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Date: 12 July 2011

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
*THE PROSECUTOR v. WILLIAM SAMOEI RUTO,
HENRY KIPRONO KOSGEY AND JOSHUA ARAP SANG***

PUBLIC

**Ruto and Sang Defence Response to the Government of Kenya's
'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 18(2)(b) of the Statute"'**

Source: Defence

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

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I. Introduction & Procedural History

1. On 31 May 2011, Pre-Trial Chamber II delivered its ‘*Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to the Article 19(2)(b) of the Statute*’ (“Decision”).¹ In this Decision, the Pre-Trial Chamber rejected the Government of the Republic of Kenya’s (“the Government”) challenge to the admissibility of the case that had been filed pursuant to Article 19(2)(b) of the Statute.
2. On 6 June 2011, the Government filed its ‘*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(b)(2) of the Statute”*’.² In its Appeal, the Government submitted that the Pre-Trial Chamber in reaching its Decision erred in procedure, in fact and in law. On 20 June 2011, the Government filed its ‘*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(b)(2) of the Statute”*’.³
3. The Defence for Mr. Ruto and Mr. Sang (the “Defence”) files its Response, pursuant to Regulation 64(4) of the Regulations of the Court, fully supporting and endorsing the Government’s Appeal, and without prejudice to any future admissibility application the Defence may raise in the future.

II. Applicable Legal Principles

4. Regulation 64(4) specifies that for appeals concerning admissibility, a participant may file a response as follows:

¹ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-101, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to the Article 19(2)(b) of the Statute, 31 May 2011.

² *Prosecutor v. Ruto et al*, ICC-01/09-01/11-109, 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(b)(2) of the Statute”, 6 June 2011 (“**Appeal**”).

³ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-135, 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(b)(2) of the Statute”, 20 June 2011. This filing was subsequently corrected; the Corrigendum was filed as ICC-01/09-01/11-135-Corr (“**Corrigendum**”). A full procedural history is set out in paragraphs 16-41 of the Corrigendum.

- a. each ground of appeal shall be answered separately, stating whether it is opposed, in whole or in part, together with the grounds put forward in support thereof; it shall also be stated whether the relief sought is opposed, in whole or in part together with the grounds of opposition in support thereto;
 - b. The legal/factual reason in support.
5. Although Regulation 64(4) refers to ‘opposing’ the appellate grounds, it is also accepted practice to file a response endorsing the appellate grounds of the other party/participant.

III. Submissions on Errors of Fact

6. In paragraphs 35-43 of its Appeal and paragraphs 3-11 of the Corrigendum, the Government submitted that the Pre-Trial Chamber erred in its finding that there were no investigations presently being undertaken into Mssrs. Ruto, Kosgey and Sang. In reaching a finding that “there remains a situation of inactivity”,⁴ the Pre-Trial Chamber’s errors were based, according to the Government’s submissions, on the following:
- a. the Government’s legal arguments concerning the definition of a case;
 - b. the Government’s promise to submit future staged investigations reports; and
 - c. that the letters and reports submitted by the Government only concerned future investigate activity.
7. The Defence submit that the Pre-Trial Chamber did so err, as explained below.

The Chamber incorrectly inferred from the Government’s legal arguments concerning the definition of a case that no investigations were presently underway against the defendants currently before the ICC

8. In its initial challenge to admissibility, the Government submitted that there was no requirement of concurrence between the persons identified by the ICC Prosecutor and those pursued by national authorities for the same crimes.⁵ It is the submission of the Defence that the Pre-Trial Chamber erred in inferring from this submission that the Government was not investigating Mssrs. Ruto, Kosgey and Sang.⁶
9. The Defence submits that the measure of a government’s actions in furtherance of its ownership of a matter before the ICC is whether or not the said event and incident upon which the charges at the ICC are based, are being investigated and/or prosecuted. In

⁴ Decision, para. 70

⁵ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-19, Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute, (the “**Application**”), para. 32.

⁶ As held in paragraph 60 of the Decision.

doing a factual analysis, then the Pre-Trial Chamber should have considered whether the matter of post-election violence was being investigated by the Kenyan Government, not whether the six suspects singled out by the ICC were being investigated.

10. The Defence submits that the Chamber failed to take into consideration the fact the Government's legal arguments were being submitted in the alternative, and were without prejudice to clear undertakings that the national authorities were investigating the persons already identified by the ICC. In light of the fact that these proceedings mark the first instance in which a State has challenged admissibility and given the potential implications for State sovereignty, it is understandable that the Government would wish to fully litigate all aspects of the legal test for admissibility, irrespective of whether it was necessary for them to do so in order to establish the inadmissibility of the case before the ICC.
11. It is clear from the Application that, in informing the Chamber that the national authorities are investigating the same case as is currently before the ICC, the Government was referring to the 6 relevant defendants. Paragraph 32 of the Application states that "[t]he Kenyan national investigative processes do extend to the highest possible levels for all possible crimes, thus covering the present cases before the ICC". Paragraph 71 of the Application further states "[a]n updated report on the state of these investigations and how they extend upwards to the highest levels and to all cases, including those presently before the ICC, will be submitted by the end of July 2011".⁷
12. The Government clarified and emphasized the point in its Reply, filed before the Pre-Trial Chamber on 13 May 2011:⁸

30. The Government of Kenya made clear in its Application and supporting Annexes that an investigation, **including into the six suspects**, was presently underway.

31. There has been an investigation underway by the Kenyan authorities **which covered the six suspects** since shortly after the Post-Election Violence; **the six suspects are presently** a focus of the investigation. The historical development of this investigation, and in particular its relation to the work and recommendations of the Waki Commission, is detailed below (see sub-section (iii)). Most importantly, **since being named by the ICC Prosecutor the six suspects have been a focus of the national investigation which continues at the present moment**. The Commissioner of Police, Mathew

⁷ Emphasis added.

⁸ *Prosecutor v. et al*, ICC-01/09-01/11-89, Reply on Behalf of the Government of Kenya to the Responses of the Prosecutor, Defence and OPCV to the Government's Application Pursuant to Article 19 of the Rome Statute (the "Reply"), paras. 30 and 31 (emphasis added).

¹⁶ Iteere¹⁶, is directing this investigation which is being carried out by a dedicated team, further details of which are set out below (see sub-section (iv)). Should there be any questions raised about the genuineness of this investigation **which covers the six suspects**, the Commissioner is ready to appear before the Pre-Trial Chamber to confirm and explain the investigative work that is presently being undertaken, the background to this investigation, and his commitment to investigate thoroughly all allegations to their conclusion as soon as possible. He has simply never been approached by the ICC Prosecutor to discover what he and his police have been doing. As he asserts - and would testify - any evidence once provided to him concerning **any of the six suspects** would be acted on immediately, objectively and dispassionately.⁹

13. Significantly, a letter dated 14 April 2011 from the Attorney-General to the Commission of Police, contained in the 21 April 2011 *'Filing Of Annexes Of Materials To The Application Of The Government Of Kenya Pursuant To Article 19 Of The Rome Statute'* clearly instructs the police to ensure that the investigations encompass the "six persons who are the subject of the proceedings currently before the International Criminal Court".¹⁰

The Chamber incorrectly inferred from the Government's promise to submit future staged investigations reports that no investigations were presently underway

14. The Pre-Trial Chamber's Decision infers from the Government's commitment to producing future investigation reports that "so far, the alleged ongoing investigations have not yet extended to those at the highest level of hierarchy, be it the three suspects subject to the Court's proceedings, or any other at the same level."¹¹ It is the submission of the Defence that the Chamber has erred in reaching this conclusion in that it failed to give due consideration to the plain meaning of the Government submissions. Paragraph 66 of the Application, for example, reads "investigations will be continuing throughout this period. Reports on these investigations will be submitted to the Pre-Trial Chamber by end of July 2011 (especially in light of the appointment of the new Director of Public Prosecutions which is expected by the end of May 2011), August 2011, and September 2011".¹²

15. The Pre-Trial Chamber, in its Decision, raised concerns as to why the Government was unable to file investigative reports concurrent with its Application. It is the submission of the Defence that the Chamber failed to give a full appreciation to the complexities of

¹⁰ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-64-Anx 1, Filing Of Annexes Of Materials To The Application Of The Government Of Kenya Pursuant To Article 19 Of The Rome Statute, 21 April 2011.

¹¹ Decision, para 62.

¹² Emphasis added.

investigations and the difficulty of translating confidential investigative leads and sources into ‘concrete results’ which can be presented in an *inter partes* judicial forum. As noted at paragraph 7 of the Appeal, any specific information concerning the conduct of the investigations would need to be conveyed in a manner which did not alert the six defendants. Since there have been no prior State challenges on admissibility, there is no clear jurisprudence concerning the modalities for ensuring that the such submissions are consistent with domestic protective measures and requirements of investigative secrecy. It was therefore reasonable and logical for the Government to promise to submit investigative reports in the future, whilst at the same time, seeking directions from the Chamber as to the modalities for the admissibility proceedings.

16. The Defence further notes that there is also no requirement under the Statute that the national authorities must have concluded their investigations before challenging admissibility.¹³ Similarly, there is also no requirement that the national investigations must be as advanced as the ICC investigations. The rationale of the complementarity regime is to eliminate an impunity gap by ensuring that there is an effective investigation conducted by either national authorities, or by the ICC, if national authorities are either unwilling or unable. The objective is not to create artificial competition between the Court and national authorities whereby which ever entity investigates first wins.
17. Viewed through this lens, the Government’s promise to submit staged investigations reports should have been considered by the Chamber as evidence concerning the *bona fides* of the Government’s commitment to the investigations, and not as evidence against the very existence of an investigation.
18. The Trial Chamber erred in its reasoning that the Kenyan Government was not genuine in its investigations. Notwithstanding that the Government averred that its investigations were genuine and persons responsible at the relevant institutions in the Kenyan Government were ready and available to the Pre-Trial Chamber to demonstrate the *bona fides* of the investigations, the Pre-Trial Chamber erred in questioning the Kenyan Government’s averment to its investigation. The notion of sovereignty of states,

¹³ Indeed, such a requirement would be inconsistent with the fact that the ICC Appeals Chamber has held that the ICC Prosecutor is not required to conclude its investigations before either seeking an application for an arrest warrant or summons, or prior to the confirmation hearing; *Prosecutor v. Lubanga*, ICC-01/04-01/06-568, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, 13 October 2006.

complimentarity, and mutual trust in proceedings should not be trampled by the findings of judges who question the integrity and genuineness of a member state's decision and assertions.

19. The Pre-Trial Chamber erred in contradicting the Kenyan Government's averment that it has and continues to investigate incidences of post-election violence; more particularly, in finding that Kenya, a party to the Rome Statute of its own volition, was lying to the Court. The Chamber incorrectly found that letters and reports submitted by the Government only concerned future investigate activity

20. The Pre-Trial Chamber found, on the basis of the letters and reports presented by the Government, that the Government of Kenya relied on "promises for future investigations" and presented no "concrete evidence" of current investigations.¹⁴ The Defence submits that the Chamber misinterpreted the documentation submitted by the Government, and imposed an unduly high evidential standard. The Pre-Trial Chamber also took an improperly collective approach in ruling that there were no investigations underway with regard to any of the suspects, in the face of clear evidence that a case has been pending against Mr. Ruto for three years; the Pre-Trial Chamber should have separated its factual findings with respect to the six defendants. If it had correctly evaluated and given weight to all of the facts available to it in relation to Mr. Ruto, the Pre-Trial Chamber should have found the Prosecutor's case against Mr. Ruto inadmissible.

21. The materials submitted by the Government indicate that investigations against the six defendants had been initiated, at the latest, from the date on which the ICC prosecutor announced the names of the 6 defendants as suspects.¹⁵ As concerns the defendant Mr. Ruto, it is indicated that a case file into his possible involvement had been officially opened since 2008,¹⁶ that witnesses had been questioned, and that the scope of the investigation encompassed incitement to violence in connection with the post-election violence in the Rift valley.¹⁷ In relation to Mr. Ruto's case, the Chief Public Prosecutor stated that as of 5 May 2011, "the matter is still under investigation because there are some areas requiring further corroboration in order to reach a fair conclusion".¹⁸ The Chamber therefore clearly erred – particularly as concerns Mr. Ruto - in its factual

¹⁴ Decision, para. 64.

¹⁵ Reply, ICC-01/09-01/11-89-Anx2, p. 3, Letter from CID to Chief Prosecutor, dated 5 May 2011. In the letter, it is stated that after Mr. Ocampo announced names of suspects, the national authorities also commenced their investigations into the suspects.

¹⁶ Reply, ICC-01/09-01/11-89-Anx2, p. 2-3, citing Nakura CID Inquiry File No 10/2008.

¹⁷ Reply, para 50. See also Reply, Reply, ICC-01/09-01/11-89-Anx2, p. 2.

¹⁸ Reply, ICC-01/09-01/11-89-Anx2, p. 3.

conclusion that there was not “any information as to the conduct, crimes or the incidents for which the three suspects are being investigated or questioned for”.¹⁹ The Defence submits that the Government’s Appeal must succeed on this ground, *at least* as regards Mr. Ruto.

22. The Defence also notes the general statements contained in the Report from the Director of the Criminal Investigation Division, dated 5 May 2011, that “the Commissioner of Police again tasked the team of investigators to carry out exhaustive investigations relating to the Ocampo six”.²⁰
23. The Chamber further erred by finding that there was no investigative activity because there was no evidence that the State had taken concrete investigative steps, such as questioning the suspects.²¹ In so doing, and as will be elaborated below in the section concerning procedural errors, the Chamber failed to give due appreciation to the inherent confidentiality and security concerns associated with the presentation of information concerning *sub judice* investigations.
24. As submitted by the Government in paragraph 8 of its Appeal, in accordance with ICC jurisprudence, the statements of State parties should be accepted by the Chamber as being accurate and in good faith unless there is compelling evidence to the contrary.²² As noted above, the Government has unequivocally stated that its present investigation encompasses the six defendants currently before the ICC, and furthermore, made good faith efforts to obtain the guidance of the Chamber via a requested Status Conference as to how to demonstrate this before the Court (in an eventual oral hearing).

¹⁹ Decision, para 69.

²⁰ Reply, ICC-01/09-01/11-89-Anx3.

²¹ Decision, para. 69. This is notwithstanding the fact that the suspects have an absolute right of silence vis-à-vis national authorities by virtue of Article 55 of the Statute.

²² See also *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1213, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 16 June 2009, paras 80 and 88. *Prosecutor v. Bemba*, ICC-01/05-01/08-802, Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, para 235; *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-3033, Decision on the security situation of three detained witnesses in relation to their testimony before the Court (Article 68 of the Statute) and Order to request cooperation from the Democratic Republic of the Congo to provide assistance in ensuring their protection in accordance with Article 93(1)(j) of the Statute 22 June 2011, para. 40: “although such diplomatic assurances cannot substitute an independent risk-analysis by the Court under Article 68 of the Statute, they must incontestably be treated with the greatest respect and must be presumed to have been made in good faith. The Chamber observes, in this regard, that the above-mentioned assurances are given within the general legal framework for cooperation between the Court and the DRC under Part IX of the Statute. As was correctly pointed out by the DRC, this framework is based on mutual trust and on the ultimate supervision and control of the Assembly of States Parties. The formal assurances given by the DRC authorities therefore carry great weight, as they commit the DRC not only vis-à-vis the Court but also to the Assembly of States Parties.”

25. Requiring a State party to lay bare the specific details of its investigative findings, before such findings have been submitted to a Judge or disclosed to the suspect, is an extremely intrusive step, which exceeds the requirements of a proper determination on admissibility. It is to be noted that when the Pre-Trial Chamber in the DRC Situation issued an order convening a status conference to discuss the progress of the investigations, the ICC Prosecutor strenuously objected and expressed its concern regarding the impact of such scrutiny on the impartiality of the proceedings.²³
26. Further, the ICC Pre-Trial Chambers have also accepted ICC Prosecution statements concerning the existence of ICC investigations, without requiring the Prosecution to adduce concrete ‘proof’ that such investigations exist. On two different occasions in the *DRC Situation*, victims filed submissions before the Chamber concerning the fact that the OTP did not appear to have conducted any investigations or prosecutions into alleged crimes occurring in particular areas of the DRC, and that this constituted a decision not to investigate or prosecute. In deciding upon the requests, the Pre-Trial Chamber based its findings solely on the Prosecution’s declaration under Article 53(1) and (2) of the Statute, and did not require the Prosecution to substantiate its position.²⁴ It is thus entirely unreasonable for the Chamber to apply a degree of investigative scrutiny to domestic proceedings which it does not apply to investigations conducted by the OTP.
27. Finally, the Chamber incorrectly relied upon the Government’s submissions concerning the fact that it had adopted a ‘bottom up’ approach, to surmise that the investigations had not yet reached the persons at the top of the hierarchy. The Government, in its Application, informed the Chamber of the following: “The investigations against low level perpetrators are the foundation for extending investigations to senior leaders associated with the ODM and PNU for the most serious incidents (as explained below). Many international courts have used a "bottom up" approach in investigating the most serious violations, it being very difficult to start an investigation at the highest levels without a sound knowledge of the underlying crimes”.²⁵

²³ *DRC Situation*, ICC-01/04-12- Anx, Submission of the Redacted Version of the Prosecutor’s Position on Pre-Trial Chamber I’s 17 February 2005 Decision to Convene a Status Conference, 11 March 2005.

²⁴ *DRC Situation*, ICC-01/04-582, Decision on the request of the legal representative of victims VPRS 3 and VPRS 6 to review an alleged decision of the Prosecutor not to proceed, 25 October 2010, p. 4; *DRC Situation*, ICC-01/04-399, Decision on the requests of the Legal Representative for victims VPRS1 to VPRS 6 regarding "Prosecutor’s information on further investigation", 26 September 2007, p. 5.

²⁵ Application, para 34.

28. The context of this paragraph was that the Government was responding to the Chamber's previous findings concerning the admissibility of the Prosecution investigation, in which the Chamber had *inter alia*, noted that the domestic investigations only concerned low level perpetrators.²⁶ The Government was thus delineating its bottom up approach to explain why there may have been no investigations against senior level persons at the time when the Chamber issued its decision authorising the Prosecution investigation. The term 'extending investigations' makes it clear that the former investigations against low level persons were the basis for the current extended investigations against senior ODM and PNU leaders, such as the six defendants.

29. Additional to the above the chamber erred in faulting Kenya Government's averment that it had conducted investigations on the ground that the suspects summoned by the court had not yet been questioned. This particular approach by the pre-trial chamber failed to note:

- a. That questioning of a suspect in the course of an ongoing investigation can be at any point in the life of the investigations including at the bottom-end and conclusion of the investigations. In fact, it is possible that suspects for myriad reasons might not be questioned and this does not automatically confirm that no investigations have been conducted at all as perceived by the Judges; or that no investigations are on-going.
- b. That the Pre-Trial Chamber elected in its own wisdom not invite information to ascertain this fact. The chamber had the option to ask the government to file observations on whether or not the said suspects had been questioned, or otherwise to call the responsible officers in the Government of Kenya to answer this particular question of fact, and this is despite the offer by Government that the said officers were available and ready to answer any concerns the chamber may have wished to clarify.
- c. The ICC court's own investigators, the office of the Prosecutor has not to date, questioned the suspects already summoned by the court (other than Mr. Ruto), yet the same Judges did not arrive at similar conclusions that there were no investigation by ICC's OTP just because the suspects now summoned were not questioned. In this regard the Judges applied double standards on what is expected of investigators of a Member State, the Kenyan Government and what is expected of its own ICC (OTP) investigators.

²⁶ As elaborated at paras 33 and 34 of the Application.

IV. Submissions on Errors of Law and Procedure

30. The Government also asserts that the Pre-Trial Chamber committed the following appealable errors, which grounds are supported by the Defence:

- a. The Chamber refused the Government of Kenya's request to file updated investigation reports in July, August and September 2011 within the timetable proposed by the Government, *without giving any reasons*. These reports would have provided further up-to-date information to the Chamber about the investigation;
- b. 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. 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;
- c. 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. 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; and
- d. 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. The Government of Kenya raised the argument that the principle of complementarity does not necessarily 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), 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". 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.²⁷

²⁷ Appeal, para 12.

The Chamber erred in refusing to allow the Government to submit staged investigations reports

31. Neither the Statute, Rules nor Regulations prescribe the procedure for admissibility proceedings in terms of the modalities or deadlines for submitting evidence. Rule 58(2) provides that the Chamber seized of the request “shall decide upon the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings”.
32. In terms of deadlines, the Appeals Chamber has specified that determination as to whether the case is or is not admissible must be “determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge”.²⁸ The reference to the term proceedings implies that the Chamber must base its decision on all the information and evidence which is submitted to it prior to its determination. The Chamber is therefore not limited to taking into consideration only the information submitted in the Government’s Application but may take into consideration any evidence submitted subsequently.
33. It is the submission of the Defence that, in light of the fact that the Chamber had the judicial power to authorise the Government to submit staged reports, it was unreasonable and contrary to the proper conduct of the proceedings to refuse to exercise this power.
34. Article 19(5) of the Statute enjoins a State to make a challenge to admissibility at the earliest opportunity. One reading of ‘earliest opportunity’ is that the State should do so, as soon as it has the means to do so in an effective manner. However, when the *Katanga* defence team attempted to reserve its right to challenge admissibility until such time that it had collected all relevant documentation and received necessary assistance from the Chamber to prepare its challenge, it was almost deprived of the right to challenge by virtue of an unanticipated judicial interpretation of the statutory deadline.²⁹
35. It is therefore understandable that the Kenyan government decided to adopt the more prudent approach of filing their challenge in line with the more literal interpretation of ‘earliest opportunity’ i.e. as soon as the case had commenced, with a view to seeking the

²⁸ *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1497, 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, 25 September 2009, para. 56.

²⁹ *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1213, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 16 June 2009, paras 29 to 56.

assistance of the Chamber to submit evidence at a later stage, which might not have been in a readily admissible format at the particular point in time that the Chamber decided to issue the summons against the defendants. In so doing, the approach of the Kenyan government was consistent with overarching objective of the drafters of the Statute to ensure that firstly, the Court was alerted to the eventuality and scope of an admissibility challenge at the earliest possible time, and secondly, that such a challenge would not overly disrupt the proceedings.³⁰

36. Given that the Kenyan government was making a good faith attempt to comply with an ambiguous statutory deadline, it was unreasonable for the Pre-Trial Chamber to deprive the Government of the opportunity to have more time to collate (and presumably redact) its evidential findings in a more tangible format which was capable of being evaluated by the Chamber, and, where appropriate, arrange for domestic security and protective measures for any persons implicated in the evidential findings. These factors should have clearly constituted good cause within the terms of Regulation 35 of the Regulations of the Court to vary the time limit for filing the reports.

37. The unreasonableness of the Chamber's decision is particularly reflected by the fact that on the one hand, the Chamber rejected the Government's request to submit investigative reports, but on the other, it also rejected the admissibility challenge on the basis that the Government failed to submit concrete evidence concerning the existence of investigations. Although Rule 58(2) vests the Chamber with the discretion to determine which measures are appropriate, in exercising this discretion, the Chamber should have ensured that the Government's right to challenge admissibility was effective and not illusory.

38. It would also have been far less disruptive to the pre-confirmation process to have allowed the Government to raise all pertinent issues concerning admissibility before the Chamber as part of one proceeding through the submission of staged investigations reports, rather than rejecting the request and giving rise to the current possibility that the Government will be forced to seek leave to mount a second admissibility challenge on the basis of the information that would have otherwise have been submitted to the Chamber in connection with the first admissibility challenge.³¹

³⁰ Id.

³¹ The Appeals Chamber has recognised that "a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States and vice versa." *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1497, 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, 25 September 2009, para. 56.

39. In this regard, whenever the Statute permits a party to resubmit an application based on new circumstances, the practice of the ICC has been to permit the party to submit additional information to supplement its initial application, rather than rejecting the application and requiring the party to submit a new application. For example, as concerns Prosecution applications for arrest warrants or summonses, the Prosecution must meet a fixed evidentiary threshold of reasonable grounds to believe. In the first cases before the ICC, there was uncertainty as to what type of evidence was required to satisfy this threshold and the procedure modalities for the application process (for example, the extent to which the Prosecution was required to submit its evidence to the Chamber and the format of such evidence).

40. Rather than penalising the Prosecution for these statutory ambiguities by adopting a stringent approach whereby the Chamber would only consider the evidence initially submitted with the application, the Chambers adopted a flexible approach, requesting additional information and clarification on specific issues where required, and convening oral hearings to discuss any ambiguous issues.³² In the Lubanga case, the Chamber specifically permitted the Prosecution to supplement its initial application with additional information concerning the admissibility of the case.³³ Moreover, in the *Prosecutor v. Ruto et al* and *Prosecutor v. Kenyatta et al* cases, Pre-Trial Chamber II accepted witness statements concerning the Article 58 Application, which were submitted over two months after the Prosecution submitted its initial application.³⁴

41. The Chamber has an overarching duty to ensure the fairness of the proceedings. A fundamental aspect of this principle of fairness is that the Chamber should exercise its discretionary powers *vis-a-vis* the different participants in a similar manner. In light of the fact that this was the first time that admissibility had been challenged by the Government and taking into consideration the fact that State parties cannot be presumed to

³² See for example, *Prosecutor v. Lubanga*, ICC-01/04-01/06-27, Redacted Version of the Decision concerning Supporting Materials in Connection with the Prosecution's Application REDACTED pursuant to article 58, 9 March 2006; *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-352-US-Exp, cited in ICC-01/04-01/07-4, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, 6 July 2007, footnote 4.

³³ *Prosecutor v. Lubanga*, ICC-01/04-01/06-47, Decision concerning the Hearing on 2 February 2006, 22 March 2006.

³⁴ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-01, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, para. 4; *Prosecutor v. Kenyatta et al*, ICC-01/09-02/11-01, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, para. 4.

be so familiar with ICC case law and proceedings as the Prosecution, it was fundamentally unreasonable and unfair for the Pre-Trial Chamber to deprive the Government of the same opportunity of supplementing its admissibility application, which the Chamber had afforded to the Prosecution in connection with its Article 58 Application.

The Chamber erred by refusing the Government's request to convene an oral hearing

42. The Pre-Trial Chamber rejected the Government's request for an oral hearing on the grounds that the issue had already been adjudicated in its Decision rejecting the Government request for a Status Conference.³⁵ In so doing, the Pre-Trial Chamber argued that there was no distinction between the Government's request for a Status Conference and its request for an oral hearing. The Defence agrees with the Government's submissions that the Pre-Trial Chamber incorrectly conflated the Government's request for a Status Conference with its request for an oral hearing.

43. At paragraph 20 of its Application, the Government argued that "before any final determination of the present Application is made by the Pre-Trial Chamber, the Government of Kenya requests that an oral hearing is scheduled, in consultation with the parties, to permit the Government the opportunity to address the Pre-Trial Chamber in respect of its Application. The Application is plainly of vital importance to the national interest and future of Kenya and its people. It is particularly critical to the future course of judicial proceedings in Kenya, and is thus clearly a matter to be dealt with at a public hearing before the Pre-Trial Chamber so that all relevant arguments can be submitted and considered, (As noted above, this is the first time that an application made by a State Party under Article 19 is being considered before the ICC)."

44. It is clear from this paragraph that the purpose of the oral hearing was to raise and discuss all "relevant arguments" concerning the substance of the admissibility challenge. In contrast, at paragraph 21 (in a different section of the Application), the Government "propose[d] that a Status Conference be convened to discuss the timetable as set out in the Application and for submissions from the parties to be made on procedure so that the Pre-Trial Chamber can make orders and directions in accordance with Rules 58 and 59. Given

³⁵ Decision, para 39.

the particular circumstances of Kenya's case, and as this is the first case in which the procedure for the consideration and determination of a challenge under Article 19 by a State will have to be decided, such matters should be addressed in detail at a Status Conference with written submissions from the parties in advance, if necessary.” The reference to a timetable, procedure and Rules 58 and 59 makes it clear that the purpose of this hearing was to discuss procedural matters concerning the resolution of the application, and not the substance of the application itself.

45. In any case, even if the prior decision on the status conference had encompassed the request for an oral hearing, the Appeals Chamber has confirmed that it is possible to challenge earlier procedural decisions which impact upon the admissibility proceedings, as part of the appeal of the ultimate decision on admissibility.³⁶ In this regard, the decision of the Chamber to reject the request for an oral hearing fundamentally prejudiced the Government, and affected the outcome of the Decision. As elaborated above, significant aspects of the Chamber's findings were predicated on misinterpretations of the Government's submissions, for example, whether, in light of the Government's submissions concerning the definition of a case, the current investigations in Kenya extended to the 6 ICC suspects. An oral hearing would have permitted the Government to clarify these issues.

46. The Chamber also imposed an evidentiary requirement that the Party must submit 'concrete evidence', and yet, at the same time, completely deprived the Government of the opportunity to meet that threshold. In this regard, whilst parties and participants may rely on documentary evidence before the ICC, the jurisprudence of the Court has consistently held that documentary evidence has less weight than oral testimony.³⁷ The Chamber should therefore have accorded the Government a fair procedural opportunity to meet the evidential burden set by the Chamber, by adducing – at an oral hearing - all relevant evidence, including live testimony, and demonstrating the reliability and relevance of documentary evidence by tendering it through a witness.

³⁶ *Prosecutor v. Bemba*, ICC-01/05-01/08-962, 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, 19 October 2010, para. 101.

³⁷ See for example, *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, paras 48-53.

47. Moreover, national authorities do not conduct investigations with a view to satisfying ICC judges concerning admissibility requirements – they conduct them with a view to ensuring a thorough and impartial outcome. The current status of the investigations might have therefore been difficult to coalesce into a tangible written format, which could have easily been submitted in conjunction with the admissibility challenge. Whereas there may have been security concerns regarding filing information concerning actual or potential witnesses in an *inter partes* setting before a foreign court, as *per* the request of the Kenyan government, the police commissioner could have given a thorough outline of the status of investigations under oath.

48. Finally, the decision of the Pre-Trial Chamber was inconsistent with the fact that the ICC has evidenced a consistent practice of granting state parties a right to audience for any matters that affect their competence.³⁸ This also takes into consideration the fact that State parties cannot be expected to be completely acquainted with ICC case law and procedures, and might thus be able to better express their views in the context of an oral court hearing, as opposed to the procedural confines of a written filing.

The Chamber erred by refusing 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

49. In its Decision, the Pre-Trial Chamber divorced the Government's request for assistance from the Government's challenge to admissibility, and held that the former was not directly related to the latter. In a subsequent decision concerning the merits of the request for assistance, however, the Pre-Trial Chamber rejected the request for assistance on the basis of the lack of documentation concerning the existence of ongoing investigations in Kenya concerning either crimes under the Statute of the Court or serious crimes under

³⁸ In addition to the admissibility related decisions referred to by the Government at footnote 16 of its Application, the Defence refers to the following case law: *Prosecutor v. Katanga and Ngudjolo*, Order convening a status conference (Regulation 30 of the Regulations of the Court), ICC-01/04-01/07-2868, 5 May 2011, para. 14 ("In light of all the submissions, and considering that a number of issues remain to be elucidated for it to rule in full knowledge of the facts, the Chamber convenes a status conference, to which the authorities of the host State are invited. The host State authorities shall, *inter alia*, address the legal status of the three detained witnesses with effect from their arrival in the Netherlands and shall state the extent of their jurisdiction over the witnesses"); See also *Prosecutor v. Bemba*, ICC-01/05-01/08-475, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, 14 August 2009, paras. 90-93 (in which the Single Judge recognised that the totality of the views of the States was not necessarily reflected in their written observations, and therefore decided that it was vital to convene a public hearing so that all relevant issues could be discussed thoroughly).

domestic law.³⁹ In so doing, the Chamber failed to take into consideration any of the evidence, which the Government has submitted in connection with its admissibility challenge, notwithstanding the fact that it was before the same Chamber.

50. By requiring the Government to demonstrate the existence of ongoing investigations, the Chamber also implicitly recognised that the issues of admissibility and requests for cooperation *are* intrinsically linked. In accordance with the Chamber's reasoning, the Government will only be entitled to either challenge admissibility or request cooperation from the Court, if it can demonstrate the existence of investigations. However, since the Chamber has set a high evidential standard for proving the existence of investigations and required the Government to adhere to the same person/same conduct test, the Government will not be in a position to prove the existence of investigations to the requisite level unless it has first been informed/provided with the evidence upon which the ICC cases are founded.

51. The Pre-Trial Chamber's decision to refuse to consider the Government's request for assistance in connection with the admissibility challenge also conflicts with other jurisprudence of the ICC, which recognises that the parties and participants are entitled to judicial assistance to obtain any cooperation which may assist an admissibility challenge.⁴⁰ In this regard, the Rome Statute system and principles of complementarity would be completely unbalanced if the Court were to impose obligations on State parties to co-operate with the Court in assisting a party to challenge the admissibility of the Court,⁴¹ but decline to provide any assistance to a State party to obtain information which may be necessary to substantiate their challenge to admissibility.

The Chamber erred by concluding 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

³⁹ *Kenyan Situation*, ICC-01/09-63, Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence', 29 June 2011.

⁴⁰ *Prosecutor v. Bemba*, ICC-01/05-01/08-655, Second decision on disclosure relating to an admissibility challenge, 15 December 2009; *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-47, Decision on the Defence Request for Disclosure, 27 January 2011, p. 11.

⁴¹ It would appear that most decisions concerning state cooperation are issued on a confidential ex parte basis. However, the existence of such orders is alluded to in *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1213, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 16 June 2009, pages 23-25.

52. The Pre-Trial Chamber concluded that the same person/same conduct test was applicable because the Appeals Chamber had implicitly endorsed the applicability of the same person aspect of the test, as had other Pre-Trial Chambers.

53. In determining whether the Pre-Trial Chamber was correct to find that the Appeals Chamber had ruled on this issue, it is notable that the ICC Appeals Chamber has repeatedly emphasised that it should not rule on hypothetical or advisory issues: “[t]he Appeals Chamber considers it inappropriate to pronounce itself on *obiter dicta*. To do so would be tantamount to rendering advisory opinions on issues that are not properly before it”.⁴²

54. In the *Katanga* admissibility proceedings, the Pre-Trial Chamber had declined to rule on precise definition of a ‘case’ and the same person/same conduct test due to the fact that the Government of the Democratic Republic of Congo had indicated that they were not conducting any investigations related to the case and as such, the initial threshold for admissibility was not met.⁴³ The Appeals Chamber expressly recognised at paragraph 80 of its Judgment on admissibility that in these circumstances, it would be inappropriate to rule on the test.

⁴² *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1497, 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, 25 September 2009, para 38. See also *DRC Situation*, ICC-01/04-556, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, 19 December 2008, para. 57; See also B. Batros, ‘The Judgment on the Katanga Admissibility Appeal: Judicial Restraint at the ICC’, *Leiden Journal of International Law*, 23 (2010), pp. 343–362 at p. 349, citing *Prosecutor v. Lubanga*, ICC-01/04-01/06-2205 OA15 OA16, Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 Entitled ‘Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court’, 8 December 2009, paras. 110-111. In addition, see *Prosecutor v. Lubanga*, ICC-01/04-01/06-568 OA3, Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I Entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence’, 13 October 2006, para. 75; *Prosecutor v. Lubanga*, ICC-01/04-01/06-1433 OA11, Judgment on the appeal of Mr Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, para. 52; *Prosecutor v. Lubanga*, ICC-01/04-01/06-824 OA7, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled ‘De’cision sur la demande de mise en liberte’ provisoire de Thomas Lubanga Dyilo’, 13 February 2007, paras 122 and 138; *Prosecutor v. Kony et al.*, ICC-02/04-179 OA and ICC-02/04-01/05-371 OA2, Judgment on the Appeals of the Defence against the Decisions Entitled ‘Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06’ of Pre-Trial Chamber II, 23 February 2009, para. 38.

⁴³ *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1213, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 16 June 2009, para. 95.

55. Whilst the findings of the Appeals Chamber concerning the domestic investigation focus on the existence of investigations against Mr. Katanga, that is because neither the DRC nor the defence referred to the existence of investigations against any other persons in connection with the case. As it would have been unnecessary for the Appeals Chamber to resolve the same person/same conduct test in resolving the appeal, any determination on this issue would have been ‘advisory’ or hypothetical, and thus fallen foul of the Appeals Chamber’s circumscribed jurisdiction.
56. In terms of the applicability of previous Pre-Trial Chamber jurisprudence concerning the test, the Single Judge in the *Ruto et al.* and *Kenyatta et al.* case expressly recognised in a prior decision in those cases that “the usage of the verb ‘may’ in Article 21(2) of the Statute provides the Chamber with the discretion as to whether to follow previous precedents. Consequently, the provision as drafted rejects the *stare decisis* doctrine”.⁴⁴ In the absence of any binding jurisprudence on this point, the Pre-Trial Chamber therefore erred by failing to address the Government’s submissions in accordance with the hierarchy of applicable law under Article 21 of the Statute.
57. None of the prior ICC decisions on this point cite any authority for the same person/same conduct test. It is also arguable that the test is not consistent with the objects and purposes of the Rome Statute, nor is it consistent with other ICC jurisprudence (including case law by the same Pre-Trial Chamber in the *Ruto et al.* and *Kenyatta et al.* cases) regarding the parameters of a case.
58. In terms of the object and purposes of the Rome Statute, the ICC is vested with the mandate to determine the truth,⁴⁵ and to eliminate impunity by ensuring effective prosecution at both the national and international level, as set out in the Preamble. These lofty objectives will only be successful if the determination of the ‘truth’ is harmonised at both the international and national level. In this regard, the same conduct/same person test invites the possibility that ICC could assume jurisdiction over crime base events, which are being prosecuted by national authorities, but attributed to a completely different militia or group of persons than the ICC case. How would the objective to determine the

⁴⁴ *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-74, Decision on the "Prosecution's Application for Leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters', ICC-01/09-01/11-44", 2 May 2011, para 25; *Prosecutor v. Kenyatta et al.*, ICC-01/09-02/11-77, Decision on the "Prosecution's Application for leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters' (ICC-01/09-02/11-48)", 2 May 2011, para 23.

⁴⁵ See for example, Article 69(3) of the Statute.

truth be realised if national courts convicted one person for allegations which the ICC is simultaneously pursuing against another person (who may be from an organization or group which is completely incompatible with the findings from the national court)?

59. The same person/same conduct test is predicated on the underlying assumption that the ICC prosecution has successfully identified the perpetrators, who bear the most responsibility, and potentially, the sole responsibility for the crimes in question (which is the case for charges of co-perpetration or command responsibility, as there can only be a finite number of persons who made an essential contribution to the commission of the crime and had the power to frustrate its execution, or who exercised *de jure* or *de facto* authority over the physical perpetrators).
60. This assumption completely violates the assumption of innocence. It might also simply be the case that the OTP has failed to identify the correct perpetrator. If the Kenyan authorities have evidence, which demonstrates that another person should be prosecuted in the stead of the ICC defendants, would justice be served if Kenyan courts had to wait until after the ICC had reached a verdict on the case before it could pursue the matter (if, indeed it could)? At the same time, it would not be feasible to conduct simultaneous prosecutions because the evidential record would suffer by being divided between two prosecuting authorities.
61. This specific scenario arose at the ICTY, in connection with a request from the ICTY prosecutor that the Macedonian authorities defer a specific case (the *Mavrovo Road Workers* case) to the competence of the ICTY. The Macedonian authorities had initiated proceedings against two specific individuals in connection with certain events.⁴⁶ The ICTY prosecutor requested the Chamber to order the Macedonian authorities to defer to the competence of the ICTY as concerns the case, but at the same time, the Prosecution informed the Chamber that the ICTY Prosecutor would not be pursuing charges against the same two individuals due to lack of evidence. The ICTY Prosecutor nonetheless submitted that the effect of the deferral would be that the Macedonian authorities would be precluded from continuing its proceedings against the two individuals. The ICTY Prosecutor justified the request on the basis that:

parallel investigations of the same acts by the Prosecutor and the Macedonian authorities at the same time, however, may have serious negative implications and may ultimately

⁴⁶ *Mavrovo Road Workers* Case, IT-02-44-Misc. 6, 'Decision on the Prosecutor's Request for Deferral and Motion for Order to the Former Yugoslav Republic of Macedonia, 4 October 2002.

jeopardize the success of the Prosecutor's investigations. In particular, the Prosecutor fears that multiple interviews of witnesses by different investigating parties create the risk that conflicting statements may arise and that witnesses be antagonised. Further, the seizure and analysis of physical and forensic evidence by the domestic authorities may compromise the Prosecutor's ability to analyse the same evidence. Due to the potentially different investigative procedures of the two investigating parties, the acts of the Macedonian authorities could also compromise or taint subsequent investigative efforts by the Prosecutor.⁴⁷

62. The Chamber granted the Prosecutor's request for deferral, although it requested the ICTY Prosecutor and national authorities to consult with a view to deciding upon a mechanism which would minimise the blocking effect for national prosecutions.⁴⁸ In deciding upon the relationship between the domestic proceedings and the ICTY proceedings, the ICTY did not require the cases to relate to identical incidents; it was sufficient if the incidents were 'closely related' to the domestic proceedings.⁴⁹

63. It is also notable that different ICC Chambers have recognised that in line with the presumption of innocence, and the fact that the Chamber has not yet reached a final determination of the personal responsibility of the defendant, it would be inappropriate to require victims requesting to participate in the case to identify the ICC defendant as the person responsible for the harm that they have suffered. For example, in the *Kony* case, the Pre-Trial Chamber found that a victim had suffered harm as a result of the charges, and should therefore be granted the right to participate in the case, notwithstanding the fact that the victim had identified the UPDF and not the LRA as being responsible for the attack in question.⁵⁰ Similarly, in the *Bemba* case, the Trial Chamber has stated that it is unnecessary to either identify the physical perpetrators or attribute responsibility to the defendant for the purpose of establishing that the harm suffered by the victim is related to the case.⁵¹

64. It would defeat the purpose of complementarity for the ICC to utilise a broad definition of a 'case' for the purpose of exercising jurisdiction over harm suffered by alleged victims, but a very narrow definition for the purpose of determining whether a sovereign State can exercise jurisdiction over the harms suffered by its own nationals.

⁴⁷ Ibid, para 12.

⁴⁸ Ibid, para 39-41.

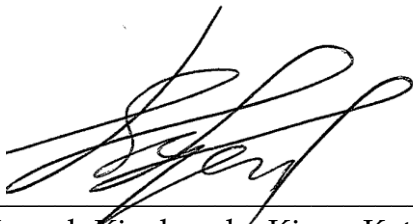
⁴⁹ Ibid, para 41.

⁵⁰ *Prosecutor v. Kony*, ICC-02/04-101, Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10 August 2007, paras 72-76.

⁵¹ *Prosecutor v. Bemba*, ICC-01/05-01/08-1091, Decision on 653 Applications by Victims to Participate in the Proceedings, 23 December 2011, para 27.

IV. Conclusion & Request for Relief

65. The Defence joins the Government in respectfully inviting the Appeals Chamber to overturn and reverse the Pre-Trial Chamber's Decision and to hold the case against Msrs. Ruto, Kosgey and Sang to be inadmissible before the ICC. In the alternative, the Defence requests that the Appeals Chamber return the matter to the Pre-Trial Chamber to hear and assess evidence on issues of complementarity with argument from the parties and in light of supplemental materials submitted by the Government of Kenya which go directly to the basis upon which the Pre-Trial Chamber rejected the Government's initial Application.⁵²



Joseph Kipchumba Kigen-Katwa

On behalf of Mr. Joshua Arap Sang and Mr. William Samoei Ruto

Dated this 12 July 2011

In Nairobi, Kenya

⁵² *Prosecutor v. Ruto et al*, ICC-01/09-01/11-159, Filing of Updated Investigation Report by the Government of Kenya in the Appeal Against the Pre-Trial Chamber's Decision on Admissibility, 4 July 2011.