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International Criminal Court

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No.: **ICC-01/09-02/11**
Date:**19 July 2011**

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF KENYA
IN THE CASE OF THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA AND MOHAMED HUSSEIN ALI

Public

Victims Observations on the Government of Kenya's Appeal Concerning Admissibility of Proceedings

Source: **Office of Public Counsel for Victims**

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I. INTRODUCTION

1. The victims oppose the appeal of the Government of Kenya (the "Government") against the Pre-Trial Chamber's decision rejecting its application for a declaration of inadmissibility.[1] The Decision is based on factual evaluations that fall well within the range of reasonableness; on unimpeachable procedure; and on a proper understanding of the applicable law.

2. The Chamber's finding of fact that the Government had not shown any ongoing investigation against the defendants was entirely justified by the conclusory, inconsistent and untimely submissions received. The admissibility application[2] (the "Application") did not unambiguously claim, much less substantiate with evidence, that any domestic investigations were ongoing against the defendants. Instead, a timetable of reforms was set out that, so it was argued, would facilitate future investigations against those at the defendants' hierarchical level. Three weeks later, more than nine hundred pages of "annexes" were filed, including an order from the Attorney-General purporting to direct an investigation into the "six persons" before the ICC. None of the annexes showed what steps, if any, may have been taken in response to that order. Only in the Reply, despite the Chamber's instruction that it must "engage solely with the relevant issues as raised in the observations received", did the Government finally reveal a letter from a police official upon which it now principally relies to show that investigations were supposedly underway.[3]

3. Though the Chamber could have disregarded the letter *in limine*, it was equally within its discretion to assess it with reasonable caution. The letter, as the Chamber observed, offered "no concrete evidence of such [investigative] steps" and

[1] Pre-Trial Chamber II, *The Prosecutor v. Muthaura et al.*, "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 May 2011, ICC-01/09-02/11-96 (the "Decision"). Pre-Trial Chamber II is hereinafter referred to as "the Chamber".
[2] ICC-01/09-02/11-26.
[3] ICC-01/09-02/11-91.

no indication of any "concrete step that has been or is being currently undertaken". The Chamber's insistence upon concrete and specific information showing that the cases were actually being investigated, given untimely disclosure of the letter and its conclusory language, was reasonable. Any other approach in the circumstances would, indeed, have been unreasonable.

II. PROCEDURAL HISTORY

4. The Government on 6 June 2011 served notice of appeal against the Decision, followed by a "Document in Support" of its appeal on 20 June 2011.[4] The present submissions are made pursuant to the Appeals Chamber's Directions of 13 June 2011, authorizing submissions by victims.[5]

5. The Prosecution responded on 12 July 2011,[6] as did the Defence for Mohamed Hussein Ali.[7] The victims hereby adopt the "Statement of Facts" set out in the Prosecution response as an accurate account of the relevant procedural background.[8]

III. THE CHAMBER'S FACTUAL ASSESSMENT WAS NOT UNREASONABLE, PARTICULARLY IN LIGHT OF THE GOVERNMENT'S AMBIGUOUS AND UNTIMELY SUBMISSIONS

(i) Standard for Appellate Review of Factual Findings

6. Factual determinations at first instance are entitled to deference on appeal. Reversal of such findings is appropriate only where there has been a

[4] ICC-01/09-02/11-104; ICC-01/09-02/11-130-Corr (the "Appeal Brief").
[5] Appeals Chamber, *Muthaura et al*., Directions on the submission of observations pursuant to article 19(3) of the Rome Statute and rule 59(3) of the Rules of Procedure and Evidence", 13 June 2011, ICC-01/09-02/11-116. The victim-applicants concerned are: a/0640/10, a/641/10, a/0642/10 and a/1203/10.
[6] ICC-01/09-02/11-168 (the "Prosecution Response").
[7] ICC-01/09-02/11-166.
[8] Prosecution Response, paras. 5-21.

"misappreciation of the facts … disregard of relevant facts, or taking into account facts extraneous to the *sub judice* issues."[9]

7. The Chamber's ultimate finding of fact – that no investigation had been shown to be ongoing against the defendants – was correct and reflected a proper exercise of its fact-finding discretion. The Government failed to show with specific evidence that an investigation against the defendants in relation to the crimes alleged in the summons was ongoing; adopted ambiguous and inconsistent positions; and tendered information in an untimely and improper manner.

(ii) The Application Did Not Assert, Much Less Substantiate, That Investigations Against the Defendants Were Ongoing

8. The Government did not claim that investigations were ongoing against any of the defendants in its original Application. It went no further than to assert that "investigative *processes* are currently underway" (emphasis added).[10] The content of these "processes" is never made clear in the application, but the focus of the submission is the ongoing process of reform of the criminal justice system as a whole, rather than on any specific investigative steps then being taken in respect of the crimes alleged against the defendants. The Government underlined that these reforms "will enable" or "open[] the way" for future investigations and prosecutions.[11] The very few paragraphs devoted to the state of investigations against the defendants are, to say the least, ambiguous. The Government indicated that "the investigation of all cases, including those presently before the ICC, will be most effectively progressed once the new DPP is appointed, which is expected to be finalized … by the end of May 2011."[12] The odd mixture of future and past tense in

[9] Appeals Chamber, *Katanga et al*., Judgement in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, ICC-01/04-01/07-572, para. 25.
[10] Application, paras. 12, 45 (section title). 46, 79 (section title).
[11] *Idem*, paras. 47, 5.
[12] *Ibidem*, para. 69 (underline added).

the phrase "will be most effectively progressed" upon the future appointment of the DPP leaves ambiguous whether the investigations are already underway, or will only be undertaken once the new DPP is appointed. A discussion follows of the investigations in "the field", without however making any mention of whether such investigations encompassed the actions of any of the defendants.[13] A promise is then made that:

> [a]n updated report on the state of these investigations and how they extend upwards to the highest levels and to all cases, including those before the ICC, will be submitted by the end of July 2011. The report will also outline the investigation strategy which, as envisaged in by the February 2009 Report, is building on the investigation and prosecution of lower level perpetrators to reach up to those at the highest levels who may have been responsible…. The report to be submitted at the end of July 2011 will cover investigations undertaken by the new DPP and the timetable for further investigations.[14]

9. The notion of an "updated" report perpetuates the ambiguity by implying that investigations have already started but without expressly stating whether that is the case. The language used in the Application appears almost designed to create the possibility that investigations are currently underway, but without expressly so stating one way or the other.

10. A further equivocation is the identity of those whom the Government asserts are being, or will be, investigated. The promised end-of-July report on investigations will explain "how they extend upwards to the highest levels and to all cases, including those before the ICC." The reference to "cases", rather than "the suspects" or "the defendants", is significant because elsewhere in the Application the Government argued that "ICC case law has not authoritatively determined the meaning of the word 'case'", and that the word could mean "the same conduct in respect of persons at the same level in the hierarchy being investigated by the ICC."[15]

[13] *Ibidem*, para. 70.
[14] *Ibidem*, paras. 71-72 (underline added).
[15] *Ibidem*, para. 32.

The Government's promise, assuming a consistent meaning of the word "case", was therefore no more than that it would investigate upwards to the same level as the positions held by the defendants.

11. The Government is wrong to allege that the Chamber's analysis of the use of the word "case" reflected a view that "the Government of Kenya was not to be trusted in respect of the information it provided about its national investigation."[16] On the contrary, the need to examine the Government's legal arguments arose from its own equivocation as to whether investigations actually would encompass the defendants.[17] The issue is not one of "trust", but simply trying to infer from ambiguous language the content of the Government's assertions or promises.

(iii) The "Annexes" Did Not Assert or Substantiate That Investigations Against the Defendants Were Ongoing

12. On 21 April 2001, twenty days after filing the Application, and only seven days before responses were due from other participants, the Government filed more than nine-hundred pages of "annexes".[18] No advance notice was provided that these so-called annexes were to be filed, nor was leave sought in the absence of any legal basis to do so under the applicable procedural rules. Some of these "annexes" had been created two weeks after the filing of the Application.

13. Most of the documents support the main thrust of the Application – that extensive constitutional, judicial, prosecutorial, police and witness protection reforms were being or had been undertaken in Kenya that would facilitate proper investigations and prosecutions. Two annexes are of particular interest for the present appeal, however. Annex 3 is an 83-page report by the Chief Public Prosecutor dated March 2011 summarizing and listing cases and investigations undertaken to

[16] Appeal Brief, para. 45.
[17] Decision, paras. 55-57. For a fuller discussion of the proper definition of "case", see *infra* section V.
[18] ICC-01/09-02/11-67.

date into the post-election violence. None of the cases involves any of the defendants in this case. Indeed, the report does not even support the Government's claim that others at the same level of hierarchy were being investigated, as not a single one of the more than three thousand cases mentioned in the report involved any reasonably senior governmental official or political figure.

14. The second document of significance, Annex 1, is a letter from the Attorney General addressed to the national Commissioner of Police, Matthew Iteere, directing him to "investigate all other persons against whom there may be an allegation of participation in the Post-Elections Violence, including the six persons who are the subject of criminal proceedings currently before the International Criminal Court (ICC)." The letter is dated 14 April 2011 – two weeks after the Government's Application. The letter notably distinguishes between those cases that are already "under active investigation", and an instruction that "[a]dditionally, you are directed to investigate all other persons…. including the six".[19] The Attorney-General's declaration made in The Hague on 9 April 2011 draws the same distinction: "Accordingly, I am directing the Commissioner of Police to ensure that all the ongoing investigations and such other additional cases relating to the Post Election Violence in Kenya are concluded expeditiously."[20] The implication, in the absence of any other information, is that this letter initiated, triggered or authorized the investigations into the defendants for the crimes identified in the summonses.

15. The Government has now resiled from this position on appeal. It now claims that investigations "had been underway from the time when the names of the six Suspects were made public by the ICC Prosecutor" on the basis of instructions given by Mr. Iteere to the Director of Criminal Investigation, Mr. Ndegwa Muhoro.[21] The

[19] ICC-01/09-02/11-67, Anx1, p. 2.
[20] ICC-01/09-02/11-67, Anx2, p. 3.
[21] Appeal Brief, para. 57 ("Appeal Brief, para. 57 ("it must also have been clear to the Chamber from the Director of Criminal Investigation's report of 5 May 2011 that the investigation specifically in to the Suspects had been underway from the time when the names of the six Suspects were made public by the ICC Prosecutor – in the passage cited by the Chamber it clearly states: 'the Commissioner of

validity of this claim is discussed in more detail below in respect of the Government's Reply. But the claim itself raises serious questions about the Attorney-General's letter of 14 April 2011 and the overall reliability of the Government's claims about investigations. How could the Attorney-General not have been aware that Mr. Iteere had already given such instructions to Mr. Muhoro, in light of the profile and sensitivity of the cases? Why were Mr. Iteere's instructions initiating investigations not included – or at least referenced – as part of the Application? Why was it not included amongst the annexes filed three weeks later? Why did the Government create the impression with the annexes, for lack of other information presented, that the investigations had in fact been ordered by the Attorney-General as of 14 April 2011, whereas it now says that those investigations had commenced some time earlier? Given these inconsistencies, should the factual submissions of counsel be taken as a full, accurate and reliable reflection of the Government's actual activities?

16. One point that is at least clear from the Government's change of position is that it does not now contest the correctness or reasonableness of the Chamber's assessment that the Attorney-General's letter did not provide an adequate showing that an investigation was underway, either on the date of the Application or on the date the letter was written.[22] It shows no more than that an instruction was given that an investigation is to be opened (which the Government now claims was superfluous because that investigation was already underway). The Attorney-General's letter, as reasonably found by the Chamber, did not constitute adequate proof of an actual investigation.

Police [the recipient of the Attorney-General's letter] **again tasked** the team of investigators to carry out exhaustive investigations relating to the Ocampo Six…. Accordingly, it is beyond doubt on the basis of these documents that by the time that the Government of Kenya filed its Admissibility Application there was an ongoing investigation.")

[22] Decision, para. 64.

(iv) The Government Exceeded the Proper Scope of a Reply and Altered the Factual Basis of the Application

17. The content of the Reply must be viewed within a broader procedural context. The Government from the start attempted to dictate its own timetable for submissions, and apparently made decisions about the nature of its submissions in the erroneous expectation that it could do so. The Application proposed filing three periodic reports over a period of six months, concluding with September of this year. The justification for this schedule was that admissibility "can only be properly" assessed on the basis of "all the steps undertaken by the Government, both those already in place as well as those that have been initiated and which will be completed progressively within the next six months."[23]

18. On 11 April 2011, just ten days after the Application had been filed and before the filing of any responses – but after it's request for an oral hearing had been denied[24] – the Government sought "confirmation of its right to reply", despite the express language of the Regulations of the Court that replies may be filed only "with leave of the Chamber, unless otherwise provided by these Regulations."[25] The Government also announced that it was entitled in any such reply "to provide … any new relevant information."[26]

19. The victims vigorously opposed the Government's request for a reply to the extent that it might purport to "alter the factual basis of the Article 19 application." As the victims argued at the time: "The apparent intent to offer sweeping supplemental submissions, combined with the lack of transparency in the original motion, would significantly undermine the fairness and efficacy of the present

[23] Application, para. 16.
[24] Pre-Trial Chamber II, "Decision on the Conduct of Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, 4 April 2011, ICC-01/09-02/11-40.
[25] Regulation 24.
[26] ICC-01/09-02/11-53, para. 7.

proceedings."[27] Replies are intended to be a limited mechanism for dealing with unforeseeable issues raised in the opposite party's response and are not a vehicle for making new claims or raising totally new arguments or to cure defects related to the vagueness of the primary filing.[28] The essential principle is that the moving party must address all reasonably foreseeable issues, including presenting any facts necessary to substantiate the motion. Allowing the moving party to change or substantially alter the foundation of a motion after the responses corrodes the basic fairness of the proceedings.[29]

20. The Government repeated its request for leave to reply on 2 May 2011, before the first request had been decided and subsequent to the responses of the other participants to the Application. It insisted that it "must be given until 30 May 2011 to file its reply, in light of up-to-date information on its national investigations that it *must* provide."[30] The Government openly asserted that it wished "to provide a detailed up-to-date report on the status of its investigations," and even complained

[27] ICC-01/09-02/11-61, para. 11.
[28] ICC-01/09-02/11-61, para. 10.
[29] See *M. Nikolic v. The Prosecutor* (IT-98-29-A), Decision on Prosecution's Motion to Strike, 20 January 2005, para. 32 (ICTY Appeals Chamber) ("Before addressing the merits of the parties' submissions, the Appeals Chamber reemphasizes the procedure for the filing of written submissions before the Appeals Chamber. A three-stage process is established by the Rules and the relevant Practice Directions for the filing of written submissions before the International Tribunal. For motions filed during appeals from judgement, as is the case here, the moving party is requested to file a motion containing (i) the precise ruling or relief sought; (ii) the specific provision of the Rules under which the ruling or relief is sought; and (iii) the grounds on which the ruling or relief is sought. The opposite party is entitled to file a response stating whether or not the motion is opposed and the grounds therefore, and the moving party may file a reply restricted to dealing with issues raised in the opposite party's response. The Appeals Chamber recognizes that it is not possible to require a party to anticipate all the arguments made in response by the opposite party. The very purpose of a reply is to permit the moving party to rebut the arguments raised in opposition by the other party. Subject to a rejoinder, this can sometime necessitate submitting an argument not developed in the initial motion. However, this right to fully address the opposing party's arguments does not allow the moving party to use its reply to make new claims or to raise totally new arguments. As the Appeals Chamber has already stated, if a party raises in a reply an argument or request for the first time, then the opposing party is deprived of an opportunity to respond and this can harm the fairness of the proceedings. That is notably why the core of the moving party's arguments must be provided in the initial motion and not raised for the first time in the reply.")
[30] ICC-01/09-02/11-76, para. 1.

that it "cannot reasonably be expected" to do so in less than 28 days.[31] This was, in effect, an indirect attempt to impose a modified briefing schedule, which the Chamber had already rejected.

21. The Chamber granted leave, but to a narrower extent than requested. The Government was instructed "to engage solely with the relevant issues as raised in the observations received."[32] This instruction evidently reflected a concern, clearly warranted in light of the leave request, that the Government might attempt to use the reply for an improper purpose.

22. The proper scope of the reply falls within a broader substantive and procedural context. The substantive framework arises from the phrase from the *Katanga* Appeals Judgement on admissibility that "[g]enerally 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."[33] The Government has construed this phrase as meaning that a Chamber must consider admissibility "when the application is being considered and determined as a whole and not merely the date on which the application is first filed."[34] Requiring the effective date for that analysis to be the date of the filing of the application would, according to the Government, be "artificial in the extreme."[35] The Government apparently believes that this entitles it to submit information as and when it sees fit, regardless of any deadlines or procedural rules, including even throughout the appeal proceedings.[36] The so-called "Updated Investigation Report" purportedly filed before the Appeals

[31] Idem, para. 15.
[32] ICC-01/09-02/11-81, para. 16.
[33] Appeals Chamber, *Prosecutor v. Katanga & Ngudjolo*, "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", ICC-01/04-01/07-1497, 25 September 2009, paras. 56, 80 (the "Katanga Admissibility Decision").
[34] Application, para. 19.
[35] *Idem*, para. 19.
[36] Appeal Brief, para. 52 ("The Government of Kenya will thus file updated reports on the investigation during the appellate proceedings.")

Chamber on 4 July 2011[37] is, in fact, the sixth time that the Government has purported to present new information in the course of these proceedings.

23. The Government's interpretation of the phrase from the *Katanga* Admissibility Decision is plainly incorrect. The Katanga Defence had argued in that case that admissibility should be assessed as of the moment of the accused's arrest, some eighteen months prior to the filing of the admissibility challenge.[38] The Appeals Chamber used the phrase "at the time of the proceedings" to reject that argument. Nowhere does the Appeals Chamber suggest or imply that a State or other applicant should be permitted to incrementally file information as and when it deems fit. Such a surprising consequence, had it been intended by the Appeals Chamber, would have been stated expressly. This is particularly the case here where, unlike in the *Katanga* proceedings, the party bringing the motion is itself the State which must be assumed to have in its possession all the information necessary to show whether or not an investigation is ongoing.

24. The obvious meaning of the *Katanga* Admissibility Decision, rather than saying anything at all about the procedure within an individual application, is that different applications in the same case can lead to different results, each assessed on their own merits. The Appeals Chamber expressly contemplated separate proceedings, citing as an example the Prosecutor's discretion under Article 19(10) of the Statute to seek a review of a previous admissibility decision. A State is similarly permitted to make additional applications concerning admissibility pursuant to Article 19(4) of the Statute.[39] Each of those applications should be governed by the usual rules of pleading and practice unless modified by the Chamber, and the existence of the conditions for inadmissibility evaluated in accordance with that procedure.

[37] ICC-01/09-02/11-153.
[38] *Katanga* Admissibility Decision, paras. 3, 5, 55.
[39] Art. 19(4), ICC Statute.

25. This approach accords with the procedural framework that applies to motions in general. Rule 58(1) of the Rules of Procedure and Evidence prescribes that admissibility challenges "shall be in writing and contain the basis for it." A principle of virtually universal application is that motions of any kind must comprehensively state the grounds thereof and any evidence relied upon. This is no technical rule; it is foundational to ensure an orderly, fair and expeditious proceedings.[40]

26. The Government cannot legitimately claim any special reason for having waited until the Reply to submit information that it now says is critical to the correct determination of its admissibility challenge. As the moving party, it determined the timing of its own Application and should have known whether or not the grounds existed for the motion to be granted. It had three-and-a-half months between the naming of the suspects and the filing of its Application to collect information about ongoing investigations against them. It has now claimed on this Appeal that investigations were ongoing throughout that period.[41] The failure to present any information substantiating such an alleged investigation, in context, suggests internal disputes about the scope of investigations, a deliberate attempt to gain a tactical advantage in these proceedings, or, simply, the absence of any such investigations.

[40] See e.g. Uganda, Civil Procedure Rules, Statutory Instrument 71-1, Order LII – Motions and other applications: Rule 3. Contents of notice: "Every notice of motion shall state in general terms the grounds of the application, and, where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with notice of motion."; Nigeria, Federal high Court (Civil Procedure) Rules 2000, Order 9, A. 4: "Where service of a motion is required by these Rules or directed by the Court or Judge, the motion shall be served together with all affidavit on which the party moving intends to rely"; *The Andreas v. Volkswagen of America, Inc*., 336 F.3d 789, 793 ("The purpose of Rule 7's particularity requirement is to give notice of the basis for the motion to the court and the opposing party so as to avoid prejudice, 'providing that party with a meaningful opportunity to respond and the court with enough information to process the motion correctly'") (citations omitted).

[41] Appeal Brief, para. 57.

(v) The Chamber Assessed the New Information Provided In the Reply With Reasonable Caution, Particularly In Light of the Procedural Context

27. The Government's main submission on appeal is that the Decision is irrational in light of (i) a report from Mr. Muhoro, the Director of Criminal Investigation in Kenya, dated 5 May 2011, stating that Mathew Iteere, the Commissioner of Police, had instructed investigators to "carry out exhaustive investigations relating to the Ocampo six and other high-ranking citizens" and that "the team is currently on the ground conducting the investigations as directed"; and (ii) statements by Mathew Iteere allegedly made to counsel for the Government about the conduct of investigations, and which were included in the body of the Reply.

28. The Chamber would have been perfectly entitled, in light of its clear instruction to the Government, to reject *in limine* any new factual information in the Reply. Both pieces of information presented in the Reply were not only new, they contradicted previous submissions. The Government's previous position, as best as could be determined by reading the Application and its "annexes", was that an investigation had started some time after 14 April 2011 upon instructions given by the Attorney-General to Mr. Iteere. Mr. Muhoro's letter of 5 May 2011 gives a different, although equally ambiguous, account of the genesis and current status of the investigation. He says that after the three suspects had been named by the ICC Prosecutor, "[t]he Commissioner of Police again tasked the team of investigators to carry out exhaustive investigations relating to the Ocampo six and other high ranking citizens…. The team is currently on the ground conducting investigations as directed."[42]

29. The letter, to be clear, does not state when Mr. Iteere "again" instructed Mr. Muhoro to renew his investigations into the defendants. The Government's position on appeal, which was not very clear in the Reply, is that this letter shows that the

[42] ICC-01/09-02/11-91-Anx2, p. 3-4.

suspects in this case had not been excluded from post-election violence investigations up until that date, and that the "again" reflects a reiteration of previous instructions.[43]

30. Neither the victims nor the Prosecution were entitled, in accordance with the procedure of the Court, to comment on this radically new information. No avenue was available, for example, to point out the incongruity of the Director of Criminal Investigation's claim that he had been "again tasked" to carry out investigations into the "Ocampo six", while at the same time indicating that, with one exception, none of the six "have been mentioned previously during the investigations."[44] No opportunity was available to point out, as discussed above, the Government's apparent change of position from its earlier view that the investigation had been authorized by the Attorney-General on 14 April 2011 by way of his letter to Mr. Iteere, which incidentally was copied to Mr. Muhoro. Further, the participants were deprived of any opportunity to comment on the admissibility or weight that should be accorded to the lengthy factual recitation of a conversation between Mr. Iteere and counsel, which supposedly corroborated and supplemented Mr. Muhoro's letter, without any supporting affidavit or documentary foundation whatsoever.

31. The Chamber showed considerable, and perhaps excessive, flexibility in not rejecting *in limine* the Director of Criminal Investigation's letter from its consideration. It was perfectly entitled, especially in the absence of any opportunity to comment thereon by the other participants, to carefully scrutinize its content. The letter did not provide, as the Chamber correctly observed, "any details about the asserted, current investigative steps undertaken," nor did it "show the Chamber any concrete step that has been or is being currently undertaken in this respect."[45] These observations are a true and accurate reflection of the letter, and the Chamber acted reasonably to require that level of specificity given the precise nature of the question

[43] Appeal Brief, para. 57.
[44] ICC-01/09-02/11-91-Anx2, p. 3.
[45] Decision, para. 64.

arising under Article 19: whether there were investigations against the defendants in respect of the specific charges described in the summonses issued against them. The absence of any details about the investigations deprived the Chamber of any capacity to make that assessment.

32. The Chamber properly, or at the very least reasonably, declined to consider counsel's undocumented submissions about his alleged conversation with Mr. Iteere. Counsel is not normally permitted to attest to *sub judice* factual matters, and certainly not to the extent found in the Reply. This places counsel in the position of testifying from the bar, a practice implicitly prohibited under Article 12(3) of the ICC's Code of Professional Conduct for counsel. The Commissioner of Police cannot be said to be bound to the accuracy of the submissions of the Government's counsel which, in turn, undermines the verifiability and reliability of the information. The absence of an affidavit, or even a letter, from the Commissioner of Police is curious given that his hierarchical superior (the Attorney-General) and his subordinate (the Director of Criminal Investigations) have both written about their instructions to or from Mr. Iteere, but Mr. Iteere's own views are nowhere on record. The absence of this information is incongruous considering the Government's previously stated view that the present matter "is plainly of vital importance to the national interest and future of Kenya and its people."[46]

(vi) The Chamber's Reasoning Is Even Stronger Taking the Application, Rather than the Reply, As The Relevant Reference Date

33. The Government infers, relying on paragraph 66 of the Decision, that the Chamber adopted the date of the Reply as the relevant date for determining whether an investigation was underway. This misreads the Decision, which instead assessed the existence of investigations as of the date the Application was filed. This is evident from the Chamber's analysis of the Attorney-General's letter of 14 April 2011:

[46] Application, para. 20.

> This letter is dated 14 April 2011 that is, two weeks after the Government of Kenya lodged its admissibility challenge. Thus, it is clear from this letter than by the time the Government of Kenya filed the Application asserting that it was investigating the case before the Court, there were in fact no *ongoing* investigations.[47]

34. The Chamber was correct, or alternatively acted within its discretion, in assessing the validity of the Application as of the date it was filed. The Chamber's remark at paragraph 66, quoted by the Government to the exclusion of the previous reference,[48] should be read as an *obiter dictum* to the effect that even if the date more favourable to the Government were to be accepted as controlling, it would still have failed to provide an adequate showing of an investigation.

(vii) The Implied Allegations of Bias Or Ulterior Motive Are Unfounded

35. The Government alleges that "[w]hen the proceedings are considered as a whole, it appears as if the Chamber was determined to reject the Government's Admissibility Application as quickly as possible."[49] The Pre-Trial Chamber is said to have "adopted interpretations" of every request and every piece of information "that least favoured the Government of Kenya." In particular, the Pre-Trial Chamber's rulings are said to reflect an "unexpressed"[50] view that "the Government of Kenya was being dishonest" in its factual submissions, and that it deliberately "den[ied] itself" information that would have led to a contrary outcome.[51]

36. The Decision is not based on any imputation of dishonesty whatsoever, but simply the absence of sufficiently detailed information to determine whether an investigation against the defendants on the crimes alleged was ongoing. The Government bore the burden of providing evidence sufficient to prove its motion according to the modalities prescribed by the rules and permitted by the Pre-Trial

[47] Decision, para. 62.
[48] Application, para. 4.
[49] Appeal Brief, para. 58.
[50] *Idem*, para. 8.
[51] *Ibidem*, para. 58.

Chamber. It should have known from the outset, pursuant to Rule 58(2) of the Rules of Procedure and Evidence, that it could not rely on being granted an oral hearing.[52] It is particularly inappropriate to fault the Chamber for failing to give Mr. Iteere an opportunity to testify when the Government itself did not even submit an affidavit from him describing the nature of any investigations into the defendants. It was not for the Chamber, as the Government complains, to clear up "any doubts about the national investigations";[53] it was rather for the Government to establish the factual basis of its motion, at the least, on the balance of probabilities. The Government is, in effect, seeking to shift the blame for its own failure to present meaningful and detailed documentary evidence.

37. The Pre-Trial Chamber was clearly troubled, as was entirely reasonable, by the absence of "detailed"[54] and "concrete" information.[55] The salient issue, it must be recalled, is not whether some investigations are underway, but rather whether investigations into the criminal conduct alleged against the three defendants in the summonses were underway. This is a specific inquiry. The Pre-Trial Chamber's rejection of the vague submissions of the Government does not reflect any predisposition against the Government, or a belief that it is dishonest, but simply reflects the Chamber's normal fact-finding function to directly verify – based on the evidence provided – the threshold condition of Article 19. The Pre-Trial Chamber correctly observed, for example, that:

> it remains unclear why the Government of Kenya has not so far submitted a detailed report on the alleged ongoing investigations. If national proceedings against the three suspects subject to the Court's proceedings are currently underway, then there is no convincing reason to wait until July 2011 to submit the said first report.[56]

[52] The victim-applicants also adopt the views expressed in the Prosecution Response, paras. 66-69.
[53] Appeal Brief, para. 7.
[54] Decision, para. 59
[55] *Idem*, paras. 60, 61, 64
[56] *Ibidem*, para. 59.

38. The Pre-Trial Chamber's insistence on specific information was appropriate and reflects no negative bias against the Government whatsoever. The Government's position would imply that a conclusory pronouncement, even in the form of a pleading from counsel, should be dispositive. This would simply make a mockery of the balanced approach to complementarity in Articles 17 and 19 of the Statute, and deprive the Chamber of its proper fact-finding role.

39. Finally, the Government cannot credibly claim that there was "no rational basis" to be concerned about the lack of specificity in its evidential submissions.[57] Any reasonable trier of fact would have been concerned by the Government's vague, untimely, and contradictory factual submissions about the nature of its investigations.[58] Requiring precise information, rather drawing unsubstantiated inferences, accords with the applicant's burden of proof, the specificity of the threshold under Article 19, and reflected an entirely reasonable and unbiased evaluation of the information presented.

IV. THE CHAMBER COMMITTED NO PROCEDURAL ERROR, AND NONE OF THE ALLEGED ERRORS MATERIALLY AFFECTED THE DECISION

40. All Prosecution submissions in respect of the three procedural errors alleged by the Government are hereby adopted by the victims.[59]

41. The Government had no legitimate basis to believe that it did not need to provide evidence in support of its Application along with the filing. Even if the Chamber could somehow be faulted for not having expressly given the Government a second chance to do so, any prejudice was eliminated by the Chamber's

[57] Appeal Brief, para. 8.
[58] *Case of Musayev and others v. Russia*, "Judgement", 26 July 2007, Application nos. 57941/00, 58699/00, 60403/00, para. 179 (European Court of Human Rights) (finding that non-disclosure or late disclosure by a State concerning its investigations "may give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations").
[59] Prosecution Response, paras. 25, 60-71.

discretionary decision to consider the 900 pages of "annexes" filed three weeks after the filing of the Application.

42. The victims submit, in addition, that the Chamber's disposition of the assistance request[60] had no material affect on the Decision. The Government never claimed that it needed the information sought from the Prosecutor to initiate its investigation; on the contrary, the Government insists that its investigation is underway notwithstanding the absence of this information. The Government cannot claim, on the one hand, that its investigations are already ongoing independent of the information, while on the other claiming that it must have the information to rebut the Chamber's conclusion that no investigations were ongoing. The position might have been different had the Decision been based on the genuineness of the investigations, which it was not.

V. THE CHAMBER COMMITTED NO ERROR OF LAW IN DEFINING "CASE" ACCORDING TO THE SAME-PERSON, SAME-CONDUCT TEST

43. The victims adopt all submissions of the Prosecution concerning the Chamber's application of the same-person, same-conduct test in defining the term "case" as used in Article 19.[61] That test does not compel a prosecution or conviction by national authorities of a particular person; it compels only a genuine investigation or prosecution of that person. The inability to obtain inaccessible information would not undermine the genuineness of a State Party's investigations. The Government's argument that a Prosecutor could deliberately divest a State Party of jurisdiction by withholding unique information is, therefore, unfounded.[62] The remedy for this unlikely scenario is not to curtail the same-conduct, same-person test, but rather to make a proper assessment of genuineness.

[60] Decision, paras. 28-31.
[61] Prosecution Response, paras. 72-103.
[62] Appeal Brief, para. 83.

VI. THE GOVERNMENT'S "UPDATED INFORMATION REPORT" SHOULD BE REJECTED IN LIMINE AS PROCEDURALLY IMPROPER AND SUBSTANTIVELY IRRELEVANT

44. The victims adopt all submissions of the Prosecution [63] concerning the "Updated Investigation Report" filed by the Government on 4 July 2011.[64]

45. The Government is, in effect, asking the Appeals Chamber to depart from its normal function of reviewing decisions at first instance, and to become itself a court of first instance. New evidence is being presented in respect of a new effective date for determining whether investigations are ongoing.

46. This approach is procedurally unsound. It was open to the Government at any time throughout these proceedings to withdraw its Application and file it again (with leave, in accordance with the specific terms of Article 19(4)) on the basis of any new information which it deemed sufficient. It has chosen instead to repeatedly change and alter the grounds of its Application according to its own timetable, regardless of time-limits prescribed by the Chamber or applicable rules. It continues to do so now throughout the appeal, with an even greater negative impact on procedural fairness. The new information is, in substance, a means of obliging to assess the Chamber's decision *de novo*, rather than according to the standards of review and deference that normally apply.

47. These are not mere technicalities or procedural inconveniences. They enhance fairness by ensuring that the losing party has an opportunity to seek appellate review. Changing the grounds of the original decisions destroys the appellate process by turning the Appeals Chamber into a secondary Pre-Trial Chamber, each taking decisions at first instance on separate grounds. This danger is especially acute here where the moving party controls the relevant information. Allowing it to

[63] Prosecution Response, paras. 34-35.
[64] ICC-01/09-02/11-153.

unilaterally alter the grounds of its motion would substantially prejudice other participants, who would be deprived of the ability to make full and meaningful submissions.

48. New factual information is exceptionally permitted at other international tribunals on an appeal from a final trial judgement based upon exigent standards. The exception is justified by the extraordinary cost that would arise from a re-trial on the basis of a relatively small amount of additional evidence. The admissibility proceedings, by contrast, could be re-conducted by the Chamber quickly and with little cost. No prudential consideration, therefore, justifies asking the Appeals Chamber to convert itself into a trier of fact on the basis of this "updated" information. Further, the novelty of this information is directly attributable to the Government's own decisions about the timing of its investigations, the timing of the Application, and the timing and choice of documentary information it provided to the Court.[65] This does not constitute the type of exceptional circumstance in which the Appeals Chamber should deviate from its proper and normal function.

49. The Government has furthermore failed to comply with the formalities for the introduction of additional evidence on appeal, assuming that the relevant provisions apply, either directly or by implication, to interlocutory appeals from pre-trial decisions. Article 83(2) of the ICC Statute authorizes the Appeals Chamber to "itself call evidence" on appeal, suggesting that such evidence is strictly within its control. Regulation 62 of the Regulations of the Court, though falling within the section entitled "Trial", provides expressly that a party seeking to adduce additional evidence on appeal must "file an application" to do so, which includes an

[65] Rule 115 of the ICTY and ICTR Rules requires that such new evidence "was not available at trial." To prove that it was not available, the party is required to show that it made "appropriate use of all mechanisms of protection and compulsion under the Statute and the Rules of the International Tribunal to bring evidence… before the Trial Chamber." *The Prosecutor v. Ntagerura et al.*., ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004, para. 9. Neither Article 83(2) of the ICC Statute nor Regulation 62 of the Regulations of the Court does not prescribe any criteria for hearing additional evidence on appeal, assuming that those provisions are intended to encompass interlocutory appeals.

explanation as to "why the evidence was not adduced before the Trial Chamber." The Government has not offered any explanation as to why it was incapable, as the party controlling the information and making any decisions about the progress of investigations, of presenting a fully transparent account of that information as of 31 March 2011.

50. Even if the "Updated Investigation Report" were to be taken into consideration, no meaningful additional information is provided about any investigation of the three defendants. The information is indicative of investigations in general being carried out, or possibly in respect of other defendants, but no specific information is provided concerning investigations of these defendants for the crimes alleged in the summons.

VII. CONCLUSION AND RELIEF SOUGHT

51. The Chamber committed no reversible errors of fact, procedure or law. The Government's Appeal should be rejected.

Respectfully submitted.

Christopher Gosnell
Counsel

Dated this 19th day of July 2011
At The Hague, The Netherlands