Cour Pénale Internationale

International Criminal Court

Original: **English**

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

Date: **13 May 2011**

PRE-TRIAL CHAMBER II

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public Document

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

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

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

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

Counsel for Francis Kirimi Muthaura
Karim A. A. Khan QC and
Kennedy Ogeto

Counsel for Uhuru Muigai Kenyatta
Steven Kay QC and
Gillian Higgins

Counsel for Mohammed Hussein Ali
Evans Monari, John Philpot, and
Gershom Otachi Bw'omanwa
Gregory Kehoe

Legal Representatives of Victims

Legal Representatives of the Applicant
Sir Geoffrey Nice QC
Rodney Dixon

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Paolina Massida

The Office of Public Counsel for the Defence

States Representatives
Sir Geoffrey Nice QC
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Amicus Curiae

REGISTRY

Registrar
Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section
Fiona McKay

Other

B. Introduction

1. This filing of the Government of Kenya is common to the two Kenya cases ICC-01/09-01/11 and ICC -01/09-02/11. Arguments presented in each case are common to both cases. The Government of Kenya can see no realistic prospect of a different decision being made in one case from that made in another and the Government of Kenya might not itself *seek* different decisions in the two cases. There might well be implications inimical to good order were a different decision to be made in one case from that made in another.

2. The Government of Kenya's position is that all elements necessary for success of its complementarity challenge to ICC admissibility are in place and that they provide the Government of Kenya with the *right* to investigate the factual situation from which the two cases have been drawn and in which the six ICC suspects have now been identified and to try them, or any of them, in Kenya if investigations show that to be justified. In particular, as expanded on below (in Part E), an investigation into the six suspects *is* underway in a country that has undergone, and is continuing to undergo, reform of police and judicial procedures that have to be accorded respect not just for what they will provide in the future but for what they guarantee now for the due process that will be brought to the investigation and to any trial of any of the six suspects. Assertions by those opposing this position are not evidence-based and of little or no weight.

3. The Prosecutor's assertions in his latest filings of 10 May 2011 (concerning Kenya's request for co-operation and access to the Prosecutor's evidence) that

    - Kenya "has not established that there is an investigation ongoing in Kenya against the same individuals under investigation before the ICC"[1];
    - the Prosecutor "does not believe that the governmental structure presently can provide the necessary protection of witnesses"[2]; and,
    - any information "provided to the Kenyan authorities can be used to attack victims and witnesses"[3]

[1] Prosecution's Response to "Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194", ICC-01/09-02/11, 10 May 2011, para. 4 ("Prosecutor's Response of 10 May 2011").
[2] *Id*. at para. 17.
[3] *Id*. at para. 5.

are wrong and not substantiated with any evidence that shows that the Kenyan authorities would interfere with witnesses were they to be supplied with the Prosecutor's evidence in order to continue the national investigation.

4. The Prosecutor has, in order to refuse co-operation, completely ignored the Government's explanation of the investigation that is going on into the six suspects. He has instead made a highly prejudicial allegation without any evidence to establish that the Government would interfere with witnesses if it were given the Prosecutor's evidence.[4] None of the Prosecutor's allegations could conceiveably be relied upon by the Chamber to make any findings adverse to the Government given that there is no evidence disclosed that supports them. The Government will seek leave to file a reply to these unfounded claims very shortly and would urge the Chamber to review carefully its submissions and evidence for the purposes of the present Admissibility Application. No decision on the Admissibility Application should be finally determined before the Government's reply to the Prosecutor's Response of 10 May 2011 is submitted to the Chamber for consideration.

5. The Prosecutor submits that the Government has not explained how it would ensure that any materials provided would be kept confidential by those investigating the cases in Kenya and "sequestered" from the six suspects. The Government can, intends to and will put strict measures in place to protect any evidence made available by the Prosecutor that requires protection in order to ensure complete confidentiality for purposes of investigations and any trial(s) and to achieve full protection for the victims and witnesses. It will do whatever is required including by use of its newly established, *independent* Witness Protection Agency (described below in Part G but which, it should be noted here, was constructed with extensive assistance and advice from the UN Office on Drugs and Crime (UNODC) to provide an effective and robust witness protection program. The Kenyan Agency has, indeed, been previously relied on by the Prosecutor for protection of his witnesses in another case). The Prosecutor could have discussed these measures with the Government at an early stage and sought

[4] The Prosecutor has not footnoted any source (however vague and speculative) for certain serious allegations: see for example para. 17, and has not disclosed to the Government (even in redacted form) certain statements relied on (see footnote 11). In addition, when citing newspaper reports and blogs the Prosecutor has not included reports that contradict his assertions: see for example reports which claim that Bernard Kimeli did not testify before the Waki Commission and that investigations are being conducted to find those responsible for his death: "Ministry: Slain officer not poll chaos witness," 10 May 2011, at http://www.nation.co.ke/News/politics/-/1064/1159870/-/7rjv1p/-/index.html. In any event, none of these reports constitute concrete evidence to be given any weight by a court of law.

to find a solution to any potential problems before making public his allegations about the Kenyan authorities. It is most regrettable that such a measure of respect was not accorded the Kenyan Government.

6. The Prosecutor has also indicated that he wishes to visit Kenya to evaluate the current security protections and risks, and that depending on the results "a more thorough analysis may be performed".[5] The Prosecutor is of course welcome to visit Kenya to make the necessary inquiries and arrangements will be made by the Government to facilitate his visit as soon as possible. It is unfortunate that the Prosecutor did not wait to undertake such an inquiry into the actual circumstances on the ground and to meet with the appropriate Kenyan authorities before racing to express a view that the Goverment is not to be trusted.

7. It is thus essential that the findings of the proposed inquiry by the Prosecutor in Kenya are submitted to the Chamber before any final determination is made in respect of the Admissibility Application (or indeed in respect of Kenya's Request for Assistance, which is clearly closely related). Moreover, the Chamber should hear evidence from the Kenyan Commissioner of Police in charge of the investigation, and the Head of the Kenyan Witness Protection Agency in an oral hearing so that the Government is afforded a fair opportunity to respond to the allegations being relied on by the Prosecutor, and so that the Chamber is able to determine whether there is any substance to the Prosecutor's generalised assertions.[6] No adverse findings should be made against the Government and Kenyan authorities without hearing from them directly, especially in circumstances in which the Prosecutor is relying on newspaper clippings, blogs, and the like to seek to argue that the Government will be involved in intimidating witnesses.

[5] Prosecutor's Response of 10 May 2011, para. 29. Also see Prosecution's Application for Extension of Time Limit for Disclosure, ICC-01/09-01/11, 2 May 2011, paras. 4, 5, 29.

[6] As explained further below (at para. 57), the Government will shortly file an application for an oral hearing for its Admissibility Application under Rule 58 (which provides that an oral hearing may be ordered) *inter alia* so that the Chamber can hear first-hand from the Commissioner of Police about the investigation into the six suspects and ensure that it has all relevant information before it makes a final determination, whilst respecting the need for expeditious proceedings.

C. Procedural history

8. On 8 March 2011, the Chamber, by majority, decided to summon William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang to appear before the Court on 7 April 2011 when an initial appearance was held.

9. On 8 March 2011, the Chamber, by majority, decided to summon Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali to appear before the Court on 8 April (varied from 7 April) 2011 when an initial appearance was held.

10. On 31 March 2011, the Chamber received the "Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute", requesting the Chamber to determine that the case, against the six persons for whom summonses to appear have been issued, is inadmissible (the "Admissibility Application").

11. On 4 April 2011, the Chamber issued the "Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute" in which, *inter alia*, it requested that the Prosecutor and the Defence submit written observations on the Admissibility Application no later than Thursday 28 April 2011. The Chamber also invited the victims who had communicated with the Court, namely those who submitted applications to participate in the Court's proceedings with regard to the present case, to make written observations and submit them on the same date. The Chamber also decided that the Office of Public Counsel for Victims ("OPCV") should make submissions on their behalf should the OPCV so desire.

12. On 11 April 2011, the Government of Kenya filed a request to be given 30 days to reply from the deadline when responses must be received, namely by 30 May 2011.

13. On 18 April 2011, the OPCV filed the "Response to Government of Kenya's Motion for Leave to Reply", in which it requested the Chamber to reject the Motion on the grounds that it is "premature" and "exceed[s] the proper scope of reply".

14. On 26 April 2011, the Prosecutor submitted the "Prosecution's response to the Government of Kenya's request to reply", in which he argued in favour of granting the Government of Kenya's Motion as far as it does not exceed "the 10 day time limit proscribed in Regulation 34(c)" of the Regulations of the Court (the "Regulations").

15. On 28 April 2011, the Chamber received responses to the Kenyan Request submitted by:

- Mohammed Hussein Ali
- Francis Kirimi Muthaura and Uhuru Muigai Kenyatta,
- Henry Kiprono Kosgey
- William Samoei Ruto and Mr. Joshua Arap Sang (the "Ruto/Sang Response")
- The Prosecutor (the "Prosecutor's Response"); as well as
- Observations on behalf of the victims submitted by the OPCV (the "OPCV Response").

16. On 2 May 2011, the Government of Kenya submitted its "Application on behalf of the Government of Kenya for leave to reply to responses filed on 28 April 2011 to Application challenging admissibility in light of the responses as filed and in light of no decision being rendered in respect of the Government of Kenya's filing of 11 April 2011 requesting a direction on its right to reply". The Government of Kenya in this Application reiterated its request concerning the right to reply.

17. By the decision under response the Chamber deemed it sufficient to grant the Government of Kenya the ten days time limit provided in Regulation 24(5) of the Regulations to respond to the written observations submitted by the Prosecutor, the Defence and the OPCV on 28 April 2011, and to engage solely with the relevant issues as raised in the observations received.

18. Responses to the Admissibility Application submitted on behalf of Mohammed Hussein Ali, of Francis Kirimi Muthaura and Uhuru Muigai Kenyatta and of Henry Kiprono Kosgey raise no issues requiring response by the Government of Kenya.

D. The Ruto/Sang Response

19. The Government of Kenya adopts, without repeating, all the arguments contained in the Ruto/Sang Response subject to the following qualifications:

- In paragraph 2(vi) of the Ruto/Sang Response it is said that the Kenyan authorities will use the evidential findings of national and international bodies as the foundation for their own investigations and in paragraph 2(vii) of the Response that the Kenyan authorities will also utilise the evidence and findings from prosecutions against lower level perpetrators to assist them to build their cases against the persons from the ODM and PNU who are the most responsible for these events. The Government of Kenya notes that evidential findings of national and international bodies refer to conclusions based on evidence that has, generally, not been provided to or available to the Government of Kenya and are findings that the Government of Kenya's own investigations cannot take as established facts without further enquiry. They are to be contrasted with the evidence and findings of its *own* investigations where the evidence *has* been available.

- The Government of Kenya adopts the reasoning of paragraphs 2-12 of the Ruto/Sang Response (subject to the obvious typographic slip of "willing" for "unwilling")[7] and invites the Chamber to find these submissions to be of particular assistance to the Court.

- Paragraphs 14, 19 and 20 of the Ruto/Sang Response deal with the extent of the evidential overlap between the investigations conducted by the ICC Prosecution and those conducted by the Kenyan authorities. It is suggested that, in light of the Government's stated reliance on the findings of the Waki Commission (which were also one of the bases for the ICC Prosecutor's investigations) and the Kenyan Government's recent request for assistance from the ICC Prosecution, it is clear that there will be a direct evidential overlap between the subject matter and conduct investigated by the national authorities and the ICC cases against the suspects. The Government of Kenya has to remind the Chamber that no evidence has been provided by the

[7] Ruto Response of 28 April 2011, para. 5.

Prosecutor to the Government of Kenya to date despite a request to do so and that there can be no guarantee of any such overlap.

E. Prosecutor's Response and OPCV Response

(i) Introduction

20. The OPCV Response raised several issues requiring response.

21. The Prosecutor's Response also raised several issues requiring response.

22. The Government of Kenya will deal later with the parts of these responses that require separate observations (see Parts F and G below). There are several matters common to both that can conveniently be dealt with first.

(ii) Two fundamental points

23. Each of the Prosecutor's and OPCV Responses presuppose the following two propositions to be accurate:

- first, that the relevant time at which the Government of Kenya's capacity and intent to investigate (and try if appropriate) those presently before the ICC should be tested is the date of the Admissibility Application made by the Government of Kenya; and

- second, that the law requires that there be identity of subject matter *and* of individuals being investigated by both the Government of Kenya and the ICC Prosecutor if the Government of Kenya's Admissibility Application is to have a prospect of success.

24. As to the first of these propositions it is worth noting that seven days before the filing of these Responses, on 21 April 2011, the Prosecutor submitted the "Prosecution's response to the Government of Kenya's request to reply" in which he concurred with the Applicant's assertion that the parties and participants may raise matters "that it

could not have addressed, or dealt with in full, in its application".[8] The Prosecutor observed that:

> "If the reply is intended to update the Chamber on the status of the investigation since the time the original admissibility application was filed, it would appear to be within the language of Regulation 24(5). Moreover, the Prosecution notes that this is the first time this Court has considered a challenge brought by a State Party to admissibility, and it does not oppose allowing additional deference to a State in this circumstance."[9]

25. The Government of Kenya agrees with this observation of the Prosecutor that *in itself* suggests that the relevant time for assessing admissibility issues in such an application is not the precise moment of the filing by the State concerned.[10] However, the Government of Kenya seeks not only to rely on material by which it may in this very filing "update" the status of the investigation but also to be able to rely on "staged" reports[11] referred to in its Admissibility Application[12], namely:

- Report to end July 2011 on the investigations under the new DPP and how they extend up to the highest levels, including in respect of the six suspects, and on cooperation with the ICC Prosecutor in these investigations;

- Report to the end of August 2011 on progress made with the investigations to the highest levels and on adoption of the three Police Bills and reorganisation of the police services, including the appointment of the New Inspector-General; and

- Report to the end of September 2011 on progress made with investigations and readiness for trials in light of judicial reforms,

[8] Prosecutor's Response of 21 April 2011, para. 3.
[9] *Id*.
[10] *Prosecutor v. Kony, et al.*, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05, 10 March 2009, paras. 28, 50. See also. *Prosecutor v. Bemba*, Decision on the Admissibility and Abuse of Process Challenges, ICC-01/05-01/08, 24 June 2010, para. 217; *Prosecutor v. Katanga*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07 OA 8, 25 September 2009, para. 56.
[11] *Prosecutor v. Kony, et al.*, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05, 10 March 2009, paras. 28-9: "Considered as a whole, the *corpus* of these provisions [Articles 17-19] delineates a system whereby the determination of admissibility is meant to be an ongoing process through the pre-trial phase, the outcome of which is subject to review depending on the evolution of the relevant factual scenario".
[12] Admissibility Application of 31 March 2011, paras.13, 16, 17, 46, 66, 70-74, 79.

together with all such other material as may be available to the Court at the time of the final hearing on the admissibility issue. Such an approach is entirely consistent with the ICC case law (see Part H below).

26. Further, the Government of Kenya respectfully reminds the Chamber that it made its Admissibility Application at the earliest proper moment (see paragraph 8 of the Admissibility Application), an event "triggered" by the issue of summonses against the six Kenyan nationals some few weeks beforehand. Constrained to act at the earliest moment by the Rome Statute and Rules and Regulations thereunder, the Government of Kenya may not have prepared every aspect of its Admissibility Application in detail in advance of this date and is not to be criticised for not doing so.[13] Although, to the surprise of many, the Prosecutor had named in advance the six persons against whom he sought summonses, there was no reason for the Government of Kenya to assume that the Court would allow his application or that there was sufficient evidence to support it. Indeed, the only assumption that the Government of Kenya could make was of the presumption of innocence of individuals against whom it did not have evidence at that stage (sufficient to charge or at all), rather than the reverse. How could, or should, Kenya have investigated the specific six persons before they were named? The State could not be expected to have had the same targets as the ICC Prosecutor if his evidence had not been shared with the Government of Kenya.

27. As to the second proposition, any argument that there *must* be identity of *individuals* as well as of *subject matter* being investigated by a State and by the Prosecutor of the ICC is necessarily false as the State may simply not have evidence available to the Prosecutor of the ICC or may even be deprived of such evidence (as here where the Prosecutor has, to date, not provided evidence he possesses to the Government of Kenya, and has now indicated that he will refuse to do so).[14] Although there may be no doubt that there is *subject matter* requiring investigation - in this case Kenya's

[13] *Prosecutor v. Katanga*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07 OA 8, 25 September 2009, para. 56: "the admissibility of a case under article 17(1)(a)(b) and (c) of the Statute depends primarily on the investigative and prosecutorial activities of States having jurisdiction. These activities may change over time. … Thus, the provision is clear evidence that the Statute assumes that the factual situation on the basis of which the admissibility of a case is established is not necessarily static, but ambulatory." See also *Prosecutor v. Kony, et al.*, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05, 10 March 2009, para. 27.

[14] *Prosecutor v. Katanga*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07, 16 June 2009, para. 47.

Post-Election Violence - there is simply no guarantee that an identical cohort of individuals will fall for investigation by the State seeking to exclude ICC admissibility as by the ICC Prosecutor seeking to establish it. To find otherwise would mean a Prosecutor could establish grounds for trying individuals against whom he alone held evidence that he declined to provide to the State (as he is doing in the present case), thus denying the State even the chance of establishing complementarity grounds for excluding ICC admissibility. It could be seen as compelling State authorities to surrender independence on the "say-so" of the ICC Prosecutor whose mere identification of possible suspects could embarrass a State to "adjust" its own proper prosecution policy in order to avoid the State humiliation of having authority wrested away to the ICC for those chosen or identified as suspects by the Prosecutor.

28. Further, even if the State *did* have the same evidence as that held by the ICC Prosecutor in relation to any particular individuals there can be no requirement that in order to exclude ICC admissibility the State must conduct an investigation that leads to *charging* of those very individuals. Investigations conducted by different prosecutors acting in good faith do not necessarily lead to identical conclusions: on the same evidence one prosecuting authority might proceed; another might not.

E. The Government has been investigating and is investigating the six ICC suspects

(i) Introduction

29. The Responses of the Prosecutor and the OPCV assert for both cases that the Government's Application should be dismissed on the basis that the Government is not investigating the six suspects presently before the ICC. The Government requested leave to reply not least in order to answer this allegation.

30. The Government of Kenya made clear in its Application and supporting Annexes that an investigation, including into the six suspects, was presently underway.[15] It had undertaken to provide a detailed report on this investigation by the end of July 2011. As its statements and intentions have been directly challenged, the Government provides by this Reply the most up-to-date information on its investigation.

[15] Admissibility Application of 31 March 2011, paras. 4, 12, 13, 17, 33, 35, 36, 46, 66, 71, 72, 74, 79; Filing of Annexes of Material to the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, 21 April 2011, Annex 1.

31. There has been an investigation underway by the Kenyan authorities which covered the six suspects since shortly after the Post-Election Violence; the six suspects are presently a focus of the investigation. The historical development of this investigation, and in particular its relation to the work and recommendations of the Waki Commission, is detailed below (see sub-section (iii)). Most importantly, since being named by the ICC Prosecutor the six suspects have been a focus of the national investigation which continues at the present moment. The Commissioner of Police, Mathew Iteere[16], is directing this investigation which is being carried out by a dedicated team, further details of which are set out below (see sub-section (iv)). Should there be any questions raised about the genuineness of this investigation which covers the six suspects, the Commissioner is ready to appear before the Pre-Trial Chamber to confirm and explain the investigative work that is presently being undertaken, the background to this investigation, and his commitment to investigate thoroughly all allegations to their conclusion as soon as possible. He has simply never been approached by the ICC Prosecutor to discover what he and his police have been doing. As he asserts - and would testify - *any* evidence once provided to him concerning *any* of the six suspects would be acted on immediately, objectively and dispassionately.

32. There can be no doubt that, on the basis of information provided by the Government of Kenya through annexes already produced or produced by this Reply and on the basis of instructions from the Government of Kenya reflected in this Reply, the cases presently before the ICC are currently being investigated by Kenya.[17] These cases are thus not admissible before the ICC, and the Pre-Trial Chamber should so order.

33. The Chamber would be led into serious error if it accepted the assertions made by the Prosecutor and the OPCV that no genuine investigation exists - assertions which are not substantiated by any evidence - in the face of the information provided by the Government in its Application and in this Reply about the investigation presently taking place in Kenya.

[16] The Commissioner was appointed after the Post-Election Violence.
[17] Filing of Annexes of Material to the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, 21 April 2011, Annex 1.

34. Kenya is at a very significant juncture in dealing with the consequences of the violence that followed the elections. A determined reform process is being implemented following the Report of the Waki Commission,[18] which the Government itself initiated and within which investigations are being undertaken, including into the six suspects, expeditiously and in good faith. As recognised by the Chamber, the admissibility of the cases before the ICC is a sensitive one.[19] In considering the information placed before it by the Government and the resolve of the Government to try all persons of whatever rank against whom there is sufficient evidence, the Chamber is urged to give precedence to Kenya's right to complete its national proceedings if the principle of complementarity is to be respected in practice by the ICC.

(ii) Relevance of background to present investigation

35. Fundamental to a fair approach to the Application now before the Court may be a recognition that much of the argument addressed to the Court in present filings, and much of the public discourse which may have become known to the court, is reflective of general public criticism of Kenya in the media as well as by politicians and others in parliaments around the world. Such criticism *assumes* the existence of sufficient *evidence* being available to the Government of Kenya pointing to the need to investigate the six persons presently accused. There has in fact been *no such sufficient evidence* available to the Government of Kenya and there may be no reason to criticise the Government of Kenya for that fact. The nature of the evidence available to the Prosecutor and to the Chamber *may*, if eventually made available to the Government of Kenya, suggest that it must also have been available to the Government of Kenya at earlier times; or it may not. The Government of Kenya can only say that no such evidence had come to the attention of any of its relevant investigatory, prosecutorial or judicial organs in the course of its work as described below (see sub-section (iii)).

36. The matters of background (as set out in sub-section (iii) below) are relied on by the Government of Kenya as of general relevance to the Application and are properly to be raised in this Reply in light of the assertions made by the Prosecutor and the OPCV. Although not now central to the issue before the Court - save, as is argued in

[18] Admissibility Application of 31 March 2011, paras. 8, 9, 37, 39-41, 47-66, 75-79.
[19] 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, para. 15.

the Responses, on issues of the Government of Kenya's "credibility" - they may explain why what has been done in the past about Post-Election Violence has fallen short of what others expected and why, over time, Kenya's citizens may have become polarised over whether it is the ICC or their own national police and judicial systems that should deal with investigation and prosecution of those responsible for the Post-Election Violence.[20]

(iii) The background and history of the present investigation

37. It is asserted by the Prosecutor and the OPCV in their Responses that there is no investigation in existence, despite the Government stating in its Application that an investigation is presently underway and undertaking that it will provide reports to the Chamber and the parties about its investigation.[21]

38. The time to judge Kenya's investigation is the present. The shortcomings of the past, which have been openly acknowledged by the Government in its Admissibility Application, should have no bearing on the Chamber's determination about the present investigation. Nevertheless, there are certain key aspects of the history, as highlighted in the Application, that the Prosecution and the OPCV have ignored in their Responses seemingly in an effort to claim that the Chamber can safely conclude that the present investigation is "hypothetical" or not "genuine".

39. It is important to set the record straight. The Chamber must be informed of the full background to the present investigations into the six suspects. It demonstrates that the Government is not seeking in its Admissibility Application, as the Prosecutor and the OPCV claim, to delay the investigation of allegations into Post-Election Violence and to promote impunity. The key developments are as follows:

40. Following the Post-Election violence a team of investigators from the Criminal Investigations Directorate (CID) was established under the Commissioner of Police, together with senior Prosecutors from the Directorate of Public Prosecutions (DPP), to investigate *all* cases.

[20] Such polarisation, it has to be said, is of no relevance to the issue of complementarity before the Court. Its only significance may be in what it shows about how present views may be strongly held without being well-founded.
[21] Admissibility Application of 31 March 2011, paras. 4, 12, 13, 17, 33, 35, 36, 46, 66, 71, 72, 74, 79.

41. The terms of reference for the CID/DPP team were to investigate any person against whom allegations were made, and specifically included investigation of acts preparatory to the commission of violence, incitement to violence, the promotion of war-like activities and creating disturbance - all conduct which is readily associated with leadership figures, including the six suspects.[22]

42. The Waki Commission was established *by the Government* at the same time to investigate the causes of the violence and to make recommendations to the Government. The Waki Commission was, thus, part of the investigation process initiated by the Government. So too was the Kenya National Human Rights Commission (KNHRC) which investigated the violence and produced *its* Report under its mandate to make recommendations to Parliament about steps to be undertaken.[23]

43. The evidence gathered by the Waki Commission was not handed over to the CID/DPP team. No persons were named in the Waki Report. Instead, it was determined by the Waki Commission that further investigation was required as the evidence gathered was not yet "sufficient to meet the threshold of proof required for criminal matters".[24] The key question at that stage was who would take forward the investigations. As is well-known, following the recommendation from the Waki Report, it was to be a Special Tribunal to be established in Kenya *with its own investigative arm to investigate those most responsible.*

44. The Waki Report had highlighted serious deficiencies in the Kenyan police and recommended drastic reforms. As outlined in the Application, numerous of these have been implemented and are being taken forward (as further elaborated below in Part G). The OPCV is thus wrong to claim, as it does, that police reforms have not been addressed.

45. It must be remembered that the Waki Report envisaged that the Special Tribunal would spearhead investigations into the most senior persons, while the Kenyan Police should investigate lower level perpetrators.

[22] For example, see report of 19 June 2008 from Mr. Keriako Tobiko, Director or Public Prosecutions, attached hereto as Annex 1.
[23] Kenya National Commission on Human Rights, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence: Final Report*, 15 August 2008.
[24] Waki Report, p. 17.

46. As is well-known, the President and the Prime Minister openly campaigned for the establishment of the Special Tribunal. Their commitment and that of many in Government to launching such a court to take forward the investigations at the highest levels cannot be questioned.

47. However, when successive attempts to establish the Special Tribunal were defeated in Parliament, the ICC stepped in to take on the responsibility of progressing the investigations. Although the Government fully cooperated with the ICC, it was not privy to the evidence gathered by the ICC.

48. Once again, the commitment of the Government to the ICC cannot be doubted in blocking strenuous efforts by Parliament to withdraw from the ICC at a time when the ICC had become directly involved in investigations in Kenya.

49. Despite the expectation that it would be a Special Tribunal that would spearhead investigations into the most senior persons, while attempts were being made to establish the Tribunal, the CID/DPP team continued their investigations. This process continued when Parliament rejected the creation of the Tribunal and ICC investigations were underway. The reports from this team that have been filed with the Chamber show the extensive investigations and prosecutions that have occurred.

50. These investigations were not limited to lower level perpetrators. As noted above, the terms of reference envisaged perpetrators at all levels. 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, as detailed below in sub-section (iv)). Had there been sufficient evidence available to the team at the time about any of the other suspects, further files would have been opened. It must be taken into account that no names of alleged perpetrators and no evidence was handed over to this team by the Waki Commission. The ICC also did not share its evidence with the national team. As explained in the Application, it was envisaged

that investigating from the bottom up would lead to further inquiries at higher levels, especially once the patterns that emerged from the alleged crimes could be assimilated and analysed.

51. The CID/DPP team's intention to investigate all persons is further evidenced by the investigations into political leaders and community leaders.[25] It is thus simply not correct that no senior officials have been investigated by the Kenyan authorities, as claimed by the OPCV.[26]

52. When the Prosecutor publicly named the six suspects, the CID/DPP team was immediately tasked to inquire into these persons and exhaustively to investigate all allegations disclosed by the Prosecutor for the first time. Certain of the persons named by the Prosecutor came as a surprise to the CID/DPP team, as no 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 (as detailed below in sub-section(iv)).

53. While these national investigations were progressing, the police services were undergoing substantial reforms. The reform and investigative processes developed in tandem and were designed to re-enforce each other. A detailed overview of these reforms is provided below in Part G. Witness protection programs were also being revamped to support the investigative work, as also described in Part G.

54. These key developments provide the Chamber with the context for the present investigation in respect of the six suspects. They explain that since the tragic events that followed the elections the Government of Kenya has sought to investigate and prosecute those responsible through the appointment of the Waki Commission, the efforts to establish a Special Tribunal, cooperation with the ICC, and through the work of the CID/DPP team. It is thus misconceived for the Prosecutor and the OPCV to suggest in their responses that the Government is only now starting to investigate the two cases that are presently before the ICC. They are equally wrong to assert that the investigation is "hypothetical". It is underway, with detail evidenced in this filing.

[25] For example, a senior politician from the Rift Valley, Mr. Jackson Kibor, was investigated in connection with the violence.
[26] OPCV Response of 28 April 2011, para. 35.

55. It may also be important to have in mind the following when assessing criticisms made by the Prosecutor and OPCV that are actually wrong. First, much of the recent criticism of the Government of Kenya's dealings with the Post-Election Violence has been dealt with in the press or in Kenya's Parliament but *without* the forensic precision that an evidence-based decision on the Admissibility Application would now require from the Court. Second, there has been widespread expression of distrust of the Kenyan police - as covered in both the Waki and Human Rights Reports - and it is always difficult to get behind such widely promulgated views to discover what may actually be positive about the body criticised.

(iv) The present investigation

56. The Commissioner of Police has confirmed for the purposes of providing the most up-to-date information for this Reply that the six suspects are currently being exhaustively investigated by the CID/DPP team. He confirms that the following investigative actions are in progress:

- The location of potential witnesses with interviews taking place in relation to the file that was opened into one of the suspects *before* the Prosecutor named the six suspects, as well as in respect of the other suspects selected by the Prosecutor.

- Government documents, records, and reports are being reviewed. In particular, meetings that have been identified by the Prosecutor as being significant are being investigated.

- All previous inquiries that have been undertaken are being reviewed for leads and further investigative work.

- In particular, the investigations of lower level perpetrators are being analysed to identify any patterns from which further investigation can be launched and to identify any potentially relevant witnesses to interview or re-interview. As previously explained, a "bottom up" strategy is being followed.

- All press clippings, public statements and radio broadcasts from the relevant time are being gathered and reviewed, particularly with a view to the consideration of allegations of incitement and organisation.

- Officers have been re-visiting the crime scenes to make inquiries and gather any evidence that could assist their investigations in respect of the six suspects.

57. A report by the Director of the CID to the Chief Public Prosecutor of 5 May 2011 (attached hereto) confirms that this investigation into the six suspects is presently being conducted.[27] As noted in the report, the six suspects are being investigated and the CID 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". Moreover, the Commissioner of Police can appear before the Pre-Trial Chamber to explain the work being undertaken on the investigation into the six suspects. He can answer, if necessary *in camera*, any questions from the Chamber about the investigation.

58. As the Chamber is aware, the Attorney-General has instructed the Commissioner to expedite the investigation (see letter of 14 April, which is Annex 1 of the Annexes to the Application).[28] The Commissioner can inform the Chamber of the proposed timetable. Further investigative work is required, and it was for that reason that the Government proposed in its Application that reports can be provided to the Chamber, with the first being available at the end of July 2011. However, in order to ensure that the Application is not rejected without the Government being given sufficient time to provide the Chamber with all relevant information, the Government has included the latest information that is public on the investigation in this Reply. Should there be any doubt about the existence and genuineness of the investigation, the Government of Kenya would invite the Chamber to accept that the Commissioner of Police *must* be heard by the Chamber.[29]

[27] The report is attached hereto as Annex 2.
[28] See Filing of Annexes of Material to the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, 21 April 2011, Annex 1.
[29] As noted above, the Government will thus shortly file an application for an oral hearing under Rule 58 (which provides that an oral hearing may be ordered) *inter alia* so that the Chamber can hear first-hand from the Commissioner of Police about the investigation into the six suspects and ensure that it has all relevant information before it makes a final determination, whilst respecting the need for expeditious proceedings.

59. The Government has also requested the ICC Prosecutor to share the results of his investigations into the six suspects with the Commissioner of Police and his team to assist in their investigations. The Prosecutor has presently refused to co-operate (in his filing of 10 May 2011), but as noted above, he has never contacted the Commissioner to discuss the cases against the six suspects or to make any inquiries of him about the evidence in possession of the Commissioner. The Commissioner invites the Prosecutor to meet with him to discuss the investigations that the Kenyan authorities are undertaking and to share information. Further information and evidence may thus become available to the Kenyan investigators.

60. Meanwhile, by way of general background that must reinforce the Government of Kenya's case on admissibility, it should be noted that the positions of Chief Justice, Deputy Chief Justice, and the Director of Public Prosecutions are all being filled after open competitions. Interviews of short-listed candidates for the positions of Chief Justice and Deputy Chief Justice *have been broadcast in full on national television as they took place*, and nominees for these positions will be known by 16/17 May 2011. Such an approach to the filling of public office may be thought to be better by far than the processes - not infrequently criticised - of filling high office followed in many "Western" countries and elsewhere.

F. Issues particular to Prosecutor's Response

61. The 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.[30] This would, in ordinary circumstances, justify the Government of Kenya "having the last word" and given the fundamental principle of complementarity would justify the Court allowing the Government of Kenya to present evidence on the topic until the moment of decision. To do otherwise would give a damaging and inappropriate priority to some assumed, but not prescribed, procedure over principle.

62. In para. 6 of his Response the Prosecutor says, "The Government of Kenya was on notice and had the opportunity to inform the Court of an ongoing investigation, pursuant to Article 18(1) and (2). However, the Applicant did not request that the

[30] Prosecutor's Response of 28 April 2011, para. 12.

Prosecution defer its investigation into the situation in Kenya".[31] This is a fact of no consequence where the test is of *present* capability and intention.

63. At para. 14 of the Response it is asserted that the Applicant (Government of Kenya) acknowledges that the necessary reform process for the domestic investigation and prosecution of alleged perpetrators of the Post Election Violence is ongoing and incomplete.[32] However, there is no requirement that legal systems should be complete in order to meet the complementarity test. The assertion is largely irrelevant.

64. At para. 15 of his Response the Prosecutor says "According to the Applicant, the process *will be completed* within the next six months" and then he says that "in order to enable the Court to consider such ongoing reform efforts over the coming months, it [the Government of Kenya] asks that the Chamber extend the period of the proceedings concerning the admissibility challenge" by the same six month time period.[33] There is no question of "extending" the period, as suggested, rather - as the Government of Kenya says - the reforms implemented in Kenya's legal system satisfy the legal requirements for finding the cases inadmissible under Article 17(1)(a), on the grounds that the relevant period for determining an admissibility challenge is "when the application is being considered and determined as a whole and not merely the date on which the application is first filed".[34]

G. Issues particular to OPCV Response

(i) Introduction

65. The OPCV maintains that "virtually nothing is said in the Application as to the deeply-embedded problems of investigation and policing chronicled in the Waki Report".[35] It is suggested that the police and the judiciary are not capable of genuinely investigating and prosecuting the cases presently before the ICC. The OPCV asserts that there is "undoubtedly" a "commonality" between the suspects and the State authorities involved in the investigation.[36]

[31] Prosecutor's Response of 28 April 2011, para. 6.
[32] Prosecutor's Response of 28 April 2011, para. 14.
[33] Prosecutor's Response of 28 April 2011, para. 15.
[34] Admissibility Application of 31 March 2011, para. 19.
[35] OPCV Response of 28 April 2011, para. 30.
[36] OPCV Response of 28 April 2011, para. 32.

66. The OPCV provides no evidence in support of these generalised allegations. The Government in its Application acknowledged the problems that have had to be confronted in the administration of justice and policing in Kenya. Evidence of the reform process in the judiciary and the police has been provided in the Application.[37] It is unhelpful in the extreme of the OPCV to dismiss wholesale the extensive process of reform that is underway in Kenya. It is an oversimplified and general criticism which is not based on any specific evidence.

67. The Commissioner has made plain that the six suspects will be investigated based on the available evidence and prosecuted should the evidence so demand - an undertaking that he can confirm before the Pre-Trial Chamber in an oral hearing.

(ii) Police reforms

68. As to policing, the OPCV has ignored the action taken by the Government following the Waki Report, and the incremental steps that have followed:

- The National Task Force on Police Reforms was appointed by the President in May 2009 to conduct a comprehensive evaluation of policing in Kenya and to recommend changes and reforms that would substantively improve policing for the benefit of Kenyan citizens. The Task Force was headed by the Hon. Justice Philip Ransley and delivered its Report in October 2009. An abridged version of the Report is attached hereto as Annex 3.[38]

- As a result of the Report the Government established the Police Reforms Implementation Committee which was appointed to implement, oversee and monitor the reform of the National Police Service, with the aim of transforming the police "into efficient, effective, professional and accountable security agencies that Kenyans can trust for their safety and security" and "at increasing Police accountability to the public".[39]

[37] Admissibility Application of 31 March 2011, paras. 8, 9, 37, 39-41, 47-66, 75-79.
[38] Report of the National Task Force of Police Reforms, Abridged Version, December 2009.
[39] Report on the Status of Police Reforms Implementation as 15 December 2010, p. 6; summary sections of the Report are attached hereto as Annex 4.

- One of the main tasks of the Committee is to generate and draft new legislation to govern policing in Kenya. As noted in the Application, new bills have been prepared by the Committee which are due for consideration by Parliament.[40]

- More importantly for the present, as noted in the July[41] and December 2010 Reports of the Committee, practical changes have been made in a number of areas to improve policing and restore public confidence, including in the procedures for public complaints. Various administrative reforms have been introduced at all levels to engender efficiency and transparency.

- Training of police forces has been significantly upgraded and improved over the past year with revisions of the curricula and the involvement of international training agencies.[42]

69. The tangible results of these changes can be seen in the investigations that have been launched into allegations of incitement during the recent referendum on the new Constitution.[43] Moreover, the Goverment has been actively monitoring and investigating all allegations of hate speech and incitement, including in relation to rallies and other events in respect of the six suspects.[44] It is misconceived for the Prosecutor to allege that the Goverment would use materials disclosed by the Prosecutor to support the six suspects and to engage in hate speech.[45]

70. These are all matters about which the Commissioner of Police can provide information and be questioned at an oral hearing.

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[40] See Admissibility Application of 31 March 2011, para. 75-77: the *Police Bill*, the *Police Service Commission Bill*, and the *Police Oversight Bill* are all presently being considered.
[41] Attached hereto as Annex 5.
[42] See December 2010 Report, p. 7 (Annex 4).
[43] For example, see letters confirming cases under investigation, attached hereto as Annex 6.
[44] "*Hate speak mongers to be prosecuted*," 8 April 2011, Kenyan Broadcasting Corporation, at http://www.kbc.co.ke/news.asp?nid=69717.; "NCIC monitoring SMS, web chatter for hate speech," 5 May 2011, jambonewspot.com, at http://webcache.googleusercontent.com/search?q=cache:Dg2bumGkmgUJ:habarizanyumbani.jambonewspot.com/2011/05/05/ncic-monitoring-sms-web-chatter-for-hate-speech/+http://habarizanyumbani.jambonewspot.com/2011/05/05/ncic-monitoring-sms-web-chatter-for-hate-speech/&cd=1&hl=nl&ct=clnk&gl=nl&source=www.google.nl.
[45] Prosecutor's Response of 10 May 2011, paras. 22, 23.

(iii) Witness Protection

71. Associated to these reforms has been a comprehensive witness protection program developed under the auspices of the Witness Protection Agency, which is entirely independent of the Government and the police. It is headed by Ms Alice Osebe Ondieki and is due shortly to have its own protection officers appointed who will be responsible for protecting victims and witnesses for all cases (including those relating to Post-Election Violence). These officers will be recruited by an international agency and shall be vetted before taking up office.

72. Ms. Ondieki has confirmed to Counsel that her Agency's first responsibility is to protect and support victims and witnesses, irrespective of whether the two cases are tried by the ICC or in the Kenyan national courts. She provided Counsel with a brochure outlining the functions and duties of the Agency.[46] She advised that international consultants will be hired to assist the Agency, and that, most importantly, the independent consolidated fund will cover the expenses of the Agency and guarantee its independence.

73. The Prosecutor did not ask earlier to meet Ms. Ondieki to discuss the witness protection measures that can be put in place. He must meet with her now on his proposed mission to Kenya, particularly in light of the allegations he makes about the Government interfering with witnesses were he to disclose his evidence to the Kenyan authorities.

74. As the Chamber may be aware, the Prosecutor has relied on the witness protection program of Kenya in another case before ICC. Following a request for assistance from the ICC a MOU was agreed between the Kenyan Government and the ICC in 2008 to provide protection to witnesses in Kenya for another case before the ICC. The agreement was successfully implemented without any problems arising. It must also be re-iterated that the Prosecutor seeks to condemn Kenya, a country that has been one of only two countries that have been entrusted by the international community to

[46] Attached hereto as Annex 7.

investigate and try piracy cases on behalf of the US and EU, which have involved witness protection issues.[47]

75. These are all matters about which Ms. Ondieki could provide evidence to the Chamber in an oral hearing and be questioned by the Chamber so that the Chamber can be satisfied that it is fully informed first-hand on the extent of security protections in Kenya before finally determining the Application. No adverse findings can be made against the Government and Kenyan authorities if they have not be given an opportunity to answer the allegations made against them before the Chamber.

H. Relevant legal authorities

76. There is *no* requirement under Article 19 that the investigation by a State must be completed if admissibility is to be successfully challenged. It must be established that the case is being investigated.[48] The case law recognises that the intent of the State can be established by "explicit statements" of officials of the State, which should be accepted unless there is compelling evidence to the contrary.[49] The Court cannot second guess a willing State.[50] An allegation of impropriety and irregularity in the national proceedings can only be demonstrated through concrete evidence, "as opposed to speculation", and only in "exceptional circumstances" should this Chamber seek to go behind the national decision.[51] Allegations of witness interference by the State (as the Prosecutor is seeking to make in the present case with speculative and generalised assertions) must therefore be supported by "concrete evidence".[52] The independence and impartiality of the national system can only be questioned in exceptional circumstances.[53] Such an approach is consistent with the

[47] See Filing of Annexes of Material to the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, 21 April 2011, Annex 15.
[48] *Prosecutor v. Kony, et al.*, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05, 10 March 2009, paras. 33-37.
[49] *Prosecutor v. Katanga*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07, 16 June 2009, para. 80, 88-93.
[50] *Prosecutor v. Katanga*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07, 16 June 2009, para. 80.
[51] *Prosecutor v. Bemba*, Decision on the Admissibility and Abuse of Process Challenges, ICC-01/05-01/08, 24 June 2010, para. 235.
[52] The criteria for the ICC granting witness protection measures are similar. See, for example, IBA/ICC Monitoring and Outreach Programme, "Balancing Rights: The International Criminal Court at a Procedural Crossroads," May 2008, at p. 31. The IBA and ICC Monitoring and Outreach Programme outline the criteria for inclusion in the Court's protection programme as "the real possibility, the concrete likelihood that the [witnesses] would be threatened … an individual's acceptance into the ICCPP would have to be 'threat based'."
[53] *Prosecutor v. Bemba*, Decision on the Admissibility and Abuse of Process Challenges, ICC-01/05-01/08, 24 June 2010, para. 235.

principle of complementarity creating a strong presumption in favour of the national jurisdiction.[54]

77. It has also been recognised that "the determination of admissibility is meant to be an ongoing process throughout the pre-trial phase, the outcome of which is subject to review depending on the evolution of the relevant factual scenario".[55] The Prosecutor accepted that the Government's Reply could provide an "update" on the investigation[56] and, as explained above, has thus acknowledged that the time for the assessment of whether a case is inadmissible is *not* the date on which the application challenging admissibility is first filed. For this reason, the Prosecutor's objection in its Response to the filing of the Annexes in support of the Government's Application is unfounded. The Annexes should be taken into consideration in the same way as this Reply and the Annexes hereto should be taken into account in the final determination of the Admissibility Application.

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[54] M. C. Bassiouni, The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute Vol. II, (Transnational Publishers, 2005), page 121, 150. "A number of [State] delegations stressed that the principle of complementarity should create a strong presumption in favour of national jurisdiction". Also see, Chatham House Lecture, 18 January 2010, Speaker: Stephen Rapp, US Ambassador-at-Large for War Crimes. During the lecture on 18 January 2010, Ambassador Rapp stated (as transcribed from the audio recording of the speech): "It's not required under complementarity that one convict people, it's required that one go through a genuine process to investigate and hold people accountable for the crimes which they can be held accountable for under one's laws and procedures … You rely on the national systems first and foremost and countries may develop different approaches to that … as a former prosecutor I think that for those that bear the greatest responsibility for serious violations of international humanitarian law, there should be at the end of the day a criminal process in those cases. So obviously in a place like South Africa they decided to proceed with the Truth and Reconciliation Commission at a historic compromise at which the group that had been victimised led by President Mandela and Desmond Tutu said that process of getting confessions, getting information, getting that kind of sea change in people's attitude, it was worth it to have a Truth and Reconciliation Commission instead of prosecution. I in the end was disappointed frankly that those that refused to come before the Commission weren't prosecuted cause I think they should have been, I think that you need a little more hammer to make sure that it's a truly effective process. But various countries will deal with these things in different ways and we don't jump in and say this needs to be internationalised until it is clear that that country really can't or won't do it … I don't think you can talk about going beyond the national process. I take the same position in each of these sorts of cases. It's consistent with complementarity." Further see, *Prosecutor v. Kony, et al.*, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05, 10 March 2009, para. 34.

[55] *Prosecutor v. Kony, et al.*, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05, 10 March 2009, paras. 28, 50. See also, *Prosecutor v. Bemba,* Decision on the Admissibility and Abuse of Process Challenges, ICC-01/05-01/08, 24 June 2010, para. 217; *Prosecutor v. Katanga*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07 OA 8, 25 September 2009, para. 56: "Genearlly speaking, the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge. This is because the admissibility of a case under article 17(1)(a)(b) and (c) of the Statute depends primarily on the investigative and prosecutorial activities of States having jurisdiction. These activities may change over time. Thus, a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States and *vice versa* … Thus, the provision is clear evidence that the Statute assumes that the factual situation on the basis of which the admissibility of a case is established is not necessarily static, but ambulatory. Furthermore, the *chapeau* of aticle 17(1) … requires the Court to determine whether or not the case *is* admissible, and not whether it *was* inadmissible."

[56] Prosecutor's Response of 21 April 2010, para. 3.

78. The Chamber may also find the Commentary on Kenya and Complementarity by Prof. Du Plessis (associate professor at the University of KwaZulu-Natal and Senior Research Associate at the International Crimes in Africa Programme of the Institute for Security Studies) and Gevers (lecturer at the Faculty of Law at the University of KwaZulu-Natal) helpful in providing a broader view of the need not only to examine this Application with great care but to recognise the need to defer to the Government of Kenya on complementarity issues where, as here, the Government of Kenya can and does assert that all elements are in place to justify it admissibility challenge:

> "There are, however, a number of reasons to consider closely Kenya's reliance on the complementarity principle. More than being a presumption in favour of local prosecutions, the principle of complementarity is at the heart of the ICC's system. Aside from easing the concerns of states over threats to their sovereignty, the principle serves more noble ends, such as the utility of local prosecutions, and recognises the very real limitations of an ICC with potentially universal jurisdiction.
>
> Therefore, should Kenya genuinely wish to conduct local trials, there are a number of reasons for allowing it to do so. First, it would relieve pressure on an already overburdened ICC. Second, should Kenya be allowed to do so, it would have positive effects for the ICC beyond diluting the mounting tension in Kenya. It would demonstrate to detractors in Africa that the ICC is designed to function only when national legal systems are unwilling or unable to prosecute international crimes. Third, complementarity has never been put to any real work, even though it is designed as an integral part of the Rome System. If the principle is to become effective, it must be taken for a test drive. Kenya presents an opportunity to do so. [57]
>
> Fourth, there is a danger in refusing Kenya the opportunity to exercise its jurisdiction over the crimes under the principle of complementarity. Kenya has one of the best developed judiciaries in Africa. It is also one of the few African states to have domestically implemented the Rome Statute, and the resulting legislation is impressive and progressive. In fact, until recently, Kenya was a model ICC state. If Kenya does not meet the threshold for complementarity, the implication is that neither would the overwhelming majority of other African states[58], making the principle a dead letter in Africa. This would be a sad reflection on domestic legal systems in Africa, and would embolden those who wish to present the ICC as an imperialistic mechanism on a 'civilising mission'.

[57] The authors' "test drive" analogy can be strengthened not only by consideration of the judicial and other reforms that have repaired what may have been less than perfect in the machine. By the use of the existing sytem for piracy trials in the international interest, there may have been a separate but entirely satisfactory "test drive" not of complementarity *per se* but of the workings of one of the objects of its proper interest - the Kenyan legal system.

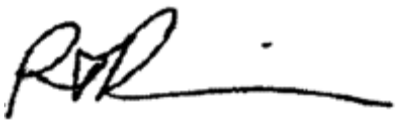
[58] The authors were focusing on Africa. This observation, however, could apply to many other countries around the world, some of them enjoying a public image of respectability arising from their power in the world by which limitations of their legal system can be masked or overlooked.

> Procedurally speaking, Kenya's dilatory response to the atrocities means it has already missed chances to halt proceedings on the basis of complementarity. However, complementarity is in substance a continuing assessment. To consider it formalistically - as a static determination reified in time - would allow the ICC to turn a blind eye to positive domestic developments and undermine the principle's worth."[59]

I. Conclusion

79. For these reasons, the Government submits that it is clear that the six suspects are currently being investigated by the Kenyan authorities. The requirements of Article 19 are plainly satisfied, and the Chamber is respectfully requested to order that the two cases presently before the ICC are inadmissible.

80. The Government submits that before any final decision is rendered, the Chamber must receive and take into account the Government's submissions and evidence in response to the Prosecutor's unsupported allegation in his filing of 10 May 2011 that the Government would interfere with and intimidate witnesses.



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Dated 13th May 2011

London, United Kingdom

[59] Du Plessis and Gevers, *International Justice: Kenya Case a good test of an ICC founding principle*, 28 January 2011 (Business Day).