

1 International Criminal Court
2 Appeals Chamber - Courtroom 1
3 Single Judge Daniel David Ntanda Nsereko
4 Situation in the Republic of Kenya - ICC-01/09-01/11 and
5 ICC-01/09-02/11
6 In the case of the Prosecutor versus William Samoei Ruto et al.
7 and Francis Kirimi Muthaura et al.
8 Appeals Hearing
9 Tuesday, 30 August 2011
10 The hearing starts at 2.34 p.m.
11 (Open session)
12 SINGLE JUDGE NSEREKO: Good afternoon, everybody.
13 Court Officer, please call the cases.
14 COURT OFFICER: Good afternoon, your Honour. The situation in
15 the Republic of Kenya in the cases of the Prosecutor versus Ruto et al.,
16 case number ICC-01/09-01/11, and the Prosecutor versus Muthaura et al.,
17 case number ICC-01/09-02/11. Thank you, your Honour.
18 SINGLE JUDGE NSEREKO: Thank you.
19 May I ask counsel to introduce themselves for the record starting
20 with counsel for the Republic of Kenya.
21 MR. NICE: (Microphone not activated)
22 THE INTERPRETER: Microphone, please.
23 MR. NICE: (Microphone not activated)
24 SINGLE JUDGE NSEREKO: Thank you.
25 MR. NICE: Can I just add one thing: The law officers might have

1 been present personally. As the Court may know, the Honourable Amos Wako
2 finished his term of office last Friday and the new attorney-general, the
3 Honourable Professor Githu Muigai was only sworn in yesterday, so it
4 wasn't possible for them to come here personally. And we're grateful to
5 the Court for allowing the government to be represented personally in
6 Court by the Ambassador of Kenya to the Netherlands, Her Excellency
7 Professor Ruthie Rono who sits behind me.

8 SINGLE JUDGE NSEREKO: Thank you. Welcome, Ambassador.
9 And the Prosecutor.

10 MR. MORENO-OCAMPO: Thank you, your Honour. The Prosecutor
11 office is represented by Mr. Reinhold Gellmetzer, Ms. Adesola Adeboyejo,
12 Mr. Rod Rastan, Ms. Carmen Garcia-Ramos, and the Prosecutor himself,
13 Mr. Moreno-Ocampo.

14 SINGLE JUDGE NSEREKO: Thank you, Mr. Prosecutor.
15 Counsel for Defence of Mr. Muthaura, Mr. Kenyatta, Mr. Ali, are
16 they here?

17 MR. MONARI: (Microphone not activated) I represent
18 General Mohammed Hussein Ali. The other counsel are not here. I am
19 accompanied by Ms. Vedrana Residovic, who is a case manager at OPCD.
20 Thank you.

21 SINGLE JUDGE NSEREKO: Did I call counsel for Mr. Muthaura,
22 Mr. Kenyatta, and Mr. Ali. Are they here? No.

23 MR. MONARI: As I said, I represent Mr. Ali, and I am present.

24 SINGLE JUDGE NSEREKO: Okay. Thank you.

25 Unfortunately, counsel for the Republic of Kenya, the system

1 didn't record what you said. Kindly repeat.

2 MR. NICE: Of course, yes. I appear with my learned friend,
3 Mr. Rodney Dixon and with our assistant, Haydee Dijkstal, who sits behind
4 him, and my name is Geoffrey Nice. My mistake for not pressing the
5 button.

6 SINGLE JUDGE NSEREKO: Thank you. And, of course, the ambassador
7 is here in person. Thank you.

8 MR. NICE: That was recorded the first time, I noted.

9 SINGLE JUDGE NSEREKO: Okay. Office for counsel of victims.

10 MS. MASSIDDA: Good afternoon, your Honour. Victims in these
11 proceedings are represented by the Office of Public Counsel for Victims.
12 My name is Paolina Massidda, principal counsel.

13 SINGLE JUDGE NSEREKO: Thank you.

14 Today, the Appeals Chamber is delivering its judgement on the
15 appeals brought by the Republic of Kenya against the decision of
16 Pre-Trial Chamber II of 30th May, 2011, on the admissibility of the two
17 cases of Mr. Ruto and others, and against Mr. Muthaura and others. The
18 judgement of the Appeals Chamber is by majority with Judge Anita Ušacka
19 dissenting.

20 As the issues raised on appeal are common to both cases, the
21 summary that follows will apply to both, except where it is indicated
22 otherwise.

23 I shall now summarise the judgement of the Appeals Chamber and
24 the reasons for it. Please note that the actual judgement, which will be
25 filed and notified to the parties and participants shortly, hereafter,

1 are the authoritative ones and not this summary.

2 I will start with a relevant procedural history. First,
3 proceedings before the Pre-Trial Chamber.

4 On 31st March 2010, Pre-Trial Chamber II issued, by majority, a
5 decision which authorised the Prosecutor to commence an investigation on
6 his own initiative into the situation in the Republic of Kenya. On the
7 8th March, 2011, the Pre-Trial Chamber, by majority, decided to grant the
8 Prosecutor's applications for summons to appear for Mr. Ruto, Mr. Kosgey,
9 Mr. Sang, Mr. Muthaura, and Mr. Kenyatta, and Mr. Ali, who will
10 hereinafter be referred to as the "suspects," and ordered their
11 appearance before the Court on 7th April 2011.

12 On 31st March, 2011, the Republic of Kenya, who will hereinafter
13 be referred to as the "appellant," filed before the Pre-Trial Chamber,
14 under Article 19 of the Statute, a challenge to the admissibility of the
15 cases against the six suspects. In its challenge, the appellant
16 indicated that it would be filing a series of updated reports to apprise
17 the Chamber on the latest developments in its investigations. The
18 reports were to be filed at the end of July, August, and September 2011.
19 The appellant also requested that the Pre-Trial Chamber convene an oral
20 hearing before the Chamber decided on the merits of the pending
21 challenge.

22 On 21st April 2011, the appellant filed, before the
23 Pre-Trial Chamber, 22 annexes in support of its challenge. On the same
24 day, the appellant filed into the record of the situation a request for
25 assistance on behalf of the Republic of Kenya pursuant to Article 93(10)

1 and Rule 194. With this, the appellant requested the transmission of all
2 statements, documents, or other types of evidence obtained by the Court
3 and the Prosecutor in the course of the ICC investigations into the post
4 election violence in Kenya, including into the six suspects. The
5 appellant also requested the Chamber to decide on the request for
6 assistance before its determination on the pending challenge.

7 After receiving submissions from the Prosecutor, the suspects and
8 the participating victims, and a reply from the appellant to which seven
9 additional documents were annexed, the Pre-Trial Chamber on 30th May 2011
10 rendered its decision on the application by the Government of Kenya
11 challenging the admissibility of the case pursuant to Article 19(2)(b) of
12 the Statute, which will hereinafter be referred to as the "impugned
13 decision." In the impugned decision the Pre-Trial Chamber decided:

14 1. To rule on the request for assistance in a separate decision,
15 as the issue of the admissibility of the cases was not dependent on the
16 grant or denial of the request for assistance.

17 2. To dismiss the application for an oral hearing on the basis
18 that a second round of submissions was unnecessary, given the extensive
19 submissions already before the Chamber on the subject.

20 3. To dismiss the challenge, because of the absence of
21 information which substantiates Kenya's claim that there were ongoing
22 investigations into the suspects.

23 Before the Appeals Chamber, the appellant filed its notice of
24 appeal on 6 June 2011 and its document in support of the appeal on the
25 20th of June, 2011. The appellant bases its appeal on legal, factual,

1 and procedural errors which will be addressed in turn.

2 We start with the alleged legal error, first with the submissions
3 and relevant part of the impugned decision.

4 The principal issue raised by the appellant under this ground of
5 appeal is the interpretation of the words: "The case is being
6 investigated ... by a state which has jurisdiction over it" in
7 Article 17(1)(a) of the Statute. In particular, the appellant challenges
8 the correctness of the Pre-Trial Chamber's finding that for a case to be
9 inadmissible for the Court, a national jurisdiction must be investigating
10 this same person and for the same conduct as in the case already before
11 the Court. The appellant submits that the test developed by the
12 Pre-Trial Chamber in its decision authorising the Prosecutor to initiate
13 an investigation is the correct test. According to that test, the
14 national proceedings must "cover the same conduct in respect of persons
15 at the same level in the hierarchy being investigated by the ICC."

16 Now the appeals decision on the alleged legal error.

17 At the outset, it should be noted that the correctness of the
18 same person/same conduct test has not previously been definitively
19 pronounced upon by Appeals Chamber. The question falls to be addressed
20 for the first time in the present appeals.

21 Article 17 stipulates the substantive conditions under which a
22 case is inadmissible before the Court. It gives effect to the principle
23 of complementarity, according to which the Court "shall be complementary
24 to national jurisdictions." Accordingly, states have the primary
25 responsibility to exercise criminal jurisdiction and the Court does not

1 replace, but complements them in that respect.

2 Article 17 (1)(a) to (c) sets out how to resolve a conflict of
3 jurisdictions between the Court, on the one hand, and a national
4 jurisdiction on the other. Consequently, under Article 17(1)(a), first
5 alternative, the question is not just whether there is an investigation
6 in the abstract, but whether the same case is being investigated by both
7 the Court and by a national jurisdiction.

8 In this regard, it must be emphasised that Article 17 applies not
9 only to the determination of the admissibility of a concrete case, as
10 stipulated in Article 19 of the Statute, but also to preliminary
11 admissibility rulings under Article 18 of the Statute. Article 17 is
12 also relevant for the Prosecutor's decision to initiate an investigation
13 under Article 53(1) of the Statute or to seek authorisation for a
14 *proprio motu* investigation under Article 15, as well as for the decision
15 to proceed with a prosecution under Article 53(2) of the Statute.
16 Therefore, the words "case is being investigated" in Article 17(1)(a) of
17 the Statute must be understood in the context in which it is applied.

18 Under Article 19 of the Statute, the context involves the
19 admissibility of a concrete case. Cases are defined by the warrant of
20 arrest or summons to appear under Article 58, or the charges brought by
21 the Prosecutor and confirmed by the Pre-Trial Chamber under Article 61.
22 Article 58 requires that for a warrant of arrest or summons to appear to
23 be issued, there must be reasonable grounds to believe that the person
24 named in the warrant or in the summons has committed a crime within the
25 jurisdiction of the Court. Likewise, under Regulation 52 of the

1 regulations of the Court, the document containing the charges must
2 identify the person against whom a confirmation of charges is sought and
3 the allegations against him or her. Articles 17(1)(c) and 20(3) of the
4 Statute state that the Court cannot try a person tried by a national
5 court for the same conduct unless the requirements of Article 20(3)(a) or
6 (b) of the Statute are met. Thus, the defining elements of a concrete
7 case before the Court are the individual and the alleged conduct. It
8 follows that for such a case to be inadmissible under Article 17(1)(a) of
9 the Statute, the national investigation must cover the same individual
10 and substantially the same conduct as alleged in the proceedings before
11 the Court.

12 The admissibility challenge that gave rise to the present appeals
13 was brought under Article 19(2)(b) in relation to two cases in which
14 summonses to appear were issued against specific suspects for specific
15 conduct. Accordingly, as regards the present appeals, the case in terms
16 of Article 17(1)(a) are the cases as defined in those summonses. Those
17 cases are only inadmissible before the Court if the same suspects are
18 being investigated by Kenya for substantially the same conduct.

19 The words "is being investigated" in this context signify the
20 taking of steps directed at ascertaining whether those suspects are
21 responsible for that conduct, for instance, by interviewing witnesses or
22 suspects, collecting documentary evidence, or carrying out forensic
23 analyses. The mere preparedness to take such steps is not sufficient.
24 Thus, unless investigative steps are actually taken in relation to the
25 suspects who are the subject of the proceedings before the Court, it

1 cannot be said that the Court and the national jurisdiction are
2 investigating the same case. And there is, therefore, no conflict of
3 jurisdictions.

4 The appellant's argument that there should be a presumption in
5 favour of domestic jurisdictions does not contradict this finding.
6 Article 17(1)(a) to (c) of the Statute does indeed favour national
7 jurisdictions, but it does so only to the extent that there actually are,
8 or have been, investigations and/or prosecutions at the national level.
9 If the suspects or conduct have not been investigated by the national
10 jurisdiction, there is no legal basis for the Court to find the cases
11 inadmissible.

12 Furthermore, proceedings to determine the admissibility of a
13 concrete case under Article 19 of the Statute are but one aspect of the
14 complementarity principle. The concerns raised by the appellant
15 regarding its exercise of criminal jurisdiction and protection of its
16 sovereignty are taken into consideration in the proceedings under
17 Articles 15, 53, 18, and 19 of the Statute. Nevertheless, under
18 Article 19, the focus is on a concrete case that is the subject of
19 proceedings before the Court.

20 Similarly, the appellant's argument that once the summonses to
21 appear were issued, it was constrained under Article 19(5) of the
22 Statute, to bring the challenge "at the earliest opportunity" and
23 therefore it could not be "expected to have prepared every aspect of its
24 admissibility application in detail in advance of this date" is
25 misconceived. Article 19, paragraph 5 of the Statute requires a state to

1 challenge admissibility as soon as possible, once it is in a position to
2 actually assert a conflict of jurisdictions. The provision does not
3 require a state to challenge admissibility just because the Court has
4 issued summonses to appear.

5 Accordingly, given the specific stage that the proceedings had
6 reached, the Appeals Chamber finds that the "same person/same conduct"
7 test that the Pre-Trial Chamber applied was the correct one. The
8 Pre-Trial Chamber thus committed no error of law.

9 Now at the -- as for the alleged factual errors. We will start
10 with submissions and relevant part of the impugned decision.

11 Under this ground of appeal, the appellant argues that the
12 Pre-Trial Chamber erred in finding that there were no investigations in
13 respect of the suspects due to a lack of substantiating information.

14 First, the appellant alleges that the Pre-Trial Chamber
15 erroneously assessed the annexes submitted in support of its challenge.
16 In this regard, the Appeals Chamber notes that the appellant filed before
17 the Pre-Trial Chamber a total of 29 annexes containing supporting
18 material.

19 However, the Pre-Trial Chamber found only Annex 1, appended to
20 the appellant's filing of 21 April 2011, and Annex 2, appended to the
21 appellant's reply of 16th May 2011, to be of direct relevance to the
22 investigative process.

23 Annex 1 was a letter dated 14th April 2011 in which the
24 attorney-general directed the Kenyan Commissioner of Police to
25 investigate the six suspects before the Court. Annex 2 was a report by

1 the Kenyan Director of Criminal Investigations dated 5th May, 2011,
2 which, among other things, mentions that there is a pending case against
3 Mr. Ruto. The Pre-Trial Chamber found in relation to these annexes that,
4 and I quote:

5 "Although the information provided in these two annexes reveals
6 that instructions were given to investigate the three suspects subject to
7 the Court's proceedings, the Government of Kenya does not provide the
8 Chamber with any details about the asserted, current investigative steps
9 undertaken."

10 Now, the determination of the Appeals Chamber --

11 (French on English channel)

12 SINGLE JUDGE NSEREKO: Proceed --

13 (French on English channel)

14 SINGLE JUDGE NSEREKO: I repeat --

15 (French on English channel)

16 SINGLE JUDGE NSEREKO: That is to say it misappreciated the
17 facts, took into account irrelevant facts or failed to take into account
18 relevant facts. As to the "misappreciation of facts," the
19 Appeals Chamber will not disturb the Pre-Trial Chamber or Trial Chamber's
20 evaluation of the facts just because the Appeals Chamber might have come
21 to a different conclusion. It will interfere only in the case where it
22 cannot discern how the Chamber's conclusion could have reasonably been
23 reached from the evidence before it. Thus, in the present appeals,
24 unless such clear errors have been demonstrated, the Appeals Chamber will
25 defer to the Pre-Trial Chamber's factual finding that it had not been

1 proven that the appellant was actually investigating the three suspects.

2 The Appeals Chamber notes that the Pre-Trial Chamber found that
3 the appellant's assertions that an investigation was ongoing in respect
4 of the six suspects was insufficient. The Pre-Trial Chamber required the
5 proof that the appellant was actually taking specific steps to
6 investigate the suspects. The Appeals Chamber cannot identify any error
7 in this approach. As explained earlier on, for a successful challenge of
8 the admissibility of a case under Articles 17(1)(a), first alternative,
9 and 19 of the Statute, the state must take steps directed at ascertaining
10 whether the suspects are responsible for substantially the same conduct
11 as the alleged -- as that alleged in the proceedings before the Court.
12 Therefore, if a state challenges the admissibility, it must provide the
13 Court with evidence of a sufficient degree of specificity and probative
14 value that demonstrates that it is indeed investigating the case. It is
15 not sufficient merely to assert that investigations are ongoing.

16 The Appeals Chamber notes that of the 29 annexes that the
17 appellant submitted, Annexes 1 and 2 were the only ones that related
18 specifically to the case at hand. However, although Annexes 1 and 2 make
19 reference, in a general manner, to alleged investigations against the
20 suspects, they do not disclose any details as to the steps that the
21 appellant may have taken to ascertain whether they are responsible for
22 the conduct that is alleged against them in the proceedings before the
23 Court. The only suspect specifically named in the two annexes is
24 Mr. Ruto. Annex 2 provides some information concerning his possible
25 involvement in inciting violence against non-Kalenjins living in some

1 parts of the Rift Valley Province. However, even this information falls
2 short of substantiating what has been done to investigate him.

3 Furthermore, the Appeals Chamber notes that in the appellant's
4 reply of 16th May 2011, it is stated that the "commissioner of police has
5 confirmed ... that the six suspects are currently being exhaustively
6 investigated by the CID/DPP team" and it identified six "investigative
7 actions [which] are in progress." However, while the appellant asserts,
8 for instance, that "officers have been re-visiting the crime scenes to
9 make inquiries and to gather any evidence that could assist their
10 investigations in respect of the six suspects," the appellant did not
11 provide any evidence to back up this claim.

12 In the circumstances, the Appeals Chamber can find no clear error
13 in the Pre-Trial Chamber's assessment of the annexes that the appellant
14 submitted.

15 Turning to the second alleged factual error, the appellant
16 alleges that the Pre-Trial Chamber drew illogical inferences from its
17 proposal to provide updated investigation reports. In addition, the
18 appellant submits that the Pre-Trial Chamber made erroneous findings on
19 the basis of Kenya's legal submissions and generally was biased against
20 the appellant.

21 In the admissibility challenge, the appellant stated that "the
22 investigation of all cases, including those presently before the ICC will
23 be most effectively progressed once the new DPP is appointed ... by the
24 end of May 2011. The appellant stated furthermore that it will provide
25 the Pre-Trial Chamber with an "updated report on the state of these

1 investigations and how they extend upwards to the highest levels ... by
2 the end of July ..." The appellant added that the report "will also
3 outline the investigation strategy which ... is building on the
4 investigation and prosecution of lower level perpetrators to reach up to
5 those at the highest levels who may have been responsible."

6 Lastly, the appellant submitted that "further reports at the end
7 of August and September 2011 on 'progress made with the investigations at
8 all levels under the new office of the DPP will be provided to the
9 Pre-Trial Chamber."

10 In the impugned decision, the Pre-Trial Chamber stated that it
11 was surprised by the appellant's statement which served as "an
12 acknowledgement by Kenya that the investigations have not yet extended to
13 those at the highest level of the hierarchy," including the suspects
14 before the Court. The Pre-Trial Chamber found that this submission
15 contradicted the arguments made in the appellant's reply of
16 16th May 2011, that there are actually ongoing investigations in relation
17 to the suspects under the Chamber's consideration. The Pre-Trial Chamber
18 also found that it was unclear why the appellant had not already
19 submitted a detailed report on the ongoing investigations. The Chamber
20 opined that if national proceedings against the suspects are currently
21 underway then "there is no convincing reason to wait until July 2011 to
22 submit the said first report."

23 In relation to the appellant's legal submissions on the
24 applicable test to be applied in determining admissibility, the
25 Pre-Trial Chamber stated that the appellant's submissions "cast doubt on

1 the will of the state to actually investigate the three suspects" and
2 that it was "unclear how the Chamber could be convinced that there are
3 actually ongoing investigations with respect to the three suspects in the
4 present case."

5 Now, decision of the Appeals Chamber on this allegation.

6 As discussed in the preceding section, the Pre-Trial Chamber
7 found that the appellant failed to submit information that showed that
8 concrete investigative steps had been taken against the suspects in
9 question. The findings of the Pre-Trial Chamber as to the appellant's
10 proposal to submit additional reports in the future must be seen in this
11 light. Since the Chamber concluded that, on the basis of the information
12 before it, there was no indication that the appellant was investigating
13 the suspects, it was not unreasonable or erroneous for the Chamber to
14 state that Kenya's proposal to submit additional reports was actually an
15 acknowledgement that there were no such investigations at that time.

16 The appellant's assertion that the Pre-Trial Chamber simply did
17 not believe it even though there was no evidence contradicting its
18 submissions or that the Chamber adopted a hostile attitude and made
19 erroneous findings on the basis of the appellant's legal submissions is
20 equally unfounded. The Pre-Trial Chamber found against the appellant not
21 because it did not trust the appellant or doubted its intentions, but
22 rather because the appellant failed to discharge its burden to provide
23 sufficient evidence to establish that it was investigating the suspects.

24 In sum, no clear error in the Pre-Trial Chamber's treatment of
25 the appellant's proposal to submit updated investigation reports can be

1 identified. Nor can it be said that the Pre-Trial Chamber was biased
2 against the appellant.

3 And lastly, the alleged procedural errors.

4 The appellant raises three procedural errors on appeal, namely:

5 (i) the refusal to permit the filing of further investigation reports
6 within the timetable proposed by the appellant; (ii), the refusal to hold
7 an oral hearing, *inter alia*, to receive evidence from the commissioner of
8 police on the alleged ongoing investigations; and (iii), the refusal to
9 decide on the appellant's request for assistance before deciding on the
10 challenge. In the appellant's view, all these errors contributed to the
11 Pre-Trial Chamber's alleged erroneous finding of "inactivity."

12 The Appeals Chamber notes that Rule 58 of the Rules of Procedure
13 and Evidence stipulates the procedure to be followed in relation to
14 challenges to the admissibility of a case. Save for certain express
15 stipulations, Rule 58 vests the Pre-Trial Chamber with broad discretion
16 in determining how to conduct the proceedings. The Appeals Chamber's
17 standard of review in relation to a discretionary decisions is limited to
18 reviewing the exercise of a Chamber's discretion. The Appeals Chamber
19 will not interfere with the Pre-Trial Chamber's exercise of discretion,
20 save where it is shown that that determination was vitiated by an error
21 of law, an error of fact, or a procedural error, and then, only if the
22 error materially affected the determination. This standard of review
23 will guide the analysis of the three alleged procedural errors that
24 follow.

25 In relation to the first alleged procedural error, namely, the

1 refusal to permit the filing of further investigation reports within the
2 timetable proposed, the appellant avers that the Pre-Trial Chamber should
3 not have decided on the admissibility challenge at the time it did, but
4 should have given Kenya more time to submit additional reports.

5 Under this ground of appeal, the question that the
6 Appeals Chamber has to resolve is not what the Pre-Trial Chamber could
7 have done, but whether the Pre-Trial Chamber erred in the exercise of its
8 discretion.

9 The Appeals Chamber notes that the Pre-Trial Chamber decided the
10 challenge on 30th May, 2011, almost two months after it was filed. The
11 Pre-Trial Chamber accepted the filing of additional annexes by the
12 appellant on 21st April 2011, even though the filing of such additional
13 material was not envisaged, either in Rule 58 of the Rules of Procedure
14 and Evidence or in the Pre-Trial Chamber's decision on the conduct of the
15 proceedings of 4th April 2011. The Pre-Trial Chamber also granted the
16 appellant's request to reply to the Prosecutor's submissions. In these
17 circumstances, the Appeals Chamber cannot say that the Pre-Trial Chamber
18 did not give the appellant sufficient opportunity to make its arguments
19 or to present supporting evidence. In this context, the Appeals Chamber
20 underscores once more the discretionary character of the
21 Pre-Trial Chamber's decision. While it would have been open to the
22 Pre-Trial Chamber to allow the filing of additional reports, it was not
23 obliged to do so, nor could the appellant expect to be allowed to present
24 those reports. Rather, it was for the appellant to ensure that the
25 challenge was sufficiently substantiated by evidence.

1 The Appeals Chamber therefore finds no abuse of the
2 Pre-Trial Chamber's discretion under this ground of appeal.

3 In relation to the second alleged error, namely, the refusal to
4 hold an oral hearing, the Appeals Chamber notes that the
5 Pre-Trial Chamber reasoned, among other things, that it had given all
6 parties and participants ample opportunity to put forward all arguments
7 regarding the challenge. It was therefore not persuaded that a second
8 round of submissions was necessary prior to making a decision on the
9 merits of the challenge.

10 The Appeals Chamber also notes that with a filing of additional
11 reports addressed in the preceding section, the question of the
12 Appeals Chamber to resolve is not whether the Pre-Trial Chamber could
13 have held an oral hearing, the question is whether its decision not to
14 hold the hearing amounted to an abuse of discretion. In the view of the
15 Appeals Chamber, although there might have been reasons to hold an oral
16 hearing, it cannot be said that by deciding not to do so, the
17 Pre-Trial Chamber abused its discretion.

18 Lastly, the appellant submits that the Pre-Trial Chamber erred in
19 refusing to decide on the appellant's request for assistance before
20 deciding on the challenge.

21 As mentioned earlier, the appellant requested the transmission to
22 it of all statements, documents, or other types of evidence obtained by
23 the Court and the Prosecutor in the course of the ICC investigations into
24 the post election violence in Kenya, including into the six suspects.

25 In the impugned decision, the Pre-Trial Chamber found that there

1 was no link between the request for assistance and the challenge.
2 Consequently, it determined that it would decide on the request for
3 assistance in a separate decision. The Pre-Trial Chamber subsequently
4 issued the decision on 29th June 2011.

5 The Appeals Chamber is not persuaded by the appellant's argument
6 that the Pre-Trial Chamber's treatment of the request for assistance
7 amounted to a procedural error. Even though the Pre-Trial Chamber could
8 have first decided on the request for assistance and then on the
9 challenge, it was not obliged to do so. For the determination of the
10 challenge, the question revolved around whether, on the available
11 evidence, the cases against the six suspects were being investigated by
12 the appellant. Whether specific evidence should have been made available
13 to the appellant to reinforce existing investigations or to lead to new
14 investigations was irrelevant for the outcome of the challenge.

15 In sum, the Appeals Chamber discerns no procedural error in the
16 Pre-Trial Chamber's decision to rule on the admissibility challenge
17 before deciding the request for assistance.

18 Now, the appropriate relief.

19 On an appeal pursuant to Article 82(1)(a) of the Statute, the
20 Appeals Chamber may confirm, reverse, or amend the decision appealed.
21 For the reasons I have summarised, the Appeals Chamber is satisfied that
22 the Pre-Trial Chamber correctly decided that the cases against the
23 suspects are admissible. The Appeals Chamber therefore considers it
24 appropriate to confirm the decisions and to dismiss the appeals.

25 This concludes my summary of the judgement. I now turn to a

1 summary of the dissenting opinion.

2 Summary of Judge Ušacka's dissenting opinion:

3 Judge Ušacka disagrees with the majority that the impugned
4 decision should be confirmed and therefore dissents from the judgement.
5 She considers that Pre-Trial Chamber II erred in the way it conducted the
6 proceedings under Rule 58 of the Rules of Procedure and Evidence.

7 Judge Ušacka finds that in exercising its discretion under
8 Rule 58 of the Rules of Procedure and Evidence to regulate the
9 proceedings on the admissibility challenge, the Pre-Trial Chamber did not
10 take full account of the rights of the appellant. The appellant provided
11 information about investigations against Mr. Ruto and also against the
12 other five persons, notably in the report on the post-election violence
13 dated 5th May 2011. During the proceedings, the appellant repeatedly
14 showed its willingness to furnish the Pre-Trial Chamber with more
15 information, in writing and orally. The Pre-Trial Chamber should have
16 allowed the appellant reasonable time to submit additional proof of
17 investigative steps taken, and/or should have requested specific
18 information from the appellant as to its alleged ongoing investigations.
19 Instead, the Pre-Trial Chamber found that there was no ongoing
20 investigations by the appellant in relation to the six persons.

21 Judge Ušacka recalls that the situation in Kenya is the first
22 *proprio motu* investigation by the Prosecutor and that the appellant is
23 the first State Party to mount a challenge to the admissibility of a
24 case. Priority these proceedings, many legal and factual matters
25 relevant to Article 17(1)(a) of the Statute had not yet been determined

1 by jurisprudence. In this context, Judge Ušacka finds that the
2 Pre-Trial Chamber did not request submissions on crucial matters, such as
3 what constitutes an investigation and what is required to show that a
4 state is investigating. Judge Ušacka underlines the many differences in
5 this respect in national systems as to what constitutes an investigation
6 or prosecution. She also recalls the difference between inactivity as
7 the first limb of admissibility determinations and unwillingness or
8 inability as its second limb. In Judge Ušacka's view, it is for the
9 Pre-Trial Chamber to reconsider those matters comprehensively after
10 hearing the parties.

11 In conclusion, Judge Ušacka holds that the impugned decision
12 should be reversed. In her opinion, Pre-Trial Chamber II should
13 reconsider the admissibility challenge and the matters arising from it
14 after conducting the proceedings in a way that fully balances all
15 relevant interests as required by the principle of complementarity.

16 Judge Ušacka's dissenting opinion will be issued in due course.

17 That concludes this session, and the session is closed. Thank
18 you.

19 COURT USHER: All rise.

20 The hearing ends at 3.28 p.m.

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25