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No.: **ICC-01/09-02/11**

Date: **20 June 2011**

IN THE APPEALS CHAMBER

Before: Judge Daniel David Ntanda Nsereko, Presiding Judge
Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Usacka

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
PROSECUTOR v. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI

Public Document

Document in Support of the "Appeal of the Government of Kenya against the Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute"

Source: **The Government of the Republic of Kenya, represented by Sir Geoffrey Nice QC and Rodney Dixon**

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

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A. Introduction

1. The Government of Kenya submits this Document pursuant to Regulation 64(2) in support of its Appeal against the Pre-Trial Chamber's Decision of 30 May 2011 that the case before the ICC is admissible (the "Admissibility Decision"). As set out in its Appeal of 6 June 2011, the Government of Kenya submits that serious errors of law, errors of fact and procedural errors were made by the Pre-Trial Chamber (each of which are explained below in Part E, Part F, and Part G, respectively).

2. The Government respectfully requests the Appeals Chamber to reverse the Admissibility Decision and rule that the case is inadmissible, alternatively, to direct that the matter be sent back to Pre-Trial Chamber II or another designated Pre-Trial Chamber to remedy these errors (as explained in Part H, Relief sought, below).

B. Overview of grounds of appeal

(i) Errors of fact

3. A fundamental error was committed by the Pre-Trial Chamber in its finding that *no* investigation is presently being undertaken by the Government of Kenya into the six Suspects (as set out further in Part E below).[1]

4. Article 17(1)(a) of the Statute provides that if the "case" before the ICC "is being investigated ... by a State which has jurisdiction over it", the Court shall determine that the case is inadmissible. The ICC may retain jurisdiction if "the State is unwilling or unable genuinely to carry out the investigation". The Pre-Trial Chamber did not find that the Government of Kenya was either "unwilling" or "unable" to investigate the six Suspects. The Chamber did not deal with these questions as it based its decision solely on its finding that no investigation was in fact currently taking place. It concluded that "*there remains a situation of inactivity*". The reason for this finding was that there is an "*absence of information, which substantiates [the] Government of Kenya's challenge that there are ongoing investigations*" against the six Suspects "*up until the party filed its Reply*".[2]

[11] ICC-01/09-01/11-101, paras. 60-70; ICC-01/09-02/11-96, paras. 56-66.
[2] Admissibility Decision, para. 66.

5. It is the Government of Kenya's submission that no reasonable Pre-Trial Chamber could have made such a finding in light of the information provided by the Government of Kenya to Pre-Trial Chamber II. In particular, the report of 5 May 2011 filed by the Government of Kenya (Annex 2 to its Reply) stated *in terms* that the six Suspects were being investigated and outlined steps that were being undertaken in the investigation. It said in clear and express terms that police officers are "*currently on the ground conducting investigations as directed*". Moreover, the Government of Kenya's Reply provided detailed information on the instructions of the Commissioner of Police that:

> "The Commissioner of Police has confirmed for the purposes of providing the most up-to-date information for this Reply that the six suspects are currently being exhaustively investigated by the CID/DPP team. He confirms that the following investigative actions **are in progress**:
>
> - The location of potential witnesses with interviews taking place in relation to the file that was opened into one of the suspects *before* the Prosecutor named the six suspects, as well as in respect of the other suspects selected by the Prosecutor.
> - Government documents, records, and reports are being reviewed. In particular, meetings that have been identified by the Prosecutor as being significant are being investigated.
> - All previous inquiries that have been undertaken are being reviewed for leads and further investigative work.
> - In particular, the investigations of lower level perpetrators are being analysed to identify any patterns from which further investigation can be launched and to identify any potentially relevant witnesses to interview or re-interview. As previously explained, a "bottom up" strategy is being followed.
> - All press clippings, public statements and radio broadcasts from the relevant time are being gathered and reviewed, particularly with a view to the consideration of allegations of incitement and organisation.
> - Officers have been re-visiting the crime scenes to make inquiries and gather any evidence that could assist their investigations in respect of the six suspects." [3]

The Pre-Trial Chamber did not mention a single one of these aspects of the investigation in its Decision.

[3] Government Reply of 13 May 2011, para. 56.

6. It is impossible to conclude, when this information is taken into account, that there is "*inactivity*". The Government of Kenya accepts that it can reasonably be said that more details could be provided in respect of each component of the investigation, but it cannot be said that **no** investigation is underway. This is of critical importance because Article 17 does not require that the details of an investigation be provided to the Court. The State Party concerned must establish the *existence* of an investigation. As the Pre-Trial Chamber itself held, "the Chamber underscorces that it [complementarity] concerns **the existence or absence of national proceedings**" (para. 44). On the basis of the information provided by the Government of Kenya, there can be no doubt that an investigation into the six Suspects *has been and is in fact going on* and that it is patently wrong to find that there is "*inactivity*".

7. In any event, the Government of Kenya submitted to the Chamber that should it have any doubts about the national investigations it should *either* hear from the Commissioner of Police directly about any details of the investigation (which could be provided *in camera*, if necessary, to ensure that any confidential information which should not be made available to the six Suspects or the public at this stage, be kept private), *or* receive investigation reports by the end of July, August, and September 2011. The Chamber did not permit either of these options. Instead, it held that the parties had had sufficient opportunity to put forward their arguments and that the Government of Kenya should have submitted a detailed report by then. This approach of "shutting down" the information available to the Chamber constitutes both a serious error in itself but also shows that the Chamber ignored the evidence before it of the *existence* of an investigation about which further information could readily have been provided.[4]

8. The underlying, unstated view of the Pre-Trial Chamber could only have been that the information provided by the Government of Kenya about its national investigation was not believed. But there was no rational basis on the information before the Pre-Trial Chamber, or at all, to assume that the Government of Kenya was being dishonest or less than candid or misleading or whatever other unwritten and unexpressed term actually was part of the Chamber's thinking as reflected in this decision. The Pre-

[4] The Chamber's seeming determination to "shut Kenya out" may have led the Chamber to disregard evidence on the basis that all evidence about a State's investigation should be available and crystallised at the first moment of the State making an admissibility challenge on complementarity grounds despite this issue being one on which rulings were required of the Chamber responsive to detailed arguments of the Government of Kenya but not delivered.

Trial Chamber paid no regard to the jurisprudence of the ICC that the statements of States Parties are to be respected and must be presumed to be accurate and made in good faith unless there is *compelling evidence* to the contrary. Similarly, the Chamber ignored the strong presumption that the principle of complementarity creates in favour of the national jurisdiction, as expressed by numerous States Parties who founded the Rome Statute.

9. The Government of Kenya respectfully asserts to the Appeals Chamber that it has, of course, at all times been completely candid and open with the Court about the state of its investigation and reform processes. There is no basis *at all* to question the Government of Kenya's good faith and transparency. It is most unfortunate that Kenya was treated as a "dishonest" State without any evidence in support of this view. It is most unfortunate that despite Kenya having been a State Party at the forefront of developing and promoting the ICC, the Pre-Trial Chamber was not prepared to hear from the Government of Kenya in court to provide it with an opportunity to answer the hidden but instrumental allegation of dishonesty that must have been in the Chamber's mind before the Chamber delivered its ruling. This all shows a basic disregard for the principle of *audi alteram partem* – no one should be condemned unheard. It is hard to imagine that other State Parties in a similar position would have been treated in this way.[5]

10. The Government explained the background to its Admissibility Application, and why it believed it should bring the application now at the earliest opportunity, and the Government openly admitted the shortcomings of the past and outlined how these were now being addressed.[6] The Government provided a frank and detailed account

[5] It may be relevant to consider the position of other States under preliminary examination by the Prosecutor, and how they are being treated. For instance, despite delays of nearly 6 years the Prosecutor has not sought to launch an investigation in Colombia or been critical of any aspect of the national investigations there. He might say that this has no bearing on the situation in Kenya. However, the ICC, as with any court, does need to ensure that justice is dispensed consistently and without prejudice, discrimination or favour. See further discussion on the Court's divergent approach to Columbia and other countries below at paras. 89-91.

[6] The Appeals Chamber will recall what was said at paragraph 9 of the Government of Kenya's Application about the difficulties facing Kenya in its move to reform arising from its being a democracy and having a coalition government. Despite these difficulties the timetable of reform has been kept to and confirmation of many appointments - including of the new Chief Justice, new Deputy Chief Justice and most /all of the Supreme Court judges will be confirmed on the very day of this filing. There had been challenges (from Parliament) about the nominated DPP and about the number of women judges nominated. But these are not matters that have disturbed or delayed the reforms or the investigations that are already underway. It may be interesting to see if the Prosecutor attempts to identify any such challenges as revealing something adverse to Kenya or whether he may, perhaps recognise in them the proper playing out of the democratic process that may be much more apparent in Kenya than in some other States in which the Prosecutor has an interest in the Middle East or South America.

of the investigative steps it has undertaken to date, including when and why it commenced its investigations into the six Suspects. The Government of Kenya was, seemingly, given no'credit' of any kind by Pre-Trial Chamber for its conduct to date. Instead, when the Government of Kenya provided detailed information to the Court about the reforms that were and are underway, the Pre-Trial Chamber held this against the Government. It found that the exhibits were voluminous and mostly irrelevant, and that the fact that most of them did not deal specifically with the investigation showed that an investigation was *not* underway.[7]

11. This reasoning is fundamentally flawed. It overlooks that the Government of Kenya *had* to submit all relevant information as to its capacity and capability to investigate and prosecute international crimes in accordance with international standards as required by Article 17. The Government of Kenya had to ensure that the Chamber would *not* find that the Government had failed to submit such evidence and that its intentions were accordingly not genuine. The Government had to be sure that its capabilities to investigate and prosecute the six Suspects would not be questioned. Furthermore, the *number* of documents has nothing to do with whether an investigation is underway - one document could be sufficient to show this.

(ii) Other errors: procedural errors and errors of law

12. The Pre-Trial Chamber committed other serious errors, each of which contributed to its erroneous conclusion that there was "inactivity". In particular, the Chamber denied the Government the opportunity to provide further information about the investigation, and yet used an "absence of information" as the reason to refuse the Government's Admissibility Application. The Chamber also relied on the Government of Kenya raising a legitimate legal argument in its pleadings about the meaning of "case" in Articles 17 and 19 to support its finding that no investigation was underway and to question the Government's *bone fides*. These errors, as elaborated below, are the following:

(i) The Chamber refused the Government of Kenya's request to file updated investigation reports in July, August and September 2011 within the timetable

[7] Admissibility Decision, para. 60, 65.

proposed by the Government, *without giving any reasons*.[8] These reports would have provided further up-to-date information to the Chamber about the investigation. (See Part F below)

(ii) The Chamber refused an oral hearing which the Government of Kenya requested for the Chamber to hear evidence directly from the Commissioner of Police about the investigation.[9] None of the reasons given for this refusal addressed the Government's main argument that should the Pre-Trial Chamber harbour any doubts about the investigation, it could hear directly from the person in charge of it. The Chamber's reasons were technical and tangential, and reveal the Chamber's inclination to dispose of the Government's admissibility challenge swiftly - almost in haste - without receiving all the relevant information. (See Part F below)[10]

(iii) The Chamber refused to decide the Government's request to have its Request for Assistance under Article 93(10) determined before a decision was made on its Admissibility Application.[11] In this Request the Government asked for access to the evidence held by the ICC against the six Suspects to assist its national investigation. The Government was also not given the opportunity to reply to the Prosecutor's refusal to provide this evidence in which he accused the Government of Kenya of being involved in witness intimidation without any evidence to support such a serious allegation. (See Part F below)

(iv) The Chamber held that the determination of inadmissibility of a "case" requires the national proceedings to encompass both the *person* and the *conduct* which is the subject of the case before the ICC.[12] The Government of Kenya raised the argument that the principle of complementarity does not necesarily require that there must be an identity of individuals being investigated by a State and by the Prosecutor of the ICC to render a case inadmissible before the ICC. Leaving aside the merits of this argument (which as further explained below were not addressed at all by the Chamber, see Part

[8] ICC-01/09-01/11-101, paras. 62-63; ICC-01/09-02/11-96, paras. 58-59.
[9] ICC-01/09-01/11-101, paras. 36-42; ICC-01/09-02/11-96, paras. 32-38.
[10] No particular reason for speed or haste has been relied on by the Prosecutor or otherwise revealed.
[11] ICC-01/09-01/11-101, paras. 32-35; ICC-01/09-02/11-96, paras. 28-31.
[12] ICC-01/09-01/11-101, paras. 51-58; ICC-01/09-02/11-96, paras. 47-54.

G), the Chamber was wrong to conclude that these arguments "cast doubt on the will of the State to actually investigate" the six Suspects. The Chamber stated that "it is unclear how the Chamber could be convinced that there are actually ongoing investigations".[13] However, the Government made it abundantly clear that irrespective of the meaning of "case" as a matter of law, the six Suspects *were* being investigated. It was simply wrong to penalise the Government of Kenya for making a legal argument about the general application of Articles 17 and 19. It appears to reflect the Chamber's determination to refuse to acknowledge and address the evidence before it that established that an investigation was ongoing.

C. Standard of review in appellate proceedings

13. The law on the standard of review in appellate proceedings before the ICC is well-established. The parties may appeal on errors of law and fact and on the basis of procedural errors that are related to the impugned decision.[14] The Appellant must show that the errors alleged had a material affect on the impugned decision such that the decision would have been "substantially different".[15] This standard is plainly satisfied in the present appeal as the case would have been declared inadmissible if the Pre-Trial Chamber had properly considered the evidence and information before it of the investigation being undertaken (including by following the proper procedural steps as outlined in Part F below).

14. The Appeals Chamber has held that when reviewing a decision on the admissibility of a case "*it may justifiably interfere with a sub judice decision 'if the findings of the [Chamber] are flawed on account of a misdirection on a question of law, a misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the sub judice issues'.*"[16]

[13] Admissibility Decision, para. 56.
[14] *Prosecutor v. Kony* et al., Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, ICC-02/04-01/05-408, 16 September 2009, para. 48.
[15] *Prosecutor v. Katanga*, 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. 37.
[16] *Prosecutor v. Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges', 19 October 2010. Para. 63.

15. The Government of Kenya submits that the findings of the Pre-Trial Chamber that there was or is "inactivity" are flawed on account of a "misappreciation" of the facts upon which the findings are based, a disregard of the relevant facts about the investigation that were *before* the Chamber, and a taking into account of, and placing reliance on, extraneous and irrelevant facts.

D. Procedural History

16. Before turning to explain further each of the grounds of appeal, the Government of Kenya outlines, in shortened form, the procedural history to this appeal.

17. On 31 March 2011, the Government of Kenya filed the "Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute" requesting Pre-Trial Chamber II to determine that the cases against the six persons for whom summonses to appear have been issued, were or are inadmissible ("the Admissibility Application"). Within the Admissibility Application, the Government of Kenya asked for an oral hearing "to permit the Government the opportunity to address the Pre-Trial Chamber in respect of its Application … so that all relevant arguments can be submitted and considered"[17] and additionally for a status conference "to discuss the timetable as set out in the Application and for submissions from the parties to be made on procedure."[18]

18. On 4 April 2011, Pre-Trial Chamber II issued the "Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute", in which Pre-Trial Chamber II invited the Prosecution, the Defence and the OPCV to submit written observations in respect of the Admissibility Application by 28 April 2011. In this Decision, Pre-Trial Chamber II also rejected the Government of Kenya's request to "convene a status conference to organise the proceedings related to the challenge under article 19(2)."[19]

19. On 11 April 2011, the Government of Kenya filed a request to reply within 30 days of when the parties' Responses were to be received (until 30 May 2011).

[17] Admissibility Application of 31 March 2011, para. 20.
[18] Admissibility Application of 31 March 2011, para. 21.
[19] Decision of 4 April 2011, para. 5, 9.

20. On 18 April 2011, the OPCV filed a response to the Government of Kenya's application for leave to reply of 11 April 2011 asking the Pre-Trial Chamber to declare it inadmissible as being "premature and, in any event, improperly seek[ing] authorisation to exceed the proper scope of a reply."[20]

21. On 21 April 2011, the Government of Kenya filed the "Filing of Annexes of Materials to the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute". The Government of Kenya also filed its "Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194." In the Request for Assistance, the Government of Kenya requested "the Court and the Prosecutor provide to the appropriate Kenyan authorities the evidence in the possession of the Court and the Prosecutor [including in relation to the six Suspects] to assist the Kenyan authorities in their national investigations and prosecutions."[21] The Government of Kenya asked that its Request be determined *before* the Chamber rendered its final decision on the Admissibility Application.

22. On 21 April 2011, the Prosecutor filed the "Prosecution's response to the Government of Kenya's request to reply," in which the Prosecution supported the Government of Kenya's request to reply as far as it did not exceed "the 10 day time limit proscribed in Regulation 34(c)" of the Regulations of the Court.

23. On 28 April 2011, the Chamber received Responses to the Government's Admissibility Application from the parties, namely: Mohammed Hussein Ali, Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, Henry Kiprono Kosgey, William Samoei Ruto and Mr. Joshua Arab Sang, the Prosecutor, and the OPCV.

24. On 2 May 2011, the Government of Kenya submitted its "Application on behalf of the Government of Kenya for leave to reply to responses filed by the parties on 28 April 2011 in light of the responses being filed and of no decision being rendered in respect of the Government's filing of 11 April 2011 requesting a direction on its right to reply."

[20] OPCV Response of 18 April 2011, para. 1, 8-10.
[21] Government Request for Assistance of 21 April 2011, para. 3 (the "Cooperation Request").

25. On 2 May 2011, Pre-Trial Chamber II granted the Government of Kenya's Application for leave to reply to the parties Responses of 28 April 2011 within 10 days.

26. On 10 May 2011, the Prosecution filed the "Prosecution's Response to 'Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194'" with a corrigendum to this Response received on 12 May 2011. The Response invited the Chamber to reject the Government of Kenya's Request for Assistance on various grounds based largely on very serious, as yet unsupported, allegations about the Government of Kenya's inability to protect victims and witnesses, which went so far as to claim (without any evidence) that the Government of Kenya could be involved in witness intimidation.

27. On 13 May 2011, the Government of Kenya submitted its Reply to the Responses of the parties filed of 28 April 2011 to the Government's Admissibility Application. The Government of Kenya explained in its Reply that the six Suspects were, and are, being investigated by the Kenyan authorities.

28. On 13 May 2011, the Defence for Henry Kosgey submitted observations to the Prosecutor's response to the Government of Kenya's Cooperation Request of 21 April 2011 in which the Defence asked the Chambers to expunge from the record the Prosecutor's Response of 10 May 2011, *inter alia*, for the reason that it was "designed to place on record new allegations concerning the prospect of an impartial investigation [which may be relevant to the Government of Kenya' s Admissibility Application] ... without formal leave of the Pre-Trial Chamber".[22]

29. On 17 May 2011, the Government of Kenya submitted its Application for an oral hearing, in which the Government of Kenya requested the Chamber grant the Government of Kenya and other parties an oral hearing to make submissions to the Court on legal issues and on the evidence of its national investigation in Kenya. The Government stated that the Chamber had not ruled on the Government of Kenya's request for an oral hearing as expressed in its original Admissibility Application of 31 March 2011. It also requested the Chamber to rule on this application for an oral

[22] Observations on behalf of Henry Kiprono Kosgey to the 'Prosecution's Response to 'Request for Assistance on behalf of the Government of Kenya pursuant to Article 93(10) and Rule 194', ICC-01/09-01/11-88, 13 May 2011, paras. 5(i),(ii).

hearing separately and before it rendered its final decision on the Admissibility Application.

30. On 17 May 2011, the Defence for William Ruto and Joshua Sang filed a request to strike the Prosecutor's 10 May 2011 response to the Government's Cooperation Request stating that the request was improperly filed, that the response "contains highly defamatory, prejudicial and completely unfounded allegations against" the Suspects and that the response "greatly exceeds the scope of the Government of Kenya Request and includes matters which are more directed at the Defendants in this case."[23]

31. On 18 May 2011, the Government of Kenya submitted an application for leave to reply to the Prosecution's Response of 10 May 2011 in respect of the Government's Request for Assistance. To date no decision has been rendered on this application.

32. On 19 May 2011, the Defence for Mohammed Hussein Ali applied for leave to reply to the Prosecutor's 10 May 2011 response to the Government's Cooperation Request. The Defence asked the Chamber for leave to reply to address "the prejudicial value of the far ranging unsubstantiated allegations against the suspects" which affect the fair trial rights of the Suspects.[24]

33. On 20 May 2011, the Defence for William Ruto and Joshua Sang submitted a response to the Government's Application for an Oral Hearing of 17 May 2011, in which the Defence "fully endorses the Government application" as a "fair procedural opportunity to meet [its] burden of proof by adducing all relevant evidence, including live testimony, and demonstrating the reliability and relevance of documentary evidence by tendering it through a witness."[25]

34. On 25 May 2011, the Defence for Henry Kosgey submitted a response to the Government of Kenya's application for an oral hearing, in which the Defence

[23] Defence Request to Strike the Prosecution's Response to 'Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194', ICC-01/09-01/11-90, 17 May 2011, para. 7.

[24] Defence Application for Leave to Respond to 'Prosecution's Response to 'Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194', ICC-01/09-02/11-93, 19 May 2011, paras. 9, 11.

[25] Response on behalf of Mr. William Samoei Ruto and Mr. Joshua Arap Sang to the 'Application for an Oral Hearing Pursuant to Rule 58(2)', ICC-01/09-01/11-95, 20 May 2011, para.10.

expressed "that the additional information now provided (and anticipated in oral evidence) by the Kenyan Government, and by virtue of complementarity being at the heart of the ICC regime, an oral hearing on these important issues is necessary for the proper conduct of the proceedings."[26]

35. The Prosecutor submitted *no* response to the application for an oral hearing.

36. On 30 May 2011, the Pre-Trial Chamber II issued its Decision to the Government of Kenya's Admissibility Application of 31 March 2011 in which the Chamber rejected the Government of Kenya's Admissibility Application, finding the case admissible before the Court.[27] In the same decision, the Chamber rejected the Government's application for an oral hearing.[28] The Court further determined that the Government of Kenya's Cooperation Request of 21 April 2011 "has no linkage with the issue of admissibility" and stated that it would decide on this request in a separate decision.[29] No separate decision on the Government of Kenya's Cooperation request has, to date, been handed down.

37. On 31 May 2011, the Government of Kenya requested leave to reply to the Prosecutor's Response of 10 May 2011 in which the Government of Kenya reiterated its former application for leave to reply on 19 May 2011 and stressed that it should have a fair opportunity to respond to the very serious allegations made against the Government in respect of witness intimidation before any final decision was made by the Chamber on the merits of the Government's Request for Assistance.[30] No decision has to date been rendered on this application.

38. On 6 June 2011, the Government of Kenya submitted its Appeal against the Pre-Trial Chamber's Admissibility Decision of 30 May 2011.[31]

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[26] Response on behalf of Henry Kiprono Kosgey to the 'Application for an Oral Hearing Pursuant to Rule 58(2)', ICC-01/09-01/11, 25 May 2011, para. 5.
[27] Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-01/11-101, ICC-01/09-02/11-96, 30 May 2011.
[28] ICC-01/09-01/11-101, paras. 36-42; ICC-01/09-02/11-96, paras. 32-38.
[29] ICC-01/09-01/11-101, paras. 32-35; ICC-01/09-02/11-96, paras. 28-31.
[30] Request on behalf of the Goverment of Kenya in respect of its Application for Leave to Reply to the Prosecutor's Response of 10 May 2011 and Corrigendum of 11 May 2011 to 'Request for Assistance on behalf of the Government of Republic of Kenya pursuant to Article 93(10) and Rule 194', ICC-01/09, 31 May 2011, para. 4.
[31] Appeal of the Government of Kenya against the 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', 6 June 2011.

39. On 6 June 2011, the Government of Kenya also filed its application to the Pre-Trial Chamber for leave to appeal on a procedural error made in the Pre-Trial Chamber's of 30 May 2011, namely the Chamber's finding "that the Government's Request for Assistance of 21 April 2011 need not have been decided *before* the Chamber's final determination of the Government's Admissibility Application."[32] The Government filed this application in the alternative in the event that the Appeals Chamber did not consider this particular procedural issue to be one that materially affected the impugned Admissibility Decision of 30 May 2011.

40. On 6 June 2011, the Prosecution responded to the observations of Henry Kosgey to the Prosecutor's Response of 10 May 2011 and the Defence of Wiliam Ruto and Joshua arap Sang's Request to Strike the Prosecutor's Response in respect of the Government's Request for Assistance.[33] On 14 June 2011, the Defence of Mr. Ruto and Mr. Sang filed an application for leave to reply to the Prosecutor's Response of 6 June 2011.[34]

41. On 10 June 2011, the Prosecutor[35] and the OPCV[36] responded to the Government of Kenya's application to the Pre-Trial Chamber for leave to appeal of 6 June 2011. On 17 June 2011 the Government of Kenya applied for leave to reply to these responses. No decision has yet been rendered by the Pre-Trial Chamber on this application or the application itself for leave to appeal on the single procedural issue.

E. Errors of fact in the findings of "inactivity"

42. The Government of Kenya's submission is that the Chamber either ignored or wrongly dismissed the factual information provided by the Government about its investigation

[32] Government of Kenya's Application for Leave to Appeal a Procedural Error in the 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', 6 June 2011, para. 2.
[33] Prosecution's Consolidated Response to 'Observations on behalf of Henry Kiprono Kosgey' and the 'Defence Request to Strike the 'Prosecution's Response' to "Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194'", 6 June 2011, para. 6.
[34] Defence Request for Leave to Reply to the 'Prosecution's Consolidated Response to 'Observations on behalf of Henry Kiprono Kosgey' and the 'Defence Request to Strike the 'Prosecution's Response' to "Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194'', ICC-01/09-01/11-129, 14 June 2011, para. 11.
[35] Prosecution's Response to the Government of Kenya's Application for Leave to Appeal a Procedural Error in the Decision on Admissibility (ICC-01/09-01/11-110), ICC-01/09-01/11-120, 10 June 2011, para. 5.
[36] Response to Government of Kenya's Application for Leave to Appeal Alleged Procedural Error In Decision on Admissibility, ICC-01/09-01/11-118, 10 June 2011, para. 8.

into the six Suspects. The Chamber ignored vital information supplied by the Commissioner of Police which, as noted above, was set out in paragraphs 56 and 58 of the Government's Reply under the heading "**The present investigation**" and the Chamber erred in finding that other information submitted by the Government of Kenya showed "inactivity".

Findings about legal arguments raised by the Government of Kenya

43. The Pre-Trial Chamber launched into its findings about the national investigation by questioning the good faith of the Government of Kenya because it had raised general legal arguments about the meaning of "case". The Government of Kenya's submission is that these legal arguments have considerable merit. As outlined below (Part G, Errors of law), it cannot be right that in all circumstances in every Situation and in every case that may come before the ICC the persons being investigated by the Prosecutor must be exactly the same as those being investigated by the State if the State is to retain jurisdiction not least where the State may not hold the same evidence as may be held by the Prosecutor who may, as here, have denied his evidence to the State. There simply must be a leaway in the exercise of discretion in the application of the principle of complementarity, especially when the States Parties who established the ICC were of the view that the presumption must lie in favour of the national jurisdiction.

44. The Pre-Trial Chamber did not address the substance of this legal argument at all. It was the main legal argument put forward by the Government of Kenya. Yet, *there is not a single paragraph in the Admissibility Decision which considers the merits of this argument*. The Chamber merely cited the existing jurisprudence on the "same conduct, same person" test. But this was the very case law that was being challenged. The Government of Kenya was raising a new legal argument of importance to this case and future cases that should have at least been acknowledged as such and then dealt with by the Chamber in its deliberations.

45. It certainly should *not* have been used to make a finding that the Government of Kenya was not to be trusted in respect of the information it provided about its national investigation. This is an extraordinary connection to make and one that lacks logic or

rigour, and reveals to the extent to which the Chamber was prepared to disbelieve the Government of Kenya in the absence of any compelling evidence.

Provision of investigation reports

46. The Chamber said it was "*surprised*" that the Government of Kenya stated that it would provide an "updated report on the state of [the] investigations and how they extend upwards to the highest levels and to all cases, including those presently before the ICC … by the end of July 2011".[37] The Chamber found this statement to be an "acknowledgement" by the Government of Kenya "that so far the alleged *ongoing* investigations have no yet extended to those at the highest level of the hierarchy", including the six Suspects. This conclusion is illogical. The Government said that it would provide an "**updated**" report, meaning that investigations were already underway, and stated that the report would cover how these investigations "extend upwards", not "*will* extend upwards". Elsewhere in the Admissibility Application, the Government again makes it clear that the "Kenyan national investigative processes **do extend** to the highest levels for all possible crimes, **thus covering the present cases before the ICC**".[38] The investigations were thus not "prospective" (the word used by the Chamber).[39] The updated report *would be* submitted, but the investigations *were* underway to gather the evidence to be included in the report.

47. In any event, the determination of admissibility should not turn on a fixation with particular words in a pleading - the issue is whether an investigation *is* in fact underway. The information submitted by the Government made it absolutely clear that an investigation was underway.

48. The Chamber instead selected various sentences and phrases from the Government's pleadings and pieced them together out of context to support its finding that there is "inactivity". The Government made it plain in its Admissibility Application at the outset that it would need until the **end of September 2011** to complete its investigations into the six Suspects, and it proposed a detailed timetable for concluding its investigations.[40] It should be recalled that there is no material provided,

[37] Admissibility Application, para. 71.
[38] Admissibility Application, para. 32.
[39] ICC-01/09-01/11-101, paras. 61; ICC-01/09-02/11-96, paras. 57.
[40] Admissibility Application, para. 13.

and no assertion made, by the Prosecutor to the effect that Kenya must have evidence in its possession to prosecute any or all of the six Suspects. The timetable and deadline are crucial to bear in mind as they shaped the entire Admissibility Application. By indicating that it could present a first detailed report by the end of July 2011, the Government of Kenya was not saying that the investigations would only be underway by this time – this is the time *by which* a report would be ready to be submitted. In all the time leading up to that report, and in order to prepare the report demonstrating how the investigations extend upwards to the highest levels, including the six Suspects, the Government was and is conducting the investigations themselves.

49. The Government never claimed that its investigations into the six Suspects were very advanced or nearly completed. The Director of Criminal Investigations in his report of 5 May 2011 (Annex 2 to the Reply) explained that, apart from one Suspect, he was instructed by the Commissioner of Police to investigate specifically the six Suspects when they were named by the Prosecutor.[41] He confirms that investigations into the six Suspects are currently being conducted by his team as directed. It must be taken into account that there is no requirement in Article 17 or in any other provisions or in ICC case law that the investigations must be completed, or even nearly completed, or significantly advanced.

50. The Chamber never gave any reason why a report could not be submitted by the end of July, either in its order on the conduct of the Article 19 proceedings of 4 April or its final Admissibility Decision. It never addressed at all the Government's open and candid statement that its investigation would only be completed by the end of September 2011 in accordance with the timetable that it could achieve. Instead, the Chamber "turned the tables" on the Government of Kenya stating that "it remains unclear why the Government of Kenya has not so far submitted a detailed report on the alleged ongoing investigations". In other words, the Chamber found there was "inactivity" because it had no detailed report of the very kind it declined to accept!

51. This finding is irrational. The Government had stated in its Reply that further investigative work was required. It was for that reason that a detailed report could be submitted by the end of July 2011, while an overview of the main steps that are being

[41] Government Reply of 13 May 2011, Annex 1.

taken was provided in the Reply in the event that the Chamber would not give the Government sufficient time to file its further reports (para. 58). This shows that an investigation *is* indeed in existence. The Government provided further information in its Reply about the investigation *because* the investigation was in fact underway. The report provided with the Reply (Annex 2) was not intended, or claimed, to be detailed, but it clarified what investigations were taking place. Moreover, as noted above, Counsel having taken instructions from the Commissioner of Police included in the Reply the various steps that were being undertaken in relation to the six Suspects. As the Commissioner stated to Counsel, he was prepared to come before the Pre-Trial Chamber and answer any questions about the details of the investigation that the Chamber might require. If the Chamber had wished to receive more detailed information about the existing investigation before it rendered its Admissibility Decision – if that was the only question in its mind – it could and should in the interests of international justice and of the longevity of the principle of complementarity have obtained that detail from the Government.

52. Indeed, the national investigation has progressed since the Chamber's Admissibility Decision. The Government of Kenya will thus file updated reports on the investigation during the appellate proceedings.[42] These reports will strengthen the basis for overturning the Admissibility Decision as they will provide further confirmation that there is *activity* and not *inactivity*.

Letters and reports submitted by the Government of Kenya

53. The Chamber found that the Government of Kenya relied on "*promises for future investigations*" and presented no "concrete evidence" of current investigations (para. 60). It based this conclusion on an errorneous assessment of the letters and reports submitted by the Government of Kenya.

[42] As has been held by the Appeals Chamber the admissibility of a case is determined on the facts as they exist at the time of the proceedings concerning the admissibility challenge because admissibility depends on the investigative and prosecutorial activities of States which may change over time. The proceedings concerning admissibility are ongoing before the Appeals Chamber and all relevant facts concerning the State's investigative activities can be taken into account. See *Prosecutor v. Katanga,* 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, and *Prosecutor v. Kony* et al., Decision on the admissibility of the case under article 91(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009, paras. 25-29.

54. *First*, the Chamber focused on Annex 3 to the Application (a 78 page report on investigations into Post-Election Violence) and noted that there is no mention in this report of any of the six Suspects. But the Government of Kenya never claimed there was. The Government of Kenya specifically stated that this report was submitted by way of background for completeness.[43]

55. This report is one of the main reports that the Kenyan police have been analysing as part of its investigation into the six Suspects. As noted above, on the instructions of the Commissoner of Police, it is stated in the Reply that "*the investigations of lower level perpetrators are being analysed to identify any patterns from which further investigation can be launched and to identify any potentially relevant witnesses to interview or re-interview. As previously explained, a 'bottom up' strategy is being followed*".[44] The Chamber never commented anywhere in its Admissibility Decision about the "bottom up" strategy being following by the Kenyan authorities. Instead, it only relied on the obvious point that the 78 page report did not mention the six Suspects, and the Chamber was critical of the Government of Kenya for filing annexes that did not mention the six Suspects overlooking entirely that the Government of Kenya might simply not have any evidence in its possession despite acting in good faith damning of any or all of the six Suspects[45].

56. *Second*, the Chamber found that two annexes (Annex 1 to the Application and Annex 3 to the Reply) show only "that *instructions* were given to investigate" the Suspects and that these documents do not demonstrate that investigations were actually being undertaken.[46] A reading of the clear and express terms of these annexes shows this conclusion to be demonstrably wrong. Annex 3 to the Reply, the report from the Director of Criminal Investigation of 5 May 2011, does not give "instructions" - it states that there is a *pending* case (file 10/2008) against one of the Suspects, Mr. Ruto, and an investigation into all six Suspects is being carried out - as noted above, it reads "The team *is currently* on the ground conducting the investigations as directed. It *is* also reviewing all the previous inquiries and reports to assist in the investigation" (which includes the 78 page report referred to above).

[43] Filing of Annexes of 21 April 2011, para. 11.
[44] Government Reply of 13 May 2011, para. 56.
[45] The Appeals Chamber is respectfully reminded that neither the Prosecutor nor the Chamber has yet provided *any* evidential material to the Government of Kenya.
[46] Admissibility Decision, para. 64.

57. Annex 1 (letter from the Attorney-General to the Commissioner of Police of 14 April 2011) does state that the Commissioner is directed to investigate the six Suspects. However, this direction must be read in the context of the letter which was an instruction to conclude all cases "expeditiously" and report to the Attorney-General. It must also have been clear to the Chamber from the Director of Criminal Investigation's report of 5 May 2011 that the investigation specifically into the six Suspects had been underway from the time when the names of the six Suspects were made public by the ICC Prosecutor - in the passage cited by the Chamber it clearly states: "the Commissioner of Police **again tasked** the team of investigators to carry out exhaustive investigations relating to the Ocampo six". The six Suspects had not been excluded from investigations up until this point, and indeed, there was a case pending against one of them - this is why the Director wrote "again". Accordingly, it is beyond doubt on the basis of these documents that by the time that the Government of Kenya filed its Admissibility Application there *was* an ongoing investigation.

Summary submission

58. The Chamber erred when it found that there was "inactivity". The Chamber did not have all of the details of the investigation before it by denying itself what was and would be available, but that was not a proper reason, or a reason at all, to find that there was no investigation in existence. It was also not a reason to suggest that the Government of Kenya was being dishonest in submitting that the case presently before the ICC was being investigated by the Kenyan authorities. The Chamber adopted interpretations of every single request and submission made by the Government of Kenya, and of every piece of evidence filed by the Government, that least favoured the Government of Kenya. When the proceedings are considered as a whole, it appears as if the Chamber was determined to reject the Government's Admissibility Application and as quickly as possible.

F. Procedural errors

59. There are three procedural errors that were committed by the Pre-Trial Chamber, each of which contributed to the errors of fact in its findings that there is "inactivity":

(i) The refusal to permit the Government to file further investigation reports within the timetable proposed by the Government;

(ii) The refusal to hold an oral hearing, *inter alia*, to receive evidence from the Commissioner of Police; and,

(iii) The refusal to decide on the Government of Kenya's Request for Assistance.

Refusal to permit the Government to file further investigation reports

60. The Government of Kenya requested in its Admissibility Application that a Status Conference should be convened for Chamber to hear from the parties and to make directions on the *procedure* to be following under Rule 58 for the determination of the admissibility challenge. As explained above, the Government of Kenya made this request in order that consideration could be given to its proposed timetable of having its national investigation completed and all judicial reforms in place within 6 months by the end of September 2011. The Chamber completely ignored this proposed timetable. There is no mention of it in its Admissibility Decision and no reasons were given for rejecting it.

61. The Chamber also made no mention at all of any situations in which other States Parties have been given substantial periods of time to conduct their investigations, and whether these situations could be distinguished, if at all.[47]

62. The Chamber repeated that it wished the proceedings to be conducted expeditiously.[48] Such a consideration is obviously important, but it cannot excuse the Chamber's total failure to provide any reasons for why it believed that the timetable proposed by the Government of Kenya to complete its investigations should be rejected.

63. As a result, the Government of Kenya was denied the opportunity to file investigation reports at the end of July, August and September 2011 that would have provided further details about the investigation, and which by the end of September would have

[47] Admissibility Application, para. 8.
[48] ICC-01/09-01/11-T-1-ENG ET WT, Transcript, 7 April 2011, pg. 18, ln. 23-25; pg. 21, ln. 2-8.; ICC-01/09-02/11-T-1-ENG ET WT, Transcript, 8 April 2011, pg. 15, ln. 25 – pg. 16, ln. 11, pg. 20, ln. 21 – pg. 21, ln.1.; Decision of 4 April 2011, para. 12, 13.; ICC-01/09-01/11-76, paras. 12, 15.; ICC-01/09-02/11-81, paras. 12, 16.

produced the results of the national investigation. As noted above, further investigation reports will be submitted during the appellate proceedings as the investigation is currently progressing.

Refusal to hold an oral hearing

64. The Pre-Trial Chamber did not decide the application for an oral hearing before it decided finally on the Admissibility Application (as specifically requested by the Government of Kenya), thus depriving the Government of Kenya the opportunity to appeal this decision to deny an oral hearing before the Chamber ruled on the merits of the admissibility challenge.

65. The Chamber gave three reasons for rejecting the application for an oral hearing: (i) the Government's request for an oral hearing in its Admissibility Application was in fact its request for a Status Conference which was denied by the Chamber in its scheduling order of 4 April 2011, or alternatively the Chamber had decided to confine the engagement of the parties to written observations in its decision of 4 April 2011 which the Government of Kenya did not appeal; (ii) as the Chamber had already ruled on an oral hearing in its decision of 4 April, the Government's application was in effect a request for reconsideration, which are not permitted before the ICC under the Statute and Rules; and, (iii) "the Chamber believes that it has given all parties and participants ample opportunities to put forward all arguments regarding the admissibility challenge … the Chamber is no persuaded that a *second round of submissions* is needed prior to making a determination on the merits of the Application".

66. Only the third reason purports to deal with the substance of the Government's application. Even then it fails to address the Government's main reason for asking for an oral hearing - it was not to make a "second round of submissions", it was to ensure that the Chamber heard directly from the Commissioner of Police about the details of the national investigation into the six Suspects. The Chamber does not mention at all the hearing of this evidence - evidence that it must have regarded as vital given that it rejected the Admissibility Application on the basis of "inactivity" unless it decided in breach of all basic principles of law to reject as worthless whatever the Commissioner might have said had the Chamber allowed him to give evidence.

67. The other reasons offered by the Chamber were in fact unnecessary to give. Either the hearing was necessary to dispose fairly of the Admissibility Application or it was not. The other reasons reveal the extent to which the Chamber was determined to "close down" the receipt of any further relevant information. As noted in its Appeal, it is simply wrong for the Chamber to suggest that the Government and its Counsel did not act in good faith when making the application for an oral hearing. The Government always had in mind that it was requesting a Status Conference to deal with *procedural* matters (including whether an Oral Hearing would be held) and an Oral Hearing to argue the *merits* of the case and hear any *evidence*, as required. If there was any doubt about these matters on the part of the Chamber, it could have been clarified in a Status Conference or by a simple question being posed in writing to Counsel by the Chamber.

68. As the Chamber was silent on the Government's request for an Oral Hearing in its Decision of 4 April 2011, and given that no Status Conference was held, the Government waited appropriately until all the pleadings were filed to make its application based on the matters raised in the proceedings that could properly be dealt with at an Oral Hearing; in particular, the evidence of the details of the ongoing investigation.

69. The Government of Kenya will in due course be applying under Rule 156(3) to the Appeals Chamber to convene an oral hearing for this appeal on the grounds of the importance of the issues, the fact that the law on the various issues is not yet by any means subject to the Appeals Chamber's rulings (see below) and the fact that the Pre-Trial Chamber declined to hold any form of hearing. It may be that the Appeals Chamber will need to assess further documentary evidence in the form of reports from Kenya concerning the investigations and that this is something that could only realistically be done in an oral hearing.

Refusal to decide on the Government of Kenya's Request for Assistance

70. On 21 April 2011 the Government of Kenya requested the Court and the Prosecutor to assist Kenya in its national investigations by providing the evidence that it had gathered in relation to Post-Election Violence, including in respect of the six Suspects

(subject to the necessary protective measures). It asked the Chamber to determine this request before it decided the Admissibility Application as there may be evidence forthcoming from the Court or Prosecutor that could impact on the Government's investigation into the six Suspects. The Prosecutor refused to provide the evidence requested on the basis that the Government could be involved in witness intimidation.

71. The Chamber refused the request to decide on the Request for Assistance first before it rendered its Decision on Admissibility. In fact, it has not as yet decided on the Request for Assistance, or on the Government's request to reply to the Prosecutor's allegations about witness intimidation. Any further submissions made and decisions rendered in respect of the Request for Assistance will, the Government of Kenya would respectfully argue, *have* to be taken into account in these appellate proceedings.

72. The Chamber noted in the Admissibility Decision that the Government "never purported" in its Admissibility Application that this application was "*dependent*" on any future Request for Assistance, and that the Government should have filed them together if the Government believed that they were "inter-related"[49] (whether "inter-related" is a *functional* or *formal procedural* concept in this setting may have been left unclear by the Pre-Trial Chamber). The Chamber found that there was no justification for linking the Admissibility Application with the Request for Assistance, and hence stated that the Request for Assistance would be ruled upon in a subsequent decision.

73. The Government of Kenya's submission is that the Pre-Trial Chamber erred in holding that there was no link between the Government's Admissibility Application and its Request for Assistance justifying deciding the Request before the Application. As it is a procedural decision which directly affects the Admissibility Decision, it is an error that can be dealt by the Appeals Chamber as part of the present appeal. The Government of Kenya has, in the alternative, filed an application before the Pre-Trial Chamber for leave to appeal this single procedural issue on 6 June 2011. The Government submits, however, that this procedural error is one that can and should be dealt with by the Appeals Chamber as part of the present appeal as is evident from the error itself:

[49] Admissibility Decision, para. 29.

74. *First*, the Government *did* state in its Admissibility Application that receiving assistance from the Prosecutor was directly relevant and related to its Application. At para. 17 it is stated that "*The Government hopes the Prosecutor may share the outcome of his investigations to date with the appropriate Kenyan authorities in order to assist the Kenyan investigations. The Government will be enthusiastic in exploring ways in which the Prosecution could continue to co-operate with the Kenyan authorities in the future*."[50] At para. 73 the Government said that it would report to the Chamber on "*the progress made with seeking ways to co-operate with the ICC Prosecutor, assuming this is acceptable to him, for the transmission of the results of his investigations to the national authorities to assist in their investigations*".[51]

75. Representatives of the Government of Kenya met with the Prosecutor shortly after filing the Admissibility Application to request his assistance, and only filed the Government's Request for Assistance where no such assistance was forthcoming from the Prosecutor. It is wrong to criticise the Government when it did raise the issue at the earliest opportunity and when it did immediately pursue the matter. The Government has maintained from the outset that the receipt of the Prosecutor's evidence would assist its national investigation and intention to try all cases in its national courts.

76. *Second* (the conceptual point referred to above), the Government never suggested that its Request for Assistance was *procedurally* linked under the Statute, Rules or Regulations to its Admissibility Application. The Government's argument was one of a *substantive* connection, namely, that it is most sensible and efficient to decide first whether the Government would receive the Prosecutor's evidence. Were the Chamber to have considered that the Government's request was a reasonable one and should be granted, the Government would have had access to potentially important evidence against the six Suspects which it may not have been able to obtain in any other way.

77. There is nothing in the Statute, Rules or Regulations preventing the Chamber from having proceeded in this way and, as the Chamber itself has held, Rule 58 provides the Chamber with a wide discretion to determine the procedure for the proceedings that best suits the circumstances of the case. There would appear to be no good reason to

[50] Government's Admissibility Application of 31 March 2011, para. 17.
[51] Government's Admissibility Application of 31 March 2011, para. 73, and see para. 79(i).

have delayed such a decision until after the decision declaring the cases admissible. It would be unfair to have denied the Government the opportunity to rely on such evidence in its national investigations and consequently its admissibility challenge and it could cause unnecessary delays in the proceedings in that the Government may have to launch a fresh challenge to admissibility on receiving the Prosecutor's evidence.

78. It is an entirely reasonable and sensible approach for the Government of Kenya to ask for assistance while the admissibility proceedings are ongoing so that any evidence received as a result of its Request for Assistance may be taken into account as material on which the Government of Kenya's investigators can work, and be seen to be working,[52] when admissibility is considered.

G. Errors of law in the interpretation of "case"

79. The Pre-Trial Chamber committed errors of law in finding that the only test to be applied in the determination of admissibility is the "same conduct, same person" test.[53] The Chamber did not address the main legal arguments raised by the Government of Kenya, namely that this test as currently articulated by certain Pre-Trial and Trial Chambers cannot be correct. Nowhere in the Pre-Trial Chamber's Admissibility Decision does the Chamber address the substance of the Government's legal arguments.

80. Instead, the Chamber avoids the arguments by stating that the Government may have "misunderstood" the test. Yet, it must have been clear that the Government disputed the legal correctness of the test on various grounds. None was considered by the Chamber, except to question the Government's good faith (see paras. 8-11 above). The Chamber merely recited the decisions of the Pre-Trial and Trial Chambers - but these are the very decisions that the Government of Kenya challenged and asked the Chamber to review.

[52] The sense of this may be further tested by contemplation of a hypothetical devious State challenging admissibility on complementarity grounds but *not* wanting to be embarrassed by evidence believed to be in the Prosecutor's possession that might be adverse to leading figures in the State's Government apparatus. Could the State legitimately say that because it had already started its investigation, admissibility had to be tested according to the evidence in its possession just at the moment when the application was made, thus to deny itself the risk or prospect of having to deal with the evidence adverse to its leaders? Kenya, by contrast with this hypothetical case, has sought out evidence adverse to its leaders from the ICC Prosecutor.
[53] Admissibility Decision, para. 53.

81. It is correct that in the Admissibility Application the Government put forth the argument that:

> "The ICC case law has not authoritatively determined the meaning of the word 'case' in Article 17(1). It is significant that for the purposes of authorising an investigation under Article 15 in respect of the Kenya Situation the Pre-Trial Chamber held that the admissibility of the case before the ICC must be determined by whether (i) the groups of persons that are the likely to be the object of an investigation by the ICC and (ii) the crimes that are likely to be the focus of such an investigation, are being investigated or prosecuted before the national courts. The Govermnent accepts that national investigations must, therefore, cover the same conduct in respect of persons at the same level in the hierarchy being investigated by the ICC. The Kenyan national investigative processes do extend to the highest levels for all possible crimes, thus covering the present cases before the ICC."[54]

82. The Government did not "misunderstand" that this test should only apply during the Situation stage. Its argument as a general matter of law is that this test should apply at all stages, there being no sound basis to find that the persons being investigated by State must necessarily always be the same as those the ICC Prosecutor has named for the State to retain jurisdiction.

83. In the Government's Reply to the Responses of the Parties on 13 May 2011, the Government further set out its legal arguments in the following terms:

> "Further, the Government of Kenya respectfully reminds the Chamber that it made its Admissibility Application at the earliest proper moment (see paragraph 8 of the Admissibility Application), an event "triggered" by the issue of summonses against the six Kenyan nationals some few weeks beforehand. Constrained to act at the earliest moment by the Rome Statute and Rules and Regulations thereunder, the Government of Kenya may not have prepared every aspect of its Admissibility Application in detail in advance of this date and is not to be criticised for not doing so. Although, to the surprise of many, the Prosecutor had named in advance the six persons against whom he sought summonses, there was no reason for the Government of Kenya to assume that the Court would allow his application or that there was sufficient evidence to support it. Indeed, the only assumption that the Government of Kenya could make was of the presumption of innocence of individuals against whom it did not have evidence at that stage (sufficient to charge or at all), rather than the reverse. How could, or should, Kenya have investigated the specific six persons before they were named? The State could not be expected to have had the same targets as the ICC Prosecutor if his evidence had not been shared with the Government of Kenya.

[54] Admissibility Application of 31 March 2011, para. 32.

> … any argument that there *must* be identity of *individuals* as well as of *subject matter* being investigated by a State and by the Prosecutor of the ICC is necessarily false as the State may simply not have evidence available to the Prosecutor of the ICC or may even be deprived of such evidence (as here where the Prosecutor has, to date, not provided evidence he possesses to the Government of Kenya, and has now indicated that he will refuse to do so).[14] Although there may be no doubt that there is *subject matter* requiring investigation - in this case Kenya's Post-Election Violence - there is simply no guarantee that an identical cohort of individuals will fall for investigation by the State seeking to exclude ICC admissibility as by the ICC Prosecutor seeking to establish it. To find otherwise would mean a Prosecutor could establish grounds for trying individuals against whom he alone held evidence that he declined to provide to the State (as he is doing in the present case), thus denying the State even the chance of establishing complementarity grounds for excluding ICC admissibility. It could be seen as compelling State authorities to surrender independence on the 'say-so' of the ICC Prosecutor whose mere identification of possible suspects could embarrass a State to 'adjust' its own proper prosecution policy in order to avoid the State humiliation of having authority wrested away to the ICC for those chosen or identified as suspects by the Prosecutor.
>
> Further, even if the State *did* have the same evidence as that held by the ICC Prosecutor in relation to any particular individuals there can be no requirement that in order to exclude ICC admissibility the State must conduct an investigation that leads to *charging* of those very individuals. Investigations conducted by different prosecutors acting in good faith do not necessarily lead to identical conclusions: on the same evidence one prosecuting authority might proceed; another might not."[55]

84. Contrary to the Chamber's finding,[56] nothing in these arguments suggests that the Government of Kenya contended that the State need not be investigating the same conduct generally (even though the charges need not be the same). The point being made by the Government of Kenya is that the test cannot require, for good reasons, the persons always to be the same.

85. None of the decisions of Pre-Trial and Trial Chambers cited by the Pre-Trial Chamber address the legal points raised by the Government of Kenya. The points have not been raised before by a State Party in admissibility proceedings on the grounds of complementarity. Kenya is the first State Party to bring such an application based on its national investigations. It is correct that these decisions all apply a "same person" test, but each one of them do so in the context of inactivity on the part of the State concerned, and when the State was *not* challenging admissibility (the DRC, CAR, and Uganda, who had all referred the cases to the ICC). It is irrelevant that these decisions

[55] Government Reply of 13 May 2011, para. 27-28.
[56] Admissibility Decision, footnote 83.

have been "consistent on this issue", as noted by the Chamber. The issue which the Chamber failed to consider is whether the legal arguments raised by the Government of Kenya, which were never dealt with in any of the decisions cited by the Chamber, would have changed any of these decisions, or should require a different approach in the present case.

86. The Chamber acknowledged that the Appeals Chamber in the *Katanga* case had not addressed the test to be applied, yet the Chamber still found that it could *infer* that the Appeals Chamber had decided the issue:

> "The Chamber considers that the relevant part of the Appeals Chamber's Judgment must be read and understood in its context. It is true that in paragraph 81 of the Judgment the Appeals Chamber stated that 'it does not have to address in the present appeal the correctness of the 'same-conduct' test used by the Pre-Trial Chambers'. Nonetheless, in paragraph 80 it made clear that the reason for making this statement was that there was no indication that there were 'ongoing investigations or prosecutions of any crime allegedly committed by the Appellant, at Bogoro or anywhere else in the [Democratic Republic of Congo] DRC' ... A similar statement was made by the Appeals Chamber in the last three lines of paragraph 81, when it stated that 'at the time of the admissibility challenge proceedings before the Trial Chamber, there were no proceedings in the DRC in respect of the Appellant. Hence, the question of whether the 'same-conduct test' is correct is not determinative for the present appeal' ... Accordingly, the Chamber can clearly infer that the Appeals Chamber ruled on part of the test, namely that a determination of the admissibility of a 'case' must at least encompass the 'same person', which in the context of that appeal, was the Appellant himself."[57]

87. The Pre-Trial Chamber's conclusion is incorrect. The Appeals Chamber clearly did not decide as a matter of law that the determination of admissibility must encompass the same person and the same conduct. It held on the facts of the case before it that it did not need to address the *correctness* of the test as used by the Pre-Trial Chambers. It is clear that it refrained from deciding on the arguments of the parties about the merits of the test.

88. The Pre-Trial Chamber in *Katanga* had noted the Defence challenge to the correctness of the test but refrained from making a determination because of the "clear and explicit expression of unwillingness of the DRC to prosecute this case."[58] The Appeals Chamber also heard argument from the parties on the test to be applied and it

[57] ICC-01/09-01/11-101, paras. 52-58. See also, ICC-01/09-02/11-96, paras. 48-54.
[58] *Prosecutor v. Katanga,* Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07, Trial Chamber II, 16 June 2009, paras. 95.

noted the parties' objections to the interpretation of "case" that was adopted by the Trial Chamber in the *Lubanga* case, but it deferred addressing the issue because the issue "is not determinative for the present appeal."[59] Similarly, the Appeals Chamber in the *Bemba* case did not need to determine the issue as the Central African Republic had referred the case to the ICC on account of its domestic inability to conduct this trial.[60]

89. The Government of Kenya had also pointed to the practice of the Prosecutor in respect of other States in which he had considered the operation and capability of the national system as a whole as being determinative of whether he should intervene.[61] The Chamber did not refer to any of these arguments. For example, in Colombia the ICC Prosecutor initiated a preliminary examination in 2006. To date, no investigation has been initiated by the Prosecutor as the Prosecutor stated in December 2011 that:

> "The President [of Colombia] has made several commitments today. He has undertaken to do justice, to make reparation to victims and that the armed forces will respect the legal framework. If these commitments are met, Colombia is doing what everyone expects it to do, so in that sense it is my duty not to intervene when I should not intervene. When the National system works, I should not intervene …
> … The President's idea of showing what has been done, what is going to happen, and requesting and offering help is exactly the kind of leadership that [justice] requires; heads of Government to commit to doing this and announce it, even offering their expertise to other countries."[62]

90. In a recent report it was stated that Colombia was able after a difficult process to elect a Prosecutor-General; a step which the Government of Colombia says will now aid in developing a "global and comprehensive strategy of investigation with clear prosecution objective and targets."[63]

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[59] *Prosecutor v. Katanga*, 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, Appeals Chamber, 25 September 2009, Paras. 80-81.
[60] *Prosecutor v. Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges', ICC-01/05-01/08OA3, 19 October 2010.
[61] Admissibility Application, para. 8.
[62] "Colombia puede ofrecer su experiencia: fiscal jefe de la CPI", El Tiempo, 6 December 2010. (unofficial translation of original Spanish article).
[63] Kai Ambos and Floian Huber, "The Colombia Peace Process and the Principle of Complementarity of the International Criminal Court: Is there sufficient willingness and ability on the part of the Colombia authorities or whould the Prosecutor open an investigation now?", 5 January 2011.

91. Similarly, in 2007 the Prosecutor stated that a preliminary investigation had been launched into allegations of war crimes and crimes against humanity committed in Afghanistan.[64] The Prosecutor stated that he was examining "different types of allegations, including massive attacks, collateral damage exceeding what is proper, and torture" and that the Prosecutor had received information about these "allegations from many different sources."[65] However, it is reported that the Prosecutor asserted Afghanistan's rights under the principle of complementarity by stating that there would be no need for the ICC to launch an official investigation if the Afghan officials initiated a credible proceeding of their own.[66] Despite criticisms from various organisations about the inactivity of the Afghan authorities, no ICC investigation has been initiated to date.[67]

92. The Government of Kenya respectfully emphasises again that despite the legal arguments raised above, it satisfies the requirements of Article 17 for the case to inadmissible before the ICC on the grounds that it *is* investigating the six Suspects.

H. Relief sought

93. For all of the reasons stated herein, the Government of Kenya respectfully requests the Appeals Chamber to overturn and reverse the Pre-Trial Chamber's Admissibility Decision and hold that the case is not admissible before the ICC pursuant to Articles 17 and 19 of the Statute.

94. Alternatively, and depending on the Appeals Chamber's own view of the evidence already presented and to be available by the time of any final hearing or determination by the Appeals Chamber of this appeal, the Appeals Chamber should return the matter to the existing - or a reconstituted - Pre-Trial Chamber to hear and assess the evidence on issues of complementarity together with argument from all parties.

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[64] ICC webpage, "Communications Referrals and Prelimary Investigations: Afghanistan", http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/Afghanistan/; Bretter Schaefer and Steven Groves, "The ICC Investigation in Afghanistan Vindicates U.S. Policy Towards the ICC", The Heritage Foundation, 14 September 2009.
[65] Louis Charbonneau, "ICC Prosecutor eyes possible Afghanistan war crimes", Reuters, 9 September 2009.
[66] Louis Charbonneau, "ICC Prosecutor eyes possible Afghanistan war crimes", Reuters, 9 September 2009.
[67] Husain Moen & Ahmad Zia Mohammadi, "International Criminal Court (ICC) in Afghanistan: A Report on the Consultative Meeting on Obligations of Afghanistan under (ICC)", Afghanistan Watch, 24 October 2009, pg. 11-12.

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Dated 20th June 2011

London, United Kingdom