

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/04-01/05
Date: 18 November 2008

PRE-TRIAL CHAMBER II

Before: Judge Mauro Politi, Presiding Judge
Judge Hans-Peter Kaul
Judge Ekaterina Trendafilova

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

Public Document

**Submission of observations on the admissibility of the Case under
article 19 (1) of the Statute**

Source: Jens Dieckmann, Counsel for the Defence

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

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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
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The Government of the Republic of
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Mr Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Outline of the Procedure

1. On 8 July 2005, Pre-Trial Chamber II issued the warrant of arrest for Joseph KONY, as amended on 27 September,¹ as well as the warrants of arrest for Vincent OTTI,² Okot ODHIAMBO,³ and Dominic ONGWEN⁴ (the “Warrants”) in the case of the *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* (“the Case”).
2. On the same day, the request for arrest and surrender of Joseph KONY, as amended on 27 September 2005,⁵ and the requests for arrest and surrender of Vincent OTTI,⁶ Okot ODHIAMBO,⁷ and Dominic ONGWEN⁸ to the Republic of Uganda were issued.
3. On 22 November 2006, Pre-Trial Chamber II designated Honorable Judge Mauro Politi as Single Judge in the Situation in Uganda (“the Situation”) as well as in the Case.
4. On 29 June 2007, the Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement Juba, Sudan was signed (the “Principal Agreement”).
5. On 13 August 2007, the Single Judge rendered his “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06” in the record of the Situation⁹ and the Case,¹⁰ whereby the Single Judge *inter alia* granted applicants a/0090/06, a/0098/06, a/0112/06, a/0119/06 and a/0122/06 the status of

¹ ICC-02/04-01/05-53.

² ICC-02/04-01/05-54.

³ ICC-02/04-01/05-56.

⁴ ICC-02/04-01/05-57.

⁵ ICC-02/04-01/05-29-US-EXP, reclassified as public pursuant to Decision ICC-02/04-01/05-135.

⁶ ICC-02/04-01/05-13-US-EXP, reclassified as public pursuant to Decision ICC-02/04-01/05-135.

⁷ ICC-02/04-01/05-15-US-EXP, reclassified as public pursuant to Decision ICC-02/04-01/05-135.

⁸ ICC-02/04-01/05-16-US-EXP, reclassified as public pursuant to Decision ICC-02/04-01/05-135.

⁹ ICC-02/04-100-Conf-Exp; ICC-02/-4-101.

¹⁰ ICC-02/04-01/05-251-Conf-Exp ; ICC-02/04-01/05-252.

victims in the Case and requested the Registrar to assist them in the appointment of a common legal representative.

6. On 15 February 2008, Pre-Trial Chamber II filed its "Decision on legal representation of Victims a/0090/06, a/0098/06, a/0112/06, a/0119/06 and a/0122/06" in the record of the Situation¹¹ and in the record of the Case.¹²
7. An "Annexure to the Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement" was issued on 19 February 2008 (the "Annexure").
8. On 29 February 2008, Pre-Trial Chamber II issued a "Request for information from the Republic of Uganda on the Status of the execution of the Warrants of Arrest",¹³ and the Registrar filed her report on the execution of this request on 28 March 2008 ("First Report").¹⁴ Attached to this First Report was the Response of the Acting Solicitor General of the Republic of Uganda (the "Ugandan First Response").¹⁵
9. On 17 March 2008, the Single Judge rendered his "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, 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/0127/06" in the record of the Situation¹⁶ and the Case,¹⁷ whereby the Single Judge *inter alia* granted applicants a/0094/06, a/0095/06, a/0103/06, a/0117/06, a/0120/06, a/0121/06, a/0123/06 and a/0124/06 the status of victims in the Case and requested the Registrar to assist them in the appointment of a common legal representative.

¹¹ ICC-02/04-117.

¹² ICC-02/04-01/05-267.

¹³ ICC-02/04-01/05-274.

¹⁴ ICC-02/04-01/05-286.

¹⁵ ICC-02/04-01/05-286-Anx2.

¹⁶ ICC-02/04-124-Conf-Exp; ICC-02/-4-125.

¹⁷ ICC-02/04-01/05-281-Conf-Exp ; ICC-02/04-01/05-282.

10. On 18 June 2008, Pre-Trial Chamber II issued its “Request for further information from the Republic of Uganda on the status of execution of the Warrants of Arrest”.¹⁸ The Registrar filed her report on the execution of this request on 10 July 2008 (“Second Report”).¹⁹ Attached to this Second Report was the Response of the Acting Solicitor General of the Republic of Uganda (the “Ugandan Second Response”).²⁰
11. On 21 October 2008, in its decision initiating proceedings under article 19(1) of the Statute, requesting observations and appointing counsel for the Defence (“Decision of 21 October 2008”), Pre-Trial Chamber II appointed the undersigning Counsel as counsel for the Defence (“Counsel”), “within the context and for the purposes of the present proceedings”.²¹ Further, the Chamber invited the Republic of Uganda, the Prosecutor, the Counsel and the victims who have already communicated with the Court with respect to the Case, or their legal representatives, to submit their observations on the admissibility of the Case by 10 November 2008.
12. On 28 October 2008, Counsel requested the Presidency to review and clarify the mandate of Counsel (“Request for Review”). Additionally, Counsel requested an order for a conditional stay/suspension of the proceedings.²²
13. On the same day, Counsel submitted his “Request for conditional stay of proceedings” (“Request”) to Pre-Trial Chamber II.²³
14. In its decision from 31 October 2008, Pre-Trial Chamber II rejected Counsel’s request for stay or suspension of the proceedings.²⁴ On Counsel’s alternative request, the Chamber decided to re-classify the

¹⁸ ICC-02/04-01/05-299.

¹⁹ ICC-02/04-01/05-305.

²⁰ ICC-02/04-01/05-305-Anx2.

²¹ ICC-02/04-01/05-320.

²² ICC-02/04-01/05-326.

²³ ICC-02/04-01/05-325.

²⁴ ICC-02/04-01/05-328.

transcripts of the hearings held on 3 and 6 October 2005 as “confidential *ex parte*” and ordered the Prosecution to disclose specific material. Furthermore, the Chamber extended until 18 November 2008 the time limit for the Republic of Uganda, the Prosecutor, the Defence and the victims having communicated with the Court with respect to the Case to submit observations in the proceedings.²⁵

15. On 31 October 2008, the Uganda Victim’s Foundation and the Redress Trust filed an application for leave to submit observations to the Pre-Trial Chamber II of the International Criminal Court, pursuant to rule 103 of the Rules of Procedure and Evidence.²⁶

16. On 3 November 2008, the Prosecution confidentially submitted the material as ordered by the Pre-Trial Chamber II in its Decision from 31 October 2008.²⁷

17. On 4 November 2008, the Office of Public Counsel for Victims (OPCV) filed an application to extend the time limit for the submission of observations with regards to the admissibility proceedings.²⁸

18. On 7 November 2008, Amnesty International filed its “Request pursuant to rule 103 (1) of the Rules of Procedure and Evidence for leave to submit observations as *amicus curiae* in the proceedings under Article 19 (1) of the Rome Statute of the International Criminal Court in the case of the Prosecutor v. Kony and others”.²⁹

19. On the 7 November 2008, the Presidency issued its “Order concerning the Application of Mr. Jens Dieckmann of 28 October 2008 for judicial review of the decision of Pre-Trial Chamber II of 21 October 2008 and the conditional stay/suspension of the proceedings”,³⁰ whereby the

²⁵ Ibid., p. 4.

²⁶ ICC-02/04-01/05-330.

²⁷ ICC-02/04-01/05-329-Conf.

²⁸ ICC-02/04-01/05-333.

²⁹ ICC-02/04-01/05-335.

³⁰ ICC-02/04-01/05-337.

Presidency ordered the Registrar to describe the consultative role played by the Registrar in the instant appointment, in accordance with regulation 76(1) of the Regulations of the Court, by 10 November 2008.

20. On 9 November 2008, Counsel filed his “Request for leave to appeal the ‘Decision on Defence Counsel’s Request for conditional stay of proceedings’ from 31 October 2008”.³¹
21. On 10 November 2008, Pre-Trial Chamber II rendered its “Decision on application for leave to submit observations under Rule 103 dated 7 November 2008”, whereby it rejected the request of the Ugandan Victims’ Foundation and the Redress Trust filed on 31 October 2008.
22. By a Decision delivered on 11 November 2008, Pre-Trial Chamber II rejected the OPCV’s application for extension of time limit in proceedings under article 19(1) filed on 4 November 2008.
23. Also on 11 November 2008, the Presidency issued its “Decision on the Application of Mr. Jens Dieckmann of 28 October 2008 for judicial review of the decision of Pre-Trial Chamber II of 21 October 2008 and the conditional stay/suspension of the proceedings”³², whereby the Presidency dismissed Counsel’s application on the basis of “reasons to be given shortly”.
24. On 12 November 2008, Pre-Trial Chamber II ordered the Prosecutor to file redacted versions of documents in the record up to 14 November 2008 at the latest.³³
25. On 13 November 2008, Pre-Trial Chamber II rendered its “Decision on the Defence Request for leave to appeal the 31 October 2008 Decision”³⁴, whereby the Chamber rejected Counsel’s request.

³¹ ICC-02/04-01/05-339.

³² ICC-02/04-01/05-344.

³³ ICC-02/04-01/05-345.

³⁴ ICC-02/04-01/05-346.

II. The Law

26. Article 19 of the Rome Statute provides in the relevant parts that

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

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

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair

hearing conducted impartially, and to the following minimum guarantees in full equality:

(a)[...]

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c)[...]

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it; [...]

28. Rule 22(3) of the Rules of Procedure and Evidence sets forth that

[i]n the performance of their duties, Counsel for the defence shall be subject to the Statute, the Rules, the Regulations, the Code of Professional Conduct of Counsel adopted in accordance with rule 8 and any other document adopted by the Court that may be relevant to the performance of their duties.

29. Regulation 76(1) of the Regulations of the Court provides that

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

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

1. Counsel shall not represent a client in a case:

(a) If the case is the same as or substantially related to another case in which counsel or his or her associates represents or formerly represented another client and the interests of the client are

incompatible with the interests of the former client, unless the client and the former client consent after consultation; [...]

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

31. Articles 14 to 16 of the Code of Professional Conduct for counsel

read:

Article 14

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

Article 15

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

3. When communicating with the client, counsel shall ensure the confidentiality of such communication.

Article 16

1. Counsel shall exercise all care to ensure that no conflict of interest arises.

Counsel

shall put the client's interests before counsel's own interests or those of any other person, organization or State, having due regard to the provisions of the Statute, the Rules of Procedure and Evidence, and this Code.

2. Where counsel has been retained or appointed as a common legal representative for victims or particular groups of victims, he or she shall advise his or her clients at the outset of the nature of the representation and the potential conflicting interests within the group. Counsel shall exercise all care to ensure a fair representation of the different yet consistent positions of his or her clients.
3. Where a conflict of interest arises, counsel shall at once inform all potentially affected clients of the existence of the conflict and either:
 - (a) Withdraw from the representation of one or more clients with the prior consent of the Chamber; or
 - (b) Seek the full and informed consent in writing of all potentially affected clients to continue representation.

III. Observations

1) Counsel's interpretation of the scope of his mandate

32. Firstly, Counsel expresses his appreciation to Pre-Trial Chamber II for having invited the persons for whom the warrants have been issued to submit written observations on the matter of the admissibility of the case under article 19(1) of the Statute pursuant to its Decision from 21 October 2008, in order to preserve the fairness of the proceedings. Pre-

Trial Chamber II did not appoint Counsel for the Situation, but rather for the Case against the four defendants, and invited Counsel to submit observations on the matter of the admissibility of the Case. Although Counsel highly appreciates that the Pre-Trial Chamber intends to take the view of the defence into account in its decision, it is respectfully submitted that Counsel's appointment as well as the Pre-Trial Chamber II's invitation from 21 October 2008 entail several serious and urgent issues.

33. Counsel contends that the terms of the mandate as outlined in the Decision of the 21 October 2008, are very broad and indeed ambiguous. In prior decisions, where Chambers appointed *ad hoc* counsel in situations, these counsel were assigned to represent "the interests of the defence".³⁵ Later jurisprudence clarified that *ad hoc* counsel in situations were not entitled to challenge jurisdictions or the admissibility of the case.³⁶ In its decision dated 21 October 2008, Pre-Trial Chamber II, however, stated:

"CONSIDERING that, in the present circumstances, where none of the persons for whom an arrest warrant has been issued is yet represented by a defence counsel, *appointment of a counsel for the defence to represent those persons* within the context and for the purposes of the present proceedings is in the interest of justice."³⁷ (emphasis added)

34. In accordance with the terms of this decision, Counsel has been appointed to "represent" the four defendants. Thus, all defendants are in fact his clients within the meaning of article 2(2) of the Code of Professional Conduct for counsel, which provides that "[i]n this code... 'client' refers to all assisted or *represented* by counsel" (emphasis added). In light of the wording of article 12(1)(a) of the Code of Professional Conduct for counsel, Counsel therefore submitted in his Request for

³⁵ ICC-02/05-12; ICC-01/04-21.

³⁶ ICC-01/04-93, p. 4.

³⁷ Decision of 21 October 2008, p. 8.

Review that the foreseeable conflict of interest resulting from the representation of four defendants in the same criminal proceedings – provokes unavoidable breaches of articles 12, 14, 15 and 16 of the Code of Professional Conduct for counsel, and thus also endangers the rights of each of the defendants to be represented effectively under the rule of law.

35. With regard to article 12 Code of Professional Conduct for counsel, in its Decision of 25 June 2008 Pre-Trial Chamber I recognized the potential conflict which could arise through providing assistance to two persons in the same case. The Decision ordered the OPCD and OPCV to provide different members of the respective Offices to assist each team.³⁸
36. In this context, Counsel respectfully resubmits that he cannot effectively perform his duty to represent all four named defendants without violating his obligations under the Code of Professional Conduct for counsel. The Rules of Procedure and Evidence expressly envisage that counsel must exercise their functions in accordance with the Code of Professional Conduct for counsel. This obligation is set out in a legal instrument which is hierarchically superior to the Regulations of the Court. Regulation 76 must therefore be construed in a manner which is consistent with rule 22(3).
37. Counsel draws the Chamber's attention to the fact that he does not have any contact to any of the four defendants. Even if he had been provided with sufficient time to devise a means of contacting the defendants, Counsel would not have been in a position to contact any of the four defendants individually, since he did not know and was unable to enquire whether the other defendants would agree with the establishment of such a contact. Under the present circumstances, Counsel could neither clarify if the individual interests of his clients

³⁸ ICC-01/04-01/07-647.

were incompatible nor if his clients consented to a representation of the other co-defendants by Counsel pursuant to article 12(1)(a) of the Code of Professional Conduct for counsel. Hence, the required consultations between Counsel and his clients under article 12(1)(a) have not taken place.

38. Consultations with the clients pursuant to article 12(1)(a) of the Code of Professional Conduct for counsel prior to the submission of the instant observations would have been all the more necessary since, according to reports provided by the media and other public sources, the LRA's position on the ICC appears to be ambiguous and controversial. Whilst several media reports state that "the LRA" wishes for the arrest warrants issued by the ICC to be withdrawn,³⁹ Counsel is not in a position to verify whether these statements indeed reflect the position of all four defendants in the present proceedings.

39. Since Counsel has not been appointed to represent the interests of the LRA as such, if Counsel were to introduce substantive observations concerning whether the criteria for admissibility pursuant to article 17 of the Statute are met, he would risk jeopardising the interests of any client who does not wish for the case to be investigated and prosecuted in Uganda. Counsel's trepidation in this regard is supported by media reports concerning divergent views within the LRA camp and possible antipathy between the defendants.⁴⁰ It is thus possible that some of the defendants might be concerned that they may face a partial and unfair trial if prosecuted in Uganda. Alternatively, some of the defendants may

³⁹ *Julian Amutuhair*, "Uganda: ICC urged to support local justice to promote peace", 19 April 2008, Communicating Justice, available at: <http://www.communicatingjustice.org/en/stories/23042008_uganda_icc_urged_support_local_justice_promote_peace>. See also *Katy Glassborow*, "Uganda says peace not at odds with ICC", 15 Apr 2008, Institute for War and Peace Reporting (IWPR), available at: <<http://www.isn.ethz.ch/isn/Current-Affairs/Security-Watch/Detail/?ots591=4888CAA0-B3DB-1461-98B9-E20E7B9C13D4&lng=en&id=88679>>.

⁴⁰ See *Tim Cocks*, "Uganda's LRA boss denies killing deputy-activist", 9 November 2007, Reuters, available at: <<http://www.alertnet.org/thenews/newsdesk/L08509381.htm>> concerning allegations that Kony had Otti under house arrest due to internal disagreements.

wish to cooperate with the Prosecutor of the ICC in order to attract leniency in sentencing. Consequently, the defendants who are in favour of the case being investigated and prosecuted at the ICC would ultimately be deprived of their right to present their observations on the admissibility of the Case under article 19(1) of the Statute, if the Pre-Trial Chamber II were to decide at this stage that the Case is inadmissible under article 17 of the Statute.

40. Whilst the Presidency dismissed the application for review, in the absence of reasons, it is not possible to ascertain whether the application was dismissed for lack of jurisdiction, or whether the Presidency considers that the appointment of one counsel to all four defendants does not create a potential conflict of interest. Therefore, Counsel has no choice but to interpret the scope of his mandate in the light of the Decision from 21 October 2008, as well as the binding rules of the Code of Professional Conduct for counsel. Counsel therefore submits his observations in these proceedings pursuant to Pre-Trial Chamber II's Decision from 21 October 2008 subject to the explicit condition that nothing in his observations shall be construed as exercising or waiving the defendants' right to challenge the admissibility of the case pursuant to article 19(2) of the Statute. Due to the specific circumstances of the instant case, Counsel therefore defines his major duty as Defence Counsel under the Code of Professional Conduct for counsel as being to ensure that each and every of the four defendants retain all options for their individual future defence. Consequently, Counsel refrains from positively raising substantive arguments concerning the admissibility of the case that might be prejudicial to any of the defendants in relation to these proceedings.

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

41. Article 19(1) of the Statute provides that the Court “may, on its own motion, determine the admissibility of a case in accordance with article 17”. Whilst the Statute thus foresees that the Chamber may *proprio motu* determine the admissibility of a case, it does not envisage that the Chamber may do so in an *in absentia* context. Counsel respectfully submits that given that article 67(1) of the Statute enshrines the right of the defendant to participate in the proceedings, an express provision in the Statute would be required in order to derogate from the general rule that the proceedings must be in the presence of the defendant.
42. Whilst article 61(2) of the Statute and rule 126 of the Rules of Procedure and Evidence explicitly provide that the confirmation hearing, and potentially, admissibility and jurisdictional issues related to the confirmation hearing, may be convened in the absence of the defendant, the Chamber must first follow the procedures set out in rule 123 and rule 125. These procedures require the Chamber to ascertain whether the defendant has a counsel and to notify their decision to convene the hearing to the defendant. Counsel further observes that the Appeals Chamber has held that the fact that the Statute provides that the Chamber has a discretionary power to *proprio motu* decide admissibility, does not mean that it is always appropriate for the Chamber to do so.⁴¹ The Appeals Chamber noted that it would only be appropriate to determine admissibility *prior* to the surrender or arrest of the defendant in a limited number of circumstances. The examples provided by the Appeals Chamber included where the determination is based on established jurisprudence, the facts are uncontested such that the case is

⁴¹ ICC-01/04-169-US-EXP, subsequently reclassified as public on 23 September 2008.

clearly inadmissible or admissible, “or an ostensible cause impel[s] the exercise of proprio motu review”.⁴²

43. The current proceedings represent the first public admissibility proceedings before the ICC, and in terms of prior precedent, the Appeals Chamber’s judgment in the *Ntangada* decision only addressed the gravity criterion of admissibility.⁴³ It is thus clear that the present proceedings are not governed by ‘established jurisprudence’. In terms of whether the facts can be considered ‘uncontested’, in light of the inability of Counsel to seek instructions from the defendants as to their version of the ‘facts’, it is impossible to verify whether the ‘facts’ are uncontested. Regarding the last category – that an ostensible cause impels the exercise of *proprio motu* review – Counsel observes 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.⁴⁴ The ability of the Prosecutor to continue its investigations is in no way impeded. The only impediment to the commencement of the case appears to be the inability of national authorities to arrest the defendants. This impediment will exist irrespective of whether the ICC confirms its admissibility, as the ICC does not have its own police force, and is therefore dependent on national authorities to effectuate the arrest. Uganda also entered into an extradition agreement with the Democratic Republic of Congo (DRC) in 2007 concerning the arrest and extradition of the LRA leaders from the territory of the DRC,⁴⁵ and is therefore not dependent on the ICC cooperation regime to facilitate their arrest. To the contrary, publicizing and reaffirming the ICC’s primacy over the case could simply render it more difficult for national authorities to effectuate the defendant’s arrest

⁴² Ibid., at para. 52.

⁴³ Ibid., at para. 54.

⁴⁴ ICC-02/04-01/05-US-EXP, p. 2.

⁴⁵ *The State House of the Republic of Uganda*, “Uganda And DRC Sign Joint Bilateral Agreement”, , 9 September 2007, available at <http://www.statehouse.go.ug/news.detail.php?newsId=1314&category=News%20Release>.

and surrender, as the LRA have on multiple occasions stated that their reluctance to accede to peace negotiations is due to the outstanding ICC arrest warrants.⁴⁶

44. Further, the participation of a court-appointed counsel in the present proceedings does not ameliorate the concerns set out in the Appeals Chamber's decision in the *Ntaganda* case.⁴⁷ The defendants will face a heightened risk of judicial pre-determination concerning any future challenges to admissibility since the Chamber will already have ruled on defence oriented challenges to admissibility, albeit defence challenges formulated in a precipitous and under-resourced manner, and without the benefit of instructions from the defendants.

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

3) The defence lacks adequate time and resources to effectively participate in the current admissibility proceedings

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

47. Moreover, in contrast to the OTP and OPCV which have been working on the case for over a year, counsel for the defence must acquaint himself

⁴⁶ "Ugandan rebels to appeal ICC warrants", The Hague, IWPR, AR No. 160, 12 March 2008.

⁴⁷ ICC-01/04-169-US-EXP, subsequently reclassified as public on 23 September 2008.

with the relevant documents in the instant case filed and/or produced prior to his assignment, the legal system in Uganda and factual reports concerning the peace negotiations between the Ugandan government and the LRA delegation within a very limited period of time.

48. It is also impossible for Counsel to gauge the interests of the defendant in a vacuum: as discussed above, Counsel has been unable to benefit from instructions from the defendants to focus his research and inquiries. In stark contrast to the position taken by the Chamber *vis-à-vis* the right of victims to effectively participate in the proceedings, the Chamber has not directed the Registry to take any measures to publicise the proceedings to the defendants or persons who may be in contact with the defendant.

49. In this regard, representatives of the LRA met with the Registry in March 2008 in order to seek legal and procedural advice as to how they could contest the ICC arrest warrants. Whilst the advice provided by the Registry has not been publicly disseminated, in an interview in Uganda after this meeting, the Registrar of the Court apparently stated that warrants would have to be enforced, and that the ICC would not withdraw them, even if the defendants were prosecuted under the Uganda judicial system.⁴⁸ It is therefore entirely likely that the defendants are not aware of their right to challenge admissibility, or the appropriate mechanisms for doing so.

⁴⁸ Simon Kasyate, "LRA Leader Joseph Kony Will Be Arrested, Says ICC", The Monitor, 30 May 2008, (stating "Speaking to Daily Monitor at the ICC field office in Kololo, a Kampala suburb last week, Ms Silvana Arbia said the 'warrants of arrest were served to the concerned states for their enforcement' an obligation they must fulfill. She described her firm stance as 'the very simple and unique position taken by the ICC.' The ICC made the same position to an LRA delegation that visited its headquarters in The Hague in May 2008. 'A warrant is an order of the chamber of the ICC. And this order has to be enforced, that is all,' said Ms Arbia of what the ICC told the LRA delegation. Asked if the ICC would reconsider its position if the government of Uganda gave it assurance of an alternative judicial system that would not allow for impunity of the LRA leaders, the registrar replied in the negative."), available at <<http://allafrica.com/stories/200805300004.html>>.

50. In terms of the time available to Counsel to file his observations, the Chamber rejected Counsel's request to order that the deadline should only commence to run upon receipt of either the Presidency's decision or the request for access to relevant documents, and only granted Counsel an additional seven days to submit its observations. Counsel was therefore unable to focus on admissibility observations due to the fact that counsel was pursuing related remedies before the Presidency. At the same time, Counsel only received a significant portion of the requested transcripts on 14 November 2008, 5pm. The disclosure batch contains 77.8 MB and 29 documents in total. Counsel was therefore not able to thoroughly review and analyse the reasons as to why the Chamber initially found the case to be admissible.

51. The proper adversarial balance in the proceedings is further disturbed by the fact that the Pre-Trial Chamber granted the Uganda Victim's Foundation and the Redress Trust authorization to file *amici curiae* briefs in the proceedings, without first allowing the defence and the Prosecution to file observations as to whether it was appropriate for them to do so. Whilst neither the Rules nor the Regulations expressly specify the procedure which should be followed in examining whether an *amicus curiae* request should be granted, the practice of the Chambers thus far has been to permit the parties to file observations concerning whether the applicant meets the requisite criteria to be authorized to file an *amicus curiae* brief.⁴⁹ Moreover, regulation 24(1) expressly provides the defence with the right to file a response to any (non ex-parte) document filed by a participant in the case. Notwithstanding the fact that under regulation 34(b) Counsel had 21 days to file its response, the Chamber issued its decision only five days after the request was notified to the parties.

⁴⁹ ICC-01/04-01/06-1175, at para. 3; ICC-01/04-01/06-442.

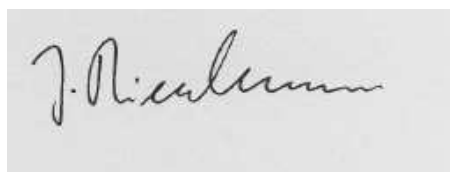
4) Right to file substantive response to other participants

52. Counsel's decision not to positively raise substantive arguments concerning the admissibility of the case should not be construed by the Chamber to mean that the defendants waive their right to file substantive responses to the observations of the Prosecution, victims and *amici curiae*. Whereas Counsel can seek to limit the prejudice to the defendants by not attracting a ruling on positive defence arguments, the defendants interests will be prejudiced in connection with Prosecution and victims observations in any case since the Chamber will issue a determination on these arguments irrespective of whether Counsel responds to the substance or not.

IV. Conclusion and Relief Sought

53. For the foregoing reasons, Counsel observes that at this stage of the admissibility proceedings the defendants' rights under article 67(1) of the Statute in conjunction with rule 121(1) are not properly safeguarded. Therefore, Counsel respectfully requests to suspend the present proceedings pending proper implementation of the defendants' right to effectively participate in the proceedings.

Respectfully submitted.



Counsel for the Defence, Mr. Jens Dieckmann

Dated this 18 November 2008

At The Hague, The Netherlands