Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No. ICC-01/09-02/11 OA
Date: 30 August 2011

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF KENYA

THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA and MOHAMMED HUSSEIN ALI

Public document – URGENT

Judgment
on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute"

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

The Office of the Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

The Office of Public Counsel for Victims
Ms Paolina Massidda

States Representatives
Mr Geoffrey Nice
Mr Rodney Dixon

Counsel for Francis Kirimi Muthaura
Mr Karim A. A. Khan
Mr Kennedy Ogeta

Counsel for Uhuru Muigai Kenyatta
Mr Steven Kay
Mr Gillian Higgins

Counsel for Mohammed Hussein Ali
Mr Evens Monari
Mr Gershom Otachi Bw'omanwa

REGISTRY

Registrar
Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" of 30 May 2011 (ICC-01/09-02/11-96),

After deliberation,

By majority, Judge Anita Ušacka dissenting,

Delivers the following

JUDGMENT

The "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" is confirmed.

I. KEY FINDINGS

1. When the Court has issued a warrant of arrest or a summons to appear, for a case to be inadmissible under article 17 (1) (a) of the Statute, national investigations must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court. The words 'is being investigated' in this context signify the taking of steps directed at ascertaining whether this individual is responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses.

2. If a State challenges the admissibility of a case, it must provide the Court with evidence with a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case. It is not sufficient merely to assert that investigations are ongoing.

3. Save for express stipulations in rule 58 of the Rules of Procedure and Evidence, a Chamber seized of an admissibility challenge enjoys broad discretion in determining how to conduct the proceedings relating to the challenge.

II. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

4. On 31 March 2010, Pre-Trial Chamber II (hereinafter: "Pre-Trial Chamber") issued, by majority, its "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya"[1] (hereinafter: "Article 15 Decision") which authorised the Prosecutor to commence an investigation, on his own initiative, into the situation in the Republic of Kenya.

5. On 8 March 2011, the Chamber, by majority, decided to summon Mr Francis Kirimi Muthaura (hereinafter: "Mr Muthaura"), Mr Uhuru Muigai Kenyatta (hereinafter: "Mr Kenyatta") and Mr Mohammed Hussein Ali (hereinafter: "Mr Ali") to appear before the Court on 7 April 2011.[2]

6. On 31 March 2011, the Government of the Republic of Kenya (hereinafter: "Kenya") filed before the Pre-Trial Chamber the "APPLICATION ON BEHALF OF THE GOVERNMENT OF THE REPUBLIC OF KENYA PURSUANT TO ARTICLE 19 OF THE ICC STATUTE"[3] (hereinafter: "Admissibility Challenge"), requesting, *inter alia*, that the Pre-Trial Chamber "find the two cases presently before it to be inadmissible".[4]

7. On 4 April 2011, the Pre-Trial Chamber rendered its "Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute"[5] (hereinafter: "Decision on the Conduct of Proceedings of 4 April 2011").

8. On 21 April 2011, Kenya filed the "FILING OF ANNEXES OF MATRIALS [sic] TO THE APPLICATION OF THE GOVERNMENT OF KENYA PURSUANT TO ARTICLE 19 OF THE ROME STATUTE"[6] (hereinafter: "Filing of Annexes of 21 April 2011"), to which it appended 22 annexes in support of its Admissibility Challenge.

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[1] ICC-01/09-19. A corrigendum was filed on 1 April 2010, as ICC-01/09-19-Corr.
[2] "Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", ICC-01/09-02/11-1.
[3] ICC-01/09-02/11-26.
[4] Admissibility Challenge, para. 80.
[5] ICC-01/09-02/11-40.
[6] ICC-01/09-02/11-67.

9. On 28 April 2011, the Prosecutor,[7] Mr Ali,[8] Mr Muthaura and Mr Kenyatta[9] filed their responses to Kenya's Admissibility Challenge. The Office of Public Counsel for Victims (hereinafter: "OPCV") acting on behalf of the victims who had submitted applications to participate also filed their response to the Admissibility Challenge.[10]

10. On 13 May 2011, Kenya, with the leave of the Pre-Trial Chamber,[11] filed its "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".[12] This document, together with its seven annexes, was notified to the Pre-Trial Chamber on 16 May 2011 (hereinafter: "Kenya's Reply of 16 May 2011").

11. On 30 May 2011, the Pre-Trial Chamber rendered its "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute"[13] (hereinafter: "Impugned Decision").

B. Proceedings before the Appeals Chamber

12. On 6 June 2011, Kenya filed an appeal entitled "Appeal of the Government of Kenya against the 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'".[14]

13. On 20 June 2011, Kenya 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(2)(b) of the Statute''".[15] A corrigendum to this document was filed on 22 June 2011[16]

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[7] "Prosecution Response to 'Application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute'", ICC-01/09-02/11-71.
[8] "The Response of the General Mohammed Hussein Ali to the 'Application on behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute'", ICC-01/09-02/11-70.
[9] "JOINT DEFENCE OBSERVATIONS ON THE ARTICLE 19 APPLICATION BY THE GOVERNMENT OF THE REPUBLIC OF KENYA", ICC-01/09-02/11-72.
[10] "Observations on behalf of victims on the Government of Kenya's Application under Article 19 of the Rome Statute", ICC-01/09-02/11-74.
[11] "Decision under Regulation 24(5) of the Regulations of the Court on the Motion Submitted on Behalf of the Government of Kenya", 2 May 2011, ICC-01/09-02/11-81.
[12] ICC-01/09-02/11-91 with 7 annexes.
[13] ICC-01/09-02/11-96.
[14] ICC-01/09-02/11-104.
[15] ICC-01/09-02/11-130.
[16] ICC-01/09-02/11-130-Corr.

(hereinafter: "Document in Support of the Appeal"). In support of its appeal, Kenya avers that the Pre-Trial Chamber's decision that the case against the suspects before the Court is admissible under the Statute is vitiated by factual, procedural and legal errors and must therefore be reversed by the Appeals Chamber.[17]

14. On 4 July 2011, Kenya filed the "Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility"[18] (hereinafter: "Updated Investigation Reports"), annexing a report from the Kenyan Director of Criminal Investigations.[19]

15. On 12 July 2011, the Prosecutor filed the "Prosecution's response to the 'Appeal of the Government of Kenya against the Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'"[20] (hereinafter: "Prosecutor's Response to the Document in Support of the Appeal"), submitting that Kenya had failed to establish any reversible error in the Impugned Decisions and that the appeals should therefore be rejected.

16. On 12 July 2011, Mr Ali filed the "Defence response to the Republic 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 19(2)(b) of the Statute"'[21] (hereinafter: "Mr Ali's Response to the Document in Support of the Appeal"). In essence, Mr Ali concurs with Kenya's assertions on appeal and request that the Impugned Decision be overturned.

17. On 19 July 2011, victims represented by the OPCV filed the "Victims Observations on the Government of Kenya's Appeal Concerning the Admissibility Proceedings"[22] (hereinafter: "Victims' Observations"). The victims largely endorse the submissions of the Prosecutor in respect of the alleged errors.[23] In particular, in relation to the alleged factual errors, they observe that Kenya's reliance on the letters and reports concerning the alleged investigations by Kenya and the unsubstantiated

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[17] Document in Support of the Appeal, para. 1.
[18] ICC-01/09-02/11-153.
[19] Annex 1 to "Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility", ICC-01/09-02/11-153-Anx 1.
[20] ICC-01/09-02/11-168.
[21] ICC-01/09-02/11-166.
[22] ICC-01/09-02/11-177.
[23] Victims' Observations, paras 40, 43-44.

instructions to counsel from the Commissioner of Police, in support of its Admissibility Challenge, is erroneous because they fail to indicate in any concrete way that investigations into the six suspects were ongoing.[24]

18. On 19 July 2011, Kenya filed the "Application on behalf of the Government of Kenya for Leave to Reply to the 'Prosecution's response to the 'Appeal of the Government of Kenya against Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'"'[25] (hereinafter: "Application to Reply"). The Application to Reply was registered on 20 July 2011.

19. On 26 July 2011, Kenya filed its "Response on behalf of the Government of Kenya to the 'Victims Observations on the Government of Kenya's Appeal Concerning Admissibility of Proceedings'"[26] (hereinafter: "Kenya's Response to the Victims' Observations"), in which Kenya states that the victims "merely repeats the argument that has been advanced by the Prosecution [...] and fails to address the central question: whether the Government of Kenya's unambiguous submission to the ICC that it is investigating the [...] Suspects [...] is simply untrue".[27]

20. On 27 July 2011, the Prosecutor filed the "Prosecution's response to the 'Victims Observations on the Government of Kenya's Appeal Concerning Admissibility of Proceedings'"[28] (hereinafter: "Prosecutor's Response to the Victims' Observations"). The Prosecutor avers that the Victims' Observations serve to confirm Kenya's "profound misunderstanding of the substantive and procedural requirements of an admissibility challenge and ultimately, its failure to present any tangible evidence substantiating its claim that the case against the suspects was being investigated at the national level".[29] Accordingly, the Prosecutor agrees that, on appeal, Kenya's reliance on the letters and reports concerning its investigations into the suspects is misplaced.[30]

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[24] Victims' Observations, paras 13-16, 27-29, 31.
[25] ICC-01/09-02/11-180.
[26] ICC-01/09-02/11-194.
[27] Kenya's Response to the Victims' Observations, para. 3.
[28] ICC-01/09-02/11-198.
[29] Prosecutor's Response to the Victims' Observations, para. 8.
[30] Prosecutor's Response to the Victims' Observations, para. 9.

21. On 28 July 2011, having heard from the Prosecutor[31] and the victims[32] and after affording an opportunity[33] to the suspects to submit their views,[34] the Appeals Chamber dismissed, *in limine*, the Updated Investigation Reports.[35]

22. On 1 August 2011, after affording an opportunity[36] to the Prosecutor[37] and the suspects to submit their views, the Appeals Chamber dismissed, *in limine*, the Application to Reply.[38]

23. On 3 August 2011, Kenya filed a "Request for an Oral Hearing Pursuant to Rule 156(3)"[39] (hereinafter: "Request for an Oral Hearing").

24. On 17 August 2011, after affording an opportunity[40] to the Prosecutor,[41] the suspects[42] and the victims participating in the appeal[43] to submit their views, the Appeals Chamber dismissed, *in limine*, the Request for an Oral Hearing.[44]

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[31] "Prosecutor Response to the Document in Support of the Appeal", para. 35.
[32] Victims' Observations, paras 44, 45-46, 48.
[33] "Order on the filing of observations in relation to the 'Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility", 14 July 2011, ICC-01/09-02/11-171.
[34] "Defence Observations on the 'Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility'", 15 July 2011, ICC-01/11-02/11-173.
[35] *See* "Decision on the 'Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility'", ICC-01/09-02/11-202.
[36] "Order on the filing of observations in relation to the Application on behalf of the Republic of Kenya for Leave to Reply to the 'Prosecutions response to the 'Appeal of the Government of Kenya against the Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", 21 July 2011, ICC-01/09-02/11-186.
[37] "Prosecution's response to the Application on behalf of the Government of Kenya for Leave to Reply to the 'Prosecution's response to the Appeal of the Government of Kenya against the Decision on the Application by the Government of Kenya Challenging the Admissibility of the case Pursuant to Article 19(2)(b) of the Statute'", 22 July 2011, ICC-01/09-02/11-190.
[38] *See* "Decision on the Application on behalf of the Government of Kenya for Leave to Reply to the "Prosecution's response to the 'Appeal of the government of Kenya against the Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute"", ICC-01/09-02/11-206.
[39] ICC-01/09-02/11-210. The Request for an Oral Hearing was registered on 4 August 2011.
[40] "Order on the filing of a response to the Republic of Kenya's 'Request for an Oral Hearing Pursuant to Rule 156 (3)'", 5 August 2011, ICC-01/09-02/11-217.
[41] "Prosecution's Response to the Government of Kenya 'Request for an oral Hearing Pursuant to Rule 156(3)'", 11 August 2011, ICC-01/09-02/11-232.
[42] "Defence Response to the 'Request for an Oral Hearing Pursuant to rule 156(3)'", 11 August 2011, ICC-01/09-02/11-233.
[43] "Response to the Government of Kenya's 'Request for an Oral Hearing Pursuant to Rule 156(3)'", 11 August 2011, ICC-01/09-02/11-228.
[44] *See* "Decision on the 'Request for an Oral Hearing Pursuant to Rule 156 (3)'", ICC-01/09-02/11-251.

III. MERITS

25. In its Document in Support of the Appeal, Kenya alleges factual, procedural and legal errors in the Impugned Decision.[45] The Appeals Chamber will address each of them in turn, starting with the legal error.

A. Alleged legal error

26. The principal issue raised by Kenya under this ground of appeal is the interpretation of the words, "[t]he case is being investigated [...] by a State which has jurisdiction over it" in article 17 (1) (a) of the Statute. In particular, Kenya challenges the correctness of the Pre-Trial Chamber's finding that for a case to be inadmissible before the Court, a national jurisdiction must be investigating the same person and for the same conduct as in the case already before the Court.[46]

1. Procedural context and relevant part of the Impugned Decision

27. In its Admissibility Challenge before the Pre-Trial Chamber, Kenya submitted that the Court had not yet authoritatively established the meaning of the word "case" in article 17 (1) of the Statute.[47] In a footnote, Kenya submitted that in the "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"[48] (hereinafter: "Judgment in *Katanga* OA 8"), the Appeals Chamber had declined to rule on the findings of other Chambers of the Court that in order for a case to be inadmissible, "national proceedings must encompass both the conduct and the person that is the subject of the case before the ICC",[49] the so-called 'same person/same conduct' test. In the view of Kenya, rather than the 'same person/same conduct' test, the test developed by the Pre-Trial Chamber in the Article 15 Decision should be applied to the Admissibility Challenge. According to that test, the national proceedings must "cover the same conduct in respect of persons at the same level in the hierarchy being investigated by the ICC".[50] In Kenya's Reply of 16 May 2011, Kenya submitted furthermore that "any argument that there *must* be identity of *individuals* as well as of *subject matter*

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[45] Document in Support of the Appeal, para. 1.
[46] Document in Support of the Appeal, paras 12 (iv), 79-92.
[47] Admissibility Challenge, para. 32.
[48] 25 September 2009, ICC-01/04-01/07-1497 (OA 8), referring to paras 81-82 of the Judgment in *Katanga* OA 8.
[49] Admissibility Challenge, footnote 20.
[50] Admissibility Challenge, para. 32.

being investigated by a State and by the Prosecutor of the ICC is necessarily false as the State may simply not have evidence available to the Prosecutor of the ICC or may even be deprived of such evidence".[51] Kenya also submitted that "there is simply no guarantee that an identical cohort of individuals will fall for investigation by the State seeking to exclude ICC admissibility as by the Prosecutor seeking to establish it".[52] Kenya also recalled that it was required under article 19 (5) of the Statute to bring the admissibility challenge "at the earliest proper moment [...], an event 'triggered' by the issue of summonses against the six Kenyan nationals some few weeks beforehand".[53]

28. In the Impugned Decision, the Pre-Trial Chamber stated that Kenya might have misunderstood the admissibility test[54] and explained that the findings it made in the Article 15 Decision were made in the context of authorising an investigation into a *situation*, in relation to one or more potential cases, when it is likely that specific suspects have not yet been identified.[55] The Pre-Trial Chamber explained that "the test is more specific when it comes to an admissibility determination at the 'case' stage".[56] The Pre-Trial Chamber recalled that in the *Lubanga* case, Pre-Trial Chamber I had established and applied the 'same person/same conduct' test in the case stage.[57] The Pre-Trial Chamber stated furthermore that the Appeals Chamber, in the *Katanga* case, had declined to rule only on the 'same conduct' element of the test, but that it could be inferred from the Appeals Chamber's judgment that the Chamber "ruled on part of the test, namely that a determination of the admissibility of a 'case' must *at least* encompass the 'same person'".[58]

2. *Kenya's submissions on appeal*

29. On appeal, Kenya submits that the Pre-Trial Chamber erred when it applied the 'same person/same conduct' test without addressing its arguments disputing the correctness of that test.[59] Kenya underlines that it did not misunderstand the test developed in the Article 15 Decision, but that in its submission this test should apply

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[51] Kenya's Reply of 16 May 2011, para. 27.
[52] Kenya's Reply of 16 May 2011, para. 27.
[53] Kenya's Reply of 16 May 2011, para. 26.
[54] Impugned Decision, para. 48.
[55] Impugned Decision, para. 50.
[56] Impugned Decision, para. 50.
[57] Impugned Decision, para. 51.
[58] Impugned Decision, para. 52.
[59] Document in Support of the Appeal, paras 79-80.

to all stages of the proceedings and not just to the situation stage.[60] As to the 'same person/same conduct' test, Kenya emphasises that the admissibility test cannot require that the same persons are being investigated by the national jurisdiction.[61] Furthermore, Kenya avers that "[t]here simply must be a leaway [sic] in the exercise of discretion in the application of the principle of complementarity" because there is a presumption in favour of national jurisdictions.[62] Kenya submits that the arguments it raised before the Pre-Trial Chamber had not yet been addressed by the jurisprudence of the Court[63] and disputes the Pre-Trial Chamber's assertion that the Appeals Chamber has endorsed the view that it must be the same person who is investigated by a State.[64] Kenya states furthermore that it submitted to the Pre-Trial Chamber that the Prosecutor, in conducting preliminary investigations with respect to other situations, considered the "operation and capability of the national system as a whole as being determinative of whether he should intervene", arguments which the Pre-Trial Chamber did not address.[65]

3. Mr Ali's submissions on appeal

30. Mr Ali agrees with Kenya's submissions that the "Pre-Trial Chamber incorrectly held that the 'same person/same conduct' test was applicable".[66] Mr Ali submits that "none of the decisions from the Chambers cite any authority for the 'same person/same conduct' test" and as such the "test is inconsistent with the objects and purpose of the Statute".[67]

4. The Prosecutor's submissions on appeal

31. The Prosecutor disagrees with Kenya's submission that the Pre-Trial Chamber did not address Kenya's arguments as to what test should be applied. The Prosecutor submits that the Pre-Trial Chamber explicitly and correctly addressed those arguments by pointing out that the test developed in the Article 15 Decision "was made for the specific and limited purpose of admissibility determinations *at the situation stage*".[68]

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[60] Document in Support of the Appeal, para. 82.
[61] Document in Support of the Appeal, para. 84.
[62] Document in Support of the Appeal, para. 43.
[63] Document in Support of the Appeal, para. 85.
[64] Document in Support of the Appeal, para. 87.
[65] Document in Support of the Appeal, para. 89.
[66] Mr Ali's Response to the Document in Support of the Appeal, para. 35.
[67] Mr Ali's Response to the Document in Support of the Appeal, para. 39.
[68] Prosecutor's Response to the Document in Support of the Appeal, para. 75.

The Prosecutor argues that article 17 of the Statute "regulates how the Court should determine which forum should proceed where there is a concurrent exercise of jurisdiction by the ICC and a State with respect to a particular case".[69] He contends that Kenya "does not envisage the possibility for the Court and the relevant State to concurrently exercise jurisdiction over different suspects for crimes arising out of the same events".[70] In addition, the Prosecutor argues that the 'same person/same conduct' test is supported by the text and drafting history of the Statute.[71]

5. The Victims' Observations

32. The victims fully endorse the submissions of the Prosecutor concerning the 'same person/same conduct' test. They argue that the "test does not compel a prosecution or conviction by national authorities of a particular person [...], instead it compels only a genuine investigation or prosecution of that person".[72]

6. Determination by the Appeals Chamber

33. The Pre-Trial Chamber in the Impugned Decision applied the 'same person/same conduct' test in deciding whether the case was admissible under article 17 (1) (a) of the Statute. The Pre-Trial Chamber noted that in the Judgment in *Katanga* OA 8, the Appeals Chamber had declined to rule on the correctness or otherwise of the 'same conduct' component of the 'same person/same conduct' test, as this question was not decisive for the determination of that appeal.[73] The Pre-Trial Chamber also stated that the Appeals Chamber had only declined to rule on the 'same conduct' component of the test, and that the Pre-Trial 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'".[74]

34. The Appeals Chamber notes that in the Judgment in *Katanga* OA 8, both the case before the Court and that investigated by the Democratic Republic of the Congo concerned the same person, namely Mr Katanga. Therefore, the Appeals Chamber did not have to consider whether the case must *always* concern the same person. Accordingly, the Appeals Chamber has not yet ruled on the correctness of the 'same

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[69] Prosecutor's Response to the Document in Support of the Appeal, para. 82.
[70] Prosecutor's Response to the Document in Support of the Appeal, para. 87.
[71] Prosecutor's Response to the Document in Support of the Appeal, paras 92-102.
[72] Victims' Observations, para. 43.
[73] Impugned Decision, para. 52, referring to Judgment in *Katanga* OA 8, para. 81.
[74] Impugned Decision, para. 52.

person' component of the test and addresses this question for the first time in the present appeal.

35. Article 17 of the Statute provides, in relevant part, as follows:

> 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
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> (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;
>
> (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;
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> (d) [...].

36. Article 17 stipulates the substantive conditions under which a case is inadmissible before the Court. It gives effect to the principle of complementarity (tenth preambular paragraph and article 1 of the Statute), according to which the Court "shall be complementary to national jurisdictions". Accordingly, States have the primary responsibility to exercise criminal jurisdiction and the Court does not replace, but complements them in that respect. Article 17 (1) (a) to (c) sets out how to resolve a conflict of jurisdictions between the Court on the one hand and a national jurisdiction on the other. Consequently, under article 17 (1) (a), first alternative, the question is not merely a question of 'investigation' in the abstract, but is whether the *same case* is being investigated by both the Court and a national jurisdiction.

37. It should also be noted that article 17 applies not only to the determination of the admissibility of a concrete case (article 19 of the Statute), but also to preliminary admissibility rulings (article 18 of the Statute). Under rule 55 (2) of the Rules of Procedure and Evidence, the Pre-Trial Chamber, when making a preliminary admissibility ruling, "shall consider the factors in article 17 in deciding whether to authorize an investigation". The factors listed in article 17 are also relevant for the Prosecutor's decision to initiate an investigation under article 53 (1) of the Statute or

to seek authorisation for a *propio motu* investigation under article 15, and for the decision to proceed with a prosecution under article 53 (2) of the Statute.

38. The meaning of the words 'case is being investigated' in article 17 (1) (a) of the Statute must therefore be understood in the context to which it is applied. For the purpose of proceedings relating to the initiation of an investigation into a situation (articles 15 and 53 (1) of the Statute), the contours of the likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages. The same is true for preliminary admissibility challenges under article 18 of the Statute. Often, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear. The relative vagueness of the contours of the likely cases in article 18 proceedings is also reflected in rule 52 (1) of the Rules of Procedure and Evidence, which speaks of "information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2" that the Prosecutor's notification to States should contain.

39. In contrast, article 19 of the Statute relates to the admissibility of concrete cases. The cases are defined by the warrant of arrest or summons to appear issued under article 58, or the charges brought by the Prosecutor and confirmed by the Pre-Trial Chamber under article 61. Article 58 requires that for a warrant of arrest or a summons to appear to be issued, there must be reasonable grounds to believe that the person named therein has committed a crime within the jurisdiction of the Court. Similarly, under regulation 52 of the Regulations of the Court, the document containing the charges must identify the person against whom confirmation of the charges is sought and the allegations against him or her. Articles 17 (1) (c) and 20 (3) of the Statute, state that the Court cannot try a person tried by a national court for the same conduct unless the requirements of article 20 (3) (a) or (b) of the Statute are met.[75] Thus, the defining elements of a concrete case before the Court are the individual and the alleged conduct. It follows that for such a case to be inadmissible under article 17 (1) (a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.

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[75] *See also* article 90 (1) of the Statute, which regulates the procedure to be followed if a State receives a request from the Court for the surrender of a person and a competing request from another State "for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender".

40. The Admissibility Challenge that gave rise to the present appeal was brought under article 19 (2) (b) of the Statute in relation to a case in which a summons to appear has been issued against specific suspects for specific conduct. Accordingly, as regards the present appeal, the 'case' in terms of article 17 (1) (a) is the case as defined in the summons. This case is only inadmissible before the Court if the same suspects are being investigated by Kenya for substantially the same conduct. The words 'is being investigated', in this context, signify the taking of steps directed at ascertaining whether *those suspects* are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses.[76] The mere preparedness to take such steps or the investigation of *other* suspects is not sufficient. This is because unless investigative steps are actually taken in relation to the suspects who are the subject of the proceedings before the Court, it cannot be said that the *same case* is (currently) under investigation by the Court and by a national jurisdiction, and there is therefore no conflict of jurisdictions. It should be underlined, however, that determining the existence of an investigation must be distinguished from assessing whether the State is "unwilling or unable genuinely to carry out the investigation or prosecution", which is the second question to consider when determining the admissibility of a case.[77] For assessing whether the State is indeed investigating, the genuineness of the investigation is not at issue; what is at issue is whether there are investigative steps.

41. Kenya's submission that "it cannot be right that in all circumstances in every Situation and in every case that may come before the ICC the persons being investigated by the Prosecutor must be exactly the same as those being investigated by the State if the State is to retain jurisdiction"[78] cannot be accepted. It disregards the fact that the proceedings have progressed and that specific suspects have been

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[76] *See* J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Martinus Nijhoff Publishers, 2008), p. 203. Stigen notes that "there must be an examination of some detail reflecting a sufficient measure of thoroughness. Otherwise it will be considered as inaction". *See* also C. Cárdenas, *Die Zulässigkeitsprüfung vor dem Internationalen Strafgerichtshof* (Berliner Wissenschafts-Verlag, 2005), p. 58.

[77] As the Appeals Chamber explained in the Judgment in *Katanga* OA 8, para. 78, "in 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 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".

[78] Document in Support of the Appeal, para. 43.

identified. At this stage of the proceedings, where summonses to appear have been issued, the question is no longer whether suspects at the same hierarchical level are being investigated by Kenya, but whether the same suspects are the subject of investigation by both jurisdictions for substantially the same conduct.

42. Kenya seeks to counter this conclusion by suggesting that a national jurisdiction may not always have the same evidence available as the Prosecutor and therefore may not be investigating the same suspects as the Court.[79] This argument is not persuasive for two reasons. First, if a State does not investigate a given suspect because of lack of evidence, then there simply is no conflict of jurisdictions, and no reason why the case should be inadmissible before the Court. Second, what is relevant for the admissibility of a concrete case under articles 17 (1) (a) and 19 of the Statute is not whether the same evidence in the Prosecutor's possession is available to a State, but whether the State is carrying out steps directed at ascertaining whether these suspects are responsible for substantially the same conduct as is the subject of the proceedings before the Court.

43. Kenya also argues that there should be a "leaway [sic] in the exercise of discretion in the application of the principle of complementarity"[80] to allow domestic proceedings to progress. This argument has no merit because, as explained above, the purpose of the admissibility proceedings under article 19 of the Statute is to determine whether the case brought by the Prosecutor is inadmissible because of a jurisdictional conflict. Unless there is such a conflict, the case is admissible. The suggestion that there should be a presumption in favour of domestic jurisdictions[81] does not contradict this conclusion. Although article 17 (1) (a) to (c) of the Statute does indeed favour national jurisdictions, it does so only to the extent that there actually are, or have been, investigations and/or prosecutions at the national level. If the suspect or conduct have not been investigated by the national jurisdiction, there is no legal basis for the Court to find the case inadmissible.

44. Furthermore, proceedings to determine the admissibility of a concrete case under article 19 of the Statute are but one aspect of the complementarity principle. The concerns raised by Kenya regarding its exercise of criminal jurisdiction and

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[79] Document in Support of the Appeal, para. 83, citing Kenya's Reply of 16 May 2011, paras 27-28.
[80] Document in Support of the Appeal, para. 43.
[81] Document in Support of the Appeal, para. 43.

protection of its sovereignty are taken into consideration in the proceedings under articles 15, 53, 18 and 19 of the Statute. Nevertheless, under article 19, the focus is on a concrete case that is the subject of proceedings before the Court. For that reason, Kenya's reference to the careful preliminary examination by the Prosecutor in relation to other situations[82] is unpersuasive: the proceedings in relation to those situations are simply at a different stage than the proceedings in the case at hand.

45. Similarly, the argument that once the summons to appear was issued, Kenya was constrained, under article 19 (5) of the Statute, to bring the admissibility challenge "at the earliest opportunity" and therefore it could not be "expected to have prepared every aspect of its Admissibility Application in detail in advance of this date"[83] is also misconceived. Article 19 (5) of the Statute requires a State to challenge admissibility as soon as possible once it is in a position to actually assert a conflict of jurisdictions.[84] The provision does not require a State to challenge admissibility just because the Court has issued a summons to appear.

46. Accordingly, the Appeals Chamber finds that given the specific stage that the proceedings had reached, the 'same person/same conduct' test applied by the Pre-Trial Chamber was the correct test. The Pre-Trial Chamber thus made no error of law.

B. Alleged factual errors

47. Under this ground of appeal, Kenya submits that the Pre-Trial Chamber's finding that there were no investigations in Kenya in respect of the ICC suspects due to an "absence of information, which substantiates the Government of Kenya's challenge that there are *ongoing* investigations against the [...] Suspects 'up until the party filed its Reply'"[85] was unreasonable "in light of the information provided by the Government of Kenya to Pre-Trial Chamber II".[86] Specifically, Kenya alleges that the Pre-Trial Chamber erred in its assessment of the annexes that Kenya submitted, that the Pre-Trial Chamber drew illogical inferences from Kenya's proposal to provide updated investigation reports, and that it was biased. These allegations will be analysed in turn.

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[82] Document in Support of the Appeal, paras 89-91.
[83] Document in Support of the Appeal, para. 83, citing Kenya's Reply of 16 May 2011, paras 27-28.
[84] Note also the restrictions to challenging admissibility contained in article 19 (4) of the Statute.
[85] Document in Support of the Appeal, para. 4, referring to the Impugned Decision, para. 66.
[86] Document in Support of the Appeal, para. 5.

1. Alleged erroneous assessment of annexes submitted by Kenya

48. Kenya alleges that the Pre-Trial Chamber erred in its assessment of the annexes Kenya had submitted.[87]

(a) Procedural context and relevant part of the Impugned Decision

49. In support of its Admissibility Challenge before the Pre-Trial Chamber, Kenya appended 22 annexes to its Filing of Annexes of 21 April 2011 and seven annexes to Kenya's Reply of 16 May 2011. Upon examining these twenty-nine annexes, the Pre-Trial Chamber found that Kenya "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".[88] In particular, the Pre-Trial Chamber found only Annex 1[89] and Annex 3,[90] appended to the Filing of Annexes of 21 April 2011 (hereinafter: "Annex 1" and "Annex 3", respectively), and Annex 2,[91] appended to Kenya's Reply of 16 May 2011 (hereinafter: "Annex 2"), to be of direct relevance to the investigative process in Kenya.[92]

50. As for Annex 3 (a progress report by the Chief Public Prosecutor to the Attorney General dated March 2011, summarising and listing cases and investigations undertaken into the post-election violence), the Pre-Trial Chamber noted, however, that "[n]owhere in this report is there the slightest mention of the names of one or more of the three suspects subject to the Court's proceedings".[93] With respect to Annex 1 (a letter by the Attorney General addressed to the Kenyan Commissioner of Police and dated 14 April 2011, directing the latter to investigate all the suspects before the Court) the Pre-Trial Chamber found that "it is clear from this letter that by the time the Government of Kenya filed the [Admissibility Challenge], asserting that it was investigating the case before the Court, there were in fact no *ongoing* investigations".[94] As for Annex 2 (a report by the Kenyan Director of Criminal Investigation dated 5 May 2011 which, *inter alia*, mentions that there is a pending case against Mr Ruto) the Pre-Trial Chamber found that "[a]lthough the information

[87] Document in Support of the Appeal, paras 53-58.
[88] Impugned Decision, para. 60.
[89] Filing of Annexes of 21 April 2011, Annex 1.
[90] Filing of Annexes of 21 April 2011, Annex 3.
[91] Kenya's Reply of 16 May 2011, Annex 2.
[92] Impugned Decision, para. 60.
[93] Impugned Decision, para. 61.
[94] Impugned Decision, para. 62.

provided in [Annex 1 and Annex 2] reveals that instructions were given to investigate the three suspects [...] the Government of Kenya does not provide the Chamber with any details about the asserted, *current* investigative steps undertaken".[95]

(b) Kenya's submissions on appeal

51. On appeal, Kenya argues that the Pre-Trial Chamber unduly focused on Annex 3 which was "one of the main reports that the Kenyan Police have been analysing"[96] and was submitted "by way of background for completeness"[97] on Kenya's bottom-up strategy. Kenya maintains that it never claimed that Annex 3 mentioned any of the suspects and that the Pre-Trial Chamber's reliance on this obvious point "overlook[ed] entirely that the Government of Kenya might simply not have any evidence in its possession despite acting in good faith damning of any or all of the [...] Suspects".[98] Moreover, Kenya disputes the Pre-Trial Chamber's finding that Annex 1 and Annex 2 only shows that "instructions were given to investigate".[99] Kenya asserts that Annex 2 states that "there is a *pending* case (file 10/2008) against one of the Suspects, Mr. Ruto, and an investigation into all [...] Suspects is being carried out"[100] and that "the investigation specifically into the [...] Suspects had been underway from the time when the names of the [...] Suspects were made public by the ICC Prosecutor".[101] Furthermore, Kenya argues that in Kenya's Reply of 16 May 2011, it provided detailed information about the investigative actions being taken but that the Pre-Trial Chamber failed to mention these submissions.[102] Kenya is of the view that had these submissions been taken into account, it would have been "impossible to conclude [...] that there is '*inactivity*'".[103]

(c) Mr Ali's submissions on appeal

52. Mr Ali supports the arguments put forward by Kenya.[104] He argues that the Pre-Trial Chamber erred in applying "an unduly high evidentiary standard on the

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[95] Impugned Decision, para. 64.
[96] Document in Support of the Appeal, para. 55.
[97] Document in Support of the Appeal, para. 54.
[98] Document in Support of the Appeal, para. 55.
[99] Document in Support of the Appeal, para. 56.
[100] Document in Support of the Appeal, para. 56. Mr Ruto is one of the three suspects in the case ICC-01/09-01/11 that is also pending before the Pre-Trial Chamber.
[101] Document in Support of the Appeal, para. 57.
[102] Document in Support of the Appeal, para. 5.
[103] Document in Support of the Appeal, para. 6.
[104] Mr Ali's Response to the Document in Support of the Appeal, para. 13.

statements submitted" by Kenya.[105] In particular, Mr Ali submits that "requiring a State party to provide the specific details of its investigative findings before such findings have been submitted before [Kenyan] judicial authorities is an extremely intrusive step which goes beyond the parameters for a proper determination of an admissibility challenge".[106]

(d) The Prosecutor's submissions on appeal

53. The Prosecutor submits that the information before the Pre-Trial Chamber, and in particular Annexes 1, 2 and 3, "constitutes evidence that the suspects were *not* investigated prior to the submission of the [Admissibility Challenge]".[107] With respect to Annex 3, the Prosecutor "submits that since this important report on the investigations and prosecutions of Post-Election Violence cases did not include any reference to the suspects, it was reasonable for the Pre-Trial Chamber to infer that no such investigation against them had taken place at least until March 2011".[108] Furthermore, the Prosecutor submits that Annex 1, "[e]ven when taken at its highest [...] only shows that the commencement of an investigation including the Suspects was instructed by the Attorney General 14 days after the challenge was filed with the Court".[109] As to Annex 2, the Prosecutor contends that had the "investigations been carried out prior to 5 May 2011 as alleged by [Kenya], those instructions would be meaningless, regardless of the statement in the same report on which [Kenya] relies that '[t]he team is currently on the ground conducting the investigations as directed'".[110]

(e) The Victims' Observations

54. The victims, in relation to Annex 3 concur with the views of the Prosecutor.[111] Furthermore, with respect to Annex 1 the victims observe that the letter dated 14 April 2011 appears to have simply "initiated, triggered or authorized the investigations into the defendants"[112] as originally argued by Kenya in its

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[105] Mr Ali's Response to the Document in Support of the Appeal, para. 20.
[106] Mr Ali's Response to the Document in Support of the Appeal, para. 22.
[107] Prosecutor's Response to the Documents in Support of the Appeals, para. 46.
[108] Prosecutor's Response to the Documents in Support of the Appeals, para. 51.
[109] Prosecutor's Response to the Documents in Support of the Appeals, para. 47.
[110] Prosecutor's Response to the Documents in Support of the Appeals, para. 48.
[111] Victims' Observations, para. 13.
[112] Victims' Observations, para. 14.

Admissibility Challenge. However, they observe that Kenya's Reply of 16 May 2011, and in particular, Annex 2 "gives a different, although equally ambiguous, account of the genesis and current status of the investigation".[113] Annex 2 indicates that after the suspects were named by the ICC Prosecutor, "[t]*he Commissioner of Police again tasked the team of investigators to carry out exhaustive investigations relating to the Ocampo six and other high ranking citizens*"[114] (emphasis added). In the victims' view, this implies that Kenya had been investigating the suspects prior to 14 April 2011 which indicates a shift in Kenya's original position.[115] The victims therefore call into question the "validity of this claim" and the "overall reliability of the Government's claims about investigations".[116]

(f) Determination by the Appeals Chamber

55. Regarding an alleged error of fact, the Appeals Chamber has ruled in previous decisions that its review is corrective and not *de novo*. It will therefore not interfere unless it is shown that the Pre-Trial or Trial Chamber committed a clear error, namely: misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts.[117] As to the "misappreciation of facts" the Appeals Chamber will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it.[118]

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[113] Victims' Observations, para. 28.
[114] Victims' Observations, para. 28.
[115] Victims' Observations, para. 15.
[116] Victims' Observations, para. 15.
[117] *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's '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'", 2 December 2009, ICC-01/05-01/08-631-Red (OA 2), para. 61 (citing *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release", 9 June 2008, ICC-01/04-01/07-572 (OA 4), para. 25; *see also Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled 'Decision on application for interim release'", 16 December 2008, ICC-01/05-01/08-323 (OA), para. 52.
[118] *Prosecutor v. Callixte Mbarushimana*, "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the "Defence Request for Interim Release"'", 14 July 2011, ICC-01/04-01/10-283 (OA), paras 1 and 17.

56. Thus, in the present appeal, unless such clear errors have been demonstrated, the Appeals Chamber will defer to the Pre-Trial Chamber's factual finding that it had not been proven that Kenya was actually investigating the three suspects.

57. The Appeals Chamber notes that Kenya submitted before the Pre-Trial Chamber that it was investigating all the suspects in respect of whom summonses to appear have been issued. While this assertion was relatively vague in the Admissibility Challenge itself,[119] Kenya elaborated on it in the Filing of 21 April 2011.[120]

58. The most specific assertions were made in Kenya's Reply of 16 May 2011, where Kenya asserted in relation to the suspects that:

> 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.[121]

59. Kenya also explained in what it described as the "full background to the present investigations into the six suspects" that:

> All allegations were investigated and any evidence that emerged about any person, including the six suspects, was considered. This is confirmed by the fact that a file was opened against one of the six suspects on account of witness statements taken by the team. Further investigations were pursued at the time on the basis of this evidence. (The file remains open as further potential witnesses are being sought, along with the investigations that are presently being undertaken into all six suspects [...]). Had there been sufficient evidence available to the team at the time about any of the other suspects, further files would have been opened.[122]
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> When the Prosecutor publicly named the six suspects, the CID/DPP team was immediately tasked to inquire into these persons [...]. Certain of the persons named by the Prosecutor came as a surprise to the CID/DPP team, as no

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[119] In the Admissibility Challenge, Kenya submitted at para. 69 that: "It is accepted by the Government that the investigation of all cases, including those presently before the ICC, will be most effectively progressed once the new [Director of Public Prosecutions] is appointed, which is expected to be finalised in accordance with the provisions of the Constitution by the end of May 2011." At para. 71, Kenya stated: "An updated report of 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."

[120] In the Filing of Annexes, paras 2 to 3, Kenya submitted as follows: "2. [...] As explained in the [Admissibility Challenge], various investigative processes are continuing. There have been further developments in respect of these national investigations, including in respect of the investigations into the six suspects presently before the ICC. [...] 3. These materials are evidence of the national investigations that are underway. They support the [Admissibility Challenge] as they demonstrate that the Government is investigating the two cases presently before the ICC, thereby rendering them inadmissible before the ICC pursuant to Article 19."

[121] Kenya's Reply of 16 May 2011, para. 31.

[122] Kenya's Reply of 16 May 2011, para. 50.

> national files were open for them, no evidence having come to light justifying such an action. Nevertheless, the Commissioner of Police sent investigators back into the field to make inquiries about all six suspects. As a result a file exists for all six of the suspects and investigations are presently going on .[123]

60. In a section entitled "The present investigation", Kenya reported that "[t]he Commissioner of Police has confirmed for the purposes of providing the most up-to-date information for this Reply that the six suspects are currently being exhaustively investigated by the CID/DPP team" and listed the specific "investigative actions [...] in progress".[124]

61. The Pre-Trial Chamber found these assertions in themselves insufficient to establish that an investigation was ongoing and required proof that Kenya was taking specific steps to investigate the three suspects.[125] The Appeals Chamber cannot identify any error in this approach. As explained in paragraph 39 above, for a successful challenge of the admissibility of a case under articles 17 (1) (a), first alternative, and 19 of the Statute, the same case as that before the Court must be under investigation by a State, i.e. the State must take steps directed at ascertaining whether the suspects are responsible for substantially the same conduct as that alleged in the proceedings before the Court. As Kenya also acknowledges, a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible.[126] To discharge that burden, the State must provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case. It is not sufficient merely to assert that investigations are ongoing. As the Appeals Chamber has previously held, albeit in a different context:

> [I]t is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence. Providing evidence to substantiate an allegation is a hallmark of judicial proceedings; courts do not base their decisions on impulse, intuition and conjecture or on mere sympathy or emotion.

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[123] Kenya's Reply of 16 May 2011, para. 52.
[124] Kenya's Reply of 16 May 2011, para. 56.
[125] Impugned Decision, paras 60-65.
[126] *See* Kenya's Reply of 16 May 2011, para. 61. where Kenya stated that "[t]he Government of Kenya agrees with the Prosecution Response at para. 12 that the party challenging admissibility bears the burden of demonstrating that the case is inadmissible" [Footnote omitted].

> Such a course would lead to arbitrariness and would be antithetical to the rule of law.[127]

62. Kenya's assertions that "[a]rticle 17 does not require that the details of an investigation be provided to the Court"[128] and that "the statements of State Parties are to be respected and must be presumed to be accurate and made in good faith unless there is *compelling evidence* to the contrary" are untenable.[129] As the Prosecutor correctly points out, "a statement by a Government that it is *actively investigating* is not [...] determinative. In such a case the Government must support its statement with tangible proof to demonstrate that it is actually carrying out relevant investigations".[130] In other words, there must be evidence with probative value.

63. Turning to the Pre-Trial Chamber's assessment of the annexes filed by Kenya and the question of whether this assessment reveals a clear error, the Appeals Chamber notes that the Pre-Trial Chamber found Annexes 1, 2 and 3 to be of most relevance.[131] Annex 3 is "a progress report including data on Post Election Violence cases in six provinces".[132] The Pre-Trial Chamber found that "[n]owhere in this report is there the slightest mention of the names of one or more the three suspects".[133] Annex 1 is a letter dated 14 April 2011 from Kenya's Attorney General to the Commissioner of Police. The Attorney General directed the Commissioner of Police *inter alia* "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*"[134] (emphasis added). Annex 2 is the progress report of 5 May 2011 by the Director of the Criminal Investigation Department (hereinafter: "CID") to the Chief Public Prosecutor, which states *inter alia* that:

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[127] *See* in the *Situation of Uganda*, "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'", 23 February 2009, ICC-02/04-179 (OA) and ICC-02/04-01/05-371 (OA 2), para.36.
[128] Document in Support of the Appeal, para. 6.
[129] Document in Support of the Appeal, para. 8.
[130] Prosecutor's Response to the Document in Support of the Appeal, para. 37.
[131] Impugned Decision, para. 60.
[132] Impugned Decision para. 61.
[133] Impugned Decision 61.
[134] Annex 1, p. 3.

> Some of the prominent pending cases include: - Nakuru CID Inquiry file No 10/2008, the suspect in this inquiry is Hon William Samoei Ruto – immediate former Minister of Agriculture. The allegations were that, the Minister together with others from the Kalenjin community incited Kalenjin youths to commit violence against non-Kalenjins living in some parts of Rift Valley Province. The matter is still under investigation because there are some areas requiring further corroboration inorder [sic] to reach to a fair conclusion.[135]

64. The report also states:

> When the ICC Prosecutor finally disclosed the names of what came to be known as the ocampo [sic] six, the Police investigators were taken by surprise. This was because *other than Hon William Ruto, non* [sic] *of the members of the ocampo* [sic] *six have been 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. [Emphasis added.][136]

65. And under the heading "Way forward", the report concludes:

> Following the disclosure by the ICC prosecutor, Mr Louise [sic] Moren [sic] Ocampo of the involvement of prominent personalities (Ocampo six) in the post election violence, the Commissioner of Police has further directed the team to exhaustively investigate all the allegations.
>
> The team is currently on the ground conducting the investigations as directed. It is also reviewing all the previous inquiries and reports to assist in the investigation.[137]

66. In relation to these annexes, the Pre-Trial Chamber found:

> 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. [138]

67. In the Appeals Chamber's view, this finding of the Pre-Trial Chamber does not reveal a clear error. The Appeals Chamber notes that of the 29 annexes that Kenya submitted, Annexes 1 and 2 were the only ones that related specifically to the case at hand. However, although Annexes 1 and 2 made reference, in a general manner, to alleged investigations against all the suspects in this case, they do not provide any details as to the steps that Kenya may have taken to ascertain whether they were

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[135] Annex 2, pp. 2-3.
[136] Annex 2, p. 3.
[137] Annex 2, p. 4.
[138] Impugned Decision, para. 64.

responsible for the conduct that is alleged against them in the proceedings before the Court. None of the three suspects in the case at hand is named in the two annexes. The only suspect specifically named is Mr Ruto, one of the three suspects in the case of *Prosecutor v. Ruto et al.*:[139] Annex 2 provides some information concerning his possible involvement in inciting violence against non-Kalenjins living in some parts of the Rift Valley Province. However, even this information falls short of substantiating what has been done to investigate him for that conduct.

68. Furthermore, the Appeals Chamber notes that even Kenya's submissions lacked specificity. In Kenya's Reply of 16 May 2011, it is stated that the "Commissioner of Police has confirmed [...] that the [...] suspects are currently being exhaustively investigated by the CID/DPP team" and it identified six "investigative actions [which] are in progress".[140] However, while Kenya asserts, for instance, that "[o]fficers have been re-visiting the crime scenes to make inquiries and gather any evidence that could assist their investigations in respect of the six suspects",[141] it provided no evidence thereof, such as police reports attesting to the time and location of those visits or the cases in which these inquiries took place.

69. In the circumstances, the Appeals Chamber can find no clear error in the Pre-Trial Chamber's assessment of the annexes that Kenya had submitted. Therefore, the Pre-Trial Chamber's finding that in relation to the three suspects Kenya has not established that it is carrying out an investigation cannot be faulted.

2. *Alleged illogical inferences from proposal to provide updated investigation reports and assertions of bias*

70. Kenya submits that the Pre-Trial Chamber drew illogical inferences from its proposal to provide updated investigation reports.[142] Kenya also submits that the Pre-Trial Chamber made erroneous findings on the basis of Kenya's legal submissions and generally was biased against Kenya.[143]

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[139] ICC-01/09-01/11.
[140] Kenya's Reply of 16 May 2011, para. 56.
[141] Kenya's Reply of 16 May 2011, para. 56.
[142] Document in Support of the Appeal, para. 46.
[143] Document in Support to the Appeal, paras 45, 58.

(a) Procedural context and relevant part of the Impugned Decision

71. In the Admissibility Challenge, Kenya stated that "the investigation of all cases, including those presently before the ICC, will be most effectively progressed once the new DPP is appointed [...] by the end of May 2011".[144] Kenya stated further that it will provide the Pre-Trial Chamber with "[a]n updated report on the state of these investigations and how they extend upwards to the highest levels [...] by the end of July 2011".[145] Kenya added that the report "will also outline the investigation strategy which [...] is building on the investigation and prosecution of lower level perpetrators to reach up to those at the highest levels who may have been responsible".[146] In addition, Kenya submitted that "[f]urther reports at the end of August and September 2011 on progress made with the investigations at all levels under the new office of the DPP will be provided to the Pre-Trial Chamber".[147] Kenya also made submissions on the appropriate test to be applied to an admissibility challenge, arguing that it should be the test adopted by the Pre-Trial Chamber in the Article 15 Decision.[148]

72. In the Impugned Decision, the Pre-Trial Chamber explained that it was surprised by Kenya's statement which served as "an acknowledgment by [...] Kenya that so far, the alleged *ongoing* investigations have not yet extended to those at the highest level of hierarchy",[149] including the suspects before the Court. The Pre-Trial Chamber found that this submission contradicted the arguments made in Kenya's Reply of 16 May 2011, that there are actually ongoing investigations in relation to the suspects under the Chamber's consideration.[150] The Pre-Trial Chamber also found that it was "unclear why [...] Kenya ha[d] not so far submitted a detailed report on the ongoing investigations".[151] The Chamber opined that if national proceedings against the suspects are currently underway then "there is no convincing reason to wait until July 2011 to submit the said first report".[152] In relation to Kenya's legal submissions, the Pre-Trial Chamber stated that Kenya's submissions "cast doubt on the will of the State to actually investigate the three suspects" and that it was "unclear how the

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[144] Admissibility Challenge, para. 69.
[145] Admissibility Challenge, para. 71.
[146] Admissibility Challenge, para. 71.
[147] Admissibility Challenge, para. 74.
[148] Admissibility Challenge, para. 32.
[149] Impugned Decision, para. 58.
[150] Impugned Decision, para. 58.
[151] Impugned Decision, para. 59.
[152] Impugned Decision, para. 59.

Chamber could be convinced that there are actually ongoing investigations with respect to the three suspects in the present case".[153]

(b) Kenya's submissions on appeal

73. On appeal, Kenya argues that the Pre-Trial Chamber's finding that Kenya's proposal to submit further reports on the investigations was an acknowledgment that there were currently no investigations of the suspects was "illogical", notably, because Kenya had proposed to provide an *updated* report while stating elsewhere in the Admissibility Challenge that the suspects were already under investigation.[154] In Kenya's submission, on the basis of the information it had presented to the Pre-Trial Chamber, it was "absolutely clear" that there were ongoing investigations.[155] Kenya also contends that the Pre-Trial Chamber failed to explain why the reports could not be submitted and instead blamed Kenya for not having presented detailed information.[156] Kenya submits furthermore that it submitted to the Pre-Trial Chamber that "should it have any doubts about the national investigations it should *either* hear from the Commissioner of Police directly [...] *or* receive investigation reports".[157]

74. Kenya submits furthermore that the Pre-Trial Chamber failed to address its legal arguments and instead used those submissions "to make a finding that the Government of Kenya was not to be trusted in respect of the information it provided about its national investigation".[158] Elsewhere in the Document in Support of the Appeal, Kenya alleges that "[w]hen the proceedings are considered as a whole, it appears as if the [Pre-Trial] Chamber was determined to reject the Government's Admissibility Application and as quickly as possible".[159] The Pre-Trial Chamber is said to have "adopted interpretations of every single request and submission made by the Government of Kenya, and of every piece of evidence filed by the Government that least favoured the Government of Kenya".[160]

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[153] Impugned Decision, para. 56.
[154] Document in Support of the Appeal, para. 46.
[155] Document in Support of the Appeal, para. 47.
[156] Document in Support of the Appeal, para. 50.
[157] Document in Support of the Appeal, para. 7.
[158] Document in Support of the Appeal, para. 45.
[159] Document in Support of the Appeal, para. 58.
[160] Document in Support of the Appeal, para. 58.

(c) Mr Ali's submissions on appeal

75. Mr Ali submits that the Pre-Trial Chamber erred in disregarding Kenya's submissions "that investigations were underway and what was to be provided was an update".[161] In addition, he submits that by its decision the Pre-Trial Chamber "incorrectly infers that investigations should have been completed at the time of filing the admissibility challenge".[162] Mr Ali avers that "the Rome Statute does not require completeness of investigations by state authorities before challenging admissibility. Further, there is no requirement that national investigations must be as advanced as the Prosecution investigations".[163] In Mr Ali's view such a requirement would "undermine the existence of the court [...] by creating competition between the Court and national authorities".[164]

(d) The Prosecutor's submissions on appeal

76. The Prosecutor argues that the Pre-Trial "Chamber correctly interpreted the submissions of [Kenya] to the effect that "the so-called 'bottom-up' approach followed in the investigation had not yet extended to those at the highest level of hierarchy, including the suspects".[165] Furthermore, the Prosecutor submits that "contrary to the contention of [Kenya], the Chamber did not require the investigations to be complete" instead it "only required that there was evidence of 'concrete steps showing ongoing investigations'" against the suspects.[166]

77. With regard to the allegations of bias, the Prosecutor submits that these allegations are without merit.[167] In particular, he avers that the Pre-Trial Chamber neither based its factual conclusions concerning the absence of national investigations on the fact that Kenya challenged the 'same person/same conduct' test nor did the Chamber insinuate that Kenya was being "dishonest" with respect to the information it provided.[168] Instead, the Prosecutor submits that the Pre-Trial Chamber "simply

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[161] Mr Ali's Response to the Document in Support of the Appeal, para. 18.
[162] Mr Ali's Response to the Document in Support of the Appeal, para. 18.
[163] Mr Ali's Response to the Document in Support of the Appeal, para. 19.
[164] Mr Ali's Response to the Document in Support of the Appeal, para. 19.
[165] Prosecutor's Response to the Document in Support of the Appeal, para. 57.
[166] Prosecutor's Response to the Document in Support of the Appeal, para. 59.
[167] Prosecutor's Response to the Document in Support of the Appeal, para. 52.
[168] Prosecutor's Response to the Document in Support of the Appeal, para. 53.

found that [Kenya] had not provided any proof to substantiate its claim that there were ongoing investigations against the suspects".[169]

(e) The Victims' Observations

78. The victims submit that Kenya's promise to submit updated reports "perpetuates the ambiguity" surrounding Kenya's claims that investigations are ongoing. They observe that the notion of an updated report implies that investigations have already started without expressly stating so.[170]

79. As to the allegations of bias, the victims observe that the Impugned Decision "is not based on any imputation of dishonesty whatsoever, but simply the absence of sufficiently detailed information to determine whether an investigation against the defendants on the crimes alleged was ongoing".[171]

(f) Determination of the Appeals Chamber

80. As discussed in the preceding section, the Pre-Trial Chamber found that Kenya failed to submit information that showed that concrete investigative steps had been taken against the suspects in question.[172] The findings of the Pre-Trial Chamber as to Kenya's proposal to submit additional reports must be seen in this light. Since the Chamber concluded that, on the basis of the information before it, there was no sufficient indication that Kenya was investigating the suspects, it was not erroneous for the Chamber to state that Kenya's proposal to submit additional reports was actually an acknowledgment that there were no such investigations at that time.

81. In addition, contrary to the submissions of Kenya and Mr Ali, the Pre-Trial Chamber did not infer that investigations had to be completed before an admissibility challenge could be raised. As correctly pointed out by the Prosecutor, the Pre-Trial Chamber merely required that concrete progressive investigative steps be taken and demonstrated at the time when an admissibility challenge is raised.[173]

82. Kenya's assertions that the Pre-Trial Chamber simply did not believe it even though there was no evidence contradicting Kenya's submissions, and that the Chamber adopted a hostile attitude and made erroneous findings on the basis of

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[169] Prosecutor's Response to the Document in Support of the Appeal, para. 53.
[170] Victims' Observations, para. 9.
[171] Victims' Observations, para. 36.
[172] Impugned Decision, para. 60.
[173] Impugned Decision, para. 60.

Kenya's legal submissions is equally unfounded. Nowhere in the Impugned Decision did the Pre-Trial Chamber find that Kenya was not to be trusted. The Pre-Trial Chamber rejected the Admissibility Challenge not because it did not trust Kenya or doubted its intentions, but rather because Kenya failed to discharge its burden to provide sufficient evidence to establish that it was investigating the three suspects.

83. In sum, no clear error in the Pre-Trial Chamber's treatment of Kenya's proposal to submit updated investigation reports can be identified. Nor can it be said that the Pre-Trial Chamber was biased against Kenya.

C. Alleged procedural errors

84. Kenya raises three procedural errors on appeal, namely: (i) the refusal to permit the filing of further investigation reports within the timetable proposed by Kenya; (ii) the refusal to hold an oral hearing, *inter alia*, to receive evidence from the Commissioner of Police on the alleged ongoing investigations; and (iii) the refusal to decide on Kenya's request for assistance before determining the Admissibility Challenge.[174] In Kenya's view, all these errors contributed to the Pre-Trial Chamber's alleged erroneous finding of 'inactivity'.[175]

85. Before turning to an analysis of these alleged errors, the Appeals Chamber's recalls its judgement of 16 September 2009 on the appeal concerning the admissibility of the case of Joseph Kony *et al.*[176] (hereinafter: "Judgment in *Kony* OA 3"). In that judgment, the Appeals Chamber held that "an appellant may raise procedural errors in appeals under article 82 (1) (a) of the Statute".[177] However, for such errors to lead to a reversal of the decision on admissibility, they must have materially affected the decision.[178]

86. The Court's legal instruments do not set out in detail the procedure to be followed upon an admissibility challenge under article 19 of the Statute. Rather, rule 58 of the Rules of Procedure and Evidence provides, in relevant part:

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[174] Documents in Support of the Appeals, para. 59.
[175] Documents in Support of the Appeals, para. 59.
[176] *See Prosecutor v. Joseph Kony et al.,* Appeals Chamber, "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", 16 September 2009, ICC-02/04-01/05-408 (OA 3).
[177] Judgment in *Kony* OA 3, para. 47. *See* also Judgment in *Katanga* OA 8, para. 37.
[178] Judgment in *Kony* OA 3, para. 48.

> 1. A request or application made under article 19 shall be in writing and contain the basis for it.
>
> 2. When a Chamber receives a request or application raising a challenge or question concerning its jurisdiction or the admissibility of a case in accordance with article 19, paragraph 2 or 3, or is acting on its own motion as provided for in article 19, paragraph 1, it shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may hold a hearing. It may join the challenge or question to a confirmation or a trial proceeding as long as this does not cause undue delay, and in this circumstance shall hear and decide on the challenge or question first.

87. Thus, rule 58 of the Rules of Procedure and Evidence stipulates the procedure to be followed when filing a request or application under article 19 of the Statute. It requires that this request be transmitted to the Prosecutor and the person concerned, who shall be given an opportunity to make written submissions. Save for these express stipulations, the Pre-Trial Chamber enjoys broad discretion in determining how to conduct the proceedings relating to challenges to the admissibility of a case. In the Judgment in *Kony* OA 3, the Appeals Chamber explained its standard of review in respect of discretionary decisions as follows:

> [T]he Appeals Chamber's functions extend to reviewing the exercise of discretion by the Pre-Trial Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion under article 19 (1) of the Statute to determine admissibility, save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position. They identify the conditions justifying appellate interference to be: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.[179]

88. This standard of review will guide the following analysis of the three alleged procedural errors.

1. Refusal to permit the filing of further investigation reports

89. The first procedural error that Kenya alleges is that the Pre-Trial Chamber erred when it refused to permit the filing of further investigation reports.

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[179] Judgment in *Kony* OA 3, para. 80.

(a) Procedural context and relevant part of the Impugned Decision

90. In its Admissibility Challenge before the Pre-Trial Chamber, Kenya submitted that investigations into the post-election violence in Kenya were ongoing and proposed a timetable for the filing of updated investigative reports. The first of these reports was to be filed at the end of July 2011, and additional reports at the end of August and September 2011 respectively.[180] Kenya averred that the reports would serve to update the Chamber on the progress made in the investigations into all cases, including those presently before the ICC.[181] In particular, the reports would demonstrate how the investigations, under the new Director of Public Prosecutions (DPP), "extend upwards to the highest levels"[182] and how the investigation strategy "is building on the investigation and prosecution of lower level perpetrators to reach up to those at the highest levels who may have been responsible".[183] These submissions were repeated in Kenya's Reply of 16 May 2011.[184] In the Decision on the Conduct of the Proceedings of 4 April 2011, the Pre-Trial Chamber did not mention this proposal. In the Impugned Decision the Pre-Trial Chamber found that the proposed provision of updated reports was in fact "an acknowledgment by the Government of Kenya 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*".[185] This, in the Chamber's view, contradicted the arguments of Kenya that investigations were actually ongoing in relation to the suspects under the Chamber's consideration.[186] Furthermore, the Pre-Trial Chamber found that it was unclear why a detailed report on the investigations into the suspects had not already been submitted if national proceedings against the suspects were currently underway.[187] The Pre-Trial Chamber did not, however, formally dispose of Kenya's request to be allowed to file additional reports.

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[180] Admissibility Challenge, paras 71 and 79.
[181] Admissibility Challenge, paras 71 and 79.
[182] Admissibility Challenge, para. 71.
[183] Admissibility Challenge, para. 71.
[184] Kenya's Reply of 16 May 2011, para. 25.
[185] Impugned Decision, para. 58.
[186] Impugned Decision, para. 58.
[187] Impugned Decision, para.59.

(b) Kenya's submissions on appeal

91. On appeal, Kenya argues that the Pre-Trial Chamber failed to give reasons for rejecting its proposed timetable for the submission of updated reports[188] and that Kenya was erroneously denied an opportunity to submit the reports that would have provided further details about the investigation.[189] Kenya submits furthermore that the Pre-Trial Chamber failed to address that in respect of other situations "States Parties have been given substantial periods of time to conduct their investigations, and whether these situations could be distinguished, if at all".[190]

(c) Mr Ali's submissions on appeal

92. Mr Ali agrees with the arguments of Kenya, emphasising that the Pre-Trial Chamber "erred in refusing to allow [Kenya] to submit staged investigation reports contrary to the jurisprudence of this Court".[191] As a result, Mr Ali argues that the Pre-Trial Chamber did not have all the necessary information before it.[192] In his view, the Pre-Trial Chamber was "not limited to taking into consideration only the information submitted by [Kenya] in its initial application but also any evidence submitted subsequently".[193]

(d) The Prosecutor's submissions on appeal

93. The Prosecutor contends that Kenya's submissions are based on an incorrect understanding of the admissibility regime and that Kenya "was artificially trying to extend the admissibility proceedings over time, seemingly in the hope that at some point in the future there would be an actual investigation into the suspects capable of rendering the ICC's case inadmissible".[194] In the view of the Prosecutor, the Pre-Trial Chamber rejected, "by necessary implication", Kenya's proposal to file additional reports when it found that there were no investigations and the cases therefore were admissible before the Court.[195]

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[188] Document in Support of the Appeal, paras 12 (i) and 60.
[189] Document in Support of the Appeal, paras 12, 60, and 63. Kenya raises similar arguments as part of its submissions on the alleged factual errors, *see* para. 50.
[190] Document in Support of the Appeal, para. 61.
[191] Mr Ali's Response to the Document in Support of the Appeal, para. 24.
[192] Mr Ali's Response to the Document in Support of the Appeal, para. 27.
[193] Mr Ali's Response to the Document in Support of the Appeal, para. 28.
[194] Prosecutor's Response to the Document in Support of the Appeal, para. 62 (footnote omitted).
[195] Prosecutor's Response to the Document in Support of the Appeal, para. 63.

(e) The Victims' Observations

94. The victims concur with the submissions of the Prosecutor in this respect.[196]

(f) Determination of the Appeals Chamber

95. In essence, Kenya's argument is that the Pre-Trial Chamber should not have decided on the Admissibility Challenge at the time it did, but should have given Kenya more time to submit additional evidence. The Appeals Chamber recalls that under rule 58 of the Rules of Procedure and Evidence, the Pre-Trial Chamber had the discretion to regulate the proceedings on the Admissibility Challenge. Under that rule, it was open to the Pre-Trial Chamber to allow the filing of additional evidence.

96. Nevertheless, the question that the Appeals Chamber has to resolve is not what the Pre-Trial Chamber could have done, but whether the Pre-Trial Chamber erred in what it did. As stated above at paragraph 87, rule 58 vests the Pre-Trial Chamber with broad discretion. The Appeals Chamber will interfere only if the Pre-Trial Chamber's exercise of discretion amounted to an abuse. In the present case, the Appeals Chamber cannot find such an abuse. The Pre-Trial Chamber decided the Admissibility Challenge on 30 May 2011, almost two months after it was filed. The Pre-Trial Chamber accepted the Filing of Annexes of 21 April 2011, even though the filing of such additional material was not envisaged either in rule 58 of the Rules of Procedure and Evidence or in the Pre-Trial Chamber's Decision on the Conduct of the Proceedings of 4 April 2011. The Pre-Trial Chamber also granted Kenya's request to reply to the submissions filed by the suspects, the Prosecutor and the victims.[197] In these circumstances, it cannot be said that the Pre-Trial Chamber did not give Kenya sufficient opportunity to make its arguments or to present supporting evidence. In this context, the Appeals Chamber underlines once more the discretionary character of the Pre-Trial Chamber's decision. While it would have been open to the Pre-Trial Chamber to allow the filing of additional evidence, it was not obliged to do so, nor could Kenya expect to be allowed to present additional evidence. Rather, as stated above at paragraphs 64 and 65, it was for Kenya to ensure that the Admissibility Challenge was sufficiently substantiated by evidence.

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[196] Victims' Observations, para. 40.

[197] "Decision under Regulation 24(5) of the Regulations of the Court on the Motion Submitted on Behalf of the Government of Kenya", 2 May 2011, ICC-01/09-02/11-81.

97. Kenya's argument that in other situations, States were given "substantial periods of time to conduct their investigations"[198] and that the Pre-Trial Chamber failed to mention this is unpersuasive. In the Admissibility Challenge, Kenya referred to the situations in Colombia, Georgia and Afghanistan.[199] As the Prosecutor notes, in respect of those situations he has not yet decided to open an investigation.[200] They are therefore not comparable to the present case, where not only has an investigation been opened, but also a summons to appear has been issued. Accordingly, there was no reason for the Pre-Trial Chamber to consider other situations or to compare them to the case at hand.

98. The Appeals Chamber notes that article 19 (5) of the Statute requires States to challenge the admissibility of a case "at the earliest opportunity". This provision must be seen in the context of the other provisions on admissibility, in particular article 17 (1) of the Statute. As explained in paragraph 36 above, the purpose of an admissibility challenge under article 17 (1) of the Statute is to resolve existing conflicts between competing jurisdictions – the Court's on the one hand, and a national jurisdiction on the other hand. As mentioned in paragraph 45 above, the "earliest opportunity" in article 19 (5) of the Statute refers to the earliest point in time after the conflict of jurisdictions has actually arisen. Therefore the State cannot expect to be allowed to amend an admissibility challenge or to submit additional supporting evidence just because the State made the challenge prematurely.

99. In sum, no procedural error can be discerned in the Pre-Trial Chamber's treatment of Kenya's proposal to submit additional reports.

2. *Refusal to hold an oral hearing*

100. The second procedural error that Kenya alleges is that the Pre-Trial Chamber erred when it refused to hold an oral hearing before deciding on the Admissibility Challenge.[201]

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[198] Document in Support of the Appeal, para. 61.
[199] Admissibility Challenge, footnote 8.
[200] Prosecutor's Response to the Document in Support of the Appeal, para. 64.
[201] Document in Support of the Appeal, paras 12 (ii), 64-69.

(a) Procedural context and relevant part of the Impugned Decision

101. In the Admissibility Challenge, Kenya requested that the Pre-Trial Chamber convene an oral hearing "to permit the Government the opportunity to address the Pre-Trial Chamber in respect of its Application" and "so that all relevant arguments can be submitted and considered".[202] Kenya also requested that the Pre-Trial Chamber convene a status conference to hear submissions on the timetable and procedure for the disposal of the Admissibility Challenge.[203] This latter request, but not the request for an oral hearing, was repeated in the concluding section of the Admissibility Challenge as one of Kenya's prayers.[204]

102. In the Decision on the Conduct of the Proceedings of 4 April 2011, the Pre-Trial Chamber rejected the request for a status conference and set out the procedure to be followed in respect of the admissibility challenge, which did not include an oral hearing.[205] On 17 May 2011, Kenya filed a new "Application for an Oral Hearing Pursuant to Rule 58 (2)",[206] which was registered the next day (hereinafter: "Application of 18 May 2011"), in which it requested that the Pre-Trial Chamber convene a hearing on the Admissibility Challenge before the Chamber decided on the merits.

103. In the Impugned Decision, the Pre-Trial Chamber addressed the Application of 18 May 2011 as a preliminary issue. The Pre-Trial Chamber explained that in its Decision on the Conduct of Proceedings of 4 April 2011, it had specifically rejected the request for a status conference, which, in the Pre-Trial Chamber's understanding, was the same as the request for an oral hearing.[207] The Pre-Trial Chamber therefore considered the Application of 18 May 2011 as a motion for reconsideration, which it rejected as impermissible.[208] The Pre-Trial Chamber also noted that "it ha[d] given all parties and participants ample opportunities to put forward all arguments regarding the admissibility challenge. Hence, the Chamber is not persuaded that a second round

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[202] Admissibility Challenge, para. 20.
[203] Admissibility Challenge, para. 21.
[204] Admissibility Challenge, para. 81.
[205] Decision on the Conduct of Proceedings of 4 April 2011, para. 10.
[206] ICC-01/09-02/11-92.
[207] Impugned Decision, paras 35-36.
[208] Impugned Decision, para. 38.

of submissions is needed prior to making a determination on the merits of the Application".[209]

(b) Kenya's submissions on appeal

104. On appeal, Kenya argues that the Pre-Trial Chamber's finding that a second round of submissions from the parties and participants was unnecessary for its determination on admissibility disregards that "the Government's main reason for asking for an oral hearing [...] was to ensure that the Chamber heard directly from the Commissioner of Police about the details of the national investigation into the [...] Suspects".[210] Kenya also submits that the Pre-Trial Chamber's treatment of the request for an oral hearing is indicative of the Chamber's determination to "'close down' the receipt of any further relevant information" and that it was "simply wrong for the Chamber to suggest that the Government or its Counsel did not act in good faith when making the application for an oral hearing".[211]

(c) Mr Ali's submissions on appeal

105. Mr Ali agrees with the submissions made by Kenya.[212] He argues that "the rejection of a requested oral hearing deprived [Kenya] of an opportunity to provide more information by adducing all relevant evidence [...] including oral testimony" and emphasises that the "jurisprudence of the Court has consistently held that documentary evidence has less weight than oral testimony".[213] Mr Ali also considers the Pre-Trial Chamber's Decision to reject the request for an oral hearing "inconsistent with previous practice by [sic] the Court".[214]

(d) The Prosecutor's submissions on appeal

106. The Prosecutor notes that rule 58 (2) of the Rules of Procedure and Evidence allows the Pre-Trial Chamber discretion in deciding whether to hold an oral hearing.[215] The Prosecutor submits that for Kenya to succeed on appeal it would have

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[209] Impugned Decision, para. 37.
[210] Document in Support of the Appeal, para. 66.
[211] Document in Support of the Appeal, para. 67
[212] Mr Ali's Response to the Document in Support of the Appeal, paras 30-34.
[213] Mr Ali's Response to the Document in Support of the Appeal, para. 33. (Footnote omitted).
[214] Mr Ali's Response to the Document in Support of the Appeal, para. 34.
[215] Prosecutor's Response to the document in Support, para. 67.

to demonstrate that the Pre-Trial Chamber abused its discretion in deciding not to hold a hearing and in his view Kenya fails to do so.[216]

(e) The Victims' Observations

107. The victims concur with the Prosecutor's views in this respect.[217]

(f) Determination of the Appeals Chamber

108. As stated above, under rule 58 (2) of the Rules of Procedure and Evidence, the Pre-Trial Chamber enjoys broad discretion when determining the appropriate procedure for conducting an admissibility challenge.[218] Under this provision, the Pre-Trial Chamber *may* hold a hearing, but it is not obliged to do so. The Pre-Trial Chamber's decision not to convene an oral hearing was thus an exercise of its discretion. As with the filing of additional reports addressed in the preceding section,[219] the question for the Appeals Chamber to resolve is therefore not whether the Pre-Trial Chamber could have held an oral hearing, but whether the decision not to do so amounted to an abuse of discretion. In the view of the Appeals Chamber, although there might have been reasons to hold an oral hearing, it cannot be said that by deciding not to do so, the Pre-Trial Chamber abused its discretion.

109. Kenya's argument that the Pre-Trial Chamber disregarded the main purpose of the request for an oral hearing, namely, to hear the Police Commissioner, is unpersuasive and fails to identify any error in the Pre-Trial Chamber's exercise of discretion. As the Prosecutor notes,[220] Kenya does not explain why the Commissioner's evidence could not have been submitted in writing, especially in light of both the unambiguous preference in rule 58 (3) of the Rules of Procedure and Evidence for submissions to be in writing and the Pre-Trial Chamber's directions that submissions be made in writing.[221] In the Application of 18 May 2011, Kenya submitted that holding an oral hearing "is, ultimately, the most effective and efficient way for the Chamber to assess national investigations into the six suspects".[222] This

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[216] Prosecutor's Response to the document in Support, paras 66-69..
[217] Victims' Observations, paras 40-41.
[218] *See* para. 87 above.
[219] *See* paras 95 et seq.
[220] Prosecutor's Response to the Document in Support of the Appeals, para. 69.
[221] Decision on the Conduct of the Proceedings of 4 April 2011, para. 12.
[222] Application of 18 May 2011, para. 23.

does not explain, however, that an oral hearing would be the "most effective and efficient" way of receiving information.

110. Furthermore, Kenya's claim that the main reason for applying for an oral hearing was to allow the Police Commissioner to testify and that the Pre-Trial Chamber disregarded this purpose is not supported by the record: in the Application of 18 May 2011, Kenya cited several reasons as to why the hearing should be called.[223] These reasons included the need to consider "seminal and complex legal issues raised by the submissions in the Admissibility [Challenge]".[224] In these circumstances, the Pre-Trial Chamber cannot be faulted for rejecting the request for an oral hearing *inter alia* on the ground that a second round of submissions was unnecessary.

111. As for Kenya's argument that the Pre-Trial Chamber may have misunderstood the request for an oral hearing in the Admissibility Challenge, it should be noted that the Pre-Trial Chamber addressed the substance of the request in the Impugned Decision and found that an oral hearing was unnecessary in light of the previous opportunities for submissions.[225] Accordingly, any mistake that the Pre-Trial Chamber might have made in the interpretation of the requests for a status conference and an oral hearing contained in the Admissibility Challenge would have been inconsequential to the Chamber's determination of the request for an oral hearing.

112. In sum, no error in the exercise of the Pre-Trial Chamber's discretion may be discerned in relation to the request for an oral hearing

3. Refusal to decide on Request for Assistance

113. The third procedural error that Kenya alleges is that the Pre-Trial Chamber erred in failing to decide on the Request for Assistance before ruling on the Admissibility Challenge.[226]

(a) Procedural context and relevant part of the Impugned Decision

114. On 21 April 2011, Kenya filed before the Pre-Trial Chamber and into the record of the situation a "Request for Assistance on behalf of the Government of the

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[223] Application of 18 May 2011, paras 12-33.
[224] Application of 18 May 2011, para. 30.
[225] Impugned Decision, paras 35-36.
[226] Document in Support of the Appeal, paras 12 (iii), 70-78.

Republic of Kenya pursuant to Article 93(10) and Rule 194"[227] (hereinafter: "Request for Assistance"). The scope of the Request for Assistance was "for the transmission of all statements, documents, or other types of evidence obtained by the Court and the Prosecutor in the course of the ICC investigations into the Post-Election Violence in Kenya, including into the six suspects presently before the ICC".[228] Kenya also requested that the Pre-Trial Chamber decide on the Request for Assistance before ruling on the pending Admissibility Challenge.[229]

115. In the Impugned Decision, the Pre-Trial Chamber found that there was no link between the Request for Assistance and the Admissibility Challenge and stated that it would therefore decide on the Request for Assistance in a separate decision.[230] The Pre-Trial Chamber issued the decision on 29 June 2011.[231]

(b) Kenya's submissions on appeal

116. On appeal, Kenya challenges the Pre-Trial Chamber's approach. It submits that "receiving assistance from the Prosecutor was directly relevant and related to its [Admissibility Challenge]",[232] and that "[i]t would be unfair to have denied [Kenya] the opportunity to rely on such evidence in its national investigations and consequently its [A]dmissibility [C]hallenge".[233] Therefore, Kenya submits that the Pre-Trial Chamber, in the exercise of its discretion to regulate the admissibility proceedings, should have first decided on the Request for Assistance.[234]

(c) Mr Ali's submissions on appeal

117. Mr Ali does not make any submissions specific to the alleged error in relation to the Pre-Trial Chamber's treatment of the Request for Assistance.

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[227] ICC-01/09-58.
[228] Request for Assistance, para. 2.
[229] Request for Assistance, para.7.
[230] Impugned Decision, paras 30-31.
[231] "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, ICC-01/09-63.
[232] Document in Support of the Appeal, para. 74.
[233] Document in Support of the Appeal, para. 77.
[234] Document in Support of the Appeal, para. 77.

(d) The Prosecutor's submissions on appeal

118. The Prosecutor notes that the Request for Assistance was filed three weeks after the Admissibility Challenge.[235] He submits that it is unclear how information obtained as a result of the Request for Assistance could have had an impact on the disposal of the Admissibility Challenge, as such information could only have been used for future investigations.[236] In the Prosecutor's view, even if the Pre-Trial Chamber erred in its treatment of the Request for Assistance, this would not have materially affected the Impugned Decision.[237]

(e) The Victims' Observations

119. The victims concur with the views of the Prosecutor.[238] They submit that Kenya "cannot claim, on the one hand, that its investigations are already ongoing independent of the information, while on the other hand claiming that it must have the information to rebut the Chamber's conclusions that no investigations were ongoing".[239]

(f) Determination of the Appeals Chamber

120. The Appeals Chamber is not persuaded by Kenya's argument that the Pre-Trial Chamber's treatment of the Request for Assistance amounted to a procedural error vitiating the Impugned Decision.

121. As noted above, rule 58 of the Rules of Procedure and Evidence affords the Pre-Trial Chamber broad discretion in deciding the conduct of proceedings relating to challenges to the admissibility of a case. Consequently, even though the Pre-Trial Chamber could have first decided on the Request for Assistance and then on the Admissibility Challenge, it was not obliged to do so. For the determination of the Admissibility Challenge, the question revolved around whether, on the available evidence, the case against the three suspects was being investigated by Kenya. Whether specific evidence should be made available to Kenya which could have reinforced existing investigations or led to new investigations was irrelevant for the outcome of the Admissibility Challenge.

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[235] Prosecutor's Response to the Document in Support of the Appeal, para. 71.
[236] Prosecutor's Response to the Document in Support of the Appeal, para. 71.
[237] Prosecutor's Response to the Document in Support of the Appeal, para. 71.
[238] Victims' Observations, para. 40.
[239] Victims' Observations, para. 42.

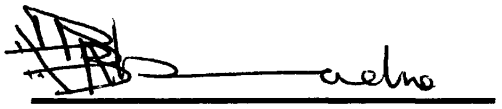
122. In sum, no procedural error can be discerned in the Pre-Trial Chamber's decision to rule on the Admissibility Challenge before deciding the Request for Assistance.

IV. APPROPRIATE RELIEF

123. On an appeal pursuant to article 82 (1) (a) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case it is appropriate to confirm the finding in the Impugned Decision, that the case is admissible, because no error in that decision has been identified. The appeal is accordingly dismissed.

The dissenting opinion of Judge Anita Ušacka will be filed in due course.

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



Judge Daniel David Ntanda Nsereko
Presiding Judge

Dated this 30th day of August 2011
At The Hague, The Netherlands