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International Criminal Court

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No.: **ICC-01/09-01/11**
Date: **30 May 2011**

PRE-TRIAL CHAMBER II

Before: **Judge Ekaterina Trendafilova, Presiding Judge**
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE REPUBLIC OF KENYA
IN THE CASE OF THE PROSECUTOR V. WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY AND JOSHUA ARAP SANG

Public

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

The Office of the Prosecutor
Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Counsel for William Samoei Ruto
Joseph Kipchumba Kigen-Katwa, David Hooper and Kioko Kilukumi Musau

Counsel for Henry Kiprono Kosgey
George Odinga Oraro

Counsel for Joshua Arap Sang
Joseph Kipchumba Kigen-Katwa

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives
Geoffrey Nice
Rodney Dixon

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar
Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

PRE-TRIAL CHAMBER II (the "Chamber") of the International Criminal Court (the "Court") renders this decision[1] on the application filed by the Government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Rome Statute (the "Statute").

I. Procedural History

1. On 31 March 2010, the Chamber, by majority, issued its decision authorising the Prosecutor to commence an investigation into the situation in the Republic of Kenya (the "31 March 2010 Authorisation Decision").[2]

2. On 8 March 2011, the Chamber, by majority, decided to summon William Samoei Ruto ("Mr. Ruto"), Henry Kiprono Kosgey ("Mr. Kosgey") and Joshua Arap Sang ("Mr. Sang") to appear before the Court on Thursday, 7 April 2011.[3]

3. On 31 March 2011, the Chamber received the "Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute"(the "Government's Application" or the "Application"), in which the Government of Kenya requested that the Chamber (1) determines that the case, against the three persons for whom summonses to appear have been issued, is inadmissible (the "First Request"); (2) convenes a status conference to be attended by the Government of Kenya as well as the parties "to address the Pre-Trial Chamber on the procedure to be adopted before any orders or directions are made [in this regard]" (the "Second Request"); and (3) affords the Kenyan Government with "a separate time allocation to have an opportunity to address briefly the Pre-Trial Chamber on one or both of

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[1] While concurring with the Chamber, Judge Hans-Peter Kaul reiterates, for the purposes of this decision, his declaration as annexed in a previous decision, see Pre-Trial Chamber II, "Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute", ICC-01/09-01/11-31.

[2] Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr.

[3] Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang", ICC-01/09-01/11-1.

the hearings' days of 7/8 April 2011, as the Court may decide in circumstances where the parties can be present" (the "Third Request").[4]

4. On 4 April 2011, the Chamber issued its "Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute" (the "4 April 2011 Decision") in which it, *inter alia,* rejected the Second and Third Requests. The Chamber moreover requested the Prosecutor and the Defence to submit written observations on the First Request presented in the Government's Application by no later than Thursday 28 April 2011. It also decided that, for the purposes of article 19 proceedings, the Office of Public Counsel for Victims (the "OPCV") shall represent victims who have submitted applications to participate in the Court's proceedings, with regard to the present case, and invited them to submit written observations by no later than Thursday 28 April 2011.[5]

5. On 11 April 2011, the Government of Kenya sought leave to reply to the written observations, which were due to be submitted to the Chamber on 28 April 2011.[6]

6. On 21 April 2011, the Government of Kenya filed 22 annexes amounting to more than 900 pages containing materials relevant to the First Request, as presented in the Application.[7] On the same date, the Government also filed into the record of the situation a request for cooperation and assistance (the "Cooperation Request"), under article 93(10) of the Statute and rule 194 of the Rules of Procedure and Evidence (the "Rules").[8] The Cooperation Request was followed by several filings.[9]

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[4] ICC-01/09-01/11-19, paras 80-82.
[5] Pre-Trial Chamber II, "Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute", ICC-01/09-01/11-31, p. 7.
[6] ICC-01/09-01/11-48.
[7] ICC-01/09-01/11-64 and its annexes.
[8] ICC-01/09-58.
[9] ICC-01/09-01/11-83; ICC-01/09-01/11-83-Corr; ICC-01/09-01/11-90; ICC-01/09-61.

7. On 28 April 2011, the Chamber received the written observations on the First Request, as presented in the Government's Application, from the Prosecutor,[10] the Defence of Mr. Ruto and Mr. Sang,[11] the Defence of Mr. Kosgey,[12] as well as from the OPCV,[13] acting on behalf of the victims who have submitted applications to participate in the Court's proceedings (the "Observations").

8. On 2 May 2011, the Government of Kenya reiterated its request to be granted leave to reply to the Observations,[14] and on the same day, the Chamber issued a decision in which it decided to grant the Government the opportunity to reply to the Observations, by no later than 13 May 2011, and to the extent that it engages "*solely* with the relevant issues raised in the observations received".[15]

9. On 13 May 2011, the Government of Kenya filed its reply to the Observations submitted on the First Request together with 7 annexes, all of which were notified to the Chamber on 16 May 2011 (the "Government's Reply" or the "Reply").[16]

10. On 17 May 2011, the Government of Kenya filed the "Application for an Oral Hearing Pursuant to Rule 58(2)", in which it requested the Chamber to convene a hearing regarding the admissibility challenge, before the Chamber decides on the merits (the "17 May 2011 Application").[17]

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[10] ICC-01/09-01/11-69.
[11] ICC-01/09-01/11-68.
[12] ICC-01/09-01/11-67.
[13] ICC-01/09-01/11-70 and its annexes.
[14] ICC-01/09-01/11-73.
[15] Pre-Trial Chamber II, "Decision under regulation 24(5) of the Regulations of the Court on the Motion Submitted on Behalf of the Government of Kenya", ICC-01/09-01/11-76, p. 7.
[16] ICC-01/09-01/11-89 and its annexes.
[17] ICC-01/09-01/11-94.

11. On 20 May 2011, the Defence of Mr. Ruto and Mr. Sang filed a response to the 17 May 2011 Application, in which it requested the Chamber to grant it (the "20 May 2011 Response").[18]

12. On 25 May 2011, the Defence of Mr. Kosgey filed a response to the 17 May 2011 Application in which it "support[ed] the Government's application for an Oral Hearing".[19]

II. Submissions of the Parties and Participants

The Government's Application

13. In its Application, the Government of Kenya argued in principle that the Chamber must make its determination "with a full understanding of the fundamental and far-reaching constitutional and judicial reforms"[20] both recently enacted and anticipated,[21] as well as "the investigative processes that are currently underway".[22] In outlining these reforms, the investigative processes, and the proposed timeframe and procedure, the Government of Kenya pointed out, *inter alia*, that a new constitution was adopted in August 2010 which incorporates a Bill of Rights that strengthens "fair trial rights and procedural guarantees" in the criminal justice system. According to the Government, the new constitution remedies past deficiencies and weaknesses in the dispensation of the administration of justice in Kenya.[23] It also empowers Kenyan national courts to deal with the cases currently before the Court,[24] without needing to pass legislation establishing a special tribunal.[25] Further, the adoption of the new constitution and related reforms such as, the appointment of a new Chief Justice and High Court judges, also "meant that

[18] ICC-01/09-01/11-95.
[19] ICC-01/09-01/11-98.
[20] ICC-01/09-01/11-19, para. 2.
[21] ICC-01/09-01/11-19, paras 2 and 9.
[22] ICC-01/09-01/11-19, para. 12.
[23] ICC-01/09-01/11-19, paras 2 and 5.
[24] ICC-01/09-01/11-19, paras 2 and 5.
[25] ICC-01/09-01/11-19, paras 2 and 43.

Kenya is able to conduct national criminal proceedings for all crimes arising from the post-election violence".[26]

14. The Government submitted that the process investigating crimes arising out of the 2007-2008 post-election violence "will continue over the coming months", and that steps currently undertaken and those envisaged, with respect to all cases at different levels, will be finalized "by September 2011".[27] In the Government's view, the investigation of the cases before the Court "will be most effectively progressed once the new [Director of Public Prosecutions] DPP is appointed [...] by the end of May 2011", and that currently they are "continuing under the Directorate of Criminal Investigations".[28] During the proposed 6-month period, the Government "will be undertaking investigations" and "will be in a position to provide progress reports" to the Chamber by end of July, August and September 2011.[29]

15. In particular, the Government proposes that by the end of July 2011, it will provide the Chamber with a progress report regarding investigations carried out under the new DPP[30] and "how they extend up to the highest levels".[31] This report will build "on the investigation and prosecution of lower level perpetrators to reach up to those at the highest levels who may have been responsible".[32] Moreover, by the end of August 2011, the Government will submit a further report on, *inter alia*, the "progress made with investigations to the highest levels"[33] followed by a third report on the "progress made with investigations and readiness for trials in light of [the] judicial reforms".[34]

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[26] ICC-01/09-01/11-19, paras 34, 47, 56 and generally paras 47-59.
[27] ICC-01/09-01/11-19, para. 13.
[28] ICC-01/09-01/11-19, para. 69.
[29] ICC-01/09-01/11-19, paras 14, 17 and 66.
[30] ICC-01/09-01/11-19, paras 72 and 79.
[31] ICC-01/09-01/11-19, para. 79.
[32] ICC-01/09-01/11-19, paras 34 and 71.
[33] ICC-01/09-01/11-19, para. 79.
[34] ICC-01/09-01/11-19, para. 79.

16. The Government also averred that in applying the law to the facts presented, the Chamber should make its determination "on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge",[35] and as to whether there "is any record of investigations or prosecutions at 'the time of the proceedings'".[36] Thus, in conducting such an examination, the Government asserted that the admissibility of the case should be assessed against the criteria established by the Chamber in the 31 March 2010 Authorisation Decision, to the effect that "national investigations must [...] cover the same conduct in respect of persons at the same level in the hierarchy being investigated by the ICC".[37]

The Prosecutor's Observations

17. The Prosecutor submitted that the interested party lodging an admissibility challenge bears the burden of proof and that the Government has failed so far to show that it "has conducted or is conducting investigations or prosecutions in relation to the cases" before the Court.[38] According to the Prosecutor, if Kenya is conducting investigations or prosecutions, in relation to persons other than the three suspects subject to the Court's proceedings, then it is not addressing the same case.[39] The same holds true in relation to a State carrying out investigations with respect to different conduct.

18. The Prosecutor further argued that a State promising to conduct domestic proceedings is not sufficient to satisfy the admissibility requirements. Also, allowing "a lengthy timetable for submissions"[40] for the sake of assessing the development of "the local judicial institutions has no basis in the Statute", and would lead to unnecessary delay of proceedings.[41] Thus, should Kenya later initiate "genuine

[35] ICC-01/09-01/11-19, para. 31.
[36] ICC-01/09-01/11-19, para. 31.
[37] ICC-01/09-01/11-19, para. 32.
[38] ICC-01/09-01/11-69, para. 12.
[39] ICC-01/09-01/11-69, para. 18.
[40] ICC-01/09-01/11-69, para. 21.
[41] ICC-01/09-01/11-69, para. 21.

proceedings against the same person[s] for the same conduct", it may seek leave to enter a second admissibility challenge, the Prosecutor added.[42]

19. With respect to the 22 annexes filed by the Government, the Prosecutor claimed that the Chamber should disregard them as they were submitted "three weeks after filing [the Government's Application]", and without having sought leave of the Chamber.[43] The Prosecutor also submitted that these annexes, even if admitted, prove that domestic investigations against the suspects remain "hypothetical",[44] and accordingly, the Chamber should determine that the case is admissible.[45]

The Joint Defence Observations of Mr. Ruto and Mr. Sang

20. In their joint observations, the Defence of Mr. Ruto and Mr. Sang put forth three main arguments. First, that Kenya is currently investigating the case against the suspects;[46] second, that Kenya is neither unwilling nor unable genuinely to carry out the investigations;[47] and third, that the present submissions are without prejudice to the right of the Defence to lodge an admissibility challenge pursuant to article 19(2)(a) of the Statute.[48]

21. In developing their arguments, the Defence of Mr. Ruto and Mr. Sang argued that the "definition of a case for the purposes of a challenge to admissibility under article 17(1)(a) is broader than the same person/same conduct test, which applies to *ne bis in idem* proceedings".[49] According to the Defence, it would be inconsistent with the Court's statutory provisions governing the pre-trial stage to require this strict test, given that there is a possibility that charges are finally confirmed in a different

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[42] ICC-01/09-01/11-69, para. 22.
[43] ICC-01/09-01/11-69, para. 23.
[44] ICC-01/09-01/11-69, paras 25 and 26.
[45] ICC-01/09-01/11-69, paras 28-29.
[46] ICC-01/09-01/11-68, paras 5-14.
[47] ICC-01/09-01/11-68, paras 15-30.
[48] ICC-01/09-01/11-68, paras 31-33.
[49] ICC-01/09-01/11-68, para. 7.

manner from that initially presented by the Prosecutor at the summonses' stage.[50] This interpretation could lead to blocking "successive [admissibility] challenges" made by the parties in favour of the Prosecutor.[51] However, apart from these arguments, the Government of Kenya is investigating the suspects "in connection with the same conduct and incidents", which formed the basis for the decision on the summonses to appear.[52]

22. The Defence also submitted that based on the case-law of Trial Chamber II, the Chamber cannot question the motive of national authorities to determine whether the State is unwilling to investigate, if the latter declared itself so. Thus, the Kenyan authorities have "clearly evidenced their willingness to investigate" the suspects, and due to the explanations provided by the Government, the requirement of article 17(2) of the Statute has not been satisfied, the Defence adds.[53] The Defence further avers that the requirements of article 17(3) of the Statute are also not applicable, since the country has a functioning judicial system and does not face legal impediments, such as those prevailing in the "Kony et al case".[54]

23. Finally, the Defence reserved its right to lodge an admissibility challenge as guaranteed by article 19(2)(a) of the Statute and on the basis of the facts as they present themselves at the time.[55]

The Defence Observations of Mr. Kosgey

24. In its observations, the Defence of Mr. Kosgey submitted that the Government's Application merits careful and thorough consideration.[56] However, being an interested party in the proceedings, the Defence is not in a position "to contribute

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[50] ICC-01/09-01/11-68, paras 9 and 10.
[51] ICC-01/09-01/11-68, para. 11.
[52] ICC-01/09-01/11-68, paras 13 and 14.
[53] ICC-01/09-01/11-68, paras 17-18, 22 and 25.
[54] ICC-01/09-01/11-68, paras 28-30.
[55] ICC-01/09-01/11-68, paras 31-33.
[56] ICC-01/09-01/11-67, para. 13.

definitively on the information submitted or to be submitted by the Government",[57] yet it reserves the right to challenge admissibility at a later stage.[58]

The OPCV's Observations

25. The OPCV invited the Chamber to reject the Government's Application and find that the case against the suspects is admissible.[59] In its Application, it argued that the Government's Application "avoided indicating whether investigations are currently underway against the suspects",[60] and instead referred to suggested, future investigative steps. Thus, despite the Government's undertaking to submit to the Chamber a progress report on said steps, the OPCV remains unconvinced. In their view, any such "report will explain *how* the highest echelons of officialdom are being investigated, and that those echelons include the suspects".[61]

26. Responding to the "litany of actual or anticipated constitutional, judicial, prosecutorial and police reforms"[62] relied upon in the Government's Application, the OPCV stressed that "they do not constitute an investigation under article 17".[63] The only indication of an investigation or prosecution proffered by the Government was the Attorney General's 21 April 2011 letter. The OPCV alleged that "the timing of the letter [...] raises serious questions about the reliability of the Government's assertions particularly when they are not supported by meaningful and concrete evidence".[64] According to the OPCV, "the letter is specifically designed to prevent proceedings at the ICC, rather than reflecting a willingness to conduct a genuine investigation".[65] Ultimately, the Chamber is implored to draw from this letter, an adverse inference that investigations against the suspects are not underway, and

[57] ICC-01/09-01/11-67, para. 14.
[58] ICC-01/09-01/11-67, para. 14.
[59] ICC-01/09-01/11-70, p. 24.
[60] ICC-01/09-01/11-70, para. 10.
[61] ICC-01/09-01/11-70, para. 10.
[62] ICC-01/09-01/11-70, para. 13.
[63] ICC-01/09-01/11-70, para. 14.
[64] ICC-01/09-01/11-70, para. 16.
[65] ICC-01/09-01/11-70, para. 38.

specifically that as at 30 March 2011 only "persons at "the same level" as the suspects were being contemplated" [66] and not the suspects themselves.

27. The OPCV reiterated that "a genuine investigation and prosecution [...] requires particularly robust guarantees of independence, neutrality, and transparency. Legislative reform alone is insufficient [...]".[67] It recalled the ethos central to proposals for the establishment of a Special Tribunal, namely to overcome deficiencies in the Kenyan national system, such as "the deep-seated mistrust that the system would be unbiased by ethnic considerations".[68] As such, "the rejection of the Special Tribunal, in the absence of other concrete and specific steps, is strongly indicative of an unwillingness to genuinely investigate and prosecute".[69] Furthermore, the absence of the suspects from the list of pending investigations, provided by the Government, is "compelling evidence" of the latter's unwillingness to genuinely investigate and prosecute the suspects, the OPCV added.[70]

The Government's Reply

28. In its Reply, the Government of Kenya endorsed a number of paragraphs outlined in the observations submitted by the Defence of Mr. Ruto and Mr. Sang.[71] The Government also reiterated its arguments that it has the capacity to address the case currently before the Court, and that there are ongoing investigations with respect to the three suspects subject to the Court's proceedings.[72] Thus, in presenting its arguments, the Government opposed a number of issues raised in the observations submitted by the Prosecutor and the OPCV. In particular, the Government disagreed with the same conduct and same person test "as the State

[66] ICC-01/09-01/11-70, para. 18.
[67] ICC-01/09-01/11-70, para. 33.
[68] ICC-01/09-01/11-70, para. 29.
[69] ICC-01/09-01/11-70, para. 31.
[70] ICC-01/09-01/11-70, para. 35.
[71] ICC-01/09-01/11-89, para. 19. The Government referred to paragraphs 2-12, 14, 19 and 20 of the Defence observations.
[72] ICC-01/09-01/11-89, paras 2, 29-32 and 57-58. The Government speaks about ongoing investigations in relation to the six suspects in the two cases. For the purposes of this decision, the Chamber will only refer to the three suspects involved in the present case.

may simply not have evidence available to the Prosecutor of the ICC or may even be deprived of such evidence".[73] Moreover, even if the State possessed the same evidence as that held by the Prosecutor, "there can be no requirement that in order to exclude ICC admissibility the State must conduct an investigation that leads to *charging* of those very individuals".[74]

29. The Government also disputed the issue of the proper timing for assessing the admissibility challenge. While it understood that the Prosecutor and the OPCV's observations suggest that the timing to make an admissibility assessment is the date on which the challenge is lodged by the State, it argued that the right moment is when it has submitted its "staged reports" to the Chamber.[75]

30. According to the Government, it has included the latest public information on the investigation, and should the Chamber doubt its genuineness, the Government proposed that the Chamber hear the Commissioner of Police.[76] The Government also pointed out the reform undertaken concerning the police and witness protection.[77] It argues that the assessment of admissibility is an ongoing process and therefore the annexes appended to the Reply should be taken into consideration by the Chamber before making its final determination.[78]

III. The Applicable Law

31. The Chamber notes articles 17, 19(2)(b), 21(1)(a), (2) and (3) of the Statute, rules 58 (2),(3) and 59(1)(b), (2) and (3) of the Rules.

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[73] ICC-01/09-01/11-89, para. 27.
[74] ICC-01/09-01/11-89, para. 28.
[75] ICC-01/09-01/11-89, paras 24-25 and also para. 64.
[76] ICC-01/09-01/11-89, paras. 58 and 70.
[77] ICC-01/09-01/11-89, paras 68-69 and 71.
[78] ICC-01/09-01/11-89, para. 77.

IV. Preliminary Determination on the Cooperation Request

32. In the Cooperation Request, the Government sought the Court's assistance in the form of receiving "all statements, documents, or other types of evidence" obtained in the course of the Prosecutor's investigations.[79] According to the Government, this will assist the national authorities in conducting and advancing their investigations and prosecutions into the Post-Election Violence.[80] Therefore, the Government of Kenya requested the Chamber to address the matter prior to ruling on the merits of the admissibility challenge.[81]

33. At the outset, the Chamber notes that the Cooperation Request was lodged by the Government of Kenya three weeks *after* the Application was filed. At the time the Government of Kenya lodged the challenge, it never purported that the First Request presented in the Application was *dependent* on any future request under article 93(10) of the Statute. Thus, if the Government of Kenya believes that these requests are inter-related, perhaps they should have presented them together and not after this period of time has elapsed.

34. Be it as it may, the Chamber wishes to point out that the Cooperation Request as referred to in its title, is actually a request for assistance which falls within the pure ambit of part IX of the Statute regulating the cooperation between the Court and States or other intergovernmental organisations. As such, the request for assistance has no linkage with the issue of admissibility, which is regulated under part II of the Statute. *Ergo*, a determination on the inadmissibility of a case pursuant to article 17 of the Statute does not depend on granting or denying a request for assistance under article 93(10) of the Statute. This conclusion finds support in the fact that a State may exercise its national jurisdiction by way of investigating or prosecuting, irrespective of and independent from any investigative activities of the Prosecutor. These

[79] ICC-01/09-58, p. 3.
[80] ICC-01/09-58, p. 3.
[81] ICC-01/09-58, p. 4.

domestic proceedings should be in principle carried out without the assistance of the Court.

35. The independence of the article 19 regime from a request for assistance under article 93(10) of the Statute is further reflected in the discretionary wording of article 93(10) of the Statute. The language used in this provision does not impose any obligation ("may") on the Court to grant a request for assistance presented by a State. In addition, cooperation under article 93(10) of the Statute may relate to crimes other than those falling under the jurisdiction of the Court ("serious crimes under national law of the requesting State"). Finally, the Chamber underlines that article 19 of the Statute does not contain any explicit reference to article 93(10) of the Statute. In particular, there is no indication whatsoever in the Statute that the application of articles 17 and 19 are subject to granting a request for assistance under article 93(10) of the Statute. For these reasons, the Chamber shall rule on the merits of the Cooperation Request in a separate decision to be issued subsequently.

V. Determination on the 17 May 2011 Application

36. In the 17 May 2011 Application, the Government argues that "it specifically requested that the Pre-Trial Chamber schedule an oral hearing", but the Chamber "did not specifically address [it]". Instead, the Chamber ruled on the Government's other requests regarding a status conference, its participation during the 7 April 2011 initial appearance hearings, and the parties' submission of written observations.

37. The Chamber reminds the parties and participants that, although they are entitled to have access to court and to put forward any request that they may deem essential for strengthening their case, they are equally obliged to frame their arguments exercising good faith.

38. In this regard, the Chamber quotes paragraph 20 of the Application, which the Government of Kenya relies upon to argue its 17 May 2011 Application:

> Furthermore, 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.)[82] (emphasis added)

39. Reading the quoted paragraph 20 together with paragraph 21 of the same Application makes clear that the Government's request for holding a status conference *is in itself* the request for an oral hearing. This conclusion is evident when reading the opening sentence of said paragraph 21: "[a]ccordingly, the Government proposes that a *Status Conference* be convened to discuss [...]" (emphasis added), which draws the linkage and elucidates that the status conference request is in fact the oral hearing referred to in paragraph 20 of the Application.

40. Thus, the Government's claim that the Chamber did not rule on the request for an oral hearing in its 4 April 2011 Decision is misleading and must be corrected. In this regard, the Chamber recalls the 4 April 2011 Decision, in which it explicitly rejected the Government's request to convene a status conference. Alternatively, and on the basis of the discretion provided for in rule 58 of the Rules, the Chamber revealed the principal approach to be followed throughout the article 19 proceedings, namely "to confine the engagement of the parties [...] to providing written observations as dictated by rules 58(3) and 59(3) of the Rules".

41. Accordingly, the 4 April 2011 Decision placed the parties and participants on sufficient notice as to the way article 19 proceedings would be conducted. Had the parties any objection regarding the manner in which the Chamber organised the proceedings, it should have requested leave to appeal the 4 April 2011 Decision. This was not the case and the Chamber believes that it has given all parties and

[82] ICC-01/09-01/11-19, para. 20 (footnotes omitted).

participants ample opportunities to put forward all arguments regarding the admissibility challenge. Hence, the Chamber is not persuaded that a second round of submissions is needed prior to making a determination on the merits of the Application.

42. In any event, given that the Chamber has already ruled on the Government of Kenya's request concerning the convening of a status conference, which is in it self the "oral hearing" as demonstrated, it considers, therefore, that the 17 May 2011 Request is *in effect* a request for reconsideration. As the Chamber consistently ruled that the Court's statutory provisions do not accommodate a request of this nature,[83] the Government's 17 May 2011 Request should be rejected, without the need to engage further with any of the Government's or the Defence submissions related thereto. The Chamber shall now turn to the First Request, the main subject-matter of the present decision.

VI. Determination on the Admissibility Challenge (First Request)

43. The Chamber has thoroughly examined the Government's Application together with the 22 annexes submitted. It has also carefully considered the Observations received from the parties and participants, as well as the Government's Reply and its respective 7 annexes. The Government's Application and its Reply to the Observations, together with the annexes, reveal mainly the efforts undertaken thus far and those intended to be performed in the future, with respect to judicial reform in the country.

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[83] See., Pre-Trial Chamber II, "Decision on the "Prosecution's Application for Extension of Time Limit for Disclosure", ICC-01/09-01/11-82; Pre-Trial Chamber II, "Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II To Redact Factual Description of Crimes from the Warrant of Arrests, Motion for Reconsideration, and Motion for Clarification", ICC-02/04-01/05-60; Pre-Trial Chamber I, "Decision on the Prosecution Motion for Redaction", ICC-01/04-01/06-123; Pre-Trial Chamber I, "Decision on the Prosecution Motion for Reconsideration and, in the alternative. Leave to Appeal", ICC-01/04-01/06-166; Pre-Trial Chamber I, "Decision on the 'Demande des représentants légaux de VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, VPRS6 et a/0071/06 aux fins d'accéder au document confidentiel déposé par le Conseil de direction du Fonds d'affectation spéciale au profit des victimes le 7 février 2008'", ICC-01/04-457; Pre-Trial Chamber I, "Decision on the Defence for Mathieu Ngudjolo Chui's Request concerning translation of documents", ICC-01/04-01/07-477.

44. The Chamber is well aware that the concept of complementarity and the manner in which it operates goes to the heart of States' sovereign rights. It is also conscious of the fact that States not only have the right to exercise their criminal jurisdiction over those allegedly responsible for the commission of crimes that fall within the jurisdiction of the Court, they are also under an existing duty to do so, as explicitly stated in the Statute's preambular paragraph 6. However, it should be borne in mind that 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".[84] Therefore, in the context of the Statute, the Court's legal framework, the exercise of national criminal jurisdiction by States is not without limitations. These limits are encapsulated in the provisions regulating the inadmissibility of a case, namely articles 17-20 of the Statute.

45. Thus, while the Chamber welcomes the express will of the Government of Kenya to investigate the case *sub judice*, as well as its prior and proposed undertakings, the Chamber's determination on the subject-matter of the present challenge is ultimately dictated by the facts presented and the legal parameters embodied in the Court's statutory provisions.

46. In this context, the Chamber recalls article 17 of the Statute, which reads:

> 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

[84] Appeals Chamber, "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", ICC-01/04-01/07-1497, para. 85.

> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
> (d) The case is not of sufficient gravity to justify further action by the Court.
>
> 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
>
> 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

47. The Chamber has previously stated that the admissibility test envisaged in article 17 of the Statute has two main limbs: (i) complementarity (article 17(l)(a)-(c) of the Statute); and (ii) gravity (article 17(l)(d) of the Statute).[85]

48. With respect to the first limb (complementarity), the Chamber underscores that it concerns the existence or absence of national proceedings. Article 17(l)(a) of the Statute makes clear that the Court "shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution". In its judgment of 25 September 2009, the Appeals Chamber construed article 17(1)(a) of the Statute as involving a twofold test:

> [I]n considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions

[85] Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr, para. 52.

> are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute.[86]

49. As to the second limb (gravity), since the Government of Kenya does not contest this element, the Chamber shall confine its examination to the subject-matter defined in the Application, namely whether there are actually ongoing domestic proceedings (complementarity).

50. The Chamber notes that throughout the entire Application and the Reply, the Government of Kenya argues that it is currently investigating crimes arising out of the 2007-2008 Post-Election Violence. Thus, the Chamber considers that the applicable test, which adheres to the facts presented in the Application and the Reply, is the one referred to in the first half of article 17(1)(a) of the Statute, namely whether "the case is being investigated or prosecuted by a State which has jurisdiction over it".

51. The Chamber is satisfied that the Republic of Kenya is a State which has jurisdiction over the present case. However, the remaining question is whether this case "is being investigated or prosecuted" by the State within the meaning of article 17(1)(a) of the Statute.

52. In this respect, the Government seems to have understood, only in part, the test consistently applied by the Chambers of the Court in interpreting the scope of a "case" for the purposes of article 17 of the Statute. In the Application, the Government of Kenya asserted that the admissibility of the case should be assessed against the criteria established by the Chamber in the 31 March 2010 Authorisation Decision, to the effect that "national investigations must [...] cover the same conduct

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[86] Appeals Chamber, "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", ICC-01/04- 01/07-1497, para. 78.

in respect of persons at the same level in the hierarchy being investigated by the ICC".[87]

53. Although in the Application, the Government does not contest the fact that for the purposes of defining a "case", national investigations "must cover the same conduct", it seems that it either misunderstood or disagreed with the remaining limb of the test, which requires that those investigations must also cover the same persons subject to the Court's proceedings. The Government of Kenya purportedly relies on the test established by the Chamber in the 31 March 2010 Authorisation Decision, which referred to "the groups of persons that are likely to be the object of an investigation by the ICC",[88] and thus, concluded that it was not necessary to investigate the same persons. Rather, it is sufficient to investigate "persons at the same level in the hierarchy".[89]

54. The Chamber considers that this interpretation is misleading. The criteria established by the Chamber in its 31 March 2010 Authorisation Decision were not conclusive but simply indicative of the sort of elements that the Court should consider in making an admissibility determination within the *context of a situation,* namely when the examination is in relation to one or more "potential" case(s). At that stage, the reference to the groups of persons is mainly to broaden the test, because at the preliminary stage of an investigation into the situation it is unlikely to have an identified suspect. The test is more specific when it comes to an admissibility determination at the "case" stage, which starts with an application by the Prosecutor under article 58 of the Statute for the issuance of a warrant of arrest or summons to appear, where one or more suspects has or have been identified. At this stage, the case(s) before the Court are already shaped. Thus, during the "case" stage,

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[87] ICC-01/09-01/11-19, para. 32.
[88] Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr, para. 50.
[89] ICC-01/09-01/11-19, para. 32.

the admissibility determination must be assessed against national proceedings related to those particular persons that are subject to the Court's proceedings.

55. In the case of *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I stated in express terms that a determination of 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".[90] So far, the Court's jurisprudence has been consistent on this issue.[91] However, the Government of Kenya claimed that the "ICC case law has not authoritatively determined the meaning of the word 'case'".[92] Citing the 25 September 2009 Judgment, the Government asserted that the Appeals Chamber "decline[d] to make any ruling on the subject [as] it did not endorse the findings of Pre-Trial Chambers in the context of issuing warrants of arrest that national proceedings must encompass both the conduct and the person that is the subject of the case before the ICC".[93]

56. The Chamber considers that the relevant part of the Appeals Chamber's Judgment must be read and understood in its context. It is true that in paragraph 81 of the Judgment the Appeals Chamber stated that "it does not have to address in the present appeal the correctness of the 'same-conduct' test used by the Pre-Trial Chambers". Nonetheless, in paragraph 80 it made clear that the reason for making this statement was that there was no indication that there were "ongoing investigations or prosecutions of any crime allegedly committed by the *Appellant*, at Bogoro or anywhere else in the [Democratic Republic of Congo] DRC" (emphasis added). A similar statement was made by the Appeals Chamber in the last three lines of paragraph 81, when it stated that "at the time of the admissibility challenge proceedings before the Trial Chamber, there were no proceedings in the DRC in

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[90] Pre-Trial Chamber I, "Decision on the Prosecutor's Application for a warrant of arrest, Article 58", ICC-01/04-01/06-8-Corr, paras 31 and 37-39.
[91] See *e.g.* Pre-Trial Chamber I, "Decision on the Prosecution Application under Article 58(7) of the Statute", ICC-02/05-01/07-1-Corr, paras 24-25.
[92] ICC-01/09-01/11-19, para. 32.
[93] ICC-01/09-01/11-19, para. 32, fn. 20.

respect of the *Appellant*. Hence, the question of whether the 'same-conduct test' is correct is not determinative for the present appeal" (emphasis added).[94] Accordingly, the Chamber can clearly infer that the Appeals Chamber ruled on part of the test, namely that a determination of the admissibility of a "case" must *at least* encompass the "same person", which in the context of that appeal, was the Appellant himself.

57. The Chamber also does not consider it necessary to examine the validity of the "same-conduct" test, as raised by the Defence of Mr. Ruto and Mr. Sang,[95] since the Government of Kenya, the interested party, conceded to this part of the test in its *initial* Application.[96]

58. Having settled the dispute about the correct test in interpreting a "case" for the purposes of article 17 of the Statute, the Chamber shall now apply the facts as presented by the Government of Kenya to the law as defined.

59. The first observation that the Chamber wishes to make stems from the arguments put forward by the Government of Kenya in order to rebut the "same person" test. The Government of Kenya persistently asserts that there are ongoing investigations "covering the present cases before the ICC". The latter statement was a concluding remark made by the Government of Kenya right after having explained its understanding of the test to be applied to the present admissibility challenge, namely that "national investigations must encompass the same conduct in respect *of persons at the same level of hierarchy*" (emphasis added).

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[94] Appeals Chamber, "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", ICC-01/04- 01/07-1497, para. 81.
[95] ICC-01/09-01/11-68, pp. 4-6.
[96] ICC-01/09-01/11-19, para. 32. Note that in its Reply to the Observations of 28 April 2011, the Government changed its initial view and presented new arguments in support of the incorrectness of the same conduct-test. However, as the parties are not allowed to go beyond what was initially contested in the Application by adding new arguments, the Chamber shall not rule on the validity of the same conduct-test. See, ICC-01/09-01/11-89, para. 27.

60. In this respect, the Chamber expresses its concern about this statement and the inferences that could be drawn from it. If the Government of Kenya persistently argued that the applicable legal test was that domestic investigations must encompass any person, as far as he/she was at the *same level of hierarchy*, it is unclear how the Chamber could be convinced that there are actually ongoing investigations, with respect to the three suspects in the present case. Further doubts arise if one reads the relevant parts from the Government's Reply. In paragraph 27 of the Reply, the Government of Kenya stated that "any argument that there *must* be identity of *individuals* [...] being investigated by a State and by the Prosecutor of the ICC is necessarily false [...]. [...] [T]here is simply no guarantee that an identical cohort of individuals will fall for investigation by the State seeking to exclude ICC admissibility [...]".[97] The Chamber believes that these arguments cast doubt on the will of the State to actually investigate the three suspects, assuming that there are ongoing investigations, as asserted. However, the factual information available to the Chamber and the arguments set forth, demonstrate that there are no concrete steps showing ongoing investigations against the three suspects in the present case. This conclusion becomes more evident as the Chamber engages with some of the Government's arguments as discussed below.

61. In the Application, the Government of Kenya argued that it will provide the Chamber with a progress report regarding prospective investigations to be carried out under the new DPP[98] and "how they extend up to the highest levels".[99] This report will build "on the investigation and prosecution of lower level perpetrators to reach up to those at the highest levels who may have been responsible".[100]

62. The Chamber is surprised by such a statement, which is actually an acknowledgment by the Government of Kenya that so far, the alleged *ongoing*

[97] ICC-01/09-01/11-89, para. 27.
[98] ICC-01/09-01/11-19, paras 72 and 79.
[99] ICC-01/09-01/11-19, para. 79.
[100] ICC-01/09-01/11-19, paras 34 and 71.

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*. This clearly contradicts the arguments presented by the Government of Kenya in its Reply, that there are actually *ongoing* investigations in relation to the three suspects of the case under the Chamber's consideration.[101]

63. Moreover, in the Application and in the Reply, the Government of Kenya proposed to submit three main reports on the status of the investigations, the first of which to be submitted in July 2011. The remaining two reports are to be submitted to the Chamber by the end of August and the end of September 2011. In the view of the Chamber, 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 subject 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.

64. It is apparent that the Government of Kenya in its challenge relied mainly on judicial reform actions and promises for future investigative activities. At the same time, when arguing that there are current initiatives, it presented no concrete evidence of such steps. This conclusion becomes more evident when reviewing the contents of the annexes submitted by the Government of Kenya. Out of the 29 annexes presented to the Chamber, only 3 annexes appear to be of some direct relevance to the investigative process, alleged by the Government of Kenya (annexes 1 and 3 appended to the Application and annex 2 appended to the Reply).

65. After careful examination of these annexes, the Chamber finds that they fall short of any concrete investigative steps regarding the three suspects in question. In particular, annex 3 appended to the Application, is a 78-pages progress report, including data on Post Election Violence cases in six provinces, submitted by the

[101] ICC-01/09-01/11-89, paras 2, 29-32 and 57.

Chief Public Prosecutor and other State counsels to the Attorney General of the Republic of Kenya. Nowhere in this report is there the slightest mention of the names of one or more of three suspects subject to the Court's proceedings in the present case.[102]

66. As to annex 1, it includes a letter signed by the Attorney General of the Republic of Kenya and addressed to the Kenyan Commissioner of Police directing the latter to "investigate all other persons against whom there may be allegation of participation in the Post-Elections Violence, including the six persons who are the subject of the proceedings currently before the International Criminal Court (ICC)".[103] The letter also instructs the Kenyan Commissioner of Police to "prepare and submit [...] bi-monthly reports on progress made with these investigations".[104] This letter is dated 14 April 2011 that is, two weeks after the Government of Kenya lodged its admissibility challenge. Thus, it is clear from this letter that by the time the Government of Kenya filed the Application, asserting that it was investigating the case before the Court, there were in fact no *ongoing* investigations.

67. When the parties submitted their observations, the Government of Kenya replied, *inter alia,* by submitting a four page report (annex 2 appended to the Reply), dated 5 May 2011 and signed by the Director of Criminal Investigation. The report mentions, *inter alia,* that there is a pending case involving Mr. Ruto (file No 10/2008) and that the investigation has not been completed "for various reasons that include, unreliable and uncooperative witnesses".[105] However, the "matter is still under investigation because there are some areas requiring further corroboration in order to reach a fair conclusion".[106] The report finally states that:

> When 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, none of the members of the Ocampo six have been

[102] ICC-01/09-01/11-64-Anx3.
[103] ICC-01/09-01/11-64-Anx1.
[104] ICC-01/09-01/11-64-Anx1.
[105] ICC-01/09-01/11-89-Anx2.
[106] ICC-01/09-01/11-89-Anx2.

> mentioned previously during the investigations. Nevertheless, the Commissioner of Police again tasked the team of investigators to carry out exhaustive investigations relating to the Ocampo six and other high ranking citizens.[107]

68. Although the information provided in these two annexes reveals that instructions were given to investigate the three suspects subject to the Court's proceedings, the Government of Kenya does not provide the Chamber with any details about the asserted, *current* investigative steps undertaken. In the Reply, the Government of Kenya alleged that "a file was opened against one of the six suspects on account of witness statements taken by the [investigative] team".[108] Yet, it does not provide the Chamber with any information about the time or content of these statements. The Government of Kenya also states that it has instructed the "team of investigators to carry out exhaustive investigations", but it does not explain or show the Chamber any concrete step that has been or is being currently undertaken in this respect.

69. In particular, the Chamber lacks information about dates when investigations, if any, have commenced against the three suspects, and whether the suspects were actually questioned or not, and if so, the contents of the police or public prosecutions' reports regarding the questioning. The Government of Kenya also fails to provide the Chamber with any information as to the conduct, crimes or the incidents for which the three suspects are being investigated or questioned for. There is equally no record that shows that the relevant witnesses are being or have been questioned. The remaining 26 annexes submitted by the Government of Kenya in support of its claim have no direct relevance to the legal test required under article 17(1)(a) of the Statute.

70. The Appeals Chamber pointed out that the admissibility of the case must be determined "on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge". Thus, in the absence of information, which substantiates the Government of Kenya's challenge that there are *ongoing*

[107] ICC-01/09-01/11-89-Anx2.
[108] ICC-01/09-01/11-89, para. 50.

investigations against the three suspects, up until the party filed its Reply, the Chamber considers that there remains a situation of inactivity. Consequently, the Chamber cannot but determine that the case is admissible following a plain reading of the first half of article 17(1)(a) of the Statute. It follows 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. The Government's First Request must, therefore, be rejected.

FOR THESE REASONS, THE CHAMBER, HEREBY

a) rejects the 17 May 2011 Request;

b) rejects the Government's First Request;

c) determines that the case is admissible;

d) orders the Registrar to notify this decision to the Government of the Republic of Kenya.

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

Judge Ekaterina Trendafilova
Presiding Judge

Judge Hans-Peter Kaul
Judge

Judge Cuno Tarfusser
Judge

Dated this Monday, 30 May 2011

At The Hague, The Netherlands