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PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Reine Adélaïde Sophie Alapini-Gansou

SITUATION IN THE STATE OF PALESTINE

Public

OPCD Submissions on Prosecution Request for an Article 19(3) ruling

Source: Office of Public Counsel for the Defence (OPCD)

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I. INTRODUCTION

1. The Office of Public Counsel for the Defence (“OPCD”) submits that a judicial ruling on territorial jurisdiction is improper at this time. First, Article 19(3) was created in the Rome Statute to occur at a time when investigations had commenced and at least one specific defendant had been identified; this is clear through a plain reading, or through a contextual reading, and is affirmed by litigation before the ICC which puts both the jurisprudence and even a former OTP interpretation of Article 19 as being post-arrest/summons, pre-confirmation of charges. Second, a ruling on territorial jurisdiction at this time for ‘certainty’ is exactly what will create prejudice for any suspect/accused before the Court in this Situation by making an onus of rebuttal in any Article 19(2)(a) challenge. As a ruling is not required at this time, the OPCD asks that such request be deferred until it is ripe for review – when an actual represented defendant is before the Court and the respective Chamber is seized of a factual basis to rule on territorial jurisdiction as applicable to the case.

II. RELEVANT PROCEDURAL HISTORY

2. On 22 January 2020, the Prosecutor filed a motion requesting that Pre-Trial Chamber I “rule on the scope of the Court’s territorial jurisdiction in the situation of Palestine and to confirm that the ‘territory’ over which the Court may exercise its jurisdiction under article 12(2)(a) comprises the West Bank, including East Jerusalem, and Gaza”.¹ The request was made pursuant to Article 19(3) of the Rome Statute.²
3. On 28 January 2020, Pre-Trial Chamber I invited the State of Palestine, victims in the situation in the State of Palestine, and the State of Israel to submit written observations on the question of jurisdiction set forth in paragraph 220

¹ Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine, [ICC-01/18-12](#), 22 January 2020 (“Prosecution Request”), para. 220.

² *Ibid.*, paras 5, 18.

of the Prosecutor's Request, without addressing any other issues arising from this Situation, by no later than 16 March 2020.³ A certain numbers of States, organisations and/or persons were also invited to submit applications for leave to file such written observations by no later than 14 February 2020.⁴

4. On 14 February 2020, the OPCD sought leave to file observations pursuant to Rule 103 and Regulation 77(4) of the Regulations of the Court. The OPCD filed its request in line with its mandate to represent and protect the rights of potential suspects who would be subject to this jurisdiction, and to prevent a judicial predetermination on the issue of territorial jurisdiction.⁵
5. On 20 February 2020, the Pre-Trial Chamber granted leave to OPCD to submit its observations under the Rule 103 of the Rule of Procedure and Evidence on the question of jurisdiction set forth in paragraph 220 of the Prosecutor's Request.⁶

III. SUBMISSIONS

a. ARTICLE 19(3) IS INAPPLICABLE UNTIL AN ARREST WARRANT OR SUMMONS IS ISSUED

- i. Plain reading or contextually considered, Article 19(3) of the Rome Statute envisages a 'case' with at least one named defendant

6. The OPCD submits that a ruling on territorial jurisdiction should be deferred until a 'case' is brought before the Court by Article 58 arrest warrant or summons. This timing is supported by either a plain reading of Article 19 of the Rome Statute or via a contextual reading of Article 19 *vis-à-vis* the Rome Statute in its entirety; comports with consideration of the very object and

³ Order setting the procedure and the schedule for the submission of observations, [ICC-01/18-14](#), 28 January 2020, paras 13, 16.

⁴ *Ibid.*, paras 17, 20.

⁵ Request to Submit *Amicus Curiae* Submissions Pursuant to Rule 103 and Regulation of the Court 77(4)(c), [ICC-01/18-44](#), 14 February 2020, para. 3.

⁶ Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, [ICC-01/18-63](#), 20 February 2020, paras 55-56.

purpose, indeed spirit, of the Rome Statute itself; and finds support through the jurisprudence that has been set forth by the ICC Chambers over the last 14 years.

7. A plain reading of Article 19(3) would indicate that review of the specifics of jurisdiction must be made on a case-by-case basis (rather than situation-by-situation basis).⁷ This is clear not only from the word ‘case’ in the title of Article 19,⁸ but also from how that word is used throughout the provision. The Prosecution’s argument that the conjunction ‘or’ means that ‘case’ applies only to admissibility proceedings and not jurisdiction is illogical.⁹ While the conjunction ‘or’ is used (“*jurisdiction of the Court or admissibility of a case*”), this must be read subject to sub-paragraph Article 19(1), which states that the Court must be satisfied that it has jurisdiction in the context of “*any case brought before it*”. This expressly ties jurisdictional determinations to a ‘case’, meaning that the word ‘case’ does not apply only to admissibility proceedings. Applying the ordinary meaning of the term ‘case’,¹⁰ as used in Article 19, means that there are specific defendants named within a Situation to create a specific framework from which to adjudicate challenges and questions of admissibility or jurisdiction.
8. Even when the word ‘case’ is examined in context, as argued by the Prosecution,¹¹ the same conclusion is reached. As acknowledged by William Schabas in discussing admissibility decisions under Article 19, this provision “*contrast[s] with Article 18 of the Statute, where admissibility of a ‘situation’ is*

⁷ See Christopher K. Hall *et al.*, “Article 19: Challenges to the jurisdiction of the Court or the admissibility of a case” in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (C.H. Beck, Hart, Nomos, 3rd Edition), p. 875 (“...the Prosecutor could attempt to seek a ruling that the Court has jurisdiction over an entire situation or that the situation was admissible, although this view is not universally accepted”) [Emphasis added.] *adding*, in footnote: “Ideally, such a possibility should have been provided for in article 18. In any event, article 19 as a whole – as is apparent from its title – at least with respect to admissibility, applies to ‘case[s]’.” [Emphasis added.]

⁸ See Prosecution Request, para. 24.

⁹ *Ibid.*

¹⁰ Vienna Convention on the Law of Treaties, Article 31(1).

¹¹ Prosecution Request, para. 26.

contemplated”, whereas Article 19 requires an actual case of which “the defining elements ... are the individual and the alleged conduct”.¹² If the intention of Article 19(3) were to allow the Prosecution to obtain preliminary admissibility or jurisdiction rulings at the ‘situation’ stage, this provision would have been included in Article 18, which governs preliminary rulings during this phase, instead of where it actually sits in Article 19, which applies to the ‘case’ stage.

9. Therefore, “the word ‘case’ in Article 19 must be interpreted by taking into account the stage of the proceedings in which the provision is applied”;¹³ here, it is discussing pre-trial proceedings when jurisdiction and admissibility are being litigated by parties and States in the context of determining the charges. What must not be lost in a contextual reading of the term and its placement is that the Rome Statute is *sui generis* and provides unique participatory rights of suspects at incredibly early stages of the investigations and, specifically, in defining potential charges through the unique confirmation process outlined in Article 61.
10. While the Prosecution argues that “[a]part from article 19(1), no other subparagraph of article 19 textually limits jurisdictional proceedings or decisions to ‘cases’”,¹⁴ to understand Article 19 in the timing of a Situation/Case before the Court, the Rome Statute must be taken as a whole. As noted above, the entirety of Article 19 refers to how a State or Suspect may make a one-time challenge on admissibility or jurisdiction in order to satisfy the seized Chamber in “a case” that it is properly before it. In the spirit of individual criminal responsibility,¹⁵ rather than collective, the Rome Statute requires a case against a person before admissibility and jurisdiction challenges can be lodged.

¹² William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd Edition, (Oxford University Press 2016), p. 487 citing *Ruto et al.*, ICC-01/04-01/06 OA4.

¹³ Prosecution Request, para. 26.

¹⁴ *Ibid.*, para. 24.

¹⁵ Rome Statute, Article 25.

11. In fact, Article 19 is the first instance in the Rome Statute where an ‘accused’ is invited to directly participate in the proceedings, through sub-paragraphs (2) and (4). The specific mention of an ‘accused’ in these sub-paragraphs necessarily indicates that there is, indeed, a ‘case’ with a specifically named defendant. It makes no sense to read sub-paragraph (3) separately in time from its bookends of subparagraphs (2) and (4). This, coupled with the specificity of sub-paragraph (1), means it is unlikely that sub-paragraph (3) would require anything less than an actual ‘case’ in the same context.
12. Further, the way the phrase “at the earliest opportunity” is used in Article 19 does nothing to bolster the Prosecution’s argument that it applies to a phase of pre-investigation. This phrase is not found in sub-paragraph (3), but appears in sub-paragraph (5), which dictates that a State triggering an admissibility or jurisdiction challenge must do so “at the earliest opportunity”, and, when a State does so, the Prosecutor “shall suspend the investigation until such time as the Court makes” the relevant determination.¹⁶ This envisages that an investigation is already ongoing, meaning that the Article cannot apply at the earlier, pre-investigation stage, where this current request resides.
13. The possibility of the Prosecution to request an early ruling under Article 19(3) is also not enshrined within its duty to act lawfully.¹⁷ The Prosecution, like any other party to proceedings, will often have to make strategic decisions on its activities without being certain what the eventual judicial determination will be. That is the nature of contentious legal proceedings. Such proceedings would be undermined if one party were able to obtain advance *ex parte* notice of legal outcomes by invoking its duty to act lawfully.
14. The Prosecutor’s limitation to shaping a situation’s investigations through judicial ruling has been affirmed in the recent *Afghanistan* Appeals Chamber decision. This decision examined the authorisation procedure for cases, noting

¹⁶ *Ibid.*, Article 19(7).

¹⁷ Prosecution Request, para. 27.

that “a proposal during the drafting of the Rules to incorporate admissibility and jurisdictional challenges into the authorization procedure was rejected by the drafters, inter alia, due to concerns that it would exceed the oversight role of the pre-trial chamber under article 15 and that it would not be feasible to resolved these issues at such an early stage of proceedings”.¹⁸ The Appeals Chamber decision goes on to highlight that the Statute provides for “specific procedural mechanisms based on the full participation of relevant parties” directing that admissibility challenges be made pursuant to the latter, and more specific, Article 18 with Article 19 allowing for challenges when a case is brought.¹⁹

15. Further, there is an important “practical purpose” to relying on Article 19(3) after the arrest warrant or summons decision. When deciding on an arrest warrant or summons decision, the Chamber needs only to find “reasonable grounds to believe” that the crime falls within the Court’s jurisdiction. This is essentially a *prima facie* “initial determination”,²⁰ which is taken “without prejudice to subsequent determination”.²¹ Since such a finding is without

¹⁸ Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, [ICC-02/17-138](#), 5 March 2020, (“Afghanistan Decision”), para. 41 *citing* Preparatory Commission for the International Criminal Court, Working Group on Rules of Procedure and Evidence, Proposal submitted by France concerning part 2 of the Rome Statute of the International Criminal Court, concerning jurisdiction, admissibility and applicable law, 23 November 1999, PCNICC/1999/WGRPE/DP.43, p. 1; J. T. Holmes, ‘Jurisdiction and Admissibility’ in R. Lee (ed.) *The ICC: Elements of Crimes and Rules of Procedure and Evidence* (2001), pp. 328-329; Friman, p. 495; and footnote 59: “Article 19 of the Statute provides that the Court may, on its own motion, determine the admissibility of a case in accordance with article 17 of the Statute and the Prosecutor may seek a ruling on the admissibility of a case (Article 19(1) and (3) of the Statute).”

¹⁹ Afghanistan Decision, para. 42 & fn. 59. The Appeals Chamber specifically contemplates that “[c]hallenges may also be brought by an accused person or person for whom a warrant of arrest or summons to appear has been issued, a State which has jurisdiction over a case and is investigating or prosecuting or has investigated or prosecuted the case, or a State from which acceptance of jurisdiction is required (Article 19(2) of the Statute). Article 19(3) of the Statute provides that those who have referred the situation under article 13 of the Statute, as well as victims, may also submit observations to the Court in proceedings with respect to admissibility.”

²⁰ *Prosecutor v. Bemba*, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, [ICC-01/05-01/08-14-tENG](#), 10 June 2008, para. 11.

²¹ See *Prosecutor v. Ntaganda*, Decision on the Prosecution Application for a Warrant of Arrest, [ICC-01/04-02/06-1-Red-tENG](#), 6 March 2007, para. 25; *Prosecutor v. Katanga*, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, [ICC-01/04-01/07-55](#), para. 21. See also *Prosecutor v. Bemba*, Decision on the Prosecutor’s Application for

prejudice, the practical purpose of seeking an Article 19(3) ruling after that point is to allow the defendant and Prosecution to conduct an adversarial argument on jurisdiction to arrive at the final findings. Therefore, unlike what the Prosecution argues, there could be “need to seek a ruling on [jurisdiction] which has already been decided by the Chamber”.²²

16. Finally, reading Article 19(3) as taking place at that earliest pre-trial stage between arrest/surrender and the Confirmation of Charges hearings of the confirmation of charges process makes more sense in practice. At this point, the proceedings require not only an Arrest Warrant, but development of a Document Containing the Charges, and the Rome Statute has provided Article 19(3) as an avenue for the Prosecution to seek rulings on jurisdiction or admissibility questions. Article 19(3), then, provides the Prosecution that same recourse of addressing any concerns or questions it has at that time, alongside the Article 19 rights of States and Defendants to challenge the propriety of the initial admissibility or jurisdiction decisions or applications. All of this is done, however, with the benefit of an actual defendant in an actual case participating in the way the Rome Statute has designed. Such reading of Article 19(3) is emphasized by the procedure set forth in Rule 58 which states:

*The Court shall transmit a request or application received under sub-rule 2 to the Prosecutor and to the person referred to in article 19, paragraph 2, who has been surrendered to the Court or who has appeared voluntarily or pursuant to a summons, and shall allow them to submit written observations to the request or application within a period of time determined by the Chamber.*²³

In the present case, the OPCD sought leave pursuant to its Regulation of the Court mandate and is acting as Rule 103 *amicus* to make submissions *because* there is no known suspect or Counsel assigned at this time to be served for

a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, [ICC-01/05-01/08-14-tENG](#), para. 22.

²² Prosecution Request, para. 25.

²³ ICC Rules of Procedure & Evidence, Rule 58(3).

response. This procedural absence alone shows that Article 19(3) is not ripe in the case.

- ii. The ICC's jurisprudence supports a reading of Article 19(3) as occurring only after warrant of arrest or summons, with at least one named defendant as party to the proceedings

17. All of the textual analysis of the Statute must be underscored by the treatment the ICC Chambers have given Article 19(3) to date. As shown in the context of admissibility, and as pointed out by the Prosecutor, the Article 19 cases that have arisen before the Court have been in situations of named defendants with standing arrest warrant or summons to appear.²⁴

18. Use of Article 19(3), specifically, has also been shown to be used at the time of opening an arrest warrant in the DRC Situation as far back as 2006. At that time, when the Pre-Trial Chamber found the case against Mr Ntaganda inadmissible, the Prosecution's appeal of this led to an inquiry by the Appeals Chamber pursuant to the second sentence of Article 19(3).²⁵ While done under seal, it was within the context of a case rather than invoked at the Situation level, having the benefit of all specifics related to that suspect to determine (in that case) admissibility *proprio motu*. What's more, according to the litigation in the *Ntaganda* arrest warrant, the Prosecutor itself took the position "*that the procedures set out in article 19 were geared towards substantial hearings, such as challenges and questions, and not preliminary assessments of admissibility which are incidental to other determinations*".²⁶ Notably, the Prosecution argued:

²⁴ See Prosecution Request, fn. 37, referencing Ongwen Article 19(1) Decision, para. 14 and fn. 38 citing Ruto Admissibility Appeals Decision, para. 40, quoted in Gaddafi Admissibility Appeals Decision, para. 60.

²⁵ *Situation in the Democratic Republic of the Congo*, 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-01/04-169](#), 13 July 2006, ("Judgment on Admissibility Determination in DRC Situation"), para. 17.

²⁶ *Ibid.*, para. 28 referring to OTP supplementary submissions, ICC-01/04-136-US-Exp, paragraph 25.

to permit admissibility proceedings with participation of victims and referring entities, at the stage of issuance of an arrest warrant would produce absurd results. On the one hand, if victims and referring entities are permitted to submit observations, but the suspect is not, then this would seem a curious and unfair process [...]. On the other hand, if the suspect is permitted to submit observations, then the ICC would have a very curious system wherein suspects are permitted to comment on their own arrest warrants before they are issued. The logical interpretation, avoiding these implausible results, is that admissibility proceedings under Article 19 are held after the issuance of the arrest warrant, when interested parties have the opportunity to submit observations.²⁷ [Emphasis added.]

19. It is significant that there are no public decisions that point to Article 19 taking place outside of a specific ‘case’ with named defendant(s). Largely, as noted above, the Chambers have declined to make this exact determination,²⁸ and have held, for example, that Article 19(1) permits *proprio motu* question by a Chamber and that “the criteria presiding over the actual exercise of such discretion are to be inferred to a great extent from the circumstances of each individual case.”²⁹ As noted above, even more direct is that Pre-Trial Chambers, in evaluating arrest warrants, have clarified that preliminary jurisdictional and admissibility assessments are separate and distinct and made “without prejudice to any subsequent determination on jurisdiction or admissibility concerning th[e] case pursuant to article 19(1), (2) and (3) of the Statute”.³⁰ [Emphasis added.]

20. More recently, in the *Situation in Myanmar/Bangladesh*, Judge Perrin de Brichambaut concluded in his Partially Dissenting Opinion that “article 19(3)

²⁷ Judgment on Admissibility Determination in DRC Situation, para. 29 citing OTP supplementary submissions, ICC-01/04-136-US-Exp, paragraph 30. There is no explanation of how this accords with its current “statutory interpretation of the provision in good faith, and tak[ing into] account of its ordinary meaning, purpose and context, as well as its drafting history”. Prosecution Request, para. 21.

²⁸ *Ibid.*, para. 30.

²⁹ *Prosecutor v. Kony et al.*, Decision on the admissibility of the case under article 19(1) of the Statute, [ICC-02/04-01/15-156](#), 12 February 2015, para. 21.

³⁰ See, e.g., *Prosecutor v. Katanga*, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, [ICC-01/04-01/07-4](#), 12 February 2008, para. 21; *Prosecutor v. Ngudjolo*, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, [ICC-01/04-01/07-262](#), 11 March 2008, para. 22.

of the Statute can be applied only when the proceedings have reached the stage of a case identified by the Prosecutor”.³¹ This means once a “case has been defined by a warrant of arrest or a summons to appear pursuant to article 58 of the Statute”.³² Judge Perrin de Brichambaut’s opinion is persuasive since the Majority did not express a view to the contrary.³³ In fact, the Majority held that “[t]he position advanced by the Prosecutor relying on article 19(3) of the Statute is quite controversial based on the different readings of the Court’s statutory documents and the literature interpreting this provision”;³⁴ instead, it rendered the decision pursuant to its power under Article 119(1) of the Statute, as well as under Article 21(1)(b)), noting: “the Chamber does not see the need to enter a definite ruling on whether article 19(3) of the Statute is applicable at this stage of the proceedings”.³⁵ This decision was taken in the principle of *la compétence de la compétence* of the Court itself, rather than an article 19(3) ruling on jurisdiction of a specific Situation. This was as much acknowledged by the Prosecution in its Request.³⁶ It considered, however, that the Palestine Situation is “markedly different” in that the Prosecution stands prepared to open an investigation once the jurisdictional scope is determined in this ruling.³⁷ However, this makes no difference to Judge Perrin de Brichambaut’s reasoning, the *ratio* of which is whether “the proceedings have reached the stage of a case identified by the

³¹ *Situation in Myanmar/Bangladesh*, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, Partially Dissenting Opinion of Judge Marc Perrin de Brichambaut, [ICC-RoC46\(3\)-01/18-37-Anx](#), 6 September 2018, (“[Partially Dissenting Opinion](#)”), para. 12.

³² [Partially Dissenting Opinion](#), para. 10.

³³ *See Situation in Myanmar/Bangladesh*, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, [ICC-RoC46\(3\)-01/18-37](#), 6 September 2018, (“*Myanmar 19(3)*”), para. 28 (“...the Chamber does not see the need to enter a definite ruling on whether article 19(3) of the Statute is applicable at this stage of the proceedings”).

³⁴ *Myanmar 19(3)*, para. 27.

³⁵ *Ibid.*, para. 28.

³⁶ Prosecution Request, para. 21, fn. 27.

³⁷ *Ibid.*

Prosecutor”, failing which Article 19(3) is inapplicable.³⁸ The OPCD agrees with this reasoning.

b. ALTERNATIVELY, A RULING ON TERRITORIAL JURISDICTION AT THIS STAGE WOULD BE PREJUDICIAL TO THE DEFENCE

21. The OPCD would submit, in the alternative, that even if the Pre-Trial Chamber finds that Article 19(3) of the Statute could be applicable at this stage in some instance, the factors weigh against ruling on territorial jurisdiction in this instance as overly prejudicial to any future right of a defendant to challenge jurisdiction pursuant to Article 19.
22. In the *Situation in the Democratic Republic of the Congo*, the Appeals Chamber held that Pre-Trial Chambers must bear in mind the interests of suspects when deciding whether to make a ruling on admissibility,³⁹ which applies also when those persons do not know about the proceedings.⁴⁰ In the context of admissibility, the Appeals Chamber also underscored the importance of providing the Defence with an effective opportunity to submit an Article 19(2) challenge at first instance, as opposed to a right which is rendered illusory by predeterminations.⁴¹ In that situation, the Appeals Chamber found that making an Article 19(2) determination was not appropriate, given that one of the circumstances was that the “review was *ex parte* without the participation of the suspect”.⁴² The Appeals Chamber considered that circumstances where it may be permissible to make such a determination without the suspect may include where “a case is based the established jurisprudence of the Court, uncontested facts [...] or an ostensible cause impelling the exercise of *proprio motu* review”⁴³ – none of which apply to the jurisdictional question currently

³⁸ Partially Dissenting Opinion, para. 12.

³⁹ [Judgment on Admissibility Determination in DRC Situation](#), paras 48-52.

⁴⁰ *Ibid.*, para. 49.

⁴¹ *Ibid.*, paras 50–51.

⁴² *Ibid.*, para. 53.

⁴³ *Ibid.*, para. 52.

before this Pre-Trial Chamber. Along the same lines, the Pre-Trial Chamber in *Kony et al.* only proceeded with making a determination under Article 19(1) after arrest warrants had been issued and when the suspects, who were not in custody, had their interests represented by *ad hoc* Defence Counsel.⁴⁴

23. Further in the *Kony* case, the Pre-Trial Chamber elaborated that the relevance and validity of arguments considered by the Chamber in connection with a *proprio motu* article 19(1) decision, in which the defendant was not participating, should be confined to that particular assessment, and “should not prejudice the arguments which the defence may put forward at a later stage”.⁴⁵

24. Rulings on territorial jurisdiction necessarily impair a suspect/accused’s right to challenge jurisdiction under Article 19(2)(a) of the Statute if, and when, they are before the Court. As held by the Appeals Chamber, if the Pre-Trial Chamber were to make an adverse admissibility ruling “without the suspect participating in the proceedings, and the suspect at a later stage seeks to challenge the admissibility of a case [...] he or she comes before a Pre-Trial Chamber that has already decided the very same issue to his or her detriment”, and that a “degree of predetermination is inevitable”.⁴⁶ Conversely, even if the Pre-Trial Chamber were to make a ruling favourable to the Defence, the future suspect would not be able to participate in any prosecution appeal against it under Article 82(1)(a) of the Statute, which means his or her rights would also be “seriously impaired”.⁴⁷

25. It may be that the danger of such jurisdictional ruling in the absence of a named defendant to participate is even more grave than an early admissibility ruling. While admissibility can be decided multiple times given the changing

⁴⁴ See *Prosecutor v. Kony et al.*, Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence, [ICC-02/04-01/05-320](#), 21 October 2008, p. 8.

⁴⁵ *Prosecutor v. Kony et al.*, Decision on the admissibility of the case under article 19(1) of the Statute, [ICC-02/04-01/05-377](#), 10 March 2009, para. 32.

⁴⁶ [Judgment on Admissibility Determination in DRC Situation](#), para. 50.

⁴⁷ *Ibid.*

circumstances of new evidence or new domestic investigations/prosecutions,⁴⁸ territorial jurisdiction can remain “generally static” as contemplated even in the Prosecution Request.⁴⁹ This renders any decision taken now as settling jurisdictional challenges for each particular incident before a defendant even arrives and creating a reversal of the burden of proof or onus of rebuttal in violation of his/her Article 67(1)(i) right. It deprives the fact-finder, equally, from rendering a decision in consideration and context of a specific case with all four corners of jurisdiction – temporal, personal, subject matter, and territorial – and with benefit of arguments from the other party to the proceedings.

26. The emphasis on how any decision now will be binding is in the Prosecution’s own arguments in making such a request. As example, the Prosecution submits that such decision would not be advisory, but rather, would be binding upon it;⁵⁰ certainly what binds one party in a case binds the other (in this case, the absent, unknown defendant) and, thus, in this case, unnecessarily binds and restricts the right of that defendant in making any necessary territorial jurisdiction challenges in his/her case.

27. Further, what the Prosecution seeks with its present Article 19(3) request is to obtain “judicial certainty”⁵¹ of a permanent nature, stating that it “needs certainty as to the legal foundation of her (and the Court’s) activities in this situation”.⁵² In fact, at paragraph 220 of the Prosecution Request, she seeks not

⁴⁸ *Prosecutor v. Kony et al.*, Decision on the admissibility of the case under article 19(1) of the Statute, [ICC-02/04-01/15-156](#), 10 March 2009, paras 26-28. “By its very nature, the determination of admissibility of a case is subject to change as a consequence of a change in circumstances”; para. 28: “the Statute as a whole enshrines the idea that a change in circumstances allows (or even, in some scenarios, compels) the Court to determine admissibility anew.”

⁴⁹ Prosecution Request, para. 24. Unlike admissibility, see *Prosecutor v. Katanga & Ngudjolo*, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, [ICC-01/04-01/07-1497](#), 25 September 2009, para. 56 (“a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States and vice versa”).

⁵⁰ Prosecution Request, para. 32.

⁵¹ *Ibid.*, para. 36.

⁵² *Ibid.*

a ruling of the Chamber, but a 'confirmation'.⁵³ However, to do so before an adversarial process even exists, which would effectively be "with prejudice" and would render any arguments by a future accused on this issue nugatory.

28. Investigating properly and within efficiency of resources is a duty upon the Office of the Prosecutor pursuant to Article 54, as recalled by the Appeals Chamber in the recent *Afghanistan* Decision.⁵⁴ In fact, in that Decision, the Appeals Chamber warned against judicial limitation of territorial jurisdiction at such an early stage of investigation, as "the Prosecutor would be required to submit repeated and sometimes unnecessary requests for authorisation of investigation as new facts are uncovered".⁵⁵ This is as much as Judge Perrin de Brichambaut warned of in the *Situation of Bangladesh/Myanmar* in observing that "attempt to rule on jurisdiction pre-emptively at this juncture would hazard an inconsistent result with subsequent determinations at a later (and more appropriate) phase of proceedings".⁵⁶

29. Additionally, as with here, the *Afghanistan* Decision held that any such restriction could unnecessarily impede the Prosecution's power of investigation.⁵⁷ Such reading of Article 19(3) as bound to a specific case is reinforced by the permissive position taken by the Appeals Chamber in a careful balancing of powers; there is simply no need for judicial intervention at this time to make this determination – the Situation is defined by the referral made and investigative activities thus fit within the scope of the case as it is referred.

⁵³ *Ibid.*, para. 220: "to confirm that the "territory" over which the Court may exercise its jurisdiction under article 12(2)(a) comprises the West Bank, including East Jerusalem, and Gaza". [Emphasis added.]

⁵⁴ *Afghanistan* Decision, para. 60.

⁵⁵ *Ibid.*, para. 63.

⁵⁶ Partially Dissenting Opinion, para. 32.

⁵⁷ *Afghanistan* Decision, para. 63.

30. Lastly, even if the Prosecution has requested a ruling under Article 19(3), there is no part of that provision that obliges the Chamber to make that ruling.⁵⁸ Where an obligation to deliver a ruling exists, the Rome Statute expresses this obligation clearly, for instance when the Pre-Trial Chamber “shall, on the application of the Prosecutor, issue a warrant of arrest” under Article 58(1), or when the Pre-Trial Chamber “shall, on the basis of the [confirmation] hearing, determine whether there is sufficient evidence” to confirm charges under Article 61(7).⁵⁹ Article 19(3) does not place any such obligation on the Chamber, which means that, even if Article 19(3) is applicable, the Pre-Trial Chamber has the discretion whether or not to rule on the Prosecutor’s request.
31. Here, the reasons cited by Prosecution for ruling at this pre-‘case’ stage do not outweigh the ultimate prejudice to suspect or accused. Arguments that it may be more “cost-effective” cannot override rights of suspects and accused⁶⁰ and the Prosecution does not have right to judicial certainty on questions properly decided in adversarial process.⁶¹ The drafters of the Rome Statute have sought to balance roles, responsibilities, and rights. In sum, the Prosecution must exercise its responsibility to carefully manage investigations of a situation and bring charges bearing in mind that it is the role of the Chambers to rule on any right – particularly jurisdictional challenges – of the defendants brought before it.

⁵⁸ See Prosecution Request, paras 19, 28.

⁵⁹ Further Rome Statute examples include: Article 58(6) (“The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied...”); Article 58(7) (“the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied [...] it shall issue the summons”); Article 61(11) (“the Presidency shall constitute a Trial Chamber”).

⁶⁰ *Contra* [Prosecution Request](#), paras 20, 38.

⁶¹ *Contra* [Prosecution Request](#), para. 36.

IV. RELIEF REQUESTED

32. In light of the above considerations, the OPCD would ask that the Pre-Trial Chamber defer ruling on the Prosecution's Article 19(3) request until an Article 58 'case' is brought and a specific defendant is before the Court as party to the proceedings.



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Dated this 16th day of March 2020
At The Hague, The Netherlands