Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-02/04-01/05**
Date: **10 March 2009**

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

Decision on the admissibility of the case under article 19(1) of the Statute

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

The Office of the Prosecutor
Mr Luis Moreno Ocampo
Ms Fatou Bensouda

Counsel for the Defence
Mr Jens Dieckmann

Legal Representatives of the Victims

Legal Representatives of the 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

Amici Curiae
The Uganda Victims' Foundation
Redress Trust

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

The Judges of Pre-Trial Chamber II (the "Chamber") of the International Criminal Court (the "Court");

NOTING the "Decision assigning the situation in Uganda" to Pre-Trial Chamber II issued by the Presidency on 5 July 2004;[1]

NOTING the warrant of arrest for Joseph KONY, issued by the Chamber on 8 July 2005, as amended on 27 September 2005,[2] and the warrants of arrest issued for Vincent OTTI,[3] Okot ODHIAMBO,[4] and Dominic ONGWEN[5] on 8 July 2005 (the "Warrants"), in the case of *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* (the "Case");

NOTING the request for arrest and surrender of Joseph KONY, dated 8 July 2005, as amended on 27 September 2005,[6] and the requests for arrest and surrender of Vincent OTTI,[7] Okot ODHIAMBO[8] and Dominic ONGWEN[9] addressed to the Republic of Uganda ("Uganda") and dated 8 July 2005;

NOTING the "Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence" dated 21 October 2008;[10]

NOTING articles 1, 17, 18, 19 and 21 of the Statute of the Court (the "Statute"), rules 58 and 59 of the Rules of Procedure and Evidence (the "Rules") and regulation 76(1) of the Regulations of the Court (the "Regulations");

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[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-02/04-01/05-29-US-Exp, reclassified as public pursuant to Decision ICC-02/04-01/05-135.
[7] ICC-02/04-01/05-13-US-Exp, reclassified as public pursuant to Decision ICC-02/04-01/05-135.
[8] ICC-02/04-01/05-15-US-Exp, reclassified as public pursuant to Decision ICC-02/04-01/05-135.
[9] ICC-02/04-01/05-16-US-Exp, reclassified as public pursuant to Decision ICC-02/04-01/05-135.
[10] ICC-02/04-01/05-320

HEREBY RENDER THIS DECISION.

Procedural history

1. On 21 October 2008, the Chamber decided to initiate proceedings under article 19(1) of the Statute (the "Proceedings"), appointed Mr Jens Dieckmann as counsel for the Defence for the purposes of the Proceedings and invited Uganda, the Prosecutor, the counsel for the Defence (the "Defence") and victims having 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. On 31 October 2008,[11] the Chamber rejected the Defence "Request for conditional stay of proceedings" dated 28 October 2008[12] and granted Uganda, the Prosecutor, the Defence and the victims having communicated with the Court with respect to the Case until 18 November 2008 to submit observations in the Proceedings.

2. Also on 31 October 2008, the Uganda Victims' Foundation (the "UVF") and the Redress Trust ("Redress") requested leave to submit written observations in the Proceedings under rule 103(1) of the Rules.[13] On 5 November 2008,[14] the Chamber granted UVF and Redress (collectively, the "*Amici curiae*") leave to submit observations under rule 103(1) of the Rules on a number of specific issues, namely (i) the state of implementation of the "Annexure to the Agreement on Accountability and Reconciliation signed between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement" on 19 February 2008 (the "Annexure"), with particular reference to the establishment of the Special Division of the High Court; (ii) the existence of any relevant legal texts relating to such establishment or to the Annexure; and (iii) the experiences of victims of crimes within the jurisdiction of the Court in seeking justice from Ugandan courts. By the same decision, the Chamber

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[11] ICC-02/04-01/05-328.
[12] ICC-02/04-01/05-325.
[13] ICC-02/04-01/05-330.
[14] ICC-02/04-01/05-333

reserved its right to determine the time limit for the Prosecutor and the Defence, as well as to grant leave to other participants in the Proceedings, to respond to the observations to be submitted by the *Amici curiae*.

3. On 7 November 2008, Amnesty International requested leave to submit written observations in the Proceedings under rule 103(1).[15] The request was rejected by the Chamber on 10 November 2008[16], on the ground that Amnesty International was seeking to submit observations of a legal nature (in particular, as to the relevant legal criteria under articles 17(2) and 17(3) of the Statute), which was deemed neither desirable nor appropriate.

4. The Prosecutor,[17] the Defence,[18] Uganda[19] and the Office of Public Counsel for Victims (the "OPCV" or the "Office")[20] submitted their observations on the admissibility of the Case on 18 November 2008.

5. The Prosecutor highlighted that he had "constantly monitored the situation" since his decision to initiate an investigation in Uganda, but had not identified "any national proceeding related to the Case". Accordingly, he maintained that the absence of national proceedings "define[d] the admissibility" of the Case and that the admissibility was not affected by Uganda's ongoing attempts at negotiations with the Lord's Resistance Army ("LRA"), nor by the Agreement on Accountability and Reconciliation between the Republic of Uganda and the Lord's Resistance Army/Movement dated 29 June 2007 (the "Agreement") or the Annexure thereto. On this basis, the Prosecutor submitted that the Case "remain[ed] admissible".

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[15] ICC-02/04-01/05-335.
[16] ICC-02/04-01/05-342.
[17] ICC-02/04-01/05-352.
[18] ICC-02/04-01/05-350.
[19] ICC-02/04-01/05-354-Anx2.
[20] ICC-02/04-01/05-349.

6. The Defence raised a number of arguments touching upon the very legitimacy of the initiative undertaken by the Chamber. Whilst appreciating having been granted the opportunity to submit its views, it argued (i) that the appointment of one counsel for the four persons sought by the Court would violate the provisions of the Code of Professional Conduct for Counsel governing issues of conflict of interests; and (ii) that lack of contact with any of the persons sought by the Court would make it impossible for it to assess their respective individual interests, in particular regarding their wishes as to the venue of a possible trial. Accordingly, with a view to preserving the suspects' rights to challenge the admissibility of the Case under article 19(2) of the Statute, the Defence would refrain "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".

7. The Defence further stated (i) that article 19(1) does not envisage that the Chamber may exercise its *proprio motu* powers in *an absentia* context, as this would violate article 67(1) of the Statute, which enshrines the defendant's right to participate in the proceedings; and (ii) that none of the circumstances listed by the Appeals Chamber as justifying the exercise of the Chamber's discretionary power under article 19(1) prior to the execution of the arrest warrants had been fulfilled in the Case. It maintained that reaffirming the Court's discretion to proceed in the Case would only result in further jeopardizing the chances of arrest and surrender of the persons sought. Emphasis was put on the fact that opening proceedings at this stage might entail that those persons would face "a heightened risk of judicial pre-determination" in the context of possible future challenges to the admissibility of the Case. Moreover, such risk would only be enhanced if an appeal were brought against the determination by the Chamber, since that might lead to the issue being finally adjudicated without the suspects having had an opportunity to be heard. Under the heading of inequality of arms affecting the fairness of the Proceedings, the Defence advanced additional arguments purportedly advising that the Proceedings not be undertaken. These considerations led the Defence to highlight that its failure

to raise substantive arguments on the admissibility of the Case should not be construed as a waiver by the persons sought by the Court. Arguing that the defendants' rights "under article 67(1) of the Statute in conjunction with rule 121(1) of the Rules" were not properly safeguarded, the Defence requested that the Proceedings be suspended "pending proper implementation of the defendants' right to effectively participate in the proceedings".

8. Uganda observed that the "framework and processes" envisaged in the Agreement and the Annexure for the application of formal criminal and civil justice measures to individuals alleged to have committed serious crimes or human rights violations in the course of the conflict in Northern Uganda had been agreed upon "in anticipation of a comprehensive peace agreement whose legal significance, importance and credibility was to be confirmed by its execution by Mr Joseph KONY and the Government of Uganda". Failure to execute the Agreement by the former resulted in the Agreement and its protocols being "of no legal force". Accordingly, Uganda's view was that the Case was still admissible.

9. The OPCV noted that, as a matter of principle, the triggering of the *proprio motu* powers of the Chamber under article 19(1) could not "but reinforce the interests of justice". By the same token, however, it questioned the timing of the Proceedings, arguing that article 17 made the triggering of admissibility proceedings conditional upon the competent jurisdictions of the State concerned exercising their jurisdiction "contemporarily with the exercise of its jurisdiction by the Court itself". In the view of the OPCV, only this scenario would make it possible to analyse whether the State was unwilling or unable genuinely to carry out the investigation or prosecution. Accordingly, failure by Uganda and the LRA to sign the Agreement would *per se* make any concern as to the admissibility of the Case moot. The responses given by Uganda to requests for information by the Chamber, as well as statements issued by its representatives at the Seventh session of the Assembly of States Parties, made it clear that the very establishment of the legal and judicial machinery envisaged in the

Annexure was conditional upon the signing of the Agreement, a scenario which the same representatives had judged "purely hypothetical". Furthermore, no assessment on Uganda's willingness could be made pending the drafting and adoption of the relevant legal and regulatory framework. These considerations led the Office to submit that the triggering of the Proceedings was premature, despite the fact that the overall features of the Ugandan legal framework would make it highly uncertain whether, within the context of proceedings enacted at the national level, victims might be vested with procedural rights as meaningful and effective as those enshrined in the Statute. A summary of the views expressed by a number of victims and a number of individual questionnaires, most of them highlighting deficiencies which might affect national proceedings on the Case and advocating in favour of the Case being held before the Court, were also submitted. Accordingly, the Office requested that the Proceedings be suspended or, in the alternative, that the Case be declared admissible pending the effective establishment of the legal and judicial machinery envisaged in the Agreement and in the Annexure. It also pointed out that nothing would preclude the Chamber from triggering proceedings under article 19(1) of the Statute at a later stage.

10. On 18 November 2008[21], the UVF and Redress submitted their observations under rule 103 of the Rules (the "*Amici curiae* Submissions"). On 21 November 2008,[22] the Chamber granted the Prosecutor and the Defence until 15 December 2008 to respond to the observations by the *Amici curiae*, pursuant to rule 103(2) of the Rules. In light of the subject-matter of the *Amici curiae* Submissions, the Chamber took the view that Uganda was in the best position to comment upon or to supplement some of the observations and, accordingly, granted it the opportunity to respond thereto pursuant to rule 58(2) of the Rules.

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[21] ICC-02/04-01/05-353.
[22] ICC-02/04-01/05-357.

11. On 15 December 2008,[23] Uganda requested an extension of the time limit, arguing that – due to ongoing consultations among relevant offices - it would require two additional weeks for it to be in a position of meaningfully responding to the *Amici curiae* Submissions. On 3 February 2009, the Chamber granted Uganda until 18 February 2009 to respond.[24]

12. On 18 February 2009,[25] the response of Uganda was filed as Annex 2 to the "Third Report of the Registrar on the execution of the 'Decision on responses to observations submitted under Rule 103'". The Solicitor General of Uganda acknowledged that efforts were being made to make the provisions of the Agreement and the Annexure operational, in particular by means of the establishment of a war crimes division within the High Court and a Transitional Justice Working Group vested with advisory tasks *vis-à-vis* the Government. Such efforts relied on the premise that "apart from those already indicted by the International Criminal Court, there [were] [other] individuals in the Lord's Resistance Army who may have to account for various crimes committed in the course of the conflict, some pre-dating the Rome Statute". Such individuals would have "to be subjected to the justice mechanisms contemplated under the Agreement regardless of what happen[ed] in respect of Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen". The Solicitor General confirmed that, since most of the relevant activities were in the initial stages, the fact that there was "a lot yet to be done" was "not in question". Accordingly, he concluded that it remained the position of Uganda that the Case was admissible and that "in the absence of the final peace agreement and in view of the ongoing military hostilities, the provisions of the Agreement [were] irrelevant in respect of the four indicted fugitives".

Legal and factual basis for the opening of the Proceedings

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[23] ICC-02/04-01/05-363-Anx.
[24] ICC-02/04-01/05-364.
[25] ICC-02/04-01/05-369.

13. The opening of proceedings under article 19(1) of the Statute by the Chamber on a *proprio motu* basis appears solidly grounded in law and appropriate in light of the factual scenario and developments of the Case.

Discretionary nature of the Chamber's power to determine the admissibility of the case

14. Article 19(1), second sentence of the Statute vests "the Court" (i.e., its Chambers in the exercise of their judicial functions) with a broad power: it "may, on its own motion, determine the admissibility of a case in accordance with article 17". The broadness of such power, and the wide discretion which presides over its exercise, are made apparent by the use of the term "may": the authority to decide whether the determination of admissibility should be made, and, in the affirmative, at what specific stage of the proceedings such determination should occur, resides exclusively with the relevant Chamber. The sole limit entailed by the lean wording of the provision appears to be that the proceedings must have reached the stage of a case (including "specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects"[26]), as opposed to the preceding stage of the situation following the Prosecutor's decision to commence an investigation pursuant to article 53 of the Statute. Apart from this procedural boundary, the Statute and the other statutory texts are silent as to the criteria which may or should guide a Chamber in deciding whether and when to resort to the power vested in it by article 19(1), second sentence, of the Statute. Accordingly, it is for the Court, in the exercise of its judicial functions and when appropriate, to establish appropriate criteria for determining whether the actual exercise of this *proprio motu* power is warranted in a given case.

The Pre-Trial Chambers' practice in assessing proprio motu *the admissibility of a case*

[26] ICC-01/05-01/08-14-tENG, para. 16; ICC-02/05-01/07-1-Corr, para. 14; ICC-01/04-01/06-8, para. 21.

15. It has already become the established practice of the Court to wield its power under article 19(1) at a number of specific procedural stages.

16. First and foremost, in most cases all three Pre-Trial Chambers of the Court have assessed admissibility on their own motion upon deciding on a Prosecutor's application for a warrant for arrest under article 58, albeit to varying degrees in scope and depth. At the time of the issuance of the Warrants, this Chamber stated that, based upon the application, the evidence and other information submitted by the Prosecutor, the Case "appear[ed] to be admissible",[27] without further elaboration.

17. Acting against a different factual background, which included the existence of judicial initiatives at the national level, Pre-Trial Chamber I, upon issuing warrants of arrest for Thomas Lubanga Dyilo and Bosco Ntaganda in the situation of the Democratic Republic of the Congo ("DRC"), pointed out that "for a case arising from the investigation of a situation to be inadmissible, national proceedings must encompass both the person and the conduct which is the subject of the case before the Court". Since the warrants of arrest issued in the DRC contained no reference to the charges brought by the Prosecutor and no other State with jurisdiction was investigating, prosecuting or had investigated and prosecuted the same crimes, the case was considered admissible.[28]

18. Pre-Trial Chamber I followed the same approach in the case against Germain Katanga[29] and Mathieu Ngujolo Chui.[30] While finding that the case was admissible, it clarified that its determination was "without prejudice to any subsequent determination on jurisdiction or admissibility concerning this case pursuant to article 19(1), (2) and (3) of the Statute".[31]

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[27] ICC-02/04-01/05-1, p. 2.
[28] ICC-01/04-118, paras. 29-41.
[29] ICC-01/04-01/07-4.
[30] ICC-01/04-01/07-262.
[31] ICC-01/04-01/07-4, para. 21; ICC-01/04-01/07-262, para. 22.

19. Both in the situation in Darfur and in the situation in the Central African Republic, Pre-Trial Chamber I[32] and Pre-Trial Chamber III[33] respectively found that the circumstances of the case warranted the exercise of their discretion to determine admissibility under article 19(1) within the context of the issuance of warrants of arrest. Both Pre-Trial Chambers clarified that their determination that the case was admissible was however without prejudice to either any challenge to the admissibility under article 19 or any subsequent determination.

Assessment of the Pre-Trial Chambers' practice by the Appeals Chamber: limited relevance for the purposes of the Proceedings

20. The practice of assessing admissibility within the context of proceedings under article 58 initiated by Pre-Trial Chamber I was scrutinised by the Appeals Chamber in an appeal seeking to reverse the decision on the Prosecutor's application for a warrant of arrest against Mr Bosco Ntaganda. In its decision dated 13 July 2006, the Appeals Chamber[34] stated that the use of the word "may" in article 19(1), second sentence, of the Statute indicated that a Chamber was vested with discretion as to whether making a determination of the admissibility of a case and that it "accept[ed] that the Pre-Trial Chamber may on its own motion address admissibility".[35] By the same token, however, it qualified its statement by pointing out that, within the context of *ex parte* Prosecutor only proceedings triggered by an application for a warrant of arrest, the Pre-Trial Chamber should exercise its discretion on the matter "only when ... appropriate in the circumstances of the case bearing in mind the interests of the suspect".[36] Elaborating on the issue, the Appeals Chamber listed a

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[32] ICC-02/05-01/07-1-Corr.

[33] ICC-01/05-01/08-14-tENG, para. 21: Pre-Trial Chamber III noted that there was "no reason to conclude that Mr Jean-Pierre Bemba's case [was] not admissible, particularly since there [was] nothing to indicate that he [was] already being prosecuted at national level for the crimes referred to in the Prosecutor's Application, on the ground that he enjoyed immunity by virtue of his status as Vice-President" of the DRC.

[34] ICC-01/04-169 (reclassified as public pursuant to Decision ICC-01/04-538-PUB-Exp), para. 48.

[35] ICC 01/04-169 (reclassified as public pursuant to Decision ICC-01/04-538-PUB-Exp), para. 52.

[36] Ibidem.

number of instances in which such appropriateness would be satisfied: namely, "instances where a case is based on the established jurisprudence of the Court, uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of *proprio motu* review"[37].

21. The Chamber wishes to clarify that the judgment by the Appeals Chamber referred to the very specific procedural scenario of a Prosecutor's application for a warrant of arrest, by its nature triggering *ex parte* proceedings where the suspect is not represented. Such a scenario profoundly differs from the one at stake in the Proceedings, where a counsel for the defence has been appointed, the relevant State is a participant and *amici curiae* observations have been submitted. Accordingly, the determinations by the Appeals Chamber as to the conditions warranting the exercise of a Chamber's *proprio motu* powers under article 19(1) are not of direct relevance to the Proceedings. For the purposes of the present decision, the judgment by the Appeals Chamber appears nevertheless to shed light on the meaning of the second sentence of article 19(1) of the Statute in two ways: first, it confirms that the exercise of the *proprio motu* power under this provision falls within the realm of a Chamber's discretion; second, it clarifies 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.

The need to "bear in mind the interests of the suspect" and the arguments raised by the Defence

22. A critical element of the guidance provided by the Appeals Chamber regarding the advisability and appropriateness of exercising the power enshrined in article 19(1), albeit in a different context, is the reference to the need to "bear in mind the interests of the suspect". The relevance of this element for the purposes of this decision stems from the fact that concern for these interests seems to underlie the

[37] Ibidem.

Defence's submissions questioning the legitimacy of opening proceedings under article 19(1) at the present stage, in the absence of any of the persons sought by the Court. The Chamber is of the view that the Defence's arguments are of a preliminary nature and, as such, need to be addressed prior to the assessment of the factual circumstances of the Case.

23. In the view of the Defence, a determination of the admissibility of the Case at this stage, when none of the persons sought by the Court is in custody, would jeopardize their right to bring a challenge pursuant to article 19(2) at a later stage, i.e. once they are apprehended and appear before the Court. More specifically, the Defence argues that opening *proprio motu* proceedings under article 19(1) under these circumstances might entail that the persons sought in the Case might face "a heightened risk of judicial pre-determination" in the context of future challenges to the admissibility of the Case.

24. The arguments of the Defence seem to stem from a partial and inaccurate view of the relevance of the Chamber's determination of admissibility at this stage, as well as from a misconstruction of the function and role of counsel appointed to represent the interests of the Defence in the absence of the persons sought by the Court. The Chamber will address the two issues separately.

Relevance of the Chamber's determination of admissibility at this stage and need to review the determination on admissibility as a consequence of a change in circumstances

25. With regard to the relevance of the determination of admissibility at this stage, the Chamber wishes to highlight that the Statute does not rule out the possibility that multiple determinations of admissibility may be made in a given case. Whilst as a general rule the accused may only raise issues of admissibility once, and that is at the commencement of the trial or prior to it, the power to bring a challenge under this heading is vested with the accused and a State which has

jurisdiction over the case or whose acceptance of jurisdiction is required under article 13 of the Statute. Nowhere is it said that a challenge brought by either of these parties forecloses the bringing of a challenge by another equally legitimate party, nor that the right of either of the parties to bring a challenge is curtailed or otherwise affected by the Chamber's exercise of its *proprio motu* powers.

26. On the contrary, the existence of a plurality of parties vested with the power to raise challenges in matters of admissibility *per se* entails that, during proceedings in a given case, the Court may need to address the issue of the admissibility of the case more than once, including as a result of multiple challenges brought by different parties at different points in time. Article 19(4), second sentence explicitly allows for a challenge to jurisdiction or admissibility to be brought "more than once" prior to the commencement of the trial, on leave to be granted by the Court "in exceptional circumstances".[38] Furthermore, no provision is made for a compulsory joinder of challenges to admissibility by different parties. On the basis of the foregoing, it appears beyond controversy that the accused will always be entitled to raise a challenge under article 19(2) of the Statute, whether or not the Chamber has exercised its powers under article 19(1).

27. By its very nature, the determination of the admissibility of a case is subject to change as a consequence of a change in circumstances. This idea underlies the whole regime of complementarity at the pre-trial stage, as may be evinced from several provisions of the Statute. According to article 18(7), "a State which has challenged a ruling of the Pre-Trial Chamber under this article (i.e., following the Prosecutor's determination that there would be a reasonable basis to commence an investigation on a situation) may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change in circumstances"; article 19(4) lays down the principle that a State or the accused may bring a challenge only

[38] For the purposes of the present decision, there is no need to address the issue of determining the types of scenarios which may amount to "exceptional circumstances" warranting leave by the Court within the meaning and for the purposes of article 19(4).

once, but nevertheless provides that "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 a trial"; article 19(5) enables the Prosecutor having deferred an investigation to the State to "request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions", to which request the State concerned "shall respond ... without undue delay"; according to article 19(10), when the Court has decided that a case is inadmissible, "the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17".

28. Considered as a whole, the *corpus* of these provisions delineates a system whereby the determination of admissibility is meant to be an ongoing process throughout the pre-trial phase, the outcome of which is subject to review depending on the evolution of the relevant factual scenario. Otherwise stated, 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.

29. Based upon the above provisions, it appears hardly debatable that the statutory framework envisages as a possible scenario that the issue of admissibility may be discussed more than once in the course of the proceedings. That may be the case either as a result of challenges brought by the various parties entitled to do so, or as a consequence of the Chamber exercising its *proprio motu* power under article 19(1), which does not provide for any restriction as to the number of times in which this power may be exercised.

Purpose of the appointment of counsel for the Defence in the absence of the persons sought

30. The overall regime governing the determination of the admissibility of a case deprives of any merit the Defence's arguments that a determination of the

admissibility of the Case by the Chamber at this stage would necessarily result in exposing the persons sought in the Case to "a heightened risk of judicial pre-determination" in the context of possible future challenges to the admissibility of the Case. Furthermore, such arguments appear to be the result of a misconstruction of the function and role of counsel appointed to represent the interests of the defence in the absence of the persons sought by the Court under regulation 76(1) of the Regulations.

31. Given a scenario which makes it necessary or appropriate for the Chamber to proceed on its own motion notwithstanding the absence of the persons sought by the Court, the appointment of a counsel tasked with representing the interests of the defence within the scope of the proceedings, whilst not mandatory, appears to be the procedurally appropriate way to ensure that fairness of the proceedings be preserved. Although the Appeals' Chamber judgment referred to a procedural context other than the Proceedings, the Chamber acknowledges that a need to ensure that the interests of the suspects be "borne in mind" and safeguarded may also exist in the present scenario; in this perspective, the appointment of a counsel for the Defence precisely allows these interests to be taken into account, in spite of the absence of the persons sought.

32. A closer look at the scope of the powers vested in counsel for the Defence appointed in the absence of the persons sought by the Court shows that no merit can be given to the submissions by the Defence that the absence of those persons from the Proceedings would expose them to a risk of judicial pre-determination. What matters, in a procedural context such as the one currently before the Chamber, is that the suspect be given a chance to submit arguments assisting the Chamber in its task, thus contributing to the interests of justice. It flows from the very nature and purpose of the appointment of a counsel under regulation 76(1) of the Regulations that the relevance and validity of the arguments raised by the latter be confined to the purposes of the assessment to be made by the Chamber at this stage and,

accordingly, should not prejudice the arguments which the defence may put forward at a later stage. The appointment of a counsel for the defence under the authority of this regulation, vested with a limited mandate, has indeed become the established practice of the Court whenever the person sought in the case is absent and the interests of justice require that the defence be nevertheless represented in a specific phase of the proceedings. This constitutes an adequate response to the Defence's argument that the Proceedings would violate article 67(1)(d) of the Statute.

Prospects for investigation and prosecution at the national level: change in circumstances since the referral by Uganda

33. Having established the procedural framework governing the determination of admissibility, the Chamber will now analyse the legal basis and the factual circumstances of the Case which make it legitimate and appropriate for the Chamber to exercise the power enshrined in article 19(1) at this particular stage.

34. It is well known that the cornerstone of the Statute and of the functioning of the Court is the principle of complementarity, according to which the Court "shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern ... and shall be complementary to national criminal jurisdictions". Complementarity is the principle reconciling the States' persisting duty to exercise jurisdiction over international crimes with the establishment of a permanent international criminal court having competence over the same crimes; admissibility is the criterion which enables the determination, in respect of a given case, whether it is for a national jurisdiction or for the Court to proceed. Accordingly, admissibility can be regarded as the tool allowing the implementation of the principle of complementarity in respect of a specific scenario.

35. Article 17 is the statutory provision governing the assessment of the admissibility of a case. Pursuant to article 17(1), a case is inadmissible where: *(a) The*

case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court".

36. For the purposes of the Proceedings, the relevant provisions appear to be article 17 (a) and (b), since there is no issue that the persons sought by the Court have already been tried at the national level, or that the relevant crimes attain the threshold of sufficient gravity, is at stake. Pursuant to article 17 (a) and (b), the paramount criterion for determining the admissibility of a case is the existence of a genuine investigation and prosecution at the national level in respect of the case; the willingness and ability of a State to genuinely prosecute and investigate crimes falling within the jurisdiction of the Court are the two fundamental concepts around which the notion of admissibility and the very principle of complementarity revolve.

37. The need that any cases to be brought before the Court within the context of the Ugandan situation comply with article 17 of the Statute has been a constant feature of proceedings in the Situation and in the Case since Uganda referred the Situation to the Court on 16 December 2003.[39] At the time, the Attorney General of Uganda stated that, "while both willing and able" to prosecute the alleged perpetrators of the atrocities allegedly committed in Northern and Western Uganda during the preceding seventeen years, the Ugandan judicial system had been unable to secure their arrest, principally because those alleged perpetrators operated from bases in Southern Sudan, as such beyond the reach of Ugandan law. On 28 May

[39] ICC-02/04-01/05-329-Conf-AnxB.

2004,[40] the Solicitor General of Uganda reiterated to the Court's Prosecutor that, whilst the national judicial system of Uganda was "widely recognised for its fairness, impartiality, and effectiveness", it was the Government's view that the Court was "the most appropriate and effective forum for the investigation and prosecution of those bearing the greatest responsibility for the crimes within the referred situation". This view was based on several considerations, including (i) the scale and gravity of the relevant crimes; (ii) the fact that the exercise of jurisdiction by the Court would be of immense benefit for the victims of these crimes and contribute favourably to national reconciliation and social rehabilitation; (iii) Uganda's inability to arrest the persons who might bear the greatest responsibility for the relevant crimes. On the basis of these considerations, the Solicitor General maintained that "the Government of Uganda ha[d] not conducted and d[id] not intend to conduct national proceedings in relation to the persons most responsible for these crimes, so that the cases may be dealt with by the ICC instead". In the view of Uganda, these conditions entailed that "none of the conditions of Article 17(1) of the Rome Statute appl[ied], and consequently, that such cases [we]re admissible before the ICC".[41]

38. The statements made by Uganda at the time of the referral and in subsequent communications with the Court appear relevant from both a legal and a factual perspective.

39. From a legal standpoint, centered as they are on the country's failure to act on the atrocities committed during the conflict in the North, these statements show that Uganda is aware that under the principle of complementarity, for a case to be brought before the Court, it must be established that the case is admissible.

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[40] ICC-02/04-01/05-329-Conf-AnxD.

[41] This paragraph refers to the content of documents which are currently treated as confidential. The Chamber is of the view that such references are required in light of the subject-matter of the Proceedings and are without prejudice to the current status of the documents.

40. From a factual standpoint, Uganda's statements mirror the fact that at the time of the referral prospects for achieving peace in Uganda by means of an agreement with the Lord's Resistance Army led by Joseph Kony appeared extremely narrow. The scenario began to change towards the end of the year 2004, when talks of the resumption of peace talks between the government and the LRA leadership began to resurface in national and international media. The same media reported at the time the purported wish of the Ugandan Government to withdraw its referral to the Court.

41. The signing of the Agreement and of the Annexure, respectively in June 2007 and February 2008, marks the climax of these developments.

42. These developments, constantly and closely monitored by the Chamber, led to a number of requests for information by the Chamber to Uganda, including a "*Request for information from the Republic of Uganda on the status of execution of the Warrants of Arrest*" made on 29 February 2008,[42] to which Uganda responded on 28 March 2008[43] (the "Ugandan First Response"); and an additional "*Request for further information from the Republic of Uganda on the status of execution of the Warrants of Arrest*" made on 18 June 2008,[44] to which Uganda responded on 10 July 2008[45] (the "Ugandan Second Response").

43. As noted by the Chamber in its decision opening the Proceedings, the Annexure provides for the establishment of a special division within the High Court of Uganda (the "Special Division"), with jurisdiction to "try individuals who are alleged to have committed serious crimes during the conflict" in Uganda.[46] It further provides that the Government of Uganda shall ensure that serious crimes committed during the conflict are addressed by either the Special Division or traditional justice

[42] ICC-02/04-01/05-274.
[43] ICC-02/04-01/05-286-Anx2.
[44] ICC-02/04-01/05-299.
[45] ICC-02/04-01/05-305-Anx2.
[46] Clause 7.

mechanisms and any other alternative justice mechanisms established under the Agreement.[47] The relationship between the Special Division and the International Criminal Court concerning jurisdiction over the Case is expressly addressed by the Ugandan First Response, which states that the Special Division "is not meant to supplant the work of the International Criminal Court" and that individuals for whom a warrant has been issued by the latter "will have to be brought before the special division of the High Court for trial".[48] Statements of a less specific nature appear in the Ugandan Second Response, where it is stated that the country's position remained "that there must not be impunity for the perpetrators of the crimes in Northern Uganda" and that the provisions on the Special Division of the High Court contained in the Agreement and the Annexure were "without prejudice to Uganda's commitments" under the Statute as well as the "Cooperation Agreement between the Government of Uganda and the Office of the Prosecutor".

Need for the Chamber to dispel the ambiguity entailed by the statements by Uganda as to the judicial venue where the Case should be tried

44. In the view of the Chamber, the statements made by Uganda concerning the meaning and scope of the Agreement and the Annexure within the context of its responses to the Chamber - ambiguous as they are as to where and by whom the alleged perpetrators of atrocities should be tried - show lack of clarity on the respective powers of the Court and of the national judicial authorities as to who has the last say regarding the admissibility of the Case and, as a consequence, as to the judicial venue in which the Case should be tried. Such lack of clarity is hardly dispelled by the latest statements by Uganda, according to which "in the absence of the final peace agreement and in view of the ongoing military hostilities, the provisions of the Agreement are irrelevant in respect of the four indicted fugitives"[49]. If anything, these statements seem to imply that the relevance of the Agreement *vis-*

[47] Clause 23.
[48] ICC-02/04-01/05-286-Anx2, p. 3.
[49] ICC-02/04-01/05-369-Anx2, p. 2.

à-vis the persons sought by the Court in the Case may resurface if and once the military hostilities were to cease and a final peace agreement were signed. These circumstances made it necessary and appropriate for the Chamber to exercise its *proprio motu* powers under article 19(1). Borrowing the language used by the Appeals Chamber in its decision dated 13 July 2006, albeit in respect of a procedural context other than the one of the Proceedings, the Chamber believes that lack of clarity as to the judicial authority ultimately vested with the power to decide the venue where the Case should proceed amount to "an ostensible cause impelling the exercise of *proprio motu* review".

The Court's power to determine admissibility in a given case in light of the principle "Compétence de la compétence"

45. In the view of the Chamber, the statements made by Uganda in its First Response appear to contradict each other: whilst it is said that the work of the Court "will not be supplanted" by the establishment of the Special Division, it is also said that the individuals sought by the Court in the Case "will have to be brought" before this Special Division. At the very minimum, such statements seem to rely on a number of assumptions which are inconsistent both with the system enshrined in the Statute and principles of international law. In particular, they seem to disregard the fact that, once the jurisdiction of the Court is triggered, it is for the latter and not for any national judicial authorities to interpret and apply the provisions governing the complementarity regime and to make a binding determination on the admissibility of a given case. This flows first and foremost from the wording of the *chapeau* of article 17, which states that "the Court shall determine that a case is inadmissible...". It is also entailed by and consistent with the very nature of the Court as a judicial institution and has been labelled by scholars as the "fundamental strength" of the principle of complementarity.[50] As this Chamber has highlighted in the past,[51] it is a

[50] HOLMES, The Principle of Complementarity, in LEE (ed.), *The International Criminal Court – The Making of the Rome Statute*, The Hague-London-Boston, 1999, 74.

well-known and fundamental principle that any judicial body, including any international tribunal, retains the power and the duty to determine the boundaries of its own jurisdiction and competence. Such a power and duty, commonly referred to as "*Kompetenz-Kompetenz*" in German and "*la compétence de la compétence*" in French, is enshrined in the first sentence of article 19(1), which provides that "the Court shall satisfy itself that it has jurisdiction in any case brought before it".

46. For the purposes of this decision, the Chamber wishes to highlight that one of the major consequences entailed by this principle is that it is also for the judicial body whose jurisdiction is being debated to have the last say as to the way in which its statutory instruments should be construed. As held by the ICJ, "in the absence of any agreement to the contrary, an international tribunal has ... the power to interpret for this purpose the instruments which govern [its] jurisdiction".[52] Since admissibility is the criterion allowing the Court to identify which cases, among those in respect of which it has jurisdiction concurrently with one or more national judicial systems, it is appropriate for it to investigate and prosecute under the complementarity regime, it is the view of the Chamber that it is for it to construe and apply the rules on admissibility as well.

The preliminary and partial nature of the measures taken with a view to implementing the Agreement and the Annexure: inappropriateness for the Chamber to engage in hypothetical judicial decision-making

47. Having established the legitimacy of its recourse to the discretionary power vested in it under article 19(1), second sentence, of the Statute, the Chamber will now

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[51] ICC-02/04-01/05-147, paras. 22-23.

[52] International Court of Justice, Judgment of 18 November 1953, *Nottebohm case (Liechtenstein v. Guatemala)*, ICJ Reports, 1953, p. 119. See also International Court of Justice, Judgment of 2 February 1973, *Fisheries Jurisdiction Case ((United Kingdom of Great Britain and Northern Ireland v. Iceland)*, ICJ Reports, 1973, p. 3; Judgment of 26 November 1984, *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. USA)*, ICJ Reports, 1984, p. 392; Order of 31 March 1988, *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)*, ICJ Reports, 1988, p. 8.

turn to the analysis of the information submitted to it regarding the proceedings to be held at the national level. In this respect, substantive information was submitted by the *Amici curiae* on the organizational and institutional developments that have followed the signature of the Annexure. In particular, it appears that in May 2008 the Principal Judge of the High Court of Uganda selected a number of judges to serve on the Special Division and that the Justice, Law and Order Sector set up a 'Transitional Justice Working Group", which is currently "considering the need for the enactment of new legislation for the Special Division, both substantive and procedural", as well as studying legislation of countries including Sierra Leone, the Netherlands and Rwanda. Temporary premises where the Special Division may be housed are reportedly being looked for, while construction of *ad hoc* premises is scheduled for the financial year June 2009-June 2010. A War Crimes Unit has been established by the Director of Public Prosecutions, and currently has a staff of six prosecutors who are scheduled to undergo special training; it is also envisaged that they will be joined by additional prosecutors of Ugandan nationality currently serving in international criminal tribunals.

48. However, the *Amici curiae* also point out that to date there have been no "public consultations or formal parliamentary debates on the policies and procedures that underpin the special Division, nor on any draft law relating to the Special Division", nor any "publicly available policy documents, draft strategic plans or budgets relating to the Special Division". With regard to the individuals reportedly designated in May 2008 by the Principal Judge of the High Court of Uganda to serve on the Special Division, the *Amici curiae* note that it is possible that those judges may "be transferred at a later stage to other fields or divisions within the High Court, and that other judges would be brought in to replace them". With respect to legislative developments, they report that no formal legal text relating to the Special Division is available and that draft legislation implementing the Statute is pending before the Ugandan Parliament. The Government of Uganda itself, in its First Response, noted that "the enactment of the relevant legislation shall take place

after the signing of the final peace agreement" and that, accordingly, it was "yet to take any steps towards the implementation of the Agreement or the Annexure".[53]

49. The information summarized above, albeit of enormous interest to the Chamber, appears without any context which would allow the Chamber to properly address it in a full-fledged determination of the admissibility of the Case. As confirmed not only by the *Amici curiae* submissions, but also by Uganda itself as recently as 16 February 2009, the measures undertaken to implement the provisions of the Agreement and the Annexure are "in the initial stages" and "a lot is yet to be done".[54] It remains a fact that the Agreement has not yet been signed and that neither the Agreement nor the Annexure has been submitted to the Parliament. It is not until both documents can be regarded as fully effective and binding upon the parties that a final determination can be made regarding the admissibility of the Case, since the Chamber will only be in a position to assess the envisaged procedural and substantive laws in the context and for the purposes of article 17 of the Statute after they are enacted and in force. In this respect, the contents of the envisaged legislation regarding the substantive and procedural laws to be applied by the Special Division, as well as the criteria presiding over the appointment of its members, will be critical.

50. By the same token, the very fact that the enactment of new procedural and substantive legislation is envisaged makes it superfluous for the Chamber to determine the admissibility of the Case against the scenario which would apply if the Case were to be investigated and prosecuted before the Ugandan courts on the basis of Uganda's procedural and substantive legislation currently in force. In this connection, the information submitted by the *Amici curiae* regarding the difficulties encountered by victims of alleged LRA crimes, the limited capacity of the Ugandan system to assert jurisdiction over members of the LRA due to the Amnesty Act

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[53] ICC-02/04-01/05-286-Anx2, p. 2.
[54] ICC-02/04-01/05-369-Anx2, p. 2.

passed in 2000, or the debate concerning the extent to which the LRA leadership might actually benefit from the provisions of that Act, whilst interesting for the Chamber as a matter of information, are equally unsuitable to build the background for a proper determination.

51. On the basis of the above considerations, the Chamber takes the view that it would be premature and therefore inappropriate to assess the features envisaged for the Special Division and its legal framework. Accordingly, the purpose of the Proceedings remains limited to dispelling uncertainty as to who has ultimate authority to determine the admissibility of the Case: it is for the Court, and not for Uganda, to make such determination. To go beyond this would be tantamount to engaging in hypothetical judicial determination, which appears *per se* inappropriate.

52. Pending the adoption of all relevant legal texts and the implementation of all practical steps, the scenario against which the admissibility of the Case has to be determined remains therefore the same as at the time of the issuance of the Warrants, that is one of total inaction on the part of the relevant national authorities; accordingly, there is no reason for the Chamber to review the positive determination of the admissibility of the Case made at that stage.

FOR THESE REASONS, THE CHAMBER HEREBY

DETERMINES that at this stage the Case is admissible under article 17 of the Statute.

Done in English and French, the English version being authoritative.

Judge Mauro Politi
Presiding Judge

Judge Hans-Peter Kaul

Judge Ekaterina Trendafilova

Dated this Tuesday, 10 March 2009

At The Hague, The Netherlands.