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Hello, my name is Rod Rastan. I work as a legal advisor in the Office of the Prosecutor at the ICC. And I am speaking in my personal capacity on article 19. This is quite a long provision. So, within the scope of time that we have in this introductory lecture, I will have to, of course, keep it quite short and brief, even though there are lots of issues to discuss. So, let's jump straight in, in relation to article 19(1).

This general provision relates to the competence that any court must have to determine the scope of its own competence. And this of course, reminds us of the decision by the Appeals Chamber at the ICTY in the Tadić case, relating to the, if you recall, the principle of *compétence de la compétence*, *Kompetenz-Kompetenz*. Again, stating out that it is the incidental inherent jurisdiction of any judicial or arbitral tribunal to determine its own competence, which it said was a necessary component of the exercises of its own judicial functions. So, in that context it was determining the scope of its own competence in relation to a challenge brought as to the authority of the Security Council to even set up the ICTY as a subsidiary body to the Security Council.

So, the same type of principle as mentioned is reflected here. Of course, the Rome Statute had the benefit of being drafted after the ICTY, and particularly after that decision also in 1995. So, this principle is not only embedded in article 19(1), but also has been reflected in several decisions by chambers of this Court, including the Appeals Chamber.

So, specifically the scope of the issues that are referred to in article 19, as you can see from the title, of course, related to both the jurisdictional challenges and challenges in relation to the admissibility of the case. And admissibility, as you know in article 17, is broken down into two components. One is, [the] cluster of issues related to complementarity. So, the existence or genuineness of national proceedings, as well as the issue of gravity, the gravity of the case in relation to 17(1)(d).

In relation to 19(1), it's a power which courts can also trigger on their own motion, as it says there. Indeed, in the Kony case, Kony *et al*. case, concerning the situation in Uganda, the allegations against the LRA, Lord's Resistance Army. In that situation, indeed, the Court proceeded to examine this issue of admissibility on its own initiative. It did so following some discussion and reports that it saw in the media, suggesting that the government of Uganda would, if it arrested Joseph Kony, that it would proceed to hear the case domestically and would make a decision on it. The Pre-Trial Chamber found it necessary, in the context of

those statements, to clarify essentially who gets to decide where the case is heard, so as a question of forum determination. In that case this is – I'm just bringing it up, sorry for my distraction – this is decision 377, in the record of the case, in the Kony *et al*. case, of the 10th of March 2009. As I said, the Pre-Trial Chamber, while noting that the issue of admissibility at this stage was premature, and so on, but took the opportunity to re-emphasize that ultimately in relation to the actual finding of admissibility, and the determination on which forum gets to decide, it referred to its own power to do so. This is in paragraph 45. Also, it referred to article 91 and the principle of *compétence de la compétence*. So, it says, that once the jurisdiction of the Court is triggered, it is for the latter − meaning the Court and not for any national jurisdiction − to interpret and imply the provisions governing the complementarity regime and to make a binding determination on the admissibility of a given case. It goes on to say that − it goes on to cite John Holmes - one of the key coordinators related to part 2 of article 17, who had referred to this as being the fundamental strength of the principle of complementarity. Then [the Chamber], recalling the Tadić case and others, said that "it is a well-known and fundamental principle that any judicial body, including any international tribunal, retains the power and the duty to determine the boundary of its own jurisdiction and competence. Such a power and duty, commonly referred to as *kompetenzen der kompetenze* in German and *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." So, as I said, we have to go quite quickly through these provisions. So, I will stop there, but at least you have one example of the Court triggering its own competence to examine jurisdiction under admissibility, in that case admissibility.

Paragraph 2, relates to others who may bring a challenge on the basis of either jurisdiction or admissibility. And (a), (b), (c), lists evidently the accused person, or the person for whom an arrest warrant or summons to appear has been issued. So, prior to being accused they are first a suspect and then accused after confirmation of charges. That's the general thrust of the position the Court has taken in terms of those labels of accused and suspect. So, that individual may bring a challenge based on either jurisdiction or admissibility.

A state which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case, or has investigated or prosecuted − so that's related to the complementarity component of admissibility. Interestingly, gravity is not mentioned there. So, it seems to be more limited, in terms of the state which has jurisdiction over the case. Note there, that it says a state which has jurisdiction, it doesn't say a State Party. And indeed, that informs our general understanding of article 17, that the Court is not limiting its consideration of complementarity only to State Parties actions. If complementarity really means something, it must surely extend to all states that have the ability, that may be engaging complementary exercise of jurisdiction, not just State Parties. There is no reason to exclude states that are not parties.

If one also considers that complementarity also has an essential component that relates to the rights of the defendant, particularly in relation to *ne bis in idem*, or most evidently, it doesn't seem logical why a person who is being proceeded against at the Court cannot raise a double jeopardy or *ne bis in idem* claim, in relation to a previous judgment on a conviction or acquittal, simply because of the fact that it was held by the authorities or by a state that is not a party to the Statute. So, (b) is of general application and the case law of the Court also upheld that issue both in the Al-Senussi and Saif Al-Islam Gaddafi cases, coming out of the Libya situation, which relates to (a) – well Libya being a state not party to the Statute - the subject of a Security Council referral. The [Pre-Trial Chamber] in those cases also took the opportunity of reaffirming that, indeed, also states not party to the Statute may challenge the jurisdiction of, and admissibility of a case under article 19, confirming that provision.

Then (c), article 19(2)(c) - refers to a state from which the acceptance of jurisdiction is required under article 12. Which leaves it open, doesn't say what the basis should be, in terms of complementarity, gravity, but leaves it generally open. Now, the intent of this sub-paragraph seems to be a little bit different to b, because it seems to be a jurisdictional pre-condition that is at challenge here. Reminding that a state from which the acceptance of jurisdiction is required under article 12, refers to the scenario in article 12(2) and (3), whereby in order for the Court to have jurisdictional competence, operating within its treaty-based framework − meaning in relation to a state party referral or proprio motu triggering of jurisdiction − the Court's jurisdiction must be based on either the state on whose territory the crime occurred or the state of the nationality of the accused persons being State Parties. Those requirements that are in the alternative. 12(3) refers to a situation where this competence can only be endowed by virtue of a declaration. So, imagining that the state has neither territorial competence nor active personality jurisdiction in relation to the alleged individuals or groups of persons, and so on, and therefore, a declaration is necessary, is required, in order to allow the Court to have those pre-conditions satisfied. So, if that's what 12(3) refers to and 19, paragraph 2(c) refers to a state from which acceptance of jurisdiction is required under article 12, it seems to be a situation where the Court may be mistaken or the Prosecutor may again be mistaken as opposed to this fulfillment of essential jurisdictional pre-conditions under article 12. Then the relevant state, who is solely competent in allowing the Court to have either territoriality or active personality being satisfied is bringing a challenge, questioning whether or not the Court even has jurisdictional competence. That's my understanding of it, my personal understanding of the purpose of 19(2)(c). But I leave that for your examination.

Let's turn to 19(3). It shows that equally the Prosecutor may also seek a ruling in relation to a question of jurisdiction and admissibility. One can imagine that maybe, situations where there are unclear issues or borderline assessments are to be made, and the Prosecutor requires guidance from the Court, even in the absence of a challenge being brought by an accused person or a suspect or a relevant state. It may do so in order to presumably also clarify certain issues which could be raised later on in the proceedings in the interest of having some of these issues resolved as early as possible. This also corresponds in some ways to the regulation that we have in Regulation 46(3) of the Regulations of the Court, which refers to the fact that any matter, request, or information not arising out of the situation assigned to a Pre-Trial Chamber may be directed to the President of the Pre-Trial Division who will then assign it to a relevant Pre-Trial Chamber. So, that provision allows things that are not yet assigned to particular benches to be raised. Perhaps an argument can be made that the ability of the Prosecutor to seek a ruling in relation to jurisdiction and admissibility could even arise before a situation is assigned to a particular chamber. So, we don't have much practice there, and whether or not that would amount to a seeking of an advisory opinion or not is unclear, whether the Prosecutor can seek that guidance in the abstract, in the sense of before a case has been brought or only after a case has been brought, and then is seeking to define certain parameters as to the understanding of the case, or the scope of a question of admissibility in relation to complementarity and gravity is also unclear. But, nonetheless the possibility of the Prosecutor approaching the Court in relation to those two aspects is set out there. And as you can see, in that context, then the referring party, in terms of the Security Council, or the State Party, or victims and/or victims may also submit observations to the Court.

Paragraph 4 relates to the timing of such challenges in relation to paragraph 2. So, that's by an accused person or suspect, state which has jurisdiction, or a state from which the acceptance of jurisdiction is required. Also, the number of times such challenges may be brought: it limits it to only one challenge, per person or per state referred to in paragraph 2. This should take place prior to or at the commencement of the trial. However, it then allows for exceptional circumstances whereby the Court may grant for more than one leave to be

brought or at a time later than commencement of trial. Then, in the latter case, this challenge would have to be limited only to a *ne bis in idem* challenge under 17(1)(c).

So, just a few things to breakdown there. In terms of the commencement of trial, that issue has come up once or twice in the cases in terms of when does the trial begin. Although trial Chambers I and II in the Lubanga and the Katanga cases took different views on this issue in relation to when the start of trial is, this issue really only arose in the Bemba case in the context of admissibility. So, really in the 19(4) situation. [There], the Trial Chamber held that the start of trial, commencement of the trial for the purposes of that provision should be understood [as the start of the trial proper], meaning when the commencement of the evidentiary phase of the trial starts with the opening statements and so on; not to the sometimes quite lengthy procedure from the assignments of a case after confirmation to a trial chamber, which sometimes involves a series of months, or if not longer, whereby the trial chambers engage in essentially pre-trial motions and decisions before the start of the evidentiary phase. So, commencement of a trial as mentioned in terms of 19(4), as one can understand if one follows the Bemba approach, is in relation to start of the evidentiary phase. Then in terms of what may constitute an exceptional circumstance, we don't have any guidance in the text itself, but perhaps one such circumstance may be a fundamental change in the underlying facts. So, perhaps, for example, the state has been unable, and that's been the reason why [the case has been declared] admissible for the ICC. Later on, they become able because they have been able to obtain the evidence or the suspect and so on. So, that may be an exceptional circumstance.

Paragraph 5, which is related to the timing, urges that states, or says in mandatory language, "states shall make a challenge at the earliest opportunity." So, this obviously is seeking to avoid situations where proceedings have progressed to quite advanced stages, only to be deferred or suspended or deferred back to the national level. Now, the issue here is whether or not this somehow prejudices states or interferes with their right to bring a well-argued submission. And in the − I don't have the record at hand for it − in the Kenya situation, where the government of Kenya brought its challenges at the confirmation stage quite early, the Pre-Trial Chamber dismissed those challenges relatively quickly, because Kenya hadn't substantiated precisely what national proceedings it was planning to do or was currently doing, nor in relation to which suspects. The person and conduct elements of its challenge were very vague and unclear. Essentially the court, the Pre-Trial Chamber confirmed by the Appeals Chamber, essentially ruled that the state had appeared to have brought its challenge, perhaps prematurely. I am not sure they use those exact words, but that's the basic thrust of it. In dismissing Kenya's plea, that, well, the reason that it had acted so quickly was because of the urging or the mandatory language in paragraph 5, that the state shall make the challenge at the earliest opportunity, the Appeals Chamber there noted that while that's true, still that doesn't require a state to bring its challenge before it's actually in a position to do so. So, it's nearly there just to encourage states that once they are in position to do so, to do so at the earliest opportunity. Obviously, a request can't be brought hypothetically in the abstract before there is actually a substantive basis to make the challenge. I think that's the general thrust that one can take away from that.

Paragraph 6, merely talks about which chamber's competent to deal with such challenges after confirmation of charges − it's the trial chamber; and also affirms that such decisions can be appealed under article 82. Under article 82, you have an automatic right of appeal in relation to decisions concerning jurisdiction and admissibility for the parties. There is no leave to appeal, this is 82(1)(a). In this context, because the entities participating in such a challenge include states, it also confirms that states also have the right to appeal such decisions, even though they are not otherwise parties to the proceedings as such.

Paragraph 7 and 8 and 9, if you like, are cluster provisions that are key in relation to the consequences of the making of a challenge. Particularly, this relates to the challenges made by a state. As you can see in paragraph 7, there is an absolute obligation of the Prosecutor to suspend investigations pending an admissibility determination by the Court. So, once a state brings a challenge to jurisdiction or admissibility, the Prosecutor shall suspend the investigation until such time that the Court makes the determination in the course of article 17. So, this is limited to admissibility. The rationale of this provision is that if the Court might find that the case indeed [should be] deferred back to the national level, then it doesn't make sense that the Prosecutor continues investigating in a situation in which, as I say, it's still speculative as to whether or not this case will continue.

This relates also to article 95, where a state that's receiving a request under part 9, may unilaterally postpone the execution of a request that's pending where there's been a challenge to admissibility. That's still under consideration.

Now, when it says that this is until the time as when the Court makes a determination, I think this should be understood as being the first instance of determination, not the appellate review of any such a decision because the making of the determination is made at the first instance and the Appeals Chamber only reviews the correctness of that determination, it doesn't make a fresh determination. So, I think, the limit of that provision should be understood as being limited to the first instance.

Then related to this suspension, which is quite a serious consequence in terms of, procedurally, the powers of the Prosecutor. Paragraph 8 deals with certain residual issues that are related to that and which may be drastically implicated by such a suspension. So, clearly, if the Prosecutor is in the midst of collecting evidence, for example, taking a statement or testimony or examining the evidence and had begun that prior to bringing of a challenge, then the bringing of that challenge cannot interrupt that collection. So, the Prosecutor can seek authority from the Court to continue that activity. The Prosecutor can't unilaterally continue, but can seek authority from the Court to continue taking that statement or collecting that piece of evidence. Then the Court has the authority to grant it. It may grant it, something to consider.

Similarly, it refers itself back in this paragraph to article 18, paragraph 6, which says that in relation to the period where the Prosecutor under article 18 has deferred an investigation, "the Prosecutor may, on an exceptional basis, seek authority from a Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence, where there is a unique opportunity to obtain important evidence or a significant risk that such evidence may not be subsequently available." So, again you have a unique opportunity. It may be that it's an exhumation that you are trying to do, and because of the soil composition there is a risk that the evidence will no longer be available after the rainy season. Or there is a moment when the evidence has become available. Maybe somebody is maybe on their death bed, or there is another issue in terms of the window of opportunity to collect evidence. There, the Prosecutor could also make a request, if the Prosecutor is able to justify the exceptional basis for pursuing that investigative step. Preservation of evidence, obviously, also is relevant because you don't want the evidence to be tampered or lost while this challenge is pending.

[Subparagraph] c relates to the absconding of persons for whom the Prosecutor has already requested an arrest warrant. So, even though the proceedings before the Court may be put on hold, the person should not be allowed to benefit from the bringing of a challenge by absconding.

Paragraph 9, sorry, very quickly. The validity of "any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of a challenge", will not be affected. Clearly it can't be that everything that has been ruled upon is suddenly made invalid by the mere lodging of a challenge. That may be a consequence down the line, in terms of a

successful admissibility challenge. For example, that orders for arrest or surrender or other orders in relation to freezing or seizing of assets and so on, may be rescinded, or set aside. But the making of the challenge, you know, itself does not affect their validity.

Paragraph 10 deals with a situation where after a change of facts and after the case having been declared inadmissible before the Court, the Prosecutor considers that the case should come back to the ICC. The standard there is that the Prosecutor is "fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible". The interpretation of the phrase "fully satisfied" is not yet adjudicated upon, has not been adjudicated up. It is not clear whether "fully satisfied" just refers to the Prosecutor being assured and confident in his or her determination, or whether somehow, there's a higher threshold being satisfied. I would tend to think that it's really, the Statute is directing the Prosecutor to be confident and certain [in making that determination] in terms of the level of, let's say, assurance that the Prosecutor has of the safety of that determination, rather than on the soundness of that determination, rather a particular threshold to be met. But, as I say, this is yet to arise. That may result in the Prosecutor requesting for a review of that initial decision to defer the case. This issue has arisen to date in the context of the al-Senussi case, where the case has been deferred to the national level. Although the Prosecutor hasn't made a determination under article 19(10), she has indicated that she is cognizant of this possibility and is [looking at the progress of national proceedings] in the light of her power to request the triggering of article 19(10), but has not yet done so. So, that's following the conviction of al-Senussi at the first instance in Libya and allegations that that procedure was flawed, according to allegations by the UN and several human rights organizations that human rights violations in the context of that proceeding are such that they might trigger [the standard for 19(10)]. As I said, the Prosecutor is yet to be convinced that's the case, but nonetheless, that's the relevant provision and that determination will fall under.

Lastly, paragraph 11 talks about the ability of the Prosecutor to seek information on an ongoing basis, even after a case has been deferred. And it's drafted in a generic manner, so it relates to [a case having been referred] pursuant to article 17.

So, I presume it to be applicable both to where the Prosecutor has litigated on a matter and lost on the argument, or where the Prosecutor has acted pursuant to article 18 where the state has come forward and has not sought to have the investigation deferred back to, brought back to the ICC's competence. So, the scope of this application is also open. But nonetheless, the point is that the Prosecutor may request information from the relevant state. That state may make that information available to the Prosecutor and [that information that] the state provides shall be kept confidential if the state so requests. Then, if the Prosecutor decides to pursue an investigation, he or she has the duty to notify the state of that intention. It doesn't state there what that means, deciding to proceed in the investigation, whether the Prosecutor intends to trigger 19(10) or intends to bring a request for review. So, it is drafted in quite generic terms there. But it may well be the general spirit of many of these provisions, article 17, 18, 19, the principle of providing early notice between the national authorities and the Prosecutor in relation to the assignment and competence and allowing the states to avail themselves of their own procedure rights to also trigger proceedings before the Court.

So, I am sorry if some of that was quite rushed and some of that was quite vague towards the end, because there hasn't been a lot of practice in relation to 19(10) or (11), in particular. But I hope that gives a quick overview in terms of the intention of those various different paragraphs.

Thank you.