



Original: English

No.: ICC-02/04-01/05
Date: 28 October 2008

THE PRESIDENCY

Before: Judge Philippe Kirsch, President
Judge Akua Kuenyehia, First Vice-President
Judge René Blattmann, Second Vice-President

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

Public Document

**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**

Source: Jens Dieckmann, Counsel for the Defence

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

The Office of the Prosecutor

Mr. Louis Moreno Ocampo

Ms. Fatou Bensouda

Counsel for the Defence

Mr. Jens Dieckmann

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms. Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

The Government of the Republic of
Uganda

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. OUTLINE OF THE PROCEDURE

1. On 05 July 2004, the Presidency assigned the situation in Uganda to Pre-Trial Chamber II.¹
2. On 8 July 2005, as amended on 27 September 2005, Pre-Trial Chamber II issued warrants of arrest for Joseph KONY², Vincent OTTI,³ Okot ODHIAMBO,⁴ and Dominic ONGWEN⁵ (the "Warrants"), in *the case of the Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongzven* ("the Case").
3. On 17 September 2008, the Single Judge of the Pre-Trial Chamber II, Honourable Judge Mauro Politi ("Single Judge"), appointed in two decisions Mr. Michiel Pestman as Counsel for the Defence "entrusted with representing and protecting the interests of the defence within the context and for the purposes of the proceedings on the Applications in the Situation and in the Case, pursuant to rule 89 of the Rules".⁶
4. On 24 September 2008, in both the Situation and the Case, Mr. Pestman, as Counsel for the Defence, filed a request for leave to appeal the Single Judge's Decision of 17 September 2008 and requested in the same submission that the appeal have suspensive effect in accordance with Article 83(3) of the Statute⁷ The Counsel submitted that issues were involved "that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which [...] an immediate resolution by the Appeals Chamber may materially advance the proceedings"⁸.

¹ ICC-02/04-1.

² ICC-02/04-01/05-53.

³ ICC-02/04-01/05-54.

⁴ ICC-02/04-01/05-56.

⁵ ICC-02/04-01/05-57.

⁶ ICC-02/04-154 and ICC-02/04-01/05-313.

⁷ ICC-02/04-160 and ICC-02/04-01/05-313.

⁸ Article 82 (1) (d) of the Statute.

5. On 7 October 2008, the Single Judge issued his decision on the requests of 24 September 2008.⁹ He did not grant the requested leave to appeal. Mr. Pestman was granted until 20 October 2008 to submit the observation on behalf of the defence.
6. On 20 October 2008, Mr. Pestman submitted observations on applications for victims participation.¹⁰
7. On 21 October 2008, in its decision initiating proceedings under Article 19 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”¹¹. In the Decision of 21 October 2008, the Chamber decided to initiate proceedings under Article 19 (1) of the Statute and ordered the Registrar to inform the Republic of Uganda and the victims who have already communicated with the Court with respect to the Case, or their legal representatives, of the initiation of the present proceedings. 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.

II. THE APPLICABLE LAW

8. Pursuant to article 19 (3) of the Statute of this Court in proceedings with respect to admissibility, only

“those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.”

⁹ ICC-02/04-01/05-316.

¹⁰ ICC-02/04-01/05-318

¹¹ ICC-02/04-01/05-320.

9. Article 19 (4) of the Statute regulates that in the absence of exceptional circumstances

“[t]he 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.”

10. The rights of the accused are laid down in article 67 (1) of the Statute:

“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; [...]

11. Rule 21 (3) of the Rules of Procedure and Evidence provides the right for a person

“to seek from the Presidency a review of a decision to refuse a request for assignment of counsel”.

12. Rule 22 (3) of the Rules of Procedure and Evidence obligates Counsel for the defence in the performance of their duties to

“be subject to the Statute, the Rules, the Regulations , the Code of Professional Conduct for 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”.

13. 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.”

14. 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.

[...]”

III. THE ARGUMENT

1. Standing before the Presidency

15. First of all, Counsel appreciates the fact that the Pre-Trial Chamber II in its Decision from 21 October 2008 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 of the Statute in order to preserve the fairness of the proceedings. This approach is notable since Article 19 (3) does not mention persons for whom a warrant of arrest has been issued as being entitled to submit observations. When appointing Counsel as counsel for the defence, the Pre-Trial Chamber was well aware that Mr. Pestmann had previously been unable to contact any of the defendants personally despite strenuous efforts as outlined in his submissions from 20 October 2008. Pre-Trial Chamber II appointed Counsel not solely for the situation, but also for the case of all four defendants, requesting the

submission of observations on the matter of admissibility of the case until 10 November 2008. 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 this appointment as well as the request from 21 October 2008 provokes several serious and urgent issues. Counsel contends that the terms of the mandate as outlined in the Decision of the 21 October 2008, are broad and ambiguous. It is argued that this ambiguity provokes unavoidable breaches of Article 12 of the Code of Conduct of the ICC by Counsel, and therefore also endangers the rights of the defendants. Consequently, Counsel respectfully requests the Presidency for an urgent clarification of the terms of the mandate.

16. Counsel has the authority to address the Presidency in this matter. The Statute expressly accords a defendant with certain rights under Article 67(1). Pursuant to Rule 121 (1), a person who is the subject of an arrest warrant shall enjoy the same rights as accorded to a defendant by Article 67 (1). Therefore, the defendants in the instant proceedings must be provided with an effective mechanism for enforcing these rights. Rule 21(3) of the Rules of Procedure and Evidence further provides that “[a] person may seek from the Presidency a review of a decision to refuse a request for the assignment of counsel”. In the *Lubanga* case, the defendant argued that rule 21(3) would also apply to the situation in which a defendant is denied the opportunity to freely designate their counsel by virtue of a decision of the Chamber, ordering the Registry to appoint duty counsel. The Presidency found the application to be admissible;

“where it is alleged that the Registrar unreasonably refused to take the wishes of the Applicant into account in the appointment of duty counsel, the situation is so similar to the type of situation that the Presidency may review under rule 21(3)(B) that, in these particular circumstances, the governing texts should be read as affording some avenue for review in the absence of any explicit provision to the contrary. Were the situation otherwise, then a person for whom duty counsel is appointed in blatant disregard of his or her wishes would be unable to

seek administrative remedies for his or her complaint that a decision of the Registrar failed to take into account his or her wishes in breach of regulation 73(2) of the Regulations of the Court”.¹²

17. Further, the system of interlocutory appeal envisaged under article 82(1)(d) is inappropriate in these circumstances. The Prosecution has sought to challenge the decisions of Pre-Trial Chamber II on several occasions.¹³ It has utilised various procedural means by stating its ‘position’ and filing requests for reconsideration and for clarification¹⁴ as well as seeking leave to appeal the Chamber’s decision.¹⁵ Already in its decision of 19 August 2005, Pre-Trial Chamber II took a rather restrictive approach to granting leave on the ground that, as a general principle, appellate proceedings should be deferred until final judgment.¹⁶ Following a refusal by Pre-Trial Chamber I to grant leave, the Prosecutor sought to bypass the requirement by applying directly to the Appeals Chamber for ‘extraordinary review’. The Appeal Chamber dismissed the application as ‘ill-founded’ on the ground that the Rome Statute did not

¹² ‘Decision on the “Demande urgente en vertu de la Règle 21-3 du Règlement de procédure et de preuves »and on the « Urgent Request for the Appointment of a Duty Counsel » filed by Thomas Lubanga Dyilo before the Presidency on 7 May 2007, and 10 May 2007 respectively’ 29 June 2007, ICC-01/04-01/06-931, at para. 18.

¹³ Prosecutor v. Kony (Pre-Trial Chamber II) ICC-02/04-01/05-66 (30 November 2005) (Application for Clarification of Matter in Relation to 7 December Status Conference); Prosecutor v. Kony (Pre-Trial Chamber II) ICC-02/4-01/05-69 (5 December 2005) (Application for Pre-Trial Chamber II to Supplement the Record with a Description of Informal Communications between Registry and the Chamber). Furthermore, it has challenged the participation of the Senior Legal Advisor to the Pre-Trial Division in the situations in both the DRC and Uganda on the ground that he previously worked for the Prosecutor: Prosecutor v. Kony (Pre-Trial Chamber II) (ICC-02/04-10/05-108 (31 August 2006) 2-3 (Prosecutor’s Application to Separate the Senior Legal Advisor to the Pre-Trial Division from Rendering Legal Advice regarding the Case); and the subsequent decision, Prosecutor v. Kony (Pre-Trial Chamber II) ICC-02/04-01/05-124 (31 October 2006) (Decision on the Prosecutor’s Request to Separate the Senior Legal Advisor to the Pre-Trial Division from Rendering Legal Advice regarding the Case).

¹⁴ Prosecutor v. Kony, ICC) Pre-Trial Chamber II) ICC-02/04-01/05-18-US-Exp (18 July 2005) 2 (Decision on the Prosecutor’s Motion for Clarification and Urgent Request for Clarification of the Time-Limit Enshrined in Rule 155); Prosecutor v. Kony, ICC (Pre-Trial Chamber II) ICC-02/04-01/05-58 (18 October 2005) (Prosecutor’s Position on the Decision of Pre-Trial Chamber II to Redact Actual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification). The Prosecutor also sought to submit a ‘motion for reconsideration’ to Pre-Trial Chamber II in Prosecutor v. Lubanga (Pre-Trial Chamber I) ICC-01/04-01/06-120 (22 May 2006) (Motion for Reconsideration).

¹⁵ Prosecutor v. Kony (Pre-Trial Chamber II) ICC-02/04-01/05-20-US-Exp (19 August 2005) (Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Application for Warrants of Arrest under Article 58); Prosecutor v. Kony (Pre-Trial Chamber II) ICC-02/04-01/05-90-US-Exp (10 July 2007) (Decision on Prosecutor’s Applications for Leave to Appeal Dated the 15th Day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal Dated the 11th Day of May 2006).

¹⁶ Prosecutor v. Kony (Pre-Trial Chamber II) ICC-02/04-01/05-20-US-Exp (19 August 2005) 14 (Decision on the Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58).

provide for such a remedy.¹⁷ It would also appear from the Single Judge's recent decision in the *Kony et al* case that issues concerning the appropriateness of a decision appointing counsel to a defendant under Regulation 76 do not meet the criteria for interlocutory appeal under article 82(1)(d).¹⁸ The Single Judge held that

“the appointment of counsel for the defence in respect of both the Situation and the Case irrespective of the specific circumstances of the persons whose arrest is sought, far from affecting the fairness of the proceedings, is meant to ensure that none of such circumstances will result in the interests of the defence being neglected,”¹⁹

and thereby decided that the fairness tenet of article 82(1)(d) was not met. The Single Judge's findings are drafted in such broad terms that they would encompass any decision concerning the appointment of counsel in a case, irrespective of the circumstances of the defendants. Counsel therefore has no reasonable prospect of being granted leave to file an interlocutory appeal against the decision of Pre-Trial Chamber dated 21 October 2008.

18. Counsel further observes that as noted by the ICTY Appeals Chamber, subjecting issues concerning the assignment of counsel to an interlocutory appeal system is likely to occasion greater delays as compared to a system of Presidential review.²⁰ The fact that a decision appointing counsel to a defendant would normally fall within the Presidency's supervisory powers is also further supported by the jurisprudence and legal framework of the ad hoc Tribunals, which accord defendants with an automatic right to seek legal

¹⁷ Prosecutor v. Lubanga (Appeals Chamber) ICC-01/04-168 (13 July 2006) 16 (Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal).

¹⁸ 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, ICC-02/04-316, 7 October 2008..

¹⁹ At page 8.

²⁰ Prosecutor v. Blagojevic. Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace his Defence Team', 7 November 2003, at para 7 <http://www.un.org/icty/blagojevic/appeal/decision-e/031107.pdf>.

review of the majority of decisions concerning the assignment and withdrawal of counsel before the Presidency.²¹

19. In terms of the potential ambiguity in counsel's mandate (whether counsel is representing the general interests of the defence, or the specific interests of each defendant), the respective Pre-Trial Chambers have held that "the Statute, the Rules of Procedure and Evidence and the Regulations of the Court do not provide for request for clarification to be submitted before the Court", and as such, have only granted it in exceptional circumstances.²² Indeed, Pre-Trial Chamber I has held that "a request to the Chamber for leave to appeal under article 82 paragraph 1 (d) of the Statute is the only remedy of a general nature whereby participants can voice their concerns regarding a Chamber's decision",²³ and has therefore consistently rejected all requests for clarification emanating from the Prosecution. There is therefore no reasonable prospect for counsel to obtain clarification from the Pre-Trial Chamber as to the scope of his mandate.

²¹ See Separate Opinion of Judge Hunt, *Prosecutor v. Ojdanic*, Decision On Interlocutory Appeal On Motion For Additional Funds, 13 November 2003, <http://www.un.org/icty/milutinovic/appeal/decision-e/031113.htm>; Articles 13(A), 20(A), 20(C) of the ICTY Directive on the Assignment of Defence Counsel, IT073, Rev 11; Articles 12(A), and 19(E), of the ICTR Directive on the Assignment of Defence Counsel (14 March 2008).

²² Decision on the request for clarification by the OPCD, ICC-01/04-403, 3 October 2007, at p. 3; Decision on the Prosecution Request for Extension of Time, Clarification and Provision of Information, ICC-01/04-01/06-376-Corr, 1 September 2006,

²³ 'Decision on the Prosecutor's Motion for Clarification and Urgent Request for Variation of the Time-Limit Enshrined in Rule 155' 18 July 2005, also cited in Decision on Prosecutor's 'Application to lift redactions from applications for Victims' Participation to be provided to the OTP' and on the Prosecution's further submissions supplementing such Application, and request for extension of time, ICC-02/04-01/05-209, 20 February 2007, at p. 5. See also 'Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from Warrants of Arrest, Motion for Reconsideration and Motion for Clarification', ICC-02/04-01/05-60, 28 October 2005 at pp.11-12.

20. Counsel further observes that neither the Regulations of the Court, the Regulations of the Registry, or the Code of Professional Conduct for Counsel provide for any advisory mechanism through which counsel could obtain a ruling or advice as to whether certain future actions would place counsel in violation of his ethical obligations. Counsel therefore submits that the Presidency, given its power to review whether the assignment of counsel in particular circumstances would comply with the regulatory framework of the ICC, is in the optimum position to provide counsel with a ruling as to whether his mandate, as presently framed by the decision of 21 October 2008, would cause Counsel to violate his obligations under the Code of Conduct, in particular, his obligation to uphold the best interests of his clients, and his obligation not to engage any conflicts of interests (absent the informed consent of his clients).
21. In the present circumstances, Counsel submits that although it was the Pre-Trial Chamber, which issued the formal order concerning the appointment of counsel, this order was issued following consultation with the Registrar, as required by the terms of Regulation 76(1). The wording of this Regulation presupposes that the Registry does indeed play a substantive role in the decision of the Chamber, and is not merely responsible for executing the resultant decision. Moreover, it is the Registry who bears responsibility for managing the legal assistance scheme before the Court, which includes the assignment and remuneration of counsel.²⁴ The Registry is therefore

²⁴ Decision of the Presidency upon the document entitled "Clarification" filed by Thomas Lubanga Dyilo on 3 April 2007, the requests of the Registrar of 5 April 2007 and the requests of Thomas Lubanga Dyilo of 17 April 2007, ICC-01/04-01/06-874, 2 May 2007, para. 17.

responsible for counsel's designation in the present case to represent all four defendants.

22. Counsel notes that the standard of judicial review, as set out in the *Lubanga* decision, is comprised of a

“consideration of whether the Registrar has: acted without jurisdiction, committed an error of law, failed to act with procedural fairness, acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors, or reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached”.²⁵

The operation of rule 21(3) is thus triggered by virtue of the fact that the Registry, in executing the order of the Pre-Trial Chamber, has: (a) committed an error of law by appointing counsel to a specific defendant in accordance with Regulation 76(1); (b) unreasonably deprived the defendants of the opportunity of designating either a counsel of their choice, or opting to represent themselves; and (c) failed to take into consideration the potential conflicts of interest which would ensue from assigning one counsel to represent all four defendants.

(a) The Registrar committed an error of law by appointing counsel to a specific defendant in accordance with Regulation 76(1).

23. Regulation 76(1) provides that the Chamber, following consultation with the Registrar, may appoint counsel in accordance with the Statute and Rules or ‘where the interests of justice so require’. Whilst the Statute and Rules empower the Chamber to appoint counsel to represent the ‘interests of the defence’, there is no reference to a power to appoint counsel to a specific defendant. In this regard, Counsel concedes that Regulation 76(1) might be

²⁵ ICC-01/04-01/06-931 at para 21.

applicable if the Chamber had appointed counsel to represent the general interests of the defence in response to a determination of the admissibility of the situation (as opposed to the case). However, it is clear from the terms of the Decision of 21 October 2008 that Counsel has been appointed to serve as a means through which the “persons for whom the Warrants have been issued shall also be given the opportunity to submit written observations on the matter”²⁶.

24. In light of the above, Counsel submits that the appointment of counsel under Regulation 76(1) in circumstances which are not expressly provided by the Statute and Rules of Procedure and Evidence would be *ultra vires*.

25. Counsel further observes that the Regulations of the Court are ultimately subject to the Statute and Rules, and as such, Regulation 76 must be construed in a manner which is consistent with the Statute and Rules of Procedure and Evidence. In this regard, Article 67(1) expressly sets out the right of a defendant to freely choose counsel or represent themselves (Article 67(1)(d)), to communicate with this counsel (Article 67(1)(b)), and to effectively participate in the proceedings (Article 67(1)(d)). For reasons, which will be developed in sections b) and c) of this request, the present appointment of counsel completely violates these rights, notwithstanding the absence of any legal basis or justification for abrogating these rights in the present circumstances.

26. In any case, Counsel respectfully submits the fact that a counsel is appointed to represent the defence does not in itself secure ‘the interests of justice’ if counsel is unable to perform his functions in an effective manner due to an

²⁶ Decision of 21 October 2008, page 7.

ambiguous mandate, an evident inability to consult with his clients, and an inability to ascertain his clients' view point on the existence of potential conflicts of interest between the respective strategies of his clients. To the contrary, the appointment of counsel to file observations concerning admissibility would be contrary to the interests of justice by potentially prejudicing the defendants' right to challenge admissibility at a later stage. This would be the case if the Pre-Trial Chamber or Trial Chamber subsequently characterizes the defence's observations as an exercise of the defendants' right to challenge admissibility once, as of right under Article 19.

27. It is of further note that 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.²⁷ 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, without the benefit of instructions from the defendants, and without the benefit of access to an evidential elements of the case file. 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. The circumstances in which the Pre-Trial Chamber is determining admissibility also do not fall into the categories

²⁷ Judgement on Appeal against the decision of Pre-Trial Chamber 1 entitled 'Decision on the Prosecution's Application for an arrest warrant under article 58', 13 July 2006 (subsequently reclassified as public on 23 September 2008).

referenced by the Appeals Chamber as being unlikely to invoke prejudice for the defendants.²⁸

28. Finally, the Appeals Chamber expressed its concern in relation to the fact that the suspect in question had not been able to participate in the proceedings.²⁹ Counsel submits that the appointment of counsel does not in itself secure the participation of the suspects, particularly if the counsel has not been appointed by the suspects, and has no information concerning the potential strategies of the suspects. In this regard, the UN Human Rights Committee has held that a defendant's right to have adequate facilities to prepare his defence, and to communicate with counsel is violated in circumstances in which the State has appointed a counsel, who has had no communications with the defendant.³⁰ The difficulties in ensuring that the defendants' interests are adequately represented are particularly compounded by the fact that the Registrar has only designated one counsel to represent all four defendants, notwithstanding the fact that the Chamber has also invited all victims who have communicated with the Court to file observations, as well as the Prosecution (who is able to benefit from resources far in excess of one counsel). The resultant proceedings can only be fundamentally unbalanced as result.

²⁸ The Appeals Chamber referred to circumstances in which the determination is based on established jurisprudence, the facts are uncontested such that the case is clearly inadmissible or admissible, "or an ostensible cause impelling the exercise of *proprio motu* review", at para. 52.

²⁹ At paras. 49 and 53.

³⁰ "The author has complained that he had no access to counsel. The State party explains, however, that he had legal representation, without clarifying whether such representation was provided by State-appointed counsel, nor contesting the author's allegation that he never actually saw a lawyer. In the circumstances, the Committee concludes that the requirement laid down in article 14, paragraph 3 (b), that an accused person have adequate time and facilities to communicate with counsel of his own choosing has been violated". *Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights*, Communication No. 289/1988: Panama 8 April 1992, CCPR/C/44/289/1988, at para. 63, <http://humanrights.law.monash.edu.au/undocs/html/289-1988.html>.

(b) The appointment of counsel under Regulation 76(1) unreasonably deprived the defendants of the opportunity of designating either a counsel of their choice, or opting to represent themselves

29. The ICC Appeals Chamber has confirmed that under the ICC Statute and Rules, the choice of counsel is vested in the suspect/accused and not the Registrar.³¹

30. The Appeals Chamber has also held that the provisions in the Regulations of the Court concerning the appointment of counsel by the Chamber or the Registry cannot

“be validly invoked to sidestep the right of the person to appoint counsel of his/her choice to represent him/her in proceedings before the Court. The Regulations of the Court must be read subject to the fundamental right of the accused to legal representation”.³²

31. Even if this right to choose counsel or to represent one-self could, in principle, be overridden by the power of the Chamber under Regulation 76(1) to appoint counsel in the interests of justice, the exercise of such a power should comply with the principles of necessity and proportionality.³³ Counsel submits that the appointment of counsel under Regulation 76(1) to the four defendants in the present case was neither necessary nor proportionate, and as such, was patently unreasonable.

³¹Reasons for the “Decision of the Appeals Chamber on the request of Counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007 issued on the 16 February 2007”, of the Appeals Chamber of 21 February 2007, at para 12, citing article 67 (1) (d) of the Statute, rules 21 and 22 of the Rules of Procedure and Evidence and regulations 67, 74, 75 of the Regulations of the Court.

³²Reasons 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 2008, ICC-01/04-01/06-844, para. 13.

³³ See *Prosecutor v. Milosevic*, Decision On Interlocutory Appeal Of The Trial Chamber’s Decision On The Assignment Of Defense Counsel, 1 November 2004, at para. 17.

32. In the present case, it is not clear from the record as to whether the Registrar has attempted to ascertain whether the defendants are currently represented by counsel, or whether they wish to designate a specific counsel. The submissions³⁴ of Mr. Pestmann as ad hoc counsel concerning his difficulties in verifying which persons were authorised to speak on behalf of the defendant Kony do not constitute a definitive answer to this issue, since the ad hoc counsel did not benefit from the diplomatic and cooperation avenues available to the Registry. In addition, the Pre-Trial Chamber has not at any stage of the proceedings invited the defendants to inform the Court as to whether they wish to be represented by a certain counsel, or whether they wish to represent themselves.
33. Indeed, notwithstanding the fundamental impact of the decision of 21 October 2008 on the rights of the defendants, the Chamber has not ordered the Registry to publicly disseminate the existence of this decision through the outreach services of the ICC, and the field offices in Uganda and the DRC in a language which the defendants fully understand. It cannot therefore be held that the defendants have waived their right to effectively participate in these proceedings, or to designate a counsel of their choice.
34. It is also evident that the lack of communication between the defendant and the court-appointed counsel cannot be attributed to deliberate attempts by the defendant to instigate such a break-down in communication.

(c) The registrar has failed to take into consideration the potential conflicts of interest which would ensue from assigning one counsel to represent all four defendants.

³⁴ Submission of observations on applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07, ICC-02/04-01/05-318, 20 October 2008.

35. As noted by the Presidency, the right of a person to a fair and expeditious trial “may be adversely affected where the appointment of duty counsel is unreasonably refused”.³⁵ In the present circumstances, the assignment of one counsel to all four defendants arguably constitutes an unreasonable refusal to assign each defendant with their own counsel, and thus a denial of their right to effective representation.
36. In the present case, it cannot be assumed that the interests of all defendants are aligned. To the contrary, media reports indicate a level of dissension between the defendants, in particular as regards their approach to the negotiation process and the role of the ICC. It is therefore completely unfeasible for the counsel to represent the interests of all four defendants simultaneously, without provoking a potential conflict of interest.
37. With regard to Article 12 of the Code of Professional Conduct for Counsel before the ICC, Pre-Trial Chamber I has recognized the potential conflict, which could arise through providing assistance to two persons in the same case, in its decision of 25 June 2008, which ordered the OPCD and OPCV to provide different members of the respect Offices to assist each team.³⁶
38. The Rules of Procedure and Evidence expressly envisage that counsel must exercise their functions in accordance with the Code of Conduct for Counsel.³⁷ 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).

³⁵ At para 16.

³⁶ Order to the OPCV and the OPCD to Submit Additional Reports on the Implementation of the 10 June 2008 Decision, ICC-01/04-01/07-647, 25 June 2008.

³⁷ Rule 22(3) “In 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”.

2. *Request for conditional stay/suspension of the proceedings concerning the Pre-Trial Chamber's request for observations on the admissibility of the case*

39. The Statute and Rules are silent in relation to the question as to whether the Presidency can issue an order suspending the proceedings before a Chamber. Counsel nonetheless observes that the Appeals Chamber has found that the Chambers of the ICC possess the power to order a conditional stay of the proceedings, where the circumstances are such that it is not possible to secure the fairness of the proceedings at that point in time.³⁸
40. Counsel submits that a conditional stay or suspension is warranted in the present proceedings in order to
- a) firstly, ensure that the actions of Counsel (in particular, the filing of observations concerning admissibility) do not irreversibly prejudice the ability of the defendant to exercise their right to challenge admissibility in the future in an effective manner, and
 - b) secondly, to ensure that Counsel is able to perform his functions in a manner which does not violate his obligations under the Code of Professional Conduct for Counsel.
41. In this connection, remedy provided by rule 21(3) would be rendered ineffective if the proceedings in which the counsel has been designated to participate were completed before the Presidency had completed the review. Whilst the Pre-Trial Chamber could, in theory, reconvene the proceedings, this would not protect the defendants from the element of predetermination which

³⁸Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 21 October 2008, ICC-01/04-01/06-1486

they would face. Moreover, such a course of action would not adequately protect the interests of the present Counsel, who could attract potential disciplinary sanctions as a result of his efforts to comply with the order of the Pre-Trial Chamber.

IV. REQUEST

42. In view of the above, may it please the honourable Presidency

- (i) to review Counsel's appointment under Regulation 76 (1) by the Registrar in accordance with the Decision of 21 October 2008, and
- (ii) to determine, if the Counsel is entitled to submit observations on behalf of all four defendants on the admissibility of the case without committing an implicit and unavoidable breach of his professional duties under Article 12 of the Code of Conduct of the ICC in consequence of the fact, that the Counsel is neither able to get instructions of all of the four defendants nor to exclude a conflict of interests before submitting the requested observations,
- (iii) further to determine, if a challenge of admissibility due to Article 19 (2) would prejudice the defendants' right to challenge the admissibility at a later stage of the proceedings due to Article 19 (4) and consequently contravene Counsel's obligations and duties to represent fairly the interests of all defendants in this case under the Code of Conduct of the ICC,
- (iv) to order the conditional stay/suspension of the proceedings concerning the Pre-Trial Chamber's request for observations on the admissibility of the Case.

Respectfully submitted.

A rectangular box containing a handwritten signature in black ink. The signature appears to be 'J. Dieckmann' written in a cursive style.

Counsel for the Defence, Mr. Jens Dieckmann

Dated this Tuesday, 28 October 2008

At The Hague, The Netherlands