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Original: **English** | No.: **ICC-01/09-02/11 OA01**
Date: **12 July 2011**

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public Document

Prosecution's response to 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: **Office of the Prosecutor**

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

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INTRODUCTION

1. On 20 June 2011, the Government of Kenya ("Appellant") filed its "Document in Support of the 'Appeal of the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19 (2) (b) of the Statute'".[1] It claims that the Chamber's ruling[2] that the case against the three Suspects is admissible under the Statute is vitiated by factual, procedural and legal errors and seeks reversal before the Appeals Chamber.

2. The Prosecution submits that in accordance with the Statute and the consistent jurisprudence of the Court the admissibility of a case is based on the following principles: first, admissibility must be determined on the basis of the facts as they exist at the time of the challenge, and not on possible future developments; second, the burden is on the challenging party to submit all relevant information; third, the party challenging a case must unequivocally demonstrate the existence of an actual investigation, in the form of concrete, meaningful and effective investigative steps, or prosecution; finally, the investigation or prosecution must relate to *the same case*, i.e. the same persons and the same conduct being investigated or prosecuted by the Court.

3. The Pre-Trial Chamber applied these well-established principles and correctly concluded in a reasoned decision that there exists no national investigation against the three suspects, based on "the facts presented and the legal parameters embodied in the Court's statutory provisions".

4. The Appellant has failed to demonstrate that it is investigating or prosecuting any of the Suspects for the same conduct. The appeal should therefore be rejected.

[1] ICC-01/09-02/11-130 ("Appeal Brief").
[2] ICC-01/09-02/11-96 ("the Decision").

STATEMENT OF FACTS

5. On 27 December 2007, national elections were held in the Republic of Kenya.[3] Immediately after these elections, widespread attacks against civilians were perpetrated. Between 27 December 2007 and 28 February 2008, 1,133 to 1,220 persons were killed, about 3,561 people injured and up to approximately 350,000 persons displaced. Furthermore, an increased number of rapes and other forms of sexual violence occurred during this period ("Post-Election Violence").[4]

6. After the end of the Post-Election Violence, the President of Kenya appointed a judicial commission of inquiry headed by Justice Waki as members of the civil society and the public in general complained that they did not have faith in Kenya's police and demanded an independent investigation.[5]

7. After the Waki Commission completed its work, no further investigations into the Post-Election Violence were conducted in Kenya.[6]

8. On 16 December 2008, the President and Prime Minister of Kenya signed an agreement stating that they considered it necessary to establish a special tribunal in order to conduct national proceedings on the Post-Election Violence. However, the Kenyan Parliament did not approve the bill presented in February 2009 and there was no quorum to discuss the bill in November 2009.[7] The Parliament overwhelmingly opted for the ICC, rather than a local tribunal.[8]

9. On 26 November 2009, the Prosecutor filed his "Request for authorization of an investigation pursuant to Article 15",[9] having determined that "no national

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[3] ICC-01/09-3, para.3.
[4] ICC-01/09-19, paras. 108-109, 130.
[5] Reply, Anx2, p.3.
[6] Reply, Anx2, p.3.
[7] ICC-01/09-3, para.53.
[8] Reply, Anx2, p.3.
[9] ICC-01/09-3 and its annexes.

investigations or proceedings are pending against those bearing the greatest responsibility for the crimes against humanity allegedly committed".[10]

10. The Government of Kenya was on notice and had an opportunity to inform the Court of an ongoing investigation, pursuant to Article 18(1). The Government of Kenya did not make any request that the Prosecution defer its investigations pursuant to Article 18(2).[11]

11. On 31 March 2010, Pre-Trial Chamber II ("Pre-Trial Chamber" or "Chamber") issued its decision authorising the Prosecutor to commence an investigation into the situation in the Republic of Kenya.[12]

12. Upon application of the Prosecution,[13] the Chamber decided on 8 March 2011 to summon Francis Kirimi Muthaura ("Muthaura"), Uhuru Muigai Kenyatta ("Kenyatta") and Mohammed Hussein Ali ("Ali") (collectively "suspects") to appear before the Court.[14]

13. On 31 March 2011, the Appellant filed its "Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute" ("Application")[15] requesting the Chamber to determine that the case against the three suspects is inadmissible.[16] The Appellant did not contend that it is currently investigating or prosecuting any of the suspects.[17] Rather, it set forth the reforms that the Government of Kenya enacted in the two years since the Post-Election Violence to enable it to "try all cases at whatever level arising from the Post-Election Violence."[18] The Appellant further advanced the novel assertion that the case is presently inadmissible pursuant to Articles 17 and 19 as long as the

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[10] ICC-01/09-3, para.55.
[11] ICC-01/09-02/11-71, para.6.
[12] ICC-01/09-19-Corr.
[13] ICC-01/09-30-Red.
[14] ICC-01/09-02/11-1.
[15] ICC-01/09-02/11-26.
[16] ICC-01/09-02/11-26.
[17] E.g. Application, paras. 34, 47, 48.
[18] Application, para. 8, 34, 47-59**.**

Appellant intends to investigate or prosecute in the future persons "at the same level in the hierarchy being investigated by the ICC" for "the same conduct."[19] The Appellant provided the Chamber with a prospective timetable for investigations to be conducted pursuant to what it described as a "bottom up" strategy of "building on the investigation and prosecution of lower level perpetrators to reach up to those at the highest levels who may have been responsible".[20] The Appellant further informed the Chamber that the process would be completed within the next six months.[21] It offered to submit progress reports in July, August and September 2011.[22] It asked that the Chamber extend the period of "the proceedings concerning the admissibility challenge" by a six month time period.

14. On 7 April 2011, the suspects Muthaura, Kenyatta and Ali appeared as summonsed and the Chamber set the confirmation hearing to begin on 1 September 2011.[23]

15. On 21 April 2011, the Appellant filed 22 annexes amounting to more than 900 pages containing materials allegedly relevant to the Application.[24] On the same date, the Appellant also filed a request for cooperation and assistance ("Cooperation Request")[25] asking that "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 suspects] to assist the Kenyan authorities in their national investigations and prosecutions."[26] The Appellant

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[19] Application, para. 32.
[20] Application, para. 71.
[21] Application, para.13, 16, 61, i.e. by late September 2011.
[22] ICC-01/09-19-Corr.
[23] ICC-01/09-02/11-T-1-ENG, p.14.
[24] ICC-01/09-02/11-67 and its annexes.
[25] ICC-01/09-58.
[26] Cooperation Request, para.3.

asked that the Cooperation Request be determined before the Chamber rendered its decision on the Application.[27]

16. On 28 April 2011, the Prosecution,[28] the Defence of Muthaura and Kenyatta,[29] and the Defence of Ali,[30] as well as the OPCV acting on behalf of the victims[31] filed observations on the Application ("Observations").

17. On 13 May 2011, the Appellant filed its reply to the Observations together with seven annexes ("Reply").[32] The Appellant claimed that the Government of Kenya has investigated and is investigating the six ICC suspects in relation to Post-Election Violence.[33] In addition, the Appellant requested that the Commissioner of Police be heard by the Chamber to "answer, if necessary *in camera*, any questions from the Chamber about the investigations".[34]

18. On 17 May 2011, the Appellant requested an oral hearing regarding the admissibility challenge before a decision on the merits.[35]

19. On 30 May, the Chamber rendered its "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" ("Decision").[36] The Chamber rejected the Appellant's request to determine its Cooperation Request prior to a decision on the Application,[37] as well as its request for an oral hearing.[38] On the merits of the Application, the Chamber concluded that "in the absence of information, which substantiates the Government of Kenya's challenge that there are *ongoing* investigations against the three suspects, up until the party filed its Reply, the

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[27] ICC-01/09-02/11-86.
[28] ICC-01/09-02/11-71.
[29] ICC-01/09-02/11-72.
[30] ICC-01/09-02/11-70.
[31] ICC-01/09-01/11-74 and its annexes.
[32] ICC-01/09-01/11-91 and its annexes.
[33] Reply, paras.2, 29-60.
[34] Reply, paras.57-58.
[35] ICC-01/09-02/11-92.
[36] ICC-01/09-02/11-96.
[37] Decision, paras.28-31.
[38] Decision, paras.32-38.

Chamber considers that there remains a situation of inactivity. Consequently, the Chamber cannot but determine that the case is admissible".[39]

20. On 6 June 2011, the Appellant filed an appeal against the Decision pursuant to Article 82(1)(a) and Rule 154(1) ("Appeal").[40] On the same date, the Appellant filed an application for leave to appeal an alleged procedural error in the Decision pursuant to Article 82(1)(d).[41] The Prosecution responded to the latter on 10 June 2011.[42] On 20 June 2011, the Appellant filed its Document in Support of the Appeal pursuant to Regulation 64(2) ("Appeal Brief").[43]

21. On 29 June 2011, the Chamber rejected the Cooperation Request.[44] On 4 July 2011, the Appellant filed an "Update on Investigations into the six ICC Suspects".[45]

THE APPLICABLE STANDARD OF REVIEW

22. An admissibility determination is a mixed question of fact and law. In relation to factual findings, the Appeals Chamber has held that they are not reviewable unless they are "patently incorrect." The Appeals Chamber will "not review the findings of the Pre-Trial Chamber *de novo*".[46]

23. The Appeals Chamber has not yet expressly adopted a standard of review for errors of law. Under existing international jurisprudence, where an error of law is found in the impugned decision, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings accordingly.[47]

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[39] Decision, para.66.
[40] ICC-01/09-02/11-104.
[41] ICC-01/09-02/11-105.
[42] ICC-01/09-02/11-113.
[43] ICC-01/09-02/11-130.
[44] ICC-01/09-63.
[45] ICC-01/09-02/11-153 and Anx.1.
[46] ICC-01/04-01/07-572 OA6, para. 25; ICC-01/05-01/08-323 OA, para.52; ICC-01/05-01/08-631-Red OA2, paras.61-63. ICC-01/05-01/08-631-Red, para.62.
[47] *Prosecutor v Dragomir Milosevic*, Appeals Judgment, IT-98-29/1-A, 12 November 2009, paras.13-14 and footnotes cited therein.

24. To the extent the Appellant complains of an error in the Pre-Trial Chamber's exercise of discretion, the Appeals Chamber has ruled that it "will interfere with a discretionary decision only under limited conditions".[48] It will not reverse an impugned decision "simply because it would have decided differently. It can only do so when it finds that the Trial Chamber exercised its discretion incorrectly."[49] "[T]he conditions justifying appellate interference [in a discretionary decision are]: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusions of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion."[50]

25. In addition, the Appeals Chamber requires that for a successful appeal, the error raised by an appellant must have materially affected the impugned decision.[51] Accordingly, "as part of the reasons in support of a ground of appeal, an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision."[52]

[48] ICC-02/04-01/05-408 OA3, para.80.
[49] ICC-01/04-01/07-2259 OA10, para.34.
[50] ICC-02/04-01/05-408 OA3, para.80.
[51] ICC-01/04-01/07-1497 OA8, paras.37-38.
[52] ICC-02/04-01/05-408 OA3, para.48; ICC-01/05-01/08-962 OA3, paras.102, 106, 133-134; ICC-01/05-01/08-1019 OA4, para.69.

THE PROSECUTION'S SUBMISSIONS

I. Preliminary Considerations

26. The Appellant's submissions both before the Pre-Trial and Appeals Chamber[53] are tainted by a fundamental misunderstanding of the Court's admissibility scheme. The Prosecution accordingly considers it necessary, before discussing the detail of the Appellant's grounds of appeal, to recall how admissibility is to be determined according to the Court's basic documents and the applicable case-law; and to compare this scheme to the conception of admissibility underpinning the Appellant's arguments.

i) The core principles governing admissibility determinations

27. The first and fundamental principle governing determinations on admissibility is the existence or lack thereof of a national investigation or prosecution on the basis of the facts as they exist at the time of the admissibility challenge. Thus, the lodging of a challenge crystallizes the relevant point in time for the purposes of determining whether there is a national investigation covering the same case. As the Appeals Chamber has held, "[i]f, *at the time of the admissibility challenge*, the State is investigating or prosecuting a case, or has investigated a case and decided not to prosecute, the case will be inadmissible before the Court, subject to the exceptions provided for in article 17 (1) (a) and (b)."[54] The "time of the challenge" is the time at which the challenge is made, i.e. the time at which the application

[53] The Prosecution notes that a State's standing to appeal decisions under Article 19 has been called into question, on the basis that Article 82 (1) only allows the "parties" to appeal such decisions (see Christopher Staker, *Commentary on the Rome Statute of the International Criminal Court - Observers' Notes, Article by Article*, Otto Triffterer , 1477 (second edition); see also "Robert Roth and Marc Henzelin, "The Appeal Procedure of the ICC", *The Rome Statute of the International Criminal Court*, Cassese / Gaeta / Jones, 1550-1551 (2002)). The Prosecution however considers that, absent any express limitations, a State's standing to appeal should flow automatically from its standing to bring a challenge under Article 19 (see John T. Holmes, 'The Principle of Complementarity', *The International Criminal court, the Making of the Rome Statute*, edited by Roy S. Lee, 64; see also Christopher K. Hall, *Commentary on the Rome Statute of the International Criminal Court - Observers' Notes, Article by Article*, Otto Triffterer, 659 (second edition)).

[54] ICC-01/04-01/07-1497 OA8, para. 111 (emphasis added).

for a declaration of inadmissibility is filed with the Court.[55] Conversely, an admissibility challenge is *not* a protracted process involving multiple filings supplementing each other and providing updates on the alleged progress of domestic proceedings over time.[56]

28. Second, for a challenge to succeed, the party or participant bringing it must establish that there in fact exists a relevant investigation. An "investigation" for the purposes of Articles 17(1) and 19(2) means the existence at the national level of *concrete, meaningful and effective* investigative steps in relation to the specific case.[57] The empty assurance that there is an investigation in the works, without any demonstration of the steps effectively undertaken, their importance and their consistency with the goal of bringing the responsible persons to justice, must necessarily fall short of satisfying this burden. This is consistent with the object and purpose of the Statute, which is "to put an end to impunity" and to ensure that "the most serious crimes of concern to the international community as a whole must not go unpunished".[58]

29. Finally, for an admissibility challenge to be successful, the national investigation must involve the "same case" being prosecuted before the Court. Under the consistent jurisprudence of this Court, the "same case" means the "same persons

[55] See Rule 58 (1). Regulation 38(1)(c) clarifies that a "challenge to admissibility" is first and foremost a document filed with the Court.
[56] The Prosecution notes that this is the interpretation that best reflects the statutory requirement enshrined in Rule 58 (1), which aims, *inter alia*, at ensuring that the filing of the challenge provides the Court with all necessary information to make an accurate determination. While any annexes to the challenge or a reply filed by the party or State challenging the admissibility may be taken into consideration by the Chamber to determine the merits of the challenge, the Prosecution submits that the date at which it must be established that national investigations or proceedings are ongoing is that when the initial challenge is filed.
[57] The European Court of Human Rights has clarified that a national investigation must be "effective", in the sense that "it must be capable of leading to a determination" of the relevant matter. The authorities must, inter alia, take all reasonable steps to secure the evidence concerning the incident. See, inter alia, *Al-Skeini et al v. UK*, 55721/07, GC, Judgement, 7 July 2011, paras. 163-167. *Nachova et al v. Bulgaria*, Applications Nos. 43577/98 and 43579/98, Judgment, 6 July 2005, paras. 113-117; *Poltoratskiy v. Ukraine*, Application No. 38812/97, Eur. Ct. H.R., Judgment (Merits and Just Satisfaction) of 29/04/2003, para. 126; *Kuznetsov v. Ukraine*, Application No. 39042/97, Eur. Ct. H.R., Judgment (Merits and Just Satisfaction) of 29/04/2003, para. 106 and also Partly Dissenting Opinion of Judge Sir Nicolas Bratza; *Tepe v. Turkey*, Application No. 27244/95, Eur. Ct. H.R., Judgment (Merits and Just Satisfaction) of 9/05/2003, paras. 181-182.
[58] ICC-01/04-01/07-1497 OA8, para. 79.

and the "same conduct"."[59] Thus, investigations of *other* persons or *other* conduct are irrelevant for the purposes of an admissibility determination.

ii) The Appellant's positions before the Pre-Trial Chamber

30. The Appellant's Application was characterized by an approach to admissibility that was plainly incompatible with the principles described above. First, the Appellant's challenge was predicated on future developments in an investigation and the possibility that it would reach the suspects or persons at a similar level of hierarchy at some point in the future.[60] Second, the Appellant considered that it could bring a challenge that would extend for at least six months, during which time the Appellant would be furnishing the Pre-Trial Chamber updates on the developing investigations.[61] Third, the Appellant considered that it could claim that an investigation was ongoing without providing detailed information to the Pre-Trial Chamber substantiating that claim.[62] Fourth, the Appellant did not demonstrate – or even consider that it had to demonstrate[63] -- the existence of a national investigation comprising the same "case", i.e. the same persons *and* the same conduct being prosecuted by the Court, as required by the Court's consistent jurisprudence.

31. In relation to the factual situation underpinning the Application, the Appellant has clearly fallen short of meeting its burden under Articles 19 and 17. The Appellant's initial position in its Application acknowledged that there were no

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[59] The Appellant's arguments pertaining to the alleged legal error incurred by the Pre-Trial Chamber in relation to the "same conduct/same person" test are discussed separately below (see The Third Ground of Appeal, below).
[60] See below.
[61] See Application, paras. 14-18, *inter alia*. The Appellant also submitted its supporting material weeks after the filing of the challenge, first in a separate filing and subsequently as annexes to its reply (See Application and Reply).
[62] The Appellant makes this position clear at para. 5 of its Appeal Brief: "[…]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" (emphasis in the original). In its Reply, the Applicants relied on findings by this Chamber to argue that the Court must accepted statements of a State unless there is compelling evidence to the contrary, (Reply, para 76), overlooking the difference between where a State is responding in proceedings initiated by others, and where it is itself the challenging party and thus bears the burden of proof under Article 19 and Rule 58.
[63] See The Third Ground of Appeal, below.

specific and ongoing investigations against the suspects; rather, there was an alleged national effort to reform the criminal justice system and start investigations that would lead, through a "bottom up" investigative approach, to persons located at the same level in the hierarchy as those being investigated by the ICC. Measures that were expected to be taken in the near future, chiefly the appointment of the new Director of Public Prosecutions, would bolster these nascent investigative efforts.[64]

32. This position was subsequently amended: first, when requesting leave to file a reply the Appellant categorically stated that it had "made absolutely clear that the investigation was, and is, progressing".[65] In its Reply, the Appellant asserted that there was an investigation into the six ICC suspects, but subsequently qualified this assertion in various ways, including explanations that the investigations *would extend* to the highest levels, including the six ICC suspects, and that there had been insufficient evidence pointing to the need to investigate the six ICC suspects available to the Appellant.[66]

33. Accordingly, the Pre-Trial Chamber was faced with an admissibility challenge based on a flawed factual and legal basis, and unsupported by any evidence capable of demonstrating the existence of a tangible national investigation of the case involving the suspects.

iii) The "update on investigations" filed on 4 July 2011

34. As indicated in its Appeal Brief,[67] on 4 July 2011, the Appellant filed a report signed by the Director of Criminal Investigations to the Director of Public

[64] Application, paras. 17, 32, 34, 69 and 71.
[65] Application on behalf of the Government of Kenya for leave to reply to responses, filed on 28 April 2011, to Application challenging admissibility in light of the responses as filed and of no decision being rendered in respect of the Government of Kenya's filing of 11 April 2011requesting a direction on its right to reply (ICC-01/-9-02/11-76, para.8).
[66] Reply, paras. 2, 25, 27, 28, 32 and 35.
[67] Appeal Brief, para.52.

Prosecutions, dated 1 July 2011.[68] Appellant says that this report constitutes an update on the investigations into the suspects and is proof that the investigations against them is "ongoing and progressing expeditiously".[69]

35. The Prosecution submits that the Appeals Chamber should dismiss this report *in limine*. First, the Appellant submitted this report to the Appeals Chamber without seeking and obtaining leave to present additional evidence before the Appeals Chamber pursuant to Regulation 62. Second, according to the Appellant, the report of 1 July 2011 provides a statement of the "facts as they *currently* exist about the national investigations".[70] Hence, they are not proof of the state of the investigations at the time when the Application was presented (i.e. by 31 March 2011) and are therefore irrelevant as evidence to establish an error in the Chamber's finding that no investigations against the suspects were ongoing at the time when the Application was filed.[71] Third, the report consists of a statement by the Director of Criminal Investigations that certain investigative steps have been taken. However, it does not provide any proof of concrete investigative steps against the suspects as required by the Chamber in its Decision,[72] such as the identity of the persons who were allegedly questioned and the exact content of their statements. Finally, the report is unclear and inconsistent, and lacks probative value, which justifies its exclusion under Article 69(4). For instance, while stating, on the one hand, that "[f]ive witness statements were taken from persons who […] alleged that there has [sic] been meetings attended by Mr Ruto in which arming persons to commit violence was discussed and planned", the same report claims, on the other, that "none of the persons interviewed to date confirmed that any of these meetings took place" and that "[t]o date no evidence

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[68] ICC-01/09-02/11-153 and Anx1.
[69] ICC-01/09-02/11-153, para.3.
[70] ICC-01/09-02/11-153, para.3
[71] According to Article 69(4) and Rule 63(2) information that is irrelevant to the matter before the Chamber should not be admitted into evidence.
[72] Decision, paras.64-65.

has been received […] which could link any of the [ICC suspects] to the crimes as alleged by the ICC Prosecutor".[73]

II. The First Ground of Appeal

36. As its First Ground of Appeal, the Appellant contends that the Pre-Trial Chamber erred in its finding that no investigation had been undertaken into the suspects' conduct.[74] It alleges that the Pre-Trial Chamber either ignored or wrongly dismissed the factual information provided by the Appellant about its investigations of the suspects.[75] The Prosecution submits that the arguments of the Appellant in support of its First Ground of Appeal are without merit and must be rejected.

A. <u>The Appellant did not provide any proof of investigations against the Suspects</u>

i) The Appellant's burden of proof

37. The burden of proof on an admissibility challenge lies with the party or State that makes such a challenge. As ruled by Trial Chamber III, "it falls to [the party or the State] to establish the facts and other relevant matters that are said to support the argument".[76] Nevertheless, the Appellant submits that "the statements of State 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".[77] This suggestion, if accepted, would effectively reverse the burden of proof. Moreover, it misrepresents a finding of Trial Chamber III which concluded that a statement by a Government that it is unwilling or unable to investigate and prosecute may be

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[73] ICC-01/09-01/11-153, Anx1, p.2.
[74] Appeal Brief, para.3.
[75] Appeal Brief, para.42.
[76] ICC-01/05-01/08-802, para.201. Although this issue was not directly addressed by the Appeals Chamber, in a judgment on an appeal against a decision on admissibility in the case against *Katanga and Ngudjolo* (ICC-01/04-01/07-1497), the Appeals Chamber approached the appeal throughout on the basis of whether the accused had "persuaded" the Chamber by his arguments (See, for example ICC-01/04-01/07-1497, paragraphs 85 and 111; see also ICC-01/05-01/08-802, para.202).
[77] Appeal Brief, para.8.

determinative.[78] Plainly, in case of *declared inaction*, the statement of a Government that it is not acting or will not act must be given considerable weight. However, a statement by a Government that it is *actively investigating* is not equally determinative. In such a case, the Government must support its statement with tangible proof to demonstrate that it is actually carrying out relevant investigations.

ii) The assertions of the Appellant are unsupported

38. The Appellant failed to provide any tangible proof that by the time it presented the Application (i.e. on 31 March 2011) it had taken concrete, meaningful and effective investigative steps against the suspects for the conduct that constitutes the subject of the proceedings before the Court. The Appellant alleges that the suspects were being exhaustively investigated as a result of the following investigative steps: i) the location and interviewing of witnesses in a case against Ruto; ii) the investigation of meetings that have been identified by the Prosecutor as being significant; iii) the review of all relevant previous inquires, press clippings, public statements and radio broadcasts for leads and further investigative work; and iv) the gathering of evidence at the crime scene.[79]

39. The Appellant asserts that "the Commissioner of Police has confirmed […] that the six suspects are currently being exhaustively investigated".[80] However, this purported statement of the Police Commissioner as well as the alleged investigative steps referred to above are not supported by any evidence. The Chamber found that among the 29 documents annexed either to the Application (22) or the Reply (7), "only 3 annexes appear to be of some direct relevance to the investigative process alleged by the Government of Kenya [namely] annexes 1

[78] ICC-01/05-01/08-802, para.246.
[79] Appeal Brief, para.5; Appeal, para.30. See also Reply, para.56.
[80] Appeal Brief, para.5, referring to Reply, para.56.

and 3 appended to the Application and annex 2 appended to the Reply".[81] The Chamber examined these three documents in detail and correctly found that none of them contains any proof that the suspects were being investigated as alleged by the Appellant.[82]

40. As it will be explained in the following paragraphs, a proper consideration of the three documents referred to above, as well as other relevant information on the record, shows that the Pre-Trial Chamber's conclusion is correct. As the Chamber emphasised, the mere assertion that there are national investigations is not enough: the claim must be supported by "concrete steps showing ongoing investigations against the three suspects".[83]

iii) The alleged location and interviewing of witnesses in a case against Ruto

41. The Appellant claims that witnesses were located and interviewed in an investigation of Ruto.[84] Firstly, the Prosecution stresses that William Samoei Ruto is not a suspect in this case, and therefore any investigations against him would not make this case inadmissible before the Court. Moreover, as found by the Pre-Trial Chamber, the Appellant did not furnish the Chamber with any information that witnesses were located and interviewed in any investigation against Ruto. In particular, it did not provide any information about the time or content of these statements,[85] or any record that showed that the relevant witnesses were being or had been questioned.[86] The Chamber also correctly found that the Appellant did not provide any information on "whether the suspects were actually questioned

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[81] Decision, para.60. The Prosecution notes that the Appellant did not challenge this finding of the Chamber. Among the 29 annexes, there is no statement from the Commissioner of Police.
[82] Decision, paras.61-66.
[83] Decision, paras 52, 56, 57 and 60.
[84] Appeal Brief, para.5.
[85] Decision, para.64.
[86] Decision, para.65.

or not, and if so, the contents of the police or public prosecution's report regarding the questioning".[87]

42. Although a report signed by the Director of Criminal Investigations dated 5 May 2011 states that a case was opened against Ruto, a case file created and investigations commenced,[88] the Appellant did not provide the Chamber with the actual case file. Nor did the Appellant, as the Chamber noted, provide essential information about this alleged case. For instance, according to this same report, the investigations in that case "have not been completed for various reasons that include unreliable and uncooperative witnesses".[89] Nevertheless, the Appellant did not provide any information regarding the difficulties encountered, the identity of the witnesses that were approached, the reasons why they were uncooperative and any strategy of the investigating authorities to overcome these difficulties. Also, the report of the Director of Criminal Investigations says that "the matter is still under investigation because there are some areas requiring further corroboration in order to reach to a fair conclusion".[90] However, the Appellant did not provide any indication regarding the information before the relevant authorities that needed corroboration.

iv) The alleged investigation of relevant meetings, review of materials and investigation at the crime scene

43. The Appellant further argues that the information provided to the Chamber, and in particular the report of the Commissioner of Police, shows that as part of the investigation against the ICC Suspects the meetings that have been identified by the Prosecutor as being significant were being investigated.[91] This contention is unsupported. There is no reference to any investigation of the relevant meetings

[87] Decision, para.65.
[88] Reply, Anx.2, p.2.
[89] Reply, Anx.2, p.2.
[90] Reply, Anx.2, p.3.
[91] Appeal Brief, para.5. See also Reply, para.56.

in either the report of the Commissioner of Police or any other documents submitted to the Chamber.

44. Moreover, contrary to the allegation of the Appellant, the evidence before the Pre-Trial Chamber does not show that Government records, the outcome of previous inquiries, or relevant press clippings, public statements and radio broadcasts were being reviewed for leads and further investigative work.[92] According to the Appellant, this information derives from the Commissioner of Police. However, no statement by the Commissioner of Police was submitted to the Chamber. Moreover, the report of the Director of Criminal Investigations, which was produced in evidence,[93] does not include any information in relation to these alleged steps. It merely states that "the Commissioner of Police deployed a team of Senior officers to investigate all the post election violence incidents" and that their mandate was to "detect and investigate all the crimes related to the Post-Election Violence and bring to book all offenders".[94] Concerning the action taken, the report vaguely refers to a number of cases being detected, some suspects being arrested and arraigned and some cases being completed, while other cases are still pending in court or are under investigation.[95] However, nowhere in the report is there any reference to the concrete investigative steps as alleged by the Appellant.

45. The Appellant's further assertion that investigators visited the crime scene to make inquiries and gather any evidence that could assist in their investigations in respect of the six ICC suspects is also unsupported. Again, the Appellant claims that a statement from the Commissioner of Police confirms this fact, although no such statement was introduced into evidence.

[92] Appeal Brief, para.5.
[93] Reply, Anx.2.
[94] Reply, Anx.2, p.2.
[95] Reply, Anx.2, p.2.

B. The information before the Pre-Trial Chamber constitutes evidence that there was *no* ongoing investigation

46. The Prosecution submits that the information before the Chamber, and in particular annexes 1 and 3 to Application and annex 2 to the Reply, constitutes evidence that the suspects were *not* investigated prior to the submission of the Application. This further demonstrates the correctness of challenged portion of the Decision.

i) The instructions of the Attorney General and the Commissioner of Police

47. The Appellant argues that the instructions by the Attorney General of Kenya[96] and the Commissioner of Police[97] to conduct investigations against the six ICC suspects is proof that there were ongoing investigations.[98] However, both the content of the relevant documents and the fact that they post-date the filing of the Application prove the opposite: in his letter of 14 April 2011, the Attorney General noted that a number of cases had been taken to court or were still pending and that over 3,700 cases were under investigation. The letter does not state that the cases against the suspects were among them. To the contrary, it gives instruction to conclude all "pending investigations" and "*[a]dditionally* […] to investigate all other persons against whom there may be *allegations* of participation in the Post-Election Violence, including the six persons who are the subject of the proceedings currently before the International Criminal Court,"[99] confirming that no investigations had been conducted against them by 14 April 2011. Even when taken at its highest, this document only shows that the commencement of an investigation including the Suspects was instructed by the Attorney General 14 days after the challenge was filed with the Court.

[96] Application, Anx.1, p.2.
[97] Reply, Anx.2, p.4.
[98] Appeal Brief, para.57
[99] Application, Anx.1, p.2 (emphasis added).

48. Moreover, the report of the Director of Criminal Investigation dated 5 May 2011 refers to the instructions given by the Commissioner of Police to the team of investigators "to carry out exhaustive investigations relating to the Ocampo six and other high ranking citizens".[100] The same report indicates that after the disclosure of the names of the suspects, an exhaustive investigation against them was, according to the Commissioner of Police, the "way forward".[101] Had such investigations been carried out prior to 5 May 2011 as alleged by the Appellant, those instructions would be meaningless, regardless of the statement in the same report on which the Appellant relies that "[t]he team is currently on the ground conducting the investigations as directed".[102]

ii) The report of the Commissioner of Police concedes that no investigations were initiated against any of the suspects

49. The report of the Commissioner of Police states that "[w]hen the ICC Prosecutor finally disclosed the names of what came to be known as the Ocampo six, the Police investigators were taken by surprise. This was because other than Hon William Ruto, non [sic.] of the members of the Ocampo six have been mentioned previously during the investigations".[103] With this statement, the Commissioner of Police expressly concedes that by 15 December 2010, when the Prosecution in its applications for summonses to appear first made public that its investigations were focussing among others on the Suspects,[104] no investigative action had been taken against Muthaura, Kenyatta and Ali.

iii) The report on the investigations into the Post-Election Violence

50. The letter of the Attorney General dated 14 April 2011[105] refers to two reports on the investigations of the Post-Election Violence cases, dated 27 February 2009 and

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[100] Reply, Anx.2,p.3.
[101] Reply, Anx.2,p.4.
[102] Reply, Anx.2,p.4; see also Appeal Brief, para.5.
[103] Reply, Anx.2, p.3, last paragraph.
[104] ICC-01/09-30-Red.
[105] Application, Anx.1.

March 2011.[106] While the former was not produced as evidence by the Appellant, the latter was filed as annex 3 to the Application "by way of background for completeness".[107] As acknowledged by the Appellant, this report does not mention any of the suspects.[108] Yet, the Appellant submits that this is one of the "main reports" concerning Post-Election Violence investigations.[109]

51. The Prosecution submits that since this important report on the investigations and prosecutions of Post-Election Violence cases did not include any reference to the suspects, it was reasonable for the Pre-Trial Chamber to infer that no such investigation against them had taken place at least until March 2011.[110] The report by the Director of Criminal Investigations dated 5 May 2011 refers to the alleged investigation against a suspect in another case, namely William Samoei Ruto. It specifically mentions that case as being particularly "prominent" and indicates the number of the relevant case file, namely 10/2008.[111] However, if an investigation had indeed been opened against Ruto,[112] or against the three suspects in this case, all of whom are more or less prominent figures in Kenya, it could reasonably be expected that such investigation would be mentioned in the March 2011 Report.

C. <u>The additional arguments advanced by the Appellant on the First Ground of Appeal must be rejected.</u>

52. The Appellant raises additional arguments to support its claim that the Chamber erred in fact when concluding that there is no evidence regarding ongoing investigations against the suspects.[113] It alleges that the Chamber drew incorrect factual inferences from the Appellant's legal submissions and from its offer to

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[106] Application, Anx.1, p.2.
[107] Appeal Brief, para.54.
[108] Appeal Brief, para.54.
[109] Appeal Brief, para.55.
[110] Decision, para.61.
[111] Reply, Anx.2, p.2.
[112] Based on the file number referred to in Anx.2 to the Reply (10/2008), the alleged case was arguably opened back in 2008.
[113] Appeal Brief, para.3 and 42, challenging Decision, para.70.

provide investigative reports in July, August and September.[114] These arguments are without merit.

53. Contrary to what the Appellant appears to suggest, the Pre-Trial Chamber did not base its factual conclusions concerning the absence of national investigations on the fact that the Appellant challenged the "same person, same conduct" test.[115] Neither did the Chamber insinuate that the Government of Kenya was being "dishonest" or "misleading"[116] and "was not to be trusted in respect of the information it provided about national investigations".[117] The Chamber simply found that the Appellant had not provided any proof to substantiate its claim that there were ongoing investigations against the suspects.[118]

54. After discussing at length the applicable legal standard and endorsing the "same person, same conduct" test,[119] the Pre-Trial Chamber noted that the Appellant had argued that investigations "covering the present case before the ICC […] must encompass the same conduct in respect *of persons at the same level of hierarchy*".[120] Bearing in mind the erroneous legal position taken by the Appellant, the Chamber found that if the understanding of the Appellant was that it was sufficient to investigate persons at the same level of hierarchy in order for an admissibility challenge to succeed, this position "casts doubt on the will of the State to actually investigate the three suspects".[121] This conclusion is reasonable and supported by the record.

55. Moreover, the Appellant has not demonstrated that this finding had any impact on the Chamber's conclusion that "there are no concrete steps showing ongoing

[114] Appeal Brief, paras.43-52.
[115] Appeal Brief, paras.43-45.
[116] Appeal Brief, paras.8-9, 43.
[117] Appeal Brief, para.45. See also Appeal, para.3.
[118] Decision, para.66.
[119] Decision, paras.46-53.
[120] Decision, para.55.
[121] Decision, para.56. This finding is not to be understood as a conclusion as to the "unwillingness or inability" pursuant to Article 17 of the Government of Kenya to investigate. The Chamber expressly stated that it did not enter any findings to that effect (Decision, para.66).

investigations against the three suspects in this case".[122] It was this latter finding, and not the Chamber's comment on the legal position taken by the Appellant, that was determinative of its overall conclusion that "there remains a situation of inactivity" and that therefore "the case is admissible".[123] Therefore, even if the Appeals Chamber were to find that the Pre-Trial Chamber's comment on the legal position taken by the Appellant was incorrect, this would not materially affect the Decision and, as a result, would be irrelevant for this appeal.

56. The Appellant further appears to argue that the Pre-Trial Chamber erred in fact when it found that the Appellant's request to provide investigation reports in July, August and September 2011 corroborates that there were no ongoing investigations against the suspects.[124] The Appellant argues that by indicating that it could present a first detailed report by the end of July 2011, it was not saying that the investigations would only be underway by this time, but that this was the time by which a report demonstrating prior investigations against the suspects would be ready to be submitted.[125]

57. The Chamber correctly interpreted the submissions of the Appellant and did not take any statements out of context.[126] The Appellant submitted to the Pre-Trial Chamber that there had been significant developments since March 2010, including "investigations against low level perpetrators".[127] It also stated that the report to be submitted in July 2011 "is building on the investigation and prosecution of lower level perpetrators to reach up to those at the highest levels".[128] Hence, the Chamber correctly inferred from these statements that the

[122] Decision, para.56.
[123] Decision, para.66.
[124] Appeal Brief, paras.46-52; Decision, para.57-58.
[125] Appeal Brief, para.48.
[126] Appeal Brief, para.48.
[127] Application, para.34.
[128] Application, para.71; see also para.79.

so-called "bottom up" approach followed in the investigation had not yet extended to those at the highest level of hierarchy, including the suspects.[129]

58. The Appellant also argues that the report to be filed in July merely consisted of an "'updated' report".[130] However, it did not provide the Chamber with any prior investigative reports referring to the suspects that would supposedly be updated in July. The Chamber therefore correctly concluded that "it remains unclear why the Government of Kenya has not so far submitted a detailed report on the alleged ongoing investigations. If national proceedings against the three suspects to the Court's proceedings are currently underway, then there is no convincing reason to wait until July 2011 to submit the said first report."[131]

59. Finally, contrary to the contention of the Appellant, the Chamber did not require the investigations to be complete.[132] It only required that there was evidence of "concrete steps showing ongoing investigations against the three suspects in this case".[133] In this respect the Chamber correctly found that the Appellant failed to make the requisite showing.

III. The Second Ground of Appeal

60. The Appellant claims that the Pre-Trial Chamber made three procedural errors during its determination of the challenge: (a) the refusal to permit the Appellant to file further investigation reports within the timetable proposed by the Appellant; (b) the refusal to hold an oral hearing; and (c) the refusal to decide on the Appellant's request for assistance. None of these claims has merit and each will be discussed separately below.

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[129] Decision, para.58.
[130] Appeal Brief, para.46.
[131] Decision, para.59.
[132] Appeal Brief, para.49.
[133] Decision, paras.56, 66.

A. <u>The refusal to permit the Appellant to file further investigation reports within the timetable proposed by the Appellant</u>

61. The Appellant claims that the Pre-Trial Chamber erred by not providing for a timetable (as proposed by the Appellant) in order to allow the Appellant to complete its national investigation as well as all judicial reforms "within six months by the end of September 2011".[134] As a result, the Appellant claims that it could not file reports at the end of July, August and September 2011 providing further details about the investigation, and by the end of September produce the results of the investigation.[135] The Appellant also criticizes the lack of mention in the Decision of other situations in which State Parties were allegedly given substantial periods of time to conduct their investigations.[136]

62. The first argument advanced by the Appellant is predicated on an erroneous interpretation of the Court's admissibility regime, discussed above.[137] The burden on the Appellant when bringing the challenge was to demonstrate the existence of an ongoing national investigation of the same case *at that time*, as required by the governing case-law. With its proposal for a scheme whereby the Appellant would be furnishing the Pre-Trial Chamber with periodic reports over a period of six months, the Appellant was artificially trying to extend the admissibility proceedings over time, seemingly in the hope that at some point in the future there would be an actual investigation into the suspects capable of rendering the ICC's case inadmissible.[138]

63. The Pre-Trial Chamber correctly noted that its duty was to determine the admissibility of the case on the basis of existing facts, concluding that in the absence of information substantiating the Government of Kenya's claims, there

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[134] Appeal Brief, para. 60.
[135] Appeal Brief, para. 63.
[136] Appeal Brief, para. 60.
[137] See paras. 27-29 above.
[138] Appeal Brief, para. 63. This is reflected by the Applicant's intention to present after the six months the "results of the investigation".

was in fact a situation of inactivity and that therefore the case was admissible.[139] This ruling rejected, by necessary implication, the possibility of granting the Appellant's request to continue with the provision of material pertaining to the national investigation in the form of periodic reports. The Chamber's approach was logical and consistent with the legal principles governing admissibility determinations.

64. Finally, as to the Appellant's claim that the Chamber failed to consider the situation of other State Parties, the Prosecution submits that his was an irrelevant consideration for the purposes of the admissibility determination, and that accordingly the Pre-Trial Chamber was correct to disregard it. The Appellant argued that other States had been given ample time to undertake their national investigations prior to any ICC intervention.[140] However, reliance on those examples is misplaced: an investigation has not been started in any of those situations, let alone a case being formed. Rather, those situations are, as publicly acknowledged by the Office of the Prosecutor, under preliminary examination, i.e. a phase where the situations are being analyzed with a view to determining whether they merit the commencement of an investigation.[141]

65. In contrast, in the instant situation, the Prosecution, after concluding that crimes within the jurisdiction of the Court had been committed and that no national investigation or prosecution of those crimes were being undertaken, completed the preliminary examination phase and proceeded to obtain the required judicial authorization under Article 15 to commence an investigation. It also provided notice to the Appellant under Article 18(1) of its intention to commence an investigation. The Appellant did not request a deferral under Article 18(2) within

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[139] Decision, para.70.
[140] The Appellant offers Colombia, the hostilities between Russia and Georgia and Afghanistan as examples.
[141] Article 15, ICC Statute; Regulation 25-28, Regulations of the Office of the Prosecutor. See Draft OTP Policy Paper on Preliminary Examinations, paras. 25-32 *inter alia* (http://www.icc-cpi.int/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf).

the one-month statutory period. After collecting and analyzing relevant information, the Prosecution concluded that there was a solid base to bring a case against the Suspects before the Court. Thus, the Appellant cannot equate its current position and the stage of proceedings in the cases before the Court with situations that are yet to be the subject of an investigation.

B. The refusal to hold a hearing

66. The Appellant claims that the Pre-Trial Chamber did not rule on its application for an oral hearing before deciding on admissibility, thus allegedly depriving the Appellant of the opportunity to appeal the denial of that application before a ruling on the challenge was made. The Appellant's criticism of the Chamber appears to be that it did not properly consider the Appellant's intention to use the requested hearing to lead evidence from the Commissioner of Police on the details of the alleged investigation, and also that it was wrong for the Chamber to consider the Appellant's request for a status conference along with its subsequent request for an oral hearing.[142]

67. The Prosecution first notes that under Rule 58(2) it is entirely within the discretion for a Chamber to hold a hearing for the purposes of determining an admissibility challenge.[143] For the Appellant to succeed on appeal, it would have to demonstrate that the Pre-Trial Chamber abused its discretion in deciding not to hold a hearing. The Appellant's arguments fail to do so.

68. The Prosecution notes that, contrary to the Appellant's submission, and as noted by the Pre-Trial Chamber in its Decision, the Chamber made clear at a very early stage of the admissibility proceedings that it did not consider it necessary to hold a hearing for the purposes of determining the challenge: on 4 April 2011, the Pre-Trial Chamber rejected the Appellant's earlier request to convene a status conference and clarified that the Chamber intended to confine the parties "to

[142] Appeal Brief, paras. 64-68.
[143] The Chamber "may hold a hearing".

providing written observations as dictated by rules 58(3) and 59(3)".[144] If the Appellant was opposed to proceeding by written submission, it should have sought to appeal this decision, as noted by the Pre-Trial Chamber in the Decision.[145] In this sense, it is immaterial whether the Appellant meant – as it now claims – something different when it requested a status conference and when it applied for an oral hearing: the Chamber's 4 April 2011 ruling determining that the proceedings, including all interventions by the parties and participants, would be conducted in writing effectively rejected both requests.[146]

69. The Prosecution further submits that the Appellant cannot validly claim any prejudice stemming from the Chamber's decision not to hold a hearing. The Appellant was given ample opportunity to demonstrate the alleged inadmissibility of the case in the form of written documents (including a reply), as well as voluminous documentary annexes which the Chamber accepted despite the fact that they were filed without leave after the challenge (the first 22 annexes totalling over 900 pages were filed three weeks after the challenge, and the second 7 annexes comprising 74 pages were attached to the reply).[147] The same reasoning disposes of Appellant's grievances about the Chamber's alleged lack of consideration of Appellant's offer of testimony from the Commissioner of Police: the Appellant was clearly able to obtain from the Commissioner of Police a formal declaration or statement and file it with the Chamber as part of its voluminous supporting materials if it wished to rely on this evidence. Instead, it chose to include in the body of its reply unsupported representations made by counsel for the Appellant allegedly reproducing information provided by the Commissioner of Police as to the progress of the investigation, and to offer to make the

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[144] See ICC-01/09-01/11-19, para.20. See also Decision, paras.39-40.
[145] Decision, para.37.
[146] As the Pre-Trial Chamber noted in its Decision, a joint reading of paras.20 and 21 of the Appellant's Admissibility Challenge clearly points at the opposite conclusion, namely: that the Appellant's request for holding a status conference was "*in itself* the request for the oral hearing" (Decision, para.39, emphasis in the original).
[147] The 7 Annexes to the Reply were filed and admitted despite the fact that the Pre-Trial Chamber had authorized a reply in order "to engage *solely* with the relevant issues as raised in the observations received" (see ICC-01/09-01/11, para.15, emphasis in the original).

Commissioner available to answer questions from the Chamber.[148] Whatever the logic behind the Appellant's litigation strategy, no error in the Decision can be validly claimed on this basis.

C. <u>The refusal to decide on the Appellant's request for assistance prior to deciding the admissibility challenge</u>

70. The Appellant argues that the Chamber erred when it refused to decide on the Cooperation Request prior to ruling on the merits of the Application, finding that there was no link between the Cooperation Request and the Application.[149] This argument is unsupported. The Pre-Trial Chamber correctly used its discretion to defer a decision on the Cooperation Request on the basis that "a determination on the inadmissibility of a case […] does not depend on granting or denying a request for assistance under Article 93(10)".[150]

71. As correctly noted by the Pre-Trial Chamber, "the Cooperation Request was lodged […] three weeks after the Application was filed".[151] Bearing in mind that the Chamber had to determine the admissibility of this case on the basis of the facts as they existed at the time of the submission of its Application, it is unclear, and the Appellant fails to explain, how information received from the Court or the Prosecution *after* that challenge had been launched could show that previously there had been ongoing national investigations. Any potential information received as a result of the Cooperation Request could have at best triggered or advanced future investigations, but they could under no circumstances have had a retroactive impact on any investigations being conducted up until the time when the Application was filed, much less create previously non-existing investigations. Therefore, even if the Appeals Chamber

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[148] See Reply, paras.56-57. Obviously, these unsupported representations had no evidentiary value and consequently could not influence in any given manner the Chamber's Decision. See First Ground of Appeal above.
[149] Appeal Brief, para.73.
[150] Decision, para.30.
[151] Decision, para.29.

finds that the Pre-Trial Chamber erred by deferring the decision on the Cooperation Request, such an error would not materially affect the Decision. The fact that in the meantime the Pre-Trial Chamber rejected the Cooperation Request[152] further demonstrates that the deferral of the ruling on cooperation was immaterial vis-à-vis the decision on admissibility.

IV. The Third Ground of Appeal

72. The Appellant argues as a matter of law that the cases before the ICC and those at national level do not need to be exactly the same. It argues that any activity by the State will be sufficient to render a case before the Court inadmissible as long as it concerns either: (i) the same conduct, against other persons situated at the same level in the hierarchy as those being investigated and/or prosecuted before the ICC (the position outlined in its admissibility challenge);[153] or (ii) other conduct, though the same subject-matter (defined generally as crimes arising from the Post-Election Violence), against other persons situated at the same level in the hierarchy as those before the Court (the position outlined in its Reply and recalled in the present appeal).[154]

A. <u>The Chamber considered Appellant's challenge of the 'same person same conduct' test.</u>

73. In addressing the alleged errors of law, the Appellant argues that it had challenged the *same person same conduct* test and the Chamber "did not address" its arguments; that the Chamber "avoided" them; and that of the grounds put forward on the issue "[n]one was considered".[155] Instead, the Chamber merely

[152] ICC-01/09-63.
[153] Application, para. 32.
[154] Reply, para. 27; Appeal Brief para. 83.
[155] Appeal Brief, paras. 79-80.

recited the applicable jurisprudence and concluded that the Government had "misunderstood" the test.[156]

74. These submissions are themselves unfounded, since the Appellant only partially refers to and improperly misrepresents the Decision.[157] First, the Chamber noted that "the Government disagreed with the same conduct and same person test" in its Reply.[158] Second, it observed that in its Application, the Appellant purportedly relied on the criteria established by the Chamber in the 31 March 2010 Authorisation Decision, which had held that "national investigations must [...] cover the same conduct in respect of persons at the same level in the hierarchy being investigated by the ICC".[159] In so doing, the Chamber observed that the Appellant had "either misunderstood or disagreed" with the *same person* limb of the test and therefore concluded that it was not necessary to investigate the same persons, but only "persons at the same level in the hierarchy".[160]

75. In pointing out this error, the Chamber explicitly addressed the test the Government Appellant had proposed. In particular, the Chamber observed that the criteria established in its 31 March 2010 Authorisation Decision was made for the specific and limited purpose of admissibility determinations *at the situation stage*, pursuant to Articles 15 and 53(1)(b) of the Statute and Rule 48. As the Chamber clarified, at that stage, "since it is not possible to have a concrete case involving an identified suspect for the purpose of prosecution, prior to the commencement of an investigation, the admissibility assessment […] actually refers to the admissibility of one or more potential cases within the context of a situation".[161] The Chamber went on to define such potential cases as "(i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the

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[156] Appeal Brief, para. 80.
[157] A contrario, Appeal Brief, paras.79-80,84-85.
[158] Decision, para. 24.
[159] Decision, para. 49.
[160] Decision, para. 49.
[161] Authorisation Decision, para. 48.

jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s)".

76. As the Chamber determined, the Appellant had incorrectly applied the previous rulings of the Chamber with regard to the *potential* cases that would be the subject of investigation at the Article 15 stage – which entails an element of indeterminacy as to the future focus on investigations – to a determination pertaining to the *actual* cases which are now being prosecuted before the Court.[162] In this regard, the Chamber was correct to have stated that the Appellant misunderstood the application of this test.

77. Alternatively, the Chamber noted that the Appellant may not have misunderstood the test, but disagreed with it, insofar as its arguments related to the *same person* limb of the *same person same conduct* test.[163] The Chamber went on to explain why this limb is a necessary component of an admissibility determination in the context of a particular case.[164] It also recalled the existing rulings of the Court on the issue to counter the claim set forth by the Appellant that "ICC case law has not authoritatively determined the meaning of the word 'case'", including in relation to the *same person* limb of the *same person same conduct* test.[165]

78. In relation to the *same conduct* limb of the test, the Pre-Trial Chamber noted that the Appellant did not initially oppose this aspect of the test, and in fact supported it. In particular, it recalled that the Appellant had accepted and asserted that "national investigations must [...] cover the *same conduct* in respect of persons at the same level in the hierarchy being investigated by the ICC" (emphasis added).[166] The Chamber went on to note that the Appellant had in the subsequent reply abandoned this limb also, thereby changing its initial position. However,

[162] Application, para. 50.
[163] Decision, para. 49.
[164] Decision, paras. 50-52.
[165] Decision, paras. 51-52.
[166] Decision, para. 15, citing ICC-01/09-02/11-26, para. 32.

the Chamber determined that since the parties are not allowed to go beyond what was initially contested in the Application by adding new arguments, it did not need to rule on the validity of the *same conduct* limb of the test.[167] In doing so, the Chamber did not avoid or ignore the arguments proffered by the Appellant on this aspect of the test, but rather ruled out *in limine* the Applicant's procedural standing to change its argument midway through the proceedings and after responses had already been tendered by the parties on its original initial submissions.

A. The 'same person same conduct' test is correct

79. The *same person same conduct* test applied by the Pre-Trial Chamber advances both the purposes of the Rome Statute and is textually supported in the Statute itself.

i. The Purposes of the Rome Statute support the 'same person same conduct' test.

80. Appellant places great emphasis on the notion that complementarity preserves the right of national authorities to investigate and prosecute cases to the exclusion of the ICC. It suggests that where there is national activity of any kind, this serves as an absolute bar on proceedings before the Court, even if those proceedings relate to different persons or and, possibly, for different conduct.[168] The Prosecution considers that this approach belies a fundamental misapprehension of the concept and operation of complementarity, and the overall object and purpose of the Statute which is "to put an end to impunity" and to ensure that "the most serious crimes of concern to the international community as a whole must not go unpunished".[169]

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[167] Decision, para.53 and accompanying footnote. For sake of completeness, the Prosecution addresses herein both tests proposed by the Applicant, as described in para 72 above.
[168] Application, para. 32; Reply, para. 27; Appeal Brief, paras. 83.
[169] Preamble, paras. 4-5; ICC-01/04-01/07 OA 8, para 79.

81. The system established in the Statute recognizes that "effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation". It recalls on the one hand that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes", while emphasizing that the ICC "shall be complementary to national criminal jurisdictions".[170] The system thus relies on a multifaceted response to situations of mass atrocity involving the interaction and possibly combined efforts of national and international jurisdictions to combat impunity. This is complementarity viewed against the goals of the Rome Statute system as a whole.

82. Within the confines of the specific cases brought before the ICC, the admissibility provision of Article 17 regulates how the Court should determine which forum should proceed where there is a concurrent exercise of jurisdiction by the ICC and a State with respect to a particular case.[171] Because two forums cannot do the same case at the same time, a determination must be made as to which jurisdiction can proceed. The admissibility determination is therefore by nature case specific.[172]

83. The complementarity test under article 17, nonetheless, is not predicated on incriminatory results; rather, it is a process focused on the genuineness of State activity in relation to the case before the Court (i.e. the same person for the same conduct). Thus, where there is State activity, the Court must be satisfied that the person and conduct that is the focus of the Prosecution's case has been the subject of a genuine investigation and/or prosecution by the State concerned, irrespective of whether the national investigation establishes incriminatory findings or a domestic prosecution results in conviction or acquittal. For example, article 17(1)(b) provides that if the State is investigating or has investigated the same case (i.e. the same person for the same conduct) and has decided not to prosecute, the *bone fides* of such a decision will be upheld unless it resulted from the

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[170] Preamble, paras. 4 and 10.
[171] ICC-02/04-01/05-377, para. 46.
[172] As article 17 sets out, the Court is to rule on the admissibility of "the case"

unwillingness or inability of the State genuinely to prosecute. Similarly, under article 17(1)(a), the absence of incriminatory findings resulting from investigations of the same case by the State concerned will remain undisturbed, unless it resulted from the unwillingness or inability of the State to conduct genuine proceedings.

84. In this case, the Pre-Trial Chamber held that the State had not met its burden pursuant to its Article 19 challenge of demonstrating domestic investigative activity in relation to the same case (same persons and the same conduct), and accordingly held that "there is no need to delve into an examination of unwillingness or inability of the State, in accordance with article 17(2) and (3) of the Statute".[173]

85. Looking at admissibility in the context of the present case, the pre-requisite for the application of Article 17 is the identification of a case over which there is a contestation of jurisdiction between the ICC and a State. If the two forums are dealing with different cases, there is no contest and admissibility is not engaged.

86. The Appellant proposes that the cases do not need to be exactly the same. As already advanced, it essentially argues that any activity by the State will be sufficient to render a case before the Court inadmissible as long as it broadly approximates to the persons and conduct before the Court.

87. What the Appellant does not envisage is the possibility for the Court and the relevant State to concurrently exercise jurisdiction over different suspects for crimes arising out of the same events. It foresees an exclusive role for the investigation and prosecution of all crimes arising from a situation: it is one forum or the other. It disregards the possibility, indeed the likelihood, that given the universe of crimes committed within a situation, the Court could proceed with

[173] Decision, para 66.

the investigation and prosecution of certain individuals while the State focuses on others.

88. In doing so, the Appellant appears to confuse the concept of a 'situation' – which may comprise numerous crimes allegedly committed by large numbers of perpetrators in multiple incidents, where there may be a role for both national and international courts to operate in tandem – and the concept of a 'case' – which comprises specific conduct by an identified individual, where the same person cannot be proceeded against for the same acts in two distinct forums.

89. Were the interpretation of Article 17 of the Statute as proposed by the Appellant to prevail, it would result in a situation where, despite the inaction of a State in relation to a particular individual, the ICC's investigation or prosecution of that individual would be declared inadmissible before the Court as long as the State investigates and prosecutes *other* individuals. Thus, it is possible that a potentially large number of individuals would not be investigated or prosecuted by either domestic jurisdictions or by the International Criminal Court.[174] As the Appeals Chamber has observed in relation to such a situation of inactivity, "[i]mpunity would persist unchecked and thousands of victims would be denied justice".[175] Contrary to the arguments of the Appellant, its interpretation of the complementarity regime would thus not necessarily lead to an increase in domestic investigations or prosecutions by the Government. It would, instead, intensify the risk of serious crimes going unpunished.[176]

90. The Pre-Trial Chamber correctly observed that, while the concept of complementarity and the manner in which it operates goes to the heart of States'

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[174] Appeals Chamber, "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber 11 of 12 June 2009 on the Admissibility of the Case", ICC-01/04-01/07-1497, para. 79. The same considerations arise in relation to the *same conduct* limb of the test. The Applicant proposes that the State's investigation of different conduct (but same general subject-matter) could render the case before the Court inadmissible, despite the conduct-specific requirements of article 17 and its inter-linkage with the principle of *ne bis in idem*; see below section A(ii)(a). *The relationship between Article 17(1) and Article 20(3).*
[175] ICC-01/04-01/07-1497, para. 79.
[176] ICC-01/04-01/07-1497, para. 86.

sovereign rights, States not only have the right to exercise their jurisdiction, but are also under an existing duty to do so. As the Chamber recalled, a core rationale underlying the concept of complementarity aims at "strik[ing] a balance between safeguarding the primacy of domestic proceedings vis-à-vis the [...] Court on the one hand, and the goal of the Rome Statute to 'put an end to impunity' on the other hand. If States do not [...] investigate [...], the [...] Court must be able to step in".[177] The Chamber correctly observed that, within the Statutory framework, the exercise of national criminal jurisdiction by States is not without limitations, but is subject to the conditions regulating the admissibility of a case under the Statute.[178]

91. The Appellant also argues that the provenance of the challenge should be determinative. In particular, it draws particular attention to that the fact that admissibility has been challenged by a State, as opposed to the parties or by the Chamber.[179] The basis for such a differentiated assessment is not substantiated. Moreover, it would lead to inconsistent and absurd results, such that admissibility and complementarity would mean something different depending on who brings the claim. As has been recalled, the admissibility regime is not exclusively concerned with the rights of the State: it also guarantees the rights of the accused/suspect against re-trial (*ne bis in idem*) while also ensuring the effective operation of the goal of the Statute to end impunity, by enabling the ICC to act where a State is inactive in relation to a particular case.[180]

ii. The 'same person same conduct' test is supported by the text and history of the Statute.

92. Not only does the *same person same conduct* test further the purposes of the Statute; it also finds firm support in the text of the Statute, considering both the applicable rules of treaty interpretation and the relevant negotiating history.

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[177] Decision, para. 40; citing ICC-01/04-01/07-1497, para. 85.
[178] Decision, para. 40.
[179] Application, para.85.
[180] Decision, para. 40; citing ICC-01/04-01/07-1497, para. 85.

93. As plainly set forth in Article 17, an assessment of admissibility must relate to a case. The term "case" has a well-settled ordinary meaning.[181] This is especially so in the judicial context, where it is based on the particular facts or conduct which is the subject of a dispute before a court. Legal dictionaries confirm that a case refers to the actions or questions contested before a court, or the crimes under investigation.[182] The ordinary meaning of the term "case" is confirmed by the translation of the term in the other, equally authentic,[183] texts of the Statute.[184] A case before the ICC must therefore be based on particular facts, incidents and conduct related to a crime within the jurisdiction of the Court allegedly committed by an identified individual.

94. The drafting history of Article 17 also indicates that the term "case" was uncontroversial and was not the subject of significant discussion, since its meaning was well understood; thus, its ordinary meaning was that intended by the legislator.[185]

95. The interpretation of the term "case" as encompassing specific persons and conduct has been consistently reflected in the case law of the ICC. Chambers

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[181] Article 31(1), *Vienna Convention on the Law of Treaties*.
[182] *The Cyclopedic Dictionary of Law* (Rothman & Co, 1987), p.129; Curzon (ed.), *Dictionary of Law* (Longman, 2002); Martin (ed.), *Oxford Dictionary of Law* (OUP, 2003); *Collin's Dictionary of Law* (Bloomsbury, 2004), p. 41. The *Oxford English Dictionary* (OUP 2009) defines judicial case as "'The state of facts juridically considered' **a.** A cause or suit brought into court for decision […] **f.** An incident or set of circumstances requiring investigation by the police"; http://dictionary.oed.com/cgi/findword?query_type=word&queryword=case
[183] Article 128 of the Statute.
[184] "l'affaire" in the official French text, is defined in *Le petit Robert de langue Française* as "Procès, objet d'une débat judiciaire"; http://petitrobert.bvdep.com/frameset.asp?word=savoir. The Spanish text of the Statute refers to "asunto", defined legal dictionaries as "Materia de que se trata; […] causa (proceso criminal que se instruye de oficio o a instancia de parte), proceso judicial"; http://neoforum.iespana.es/neoforum/. Diccionario Jurídico on-line; and Louis A., *Dictionary of Legal Terms*, (Editorial Limusa, Mexico 1990), defining "asunto" as "contencioso", subject of litigation […]". In the Arabic text of the Statute ("دعوى") has a similar sense, meaning "Litigation, case, allegation, alleging, pleading, plea, contention, lawsuit"; http://qamoos.sakhr.com/SearchResults.aspx. Munir Baalbaki, *Dictionary Al-Mawrid* (Englisg–Arabic) (Lebanon, 2001), p. 156.
[185] The main differences concerned the distinction as to whether the Security Council should refer "matters", "cases" or "situations" to the Prosecutor. Delegates opted for the broadest notion ("situation") which would allow the Prosecutor discretion in determining the attribution of individual criminal responsibility through the selection of specific cases for investigation and prosecution. See Yee, L., "The International Criminal Court and the Security Council: Articles 13 (b) and 16", in Lee, R. S., *The International Criminal Court: The Making of the Rome Statute,* (Kluwer Law International, The Hague, London, Boston: 1999), pp.147-148. Also Fernandez de Gurmendi, S., "The Role of the International Prosecutor", in Lee, R. S., *The International Criminal Court: The Making of the Rome Statute,* (Kluwer Law International, The Hague, London, Boston: 1999), pp, 175, 180.

have routinely adopted an interpretation of "case" consistent with the same person same conduct test, namely that a case constitutes "specific incidents during which one of more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects"; and that a determination on the inadmissibility of a 'case' requires that "national proceedings [...] encompass both the person and the conduct which is the subject of the case before the Court.[186] The Appeals Chamber has further confirmed that "[o]nce the charges in a case against an accused have been confirmed in accordance with article 61 of the Statute, the subject matter of the proceedings in that case is defined by the crimes charged".[187] The charges in the ICC encompass "the facts, including the time and place of the alleged crimes, which provide a sufficient basis to bring the person or persons to trial".[188] This necessarily includes the conduct of a specific suspect or accused.

96. Commentators have also observed that "the notion of a case, […] refers to proceedings regarding identified suspects for the commission of specific crimes",[189] and that "[g]enerally, the term 'case' in the Statute refers to a specific case against an accused."[190] The determination of admissibility vis-à-vis a "case" should be "understood narrowly to encompass both the person and the conduct which is the subject of the case before the Court".[191]

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[186] ICC-01/04-01/06-8-US-Corr, paras.21,31 and 37-39; ICC-02/05-01/07-1-Corr, paras.14,24; ICC-01/05-01/08-14-tENG, paras. 16, 21; ICC-02/04-01/05-377, para.14.
[187] ICC-01/04-01/06-1432, para.62.
[188] Regulation 52(b).
[189] Olasolo, H., "The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of Office of the Prosecutor", *International Criminal Law Review*, Vol. 5, Number 1, (2005), p.125 (emphasis added).
[190] J.T. Holmes, "Complementarity: National Courts vs. the ICC", in Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I.* (OUP, Oxford: 2002), p.680, footnote 38 (emphasis added).
[191] "[…] given that the specificity of proof under Article 19 requires admissibility to be assessed in relation to a 'case', the Court, those challenging admissibility, and the Prosecutor when s/he seeks a ruling regarding a question of admissibility, all will have specific information available on the domestic proceedings *vis-à-vis* <u>a particular individual in respect of precise conduct</u>. This would allow for a more concrete assessment of whether domestic proceedings have been, or are being, conducted in relation to <u>that person and conduct,</u> and whether or not they satisfy the complementarity requirements"; Kleffner, J., *Complementarity in the Rome Statute and National Criminal Jurisdictions*, (2008), p. 221 (emphasis added) and p. 198.

iii. The relationship between Article 17(1) and Article 20(3)

97. Consistent with the Vienna Convention on the Law of Treaties, the ordinary meaning given to the terms in Article 17 must also be interpreted in light of the Statute as a whole. The provisions of the Statute must be interpreted in a manner which results in a coherent, rather than an internally inconsistent, system.[192]

98. A plain reading of the Statute shows that Article 17(1)(c) incorporates the principle of ne bis in idem into the scheme of admissibility.[193] Ne bis in idem relates to a very specific notion based on the same case, same acts or same offence for which an individual stands accused.[194] Both Article 17(1)(c) and Article 20(3) refer to "the same conduct", while the principle of ne bis in idem only arises in relation to the same person.[195] The express link between Article 17(1)(c) and the principle of ne bis in idem shows that the case under the provision must relate to the same person and the same conduct.

99. Article 17(1)(a)-(c) deal with the possible grounds rendering a case inadmissible in a systematic, sequential manner.[196] These provisions, which have been described as the cornerstone of the Rome Statute,[197] must be read together systematically so as to avoid leaving any ambiguity. Therefore, one cannot have a different meaning and approach to the meaning of the term 'case' for each of the

[192] ICC-01/04-01/06-803-Ten, para. 284; ICC-01/05-01/08-388, paras. 34-36.
[193] See "Article 17" in Triffterer, O. (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2008) [9],[10],[18],[42] and [49]; J. Holmes, "The Principle of Complementarity", in Lee, R (ed.), *The International Criminal Court: The Making of the Rome Statute: issues, negotiations, results* (Kluwer, 1999), pp.42, 44; Kleffner, J., (2008), pp. 99, 102.
[194] "Article 20" in Triffterer (2008), [11]-[15].
[195] This is consistent with the logic of Article 20(3): *ne bis in idem* serves to protect both the person, and also the integrity of the judicial system by confirming the finality of genuine penal judgements- "Article 20" in Triffterer (2008), [4]. There would be nothing to protect if the ICC is prosecuting different persons or conduct.
[196] See El Zeidy, M.M., *The Principle of Complementarity in International Criminal Law*, Martinus Nijhoff Publishers, (Leiden, Boston: 2008), p. 285. (quoting Bassiouni in fn 210) - "The principle of *ne bis in idem* is a 'corollary' of the principle of complementarity, mirrored in Article 17 […] While Article 17 covers investigations and prosecutions, Article 20 covers cases that have already been tried. Article 20(3) sets the standards for assessing whether a domestic adjudication of a case makes it inadmissible before the ICC." See also "Article 20" in Triffterer (2008), [34].
[197] ICC-02/04-01/05-377, para.34.

subparagraphs of article 17(1).[198] Accordingly, a "case" for the purposes of Article 17(1)(a) and (b) must mean the same thing as a case for the purposes of Article 17(1)(c), i.e. the same person and the same conduct.[199]

100. This interpretation is supported by a contextual reading of other relevant provisions of the Statute, under Part 9, which deal with what happens when the national authorities are dealing with a different case. In particular, Articles 89(4) and 94 expressly contemplate the potential for conflicts between a case before the Court and other cases at the national level. These provisions give neither the ICC nor the State automatic priority, but envisage a process of consultation and dialogue to resolve pending issues through sequencing.

101. A close examination of the Statute reveals that the two scenarios and different procedures set forth in Articles 89(2) and 89(4) underscore this difference. The two sub-paragraphs distinguish between conflicts raised by the principle of ne bis in idem, which are to be dealt with through admissibility (Article 89(2)), and those related to different cases, which are dealt with as a cooperation matter (Articles 89(4)). The differentiated procedures under Articles 94 and 95 reflect the same distinction.

102. Finally, Article 90, which deals with the choice of forum allocation with respect to competing requests for extradition and surrender, defines the notion of a contested case under the provision by reference to "the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender" (emphasis added). Articles 90(2)(a) refers to issues of admissibility arising in relation to "the case in respect of which surrender is

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[198] Rastan R., "What is a 'Case' for the purpose of the Rome Statute?", *Criminal Law Forum* Vol. 19 (2008), pp. 437-438. The same applies in the context of Article 17(1)(d) – an assessment of the gravity of a case cannot be properly made unless it is based on given conduct.
[199] The rules of treaty interpretation require that identical terms in a treaty text should be presumed to carry identical meaning in the absence of manifest intention of the drafters to the contrary and unless a consistent interpretation would lead to absurd results; *see* Jennings, R & Watts, A, *Oppenheim's International Law* (1996) 1273, referring to the case of *Ministry of Defence v. Ergialli*, Italy, Court of Venice, Judgment of 5 February 1958, 26 ILR (1958-II), 732-734.

sought", i.e. the case as defined in article 90(1). The cross reference is further recalled in paragraphs (3)-(5) of Article 90. The provision thus explicitly stipulates that the case which forms the subject of an admissibility determination under the Statute is the one that concerns the same person and same conduct.[200]

103. The interest of a State to investigate or prosecute other persons or other conduct, thus, is not prejudiced by the Pre-Trial Chamber's application of Article 17.[201] Contrary to the vagueness of the alternatives proposed by the Appellant, the same person same conduct test enables the Court to distinguish between those cases that should be heard before the ICC and those that should proceed at the national level, thereby promoting overall accountability for criminal conduct arising from a situation, consistent with the object and purpose of the Statute.

Conclusion

104. For the reasons set out above, the Prosecution submits that the appeal should be rejected.

Luis Moreno-Ocampo,

Prosecutor

Dated this 12th day of July 2011

At The Hague, The Netherlands

[200] This contrasts with the procedure envisaged under Article 90(7) concerning competing request for "the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender", which contains no inter-linkage with admissibility. See R. Rastan, Situations and cases: defining the parameters, The International Criminal Court and Complementarity', edited by Carsten Stahn and Mohamed El Zeidy (CUP, 2011), 421-458. The specificity of 'person' and 'conduct' in a case before the Court is further emphasized by the rule of speciality in Article 101.

[201] Application, paras. 83-84.