosecutor refutes the arguments of Counsel for the Defence under the second ground of appeal. He urges the Appeals Chamber to dismiss *in limine* any submissions that Counsel for the Defence makes by way of reference to his earlier submissions before the Pre-Trial Chamber, but that are not developed in the Document in Support of the Appeal.[92] The Prosecutor's arguments as to the merits of the second ground of appeal are twofold. First of all, he is of the opinion that the Pre-Trial Chamber correctly identified an ostensible cause justifying the exercise of its discretion according to the terms of the Judgment in DRC OA.[93] Secondly, the Prosecutor submits that there is no "cognizable prejudice to the suspects from the decision to examine admissibility", as the Impugned Decision did not change the Pre-Trial Chamber's previous finding that the case is admissible.[94]

**(b) Third ground of appeal**

74. As to the third ground of appeal, the Prosecutor argues that, by the terms of the law as well as by the terms of the Impugned Decision, the four persons in respect of whom arrest warrants were issued will not lose their right to challenge the admissibility of the case.[95] In addition, the Prosecutor agrees with the reasoning of the Pre-Trial Chamber, underlining that:

> Article 19 expressly allows for the possibility of successive challenges by different parties or States (without conditioning those challenges on the existence of new facts), and further contemplates the possibility of challenges by different parties relying on new arguments without requiring a change in the factual scenario. Further, the Chambers of this Court are constituted by professional judges. The speculative projection of potential future unfairness is inadequate to establish any unfairness affecting the reliability of this admissibility judgment.[96]

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[92] See Response to the Document in Support of the Appeal, para. 30.
[93] See Response to the Document in Support of the Appeal, paras 31 to 34.
[94] See Response to the Document in Support of the Appeal, para. 35.
[95] See Response to the Document in Support of the Appeal, paras 37 to 39.
[96] Response to the Document in Support of the Appeal, para. 41, footnotes omitted.

*4. Submissions of the victims and responses thereto*

75. The victims endorse the arguments of the Prosecutor with respect to the second and third grounds of appeal.[97] They point out that the decision of the Pre-Trial Chamber on the admissibility of a case under article 19 (1) of the Statute is a discretionary one. They submit that such discretionary decisions can only be reviewed by the Appeals Chamber when the appellant uncovers certain errors in the exercise of discretion by the first-instance court.[98] The victims refer to the jurisprudence of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia. That Chamber established with respect to appeals against interlocutory decisions that it does not hear the matter *de novo* but only reviews the exercise of a first-instance court's discretion when an abuse of this discretion is alleged.[99] They also refer to a similar decision of the Appeals Chamber of the Special Court for Sierra Leone. The victims contend that Counsel for the Defence did not demonstrate any error that shows an abuse of the discretion by the Pre-Trial Chamber. Consequently, to their mind, the grounds of appeal should be rejected.[100]

76. Counsel for the Defence did not respond to these arguments raised by the victims.

*5. Determination by the Appeals Chamber*

**(a) Admissibility of the second and third grounds of appeal**

77. As noted above at paragraph 33, the Prosecutor, supported by the victims, urges the Appeals Chamber to dismiss the appeal in its entirety *in limine*, arguing that Counsel for the Defence has failed to set out how the alleged procedural errors materially affected the determination of admissibility. In respect of the second and third grounds of appeal, the Appeals Chamber is not persuaded by this contention. Under the second and third grounds of appeal, Counsel for the Defence submits that the Pre-Trial Chamber exercised its discretion under article 19 (1) of the Statute improperly when convening admissibility proceedings. Counsel for the Defence thus argues that the Pre-Trial Chamber should not have determined the admissibility of the

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[97] See victims' observations, para. 27.
[98] See victims' observations, paras. 31 to 34.
[99] See victims' observations, para. 32.
[100] See victims' observations, para. 33.

case in the present proceedings. He thus claims that the alleged error – the improper exercise of discretion – materially affected the Impugned Decision.

**(b) Merits of the second and third grounds of appeal**

78. The second sentence of article 19 (1) of the Statute vests discretionary power in the Court to determine on its own motion the admissibility of a case.[101] As stated above, under the second and third grounds of appeal, Counsel for the Defence avers that the Pre-Trial Chamber should not have ruled on the admissibility of the case, implying an improper exercise of its discretion under article 19 (1). Thus, the first question that the Appeals Chamber must address under these grounds of appeal is the scope of its powers to review the exercise of discretion by the first-instance Chamber.

79. The Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion to make a determination *proprio motu* on the admissibility of a case merely because the Appeals Chamber, if it had the power, might have made a different ruling. To do so would be to usurp powers not conferred on it and to render nugatory powers specifically vested in the Pre-Trial Chamber.

80. The function of the Appeals Chamber in respect of appeals brought under article 82 (1) (a) of the Statute is to determine whether the determination on the admissibility of the case or the jurisdiction of the Court was in accord with the law. In the case of a *proprio motu* determination under the second sentence of article 19 (1) of the Statute, the Appeals Chamber's functions extend to reviewing the exercise of discretion by the Pre-Trial Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion under article 19 (1) of the Statue to determine admissibility, save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals[102] as well as that of domestic courts[103] endorses this position.

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[101] See Judgment in DRC OA, para. 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."

[102] See, for example, ICTY Appeals Chamber, *P. v. V. Seselj* (IT-03-67-AR73.5), "Decision on Vjislav Seselj's Interlocutory Appeal against the Trial Chamber's Decision on Form of Disclosure", 17 April 2007, para. 14; ICTY, Appeals Chamber, *P v. Milosevic* (IT-02-54-AR73.7), "Decision on

They identify the conditions justifying appellate interference to be: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.

81. For instance in the *Prosecutor v. Slobodan Milosovic*, the Appellant complained that in appointing counsel to represent him against his will, the ICTY Trial Chamber had improperly exercised its discretion.[104] The Appeals Chamber partially dismissed the appeal, holding that appointing counsel was related to matters of practice and procedure, which was ideally within the Trial Chamber's discretionary powers. The Appeals Chamber pointed out that when it intervenes to review a decision, its intervention is limited to determining whether the Trial Chamber properly exercised its discretion. As to the standard of review, the Appeals Chamber stated as follows:

> In reviewing this exercise of discretion, the question is not whether the Appeals Chamber agrees with the Trial Chamber's conclusion, but rather "whether the Trial Chamber has correctly exercised its discretion in reaching that decision." In order to challenge a discretionary decision, appellants must demonstrate that "the Trial Chamber misdirected itself either as to the

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interlocutory appeal of the Trial Chamber's decision on the assignment of defense counsel", 1 November 2004, paras 9 and 10; ICTY, Appeals Chamber, *P. v. Blagojevic et al.* (IT-02-60-AR73), decision of 8 April 2003, para. 18; ICTY, Appeals Chamber, *P. v. Kordic and Cerkez* (case number not indicated), "Decision on appeal regarding statement of deceased witness", 21 July 2001, para. 20; ICTY, Appeals Chamber, *P v. Milosevic* (IT-99-37-AR73, IT-01-50-AR73; IT-01-51-AR73), "Decision on prosecution interlocutory appeal from refusal to order joinder", 1 February 2002; ICTR Appeals Chamber, *P. v. Karemera et al.* (ICTR-98-44-AR73.8), "Decision on Interlocutory Appeal Regarding Witness Proofing", 11 May 2007, para. 3; ICTR, Appeals Chamber, *P. Ntahobali and Nyiramasuhuko* (ICTR-97-21-AR73), "Decision on 'Appeal of Accused Arsène Shalom Ntahobali against the decision on Kanyabashi's oral motion to cross-examine Ntahobali using Ntahobali's statements to Prosecution investigators in July 1997", 27 October 2006, para. 10; SCSL Appeals Chamber, *P. v. Norman et al.* (SCSL-04-14-AR65), "Forfana – Appeal Against Decision Refusing Bail", 11 March 2005, para. 20.

[103] For England and Wales, see for example, English Court of Appeals, *R v West Sussex Quarter Sessions, Ex parte Albert and Maud Johnson Trust Limited.* [1973] 3 All ER 289, 298, 301 (CA); English Court of Appeals, *Charles Osenton v. Johnston* [1942] A.C. 130, 138; English Court of Appeals, *Holland v. Holland* [1918] A.C. 273, 280; for Germany, see for example, *Bundesgerichtshof* (Federal Court of Justice), BGHSt. 6, 298 at 300; BGHSt. 10, 327 at 329; BGHSt. 18, 238; for South Africa, see, for example, Constitutional Court of South Africa, *S. v. Basson* 2005 (12) BCLR 1192 (CC); for Uganda, see, for example, Supreme Court of Uganda, *Mbogo and Another v. Shah* (1968) E.A. 93; for the United States of America, see, for example, United States Court of Appeals, Seventh Circuit, *Harrington v. DeVito,* decision of 10 August 1981, 656 F.2d 264 at 269; United States Court of Appeals, Tenth Circuit, *Wright v. Abbott Laboratories,* decision of 6 August 2001, 259 F.3d 1226 at 1235 et seq.

[104] *Slobodan Milosevic v. Prosecutor*, Decision on Interlocutory Appeal of Trial Chamber's Decision on the Assignment of Counsel, Case No. IT-02-54-AR 73.3 (1 November 2004).

> principle to be applied or as to the law which is relevant to the exercise of the discretion," or that the Trial Chamber "[gave] weight to extraneous or irrelevant considerations, ... failed to give weight or sufficient weight to relevant considerations, or ... made an error as to the facts upon which it has exercised its discretion," or that the Trial Chamber's decision was "so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion.[105]

82. In the present case, Counsel for the Defence's major complaint of alleged error is of a procedural nature – i.e. the timing of the exercise of the discretion and its consequent effect on the rights of the persons sought by the Court. In support of his contention he relies, in the main, on an earlier decision of the Appeals Chamber, namely, the Judgment in DRC OA. In that decision the Chamber considered that the exercise of Pre-Trial Chamber I's discretion in that case was erroneous "because by deciding that [Pre-Trial Chamber I] 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."[106]

83. The first question to be answered here, then, is whether in exercising its discretion the Pre-Trial Chamber failed to give sufficient weight to the rights of the four suspects, which would make the exercise of its discretion unfair, and therefore erroneous. The second question is whether this error materially affected the ruling on admissibility, thus triggering the powers of the Appeals Chamber to reverse it. For the reasons summarised below, the Appeals Chamber determines that the first question should be answered in the negative and, consequently, the second question does not arise.

84. In the Judgment in DRC OA the Appeals Chamber found that it may prejudice the interests of a suspect if a Pre-Trial Chamber determines the admissibility of a case in his or her absence. The Appeals Chamber stated as follows:

> [I]f 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 a case pursuant to article 19 (2) (a) of the Statute, he or she comes before a Pre-Trial Chamber that has already decided the very same issue to his or her

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[105] *Slobodan Milosevic v. Prosecutor*, Decision on Interlocutory Appeal of Trial Chamber's Decision on the Assignment of Counsel, Case No. IT-02-54-AR 73.3 (1 November 2004) at para. 10.
[106] Judgment in DRC OA, para. 48.

> detriment. A degree of predetermination is inevitable. If, on the other hand, the Pre-Trial Chamber decides that the case against the suspect is inadmissible, the situation for the suspect could be even worse: pursuant to article 82 (1) (a) of the Statute, decisions with respect to admissibility can be appealed by the Prosecutor as a matter of right; the present appeal is an appeal of this kind. If the Appeals Chamber overturns the Pre-Trial Chamber's decision and determines that the case is admissible, the suspect would be faced with a decision by the Appeals Chamber that the case is admissible. The right of the suspect to challenge the admissibility of the case before the Pre-Trial and – potentially – the Appeals Chamber thus would be seriously impaired.[107]

85. The prejudice to the suspect that the Appeals Chamber identified in the Judgment in DRC OA as likely to result does not arise in the instant case. The Judgment in DRC OA concerned a decision on admissibility that the Pre-Trial Chamber had rendered in the context of proceedings that were held *in camera* and in which only the Prosecutor participated. This is not the case here. The proceedings that led to the Impugned Decision were public. Not only the Prosecutor, but also the Government of Uganda and victims participated in the proceedings. The Pre-Trial Chamber also appointed Counsel for the Defence in order to facilitate submissions to the Chamber on the defence perspective. Furthermore, the Pre-Trial Chamber's decision was based, in the main, on the gravity of the case under article 17 (1) of the Statute. Arguably, a Chamber determines the gravity of a case only once in the course of the proceedings because the facts underlying the assessment of gravity are unlikely to change and a party may therefore be unable to raise the same issue again in future admissibility challenges. Again, this is not the case in the instant case. Gravity was not an issue. The issue was whether there were ongoing domestic proceedings which rendered the case inadmissible pursuant to article 17 (1) (a) of the Statute. Thus, the Pre-Trial Chamber's decision to hold admissibility proceedings at the time that it did, did not, as in the DRC OA case, impair the right of the four suspects to challenge subsequently the admissibility of the case.

86. As for the issue of predetermination, alluded to by the Chamber in the Judgment in DRC OA and canvassed by Counsel for the Defence, as likely to ensue from the Pre-Trial Chamber's decision, the Appeals Chamber holds that no such prejudice is likely to happen in the instant case. This is so because the factual scenario on which the Pre-Trial Chamber based its determination of admissibility was identical to the

[107] Judgment in DRC OA, para. 50.

factual scenario prevailing at the time when the Chamber issued the warrants of arrest, namely "total inaction on the part of the relevant national authorities", and that "accordingly, there is no reason for the Chamber to review the positive determination of the admissibility of the Case made at [the arrest warrant] stage."[108] The Pre-Trial Chamber clarified further that the purpose of the proceedings "remains limited to dispelling uncertainty as to who has ultimate authority to determine the admissibility of the Case: it is for the Court, and not for Uganda, to make such determination."[109] Thus, there is no indication that the Pre-Trial Chamber made any determination that could potentially prejudice a subsequent challenge to the admissibility of the case brought by any of the four suspects.

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

## V. APPROPRIATE RELIEF

88. In his notice of appeal of 16 March 2009, Counsel for the Defence requests that the Appeals Chamber reverse the Impugned Decision. In addition, he requests the Appeals Chamber to "suspend the present proceedings under article 19 (1) of the Rome Statute pending proper implementation of the defendants' rights to effectively participate in the proceedings."[110]

89. In his Document in Support of the Appeal, Counsel for the Defence requests the Appeals Chamber to reverse the Impugned Decision, 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."[111]

90. Both the Prosecutor and the victims urge that the appeal should be rejected in its entirety.[112]

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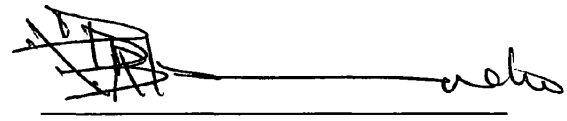
[108] See Impugned Decision, para. 52.
[109] See Impugned Decision, para. 51.
[110] "Defence Appeal against 'Decision on the admissibility of the case under article 19 (1) of the Statute' dated 10 March 2009", 16 March 2009 (ICC-02/04-01/05-379), para. 31.
[111] Document in Support of the Appeal, para. 50 b).
[112] See Response to the Document in Support of the Appeal, para. 48.

91. As to the request to suspend the proceedings, the Appeals Chamber notes that in appeals brought under article 82 (1) (a) of the Statute, the Appeals Chamber does not have the power to suspend proceedings pending before another Chamber outside the framework of article 82 (3) of the Statute.[113] Furthermore, the admissibility proceedings before the Pre-Trial Chamber could not meaningfully be suspended in the present case, as they have already been concluded.

92. In an appeal brought under article 82 (1) of the Statute, the Appeals Chamber may confirm, reverse or amend the impugned decision (rule 158 (1) of the Rules of Procedure and Evidence). In the present case, it is appropriate to confirm the Impugned Decision because, as set out above, no error has been identified that would materially affect the Impugned Decision.



**Judge Daniel David Ntanda Nsereko**
**Presiding Judge**

Dated this 16th day of September 2009

At The Hague, The Netherlands

[113] See "Reasons for 'Decision of the Appeals Chamber on the Defence application "Demande de suspension de toute action ou procédure afin de permettre la désignation d'un nouveau Conseil de la Défense" filed on 20 February 2007' issued on 23 February 2007", 9 March 2007 (01/04-01/06-844); "Decision on the Prosecutor's 'Application for Appeals Chamber to Give Suspensive Effect to Prosecutor's Application for Extraordinary Review'", 13 July 2006 (ICC-0/04-01/5-92).