Cour Pénale Internationale

International Criminal Court

Original: English

No. ICC-01/09-02/11 OA
Date: 20 September 2011

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public document

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

Dissenting Opinion of Judge Anita Ušacka

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

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

Counsel for William Samoei Ruto
Mr Joseph Kipchumba Kigen-Katwa
Mr David Hooper
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Mr George Odinga Oraro

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Mr Geoffrey Nice
Mr Rodney Dixon

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REGISTRY

Registrar
Ms Silvana Arbia

This constitutes the Dissenting Opinion of Judge Anita Ušacka to the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", issued on 30 August 2011[1] (hereinafter: "Judgment of the Majority").

1. I disagree with the Majority that the Impugned Decision should be confirmed and therefore dissent from the Judgment of the Appeals Chamber. I consider that Pre-Trial Chamber II (hereinafter: "the Pre-Trial Chamber") erred in the way it conducted the proceedings that led to the "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute"[2] of 30 May 2011 (hereinafter: "Impugned Decision"), and I believe the Impugned Decision should therefore be reversed.

I. PROCEDURAL CONTEXT

2. The procedural history of this appeal is addressed in the Judgment of the Majority; the present focuses on those aspects of the procedural history that are particularly relevant to this Opinion.

3. Kenya ratified the Rome Statute in 2005[3] and the 2007 post-election violence in Kenya is the first subject of a *proprio motu* investigation of the Prosecutor under article 15 of the Statute. In the decision under article 15 (4) of the Statute, authorising the Prosecutor's investigation[4] (hereinafter: "Decision Authorising the Investigation"), the Pre-Trial Chamber held with respect to the admissibility of potential cases that may arise from the Prosecutor's investigation:

> 51. The Chamber emphasizes that defining the scope of potential case(s) at this stage may well serve an effective application of article 18 of the Statute, which is immediately applicable when a Pre-Trial Chamber authorizes the commencement of an investigation. This would generally enable States which "would normally exercise jurisdiction over the crimes" in question to receive

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[1] ICC-01/09-02/11-274.
[2] ICC-01/09-02/11-96.
[3] Information *available at:* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en.
[4] *Situation in the Republic of Kenya* "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", 31 March 2010, ICC-01/09-19-Corr.

> useful information (subject to the limitation provided in article 18(1) of the Statute), as to the parameters of possible case(s) before the Court. In turn, this would facilitate a mutual understanding between the Court and the relevant State(s) as to the scope of the complementarity assessment dictated by article 18(2)-(5) of the Statute.
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> 52. Having said the above, the Chamber considers that, at this stage, the admissibility assessment requires an examination as to whether the relevant State(s) is/are conducting or has/have conducted national proceedings in relation to the groups of persons and the crimes allegedly committed during those incidents, which together would likely form the object of the Court's investigations. [...]"
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> 54. Thus, in the present scenario, it is not necessary to proceed to the second step, which requires an examination of the remaining parts of the provision, since the available information indicates that there is a situation of inactivity with respect to the elements that are likely to shape the potential cases [...].

4. The Pre-Trial Chamber found in this decision, based upon the assessment of the facts before it, that potential cases would be admissible because there is a situation of inactivity in Kenya with respect to the investigation and prosecution of the conduct of senior business and political leaders during the 2007 post-election violence.[5]

5. On 15 December 2010, the Prosecutor disclosed to the public the names of the six Kenyans against whom he had sought summonses to appear on the same day.[6] On 8 March 2011, the Pre-Trial Chamber issued summonses against the three suspects in the present case,[7] as well as against the three suspects in the case *Prosecutor v. Ruto et al.*[8] In those decisions, the Pre-Trial Chamber refrained from deciding on the admissibility of the cases.[9]

6. On 31 March 2011, Kenya filed the "APPLICATION ON BEHALF OF THE GOVERNMENT OF THE REPUBLIC OF KENYA PURSUANT TO ARTICLE 19 OF THE ICC STATUTE"[10] (hereinafter: "Admissibility Challenge"), challenging the admissibility of the present case. In further support of the Admissibility Challenge,

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[5] Decision Authorising the Investigation, paras 185-187.
[6] OTP Press Release of 15 December 2010, ICC-OTP-20101215-PR615, *available at:* http://www.icc-cpi.int/NR/exeres/BA2041D8-3F30-4531-8850-431B5B2F4416.htm.
[7] "Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", ICC-01/09-02/11-1.
[8] "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang", ICC-01/09-01/11-1.
[9] "Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", ICC-01/09-02/11-1, para. 12.
[10] ICC-01/09-02/11-26.

Kenya filed, on 21 April 2011, the "FILING OF ANNEXES OF MATRIALS [sic] TO THE APPLICATION OF THE GOVERNMENT OF KENYA PURSUANT TO ARTICLE 19 OF THE ROME STATUTE"[11] (hereinafter: "Filing of Annexes of 21 April 2011"), appending 22 annexes, and, on 13 May 2011, the "Reply on behalf of the Government of Kenya to the Responses of the Prosecutor, Defence, and OPCV to the Government's Application pursuant to Article 19 of the Rome Statute",[12] which was notified on 16 May 2011 (hereinafter: "Reply of 16 May 2011") and which contained seven annexes.

7. Kenya clarified in its filings before the Pre-Trial Chamber that it was currently reforming its criminal justice system with a view to enabling it fully to investigate and prosecute the post-election violence.[13] Kenya emphasised that it required a few more weeks to present a complete picture, and it put forward a schedule for the additional filings which would have allowed Kenya to show the Court fully its progress in investigating the case within a matter of a few months.[14]

8. To support the Admissibility Challenge, Kenya submitted documentation about the reform of the criminal justice system in the annexes appended to the Filing of Annexes of 21 April 2011 and to the Reply of 16 May 2011.[15] These annexes also provided information about the facts that "national investigations are underway" and that more documentation will be made available over the coming months.[16] Notably, annex 1 to the Filing of Annexes of 21 April 2011 is an order dated 14 April 2011 by the Attorney General of Kenya to the Commissioner of Police to investigate "all other persons against whom there may be allegation of participation in the Post-Elections violence, including the six persons who are the subject of the proceedings currently before the International Criminal Court".[17] Annex 2 to the Reply of 16 May 2011[18] is a Report on the 2007 post-election violence dated 5 May 2011, which contained specific information as to the investigations that were carried out by Kenya. It provided information as to the scope of the investigations and the allegations against

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[11] ICC-01/09-01/11-67.
[12] ICC-01/09-02/11-91 with 7 annexes.
[13] Admissibility Challenge, paras 47-66, 75-78.
[14] Admissibility Challenge, paras 14, 67-74,79; *see* also Reply of 16 May 2011, para. 58.
[15] Filing of Annexes of 21 April 2011.
[16] Filing of Annexes of 21 April 2001, para. 4.
[17] ICC-01/09-02/11-67-Anx1, p. 2.
[18] ICC-01/09-02/11-91-Anx2.

Mr Ruto, relevant to the parallel case *Prosecutor v. Ruto et al.*[19] and indicated that orders had been given, apparently by the authorities in charge, to start investigations against the other five persons under investigation by the Court.[20]

9. In its filings before the Pre-Trial Chamber, Kenya also made legal submissions, notably on the complementarity principle and on the definition of the word "case" in article 17 (1) (a) of the Statute.[21] Kenya submitted that it has the right to submit "staged report[s]" during the admissibility proceedings and that the test that had been developed and applied by other Chambers – the so called "same person/same conduct test" – was too narrow and that a broader test based on the Decision Authorising the Investigation should be applied.

10. In the course of the admissibility proceedings, the Pre-Trial Chamber issued the following main procedural decisions. On 4 April 2011, the Pre-Trial 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" (hereinafter: "Decision of 4 April 2011").[22] On 2 May 2011, Pre-Trial Chamber granted Kenya's request for leave to reply by "Decision under Regulation 24(5) of the Regulations of the Court on the Motion Submitted on Behalf of the Government of Kenya" (hereinafter: "Decision of 2 May 2011").[23] In these procedural decisions, the Pre-Trial Chamber put emphasis on the need to expedite the proceedings.[24]

11. Kenya also filed the "Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(1) and Rule 194"[25](hereinafter: "Request

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[19] It reads: "The investigations have not been completed for various reasons that include unreliable and uncooperative witnesses. Some of the prominent cases include: Nakuru CID Inquiry file No 10/2008, the suspect in this inquiry is Hon William Samoei Ruto – immediate former Minister for Agriculture. The allegations were that, the Minister together with others from the Kalenjin community incited Kalenjin youths to commit violence against non-Kalenjins living in some parts of Rift Valley Province. The matter is still under investigation because there are some areas requiring further corroboration inorder *[sic]* to reach to a fair conclusion.", ICC-01/09-01/11-89-Anx2, p. 2, 3.
[20] It reads under the heading "Way forward": [...] the Commissioner of Police has further directed the team to exhaustively investigate all the allegations. The team is currently on the ground conducting the investigations as directed. It is also reviewing all the previous inquiries and reports to assist in the investigation.", ICC-01/09-01/11-89-Anx2, p. 4.
[21] Admissibility Challenge, paras 23-34; Reply of 16 May 2011, paras 24-27.
[22] ICC-01/09-02/11-40.
[23] ICC-01/09-02/11-81, paras 13-14.
[24] Decision of 4 April 2011, para. 10: "the Chamber, being keen to expedite the proceedings and avoid any unnecessary delays"; *see* also Decision of 2 May 2011, para. 15.
[25] ICC-01/09-58.

for Assistance") on 21 April 2011, and the "Application for an Oral Hearing Pursuant to Rule 58 (2)"[26] (hereinafter: "Request of 18 May 2011") registered on 18 May 2011.

12. In the Impugned Decision, the Pre-Trial Chamber denied Kenya's Request of 18 May 2011 to hold an oral hearing at which Kenya requested it hear from an official in charge of investigations in Kenya.[27] The Pre-Trial Chamber further decided on the definition of a "case" – adopting the "same person/same conduct test".[28] The Pre-Trial Chamber adverted to the lack of information and detail in the documentation provided by Kenya[29] and found that only three out of the 29 annexes presented to the Chamber appeared to be of "some direct relevance".[30] It found that Kenya had not presented evidence of "any concrete step" taken that would show that it is currently investigating the three suspects in the present case.[31] In this context, the Pre-Trial Chamber mentioned Kenya's suggestion to produce additional reports on the development of investigations but did not further reflect upon this request.[32] The Pre-Trial Chamber then decided:

> 70. The Appeals Chamber pointed out that the admissibility of the case must be determined "on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge". Thus, in the absence of information, which substantiates the Government of Kenya's challenge that there are *ongoing* investigations against the three suspects, up until the party filed its Reply, the Chamber considers that there remains a situation of inactivity. [...]

13. On 6 June 2011, Kenya filed the "Appeal of the Government of Kenya against the 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'"[33] and submitted its "Document in Support of the 'Appeal of the Government of Kenya against the 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'"[34] on 20 June.

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[26] ICC-01/09-02/11-92.
[27] The Pre-Trial Chamber also denied to deal with Kenya's Request for Assistance before the issuance of the Impugned Decision.
[28] Impugned Decision, paras 51-57.
[29] Impugned Decision, para. 69.
[30] Impugned Decision, para. 64.
[31] Impugned Decision, para. 68.
[32] Impugned Decision, para. 63.
[33] ICC-01/09-02/11-104.
[34] ICC-01/09-02/11-130; see the corrigendum thereto ICC-01/09-02/11-130-Corr.

II. ERROR IN THE EXERCISE OF THE DISCRETION BY THE PRE-TRIAL CHAMBER

14. On appeal, the Appellant avers *inter alia* that the Pre-Trial Chamber committed errors in the procedure leading up to the Impugned Decision, notably by rejecting the Request of 18 May 2011 for an oral hearing, by not allowing the Appellant to produce additional documentation as to the ongoing investigation in Kenya within a certain period of time, and by not deciding the Request for Assistance before the issuance of the Impugned Decision. One may note that article 19 (3) of the Statute read with rule 59 of the Rules of Procedure and Evidence, and rule 58 (1) and (3) of the Rules of Procedure and Evidence stipulate some minimum requirements relevant to the procedure to be followed. Notably, according to article 19 (3) of the Statute and rules 59 (3) and 58 (3) of the Rules of Procedure and Evidence, those who have referred the situation to the Court, victims, the Prosecutor and the person "who has been surrendered to the Court or who has appeared voluntarily or pursuant to a summons" have a right to submit "observations" within a period of time determined by the Chamber. Apart from these minimum requirements, rule 58 (2) of the Rules of Procedure and Evidence vests broad discretion in the Chamber to regulate the procedure to be followed. It reads as follows:

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

15. The Appeals Chamber reviews discretionary decisions of the Pre-Trial and Trial Chambers with some deference. It is the Appeals Chamber's jurisprudence that it is not conducting a *de novo* review and therefore cannot substitute its discretion with the discretion of the Pre-Trial or Trial Chamber. Rather, the Appeals Chamber will intervene only if the exercise of discretion amounted to an abuse of discretion.[35]

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[35] The Appeals Chamber held in this respect, with reference to the approach taken in other international criminal tribunals: "[T]he Appeals Chamber's functions extend to reviewing the exercise of discretion by the Pre-Trial Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion under article 19 (1) of the Statute to determine admissibility, save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected

Accordingly, the question to be answered is whether the Pre-Trial Chamber erred in the exercise of its discretion. Below, I shall explain why I believe that this is the case.

16. At the outset, one may recall that article 19 of the Statute provides for several procedures relating to the admissibility of a case. Under article 19 (1) of the Statute, a Chamber may determine the admissibility of a case on its own motion. Under article 19 (3) of the Statute, the Prosecutor may seek a ruling of the Chamber regarding admissibility. Under article 19 (2) of the Statute, an admissibility challenge may be brought *inter alia*, as in the proceedings at hand, by a "State which has jurisdiction over the case". In addition, article 19 of the Statute applies also to determinations of the Court's jurisdiction. Proceedings under article 19 of the Statute are therefore not criminal proceedings, but proceedings of their own kind, primarily serving the purpose of resolving conflicts of jurisdiction.

17. Considering that the participants as well as the subject-matter of proceedings under article 19 of the Statute can vary considerably, it appears that the reason why the Chamber has such broad discretion under rule 58 (2) of the Rules of Procedure and Evidence is to enable the Chamber to adapt the procedure to the specific case at hand.

18. A challenge to the admissibility of the case by a State under article 19 (2) (b) of the Statute can only be based "on the ground that it is investigating or prosecuting the case or has investigated or prosecuted." In other words, in proceedings under article 19 (2) (b), the State's right to investigate and prosecute a case itself, which forms the basis of the principle of complementarity, is immediately at issue.

19. Complementarity is, as a commentator said,

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the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position. They identify the conditions justifying appellate interference to be: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion." *See Prosecutor v. Joseph Kony et al.*, "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", 16 September 2009, ICC-02/04-01/05-408, para. 80.

> [...] one of if not the cornerstone of the Rome Statute. It strikes a balance between state sovereignty and an effective and credible ICC. Without it there would have been no agreement.[36]

That complementarity is a core guiding principle for the relationship between States and the Court is confirmed by its prominent place in the Statute (article 1 and Preamble) as well as by the drafting history of the Rome Statute:[37] The "criminal jurisdiction" of the Court and that of States are "complementary" to each other. This means that both the Court and States strive to achieve the goals of the Statute, as reflected in its Preamble, especially that of putting an "end to impunity for the perpetrators" of "the most serious crimes of concern to the international community as a whole".[38] This also means that there must be, to the extent possible, close cooperation and communication between the Court, especially the Office of the Prosecutor, and the State in question.[39] Complementarity reinforces the principle of international law that it is the sovereign right of every State to exercise its criminal jurisdiction; but it also ensures that the Court can step in to give effect to the goals of international criminal justice. While dialogue between the State and the Court is therefore required and desired, it is the Court, and not a third authority, that is the arbiter in case of conflict.[40] According to a commentator, complementarity attempts to reconcile "the imperatives of sovereignty and global justice".[41] When those "imperatives" clash, the judiciary of the Court will have to determine whether a case

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[36] S. A. Williams, "Issues of Admissibility, Article 17", in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court, Observer's Notes, Article by Article*, (NOMOS, Baden-Baden, 1st ed., 1999),p. 392, para. 20 (footnote omitted).

[37] *See Ad Hoc Committee on the Establishment of an International Criminal Court,* Draft Report of the Ad Hoc Committee, 22 August 1995, A/AC.244/CRP.5, at p.1: "The concept of complementarity was described as an essential element in the establishment of an international criminal court."; *see* also *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court,* Summary Records of the 1998 Diplomatic Conference, 11th meeting, 22 June 1998, A/CONF.183/C.1/SR11, para 19; *see* also 12th meeting, 23 June 1998, A/CONF.183/C.1/SR.12, para. 49.

[38] Paras 4 and 5 of the Preamble.

[39] *See* X. Agirre, A. Cassese, R. E. Fife, H. Friman, C. K. Hall, J. T. Holmes, J. Kleffner, H. Olasolo, N. H. Rashid, D. Robinson, E. Wilmshurst, A. Zimmermann, "Informal expert paper: The principle of complementarity in practice", ICC-OTP 2003, p. 5; *see* also J. Kleffner, "Complementarity as a catalyst for compliance", in: J. Kleffner, G. Kor (eds) *Complementary Views on Complementarity* (Asser Press, 2006), p. 82; *see* also the reverse side of this (encouraging States to exercise their jurisdiction) M. Benzing, *The Complementarity Regime of the ICC*, Max Planck Yearbook of United Nations Law, volume 7, 2003, p. 592, at p. 596.

[40] *See* J. T. Holmes, Complementarity: National Courts versus the ICC, in: A. Cassese, P. Gaeta, J. R.W.D. Jones (ed.) *The Rome Statute of the International Criminal Court: A Commentary, Volume 1* (Oxford 2002), p. 672.

[41] G. Simpson, "Politics, Sovereignty, Remembrance" in: D. McGoldrick, P. Rowe, E. Donnelly (eds), The Permanent International Criminal Court. Legal and Policy Issues (Oxford, 2004), p. 61

is admissible on the basis of article 17 (1) (a) and (b) of the Statute. Under this provision, the Court may exercise its jurisdiction in relation to a specific case only when the case a) is either not taken up by national jurisdictions (situation of inactivity) or b) is or was taken up but the national jurisdiction is or was unable or unwilling genuinely to carry out the investigation or prosecution. The Appeals Chamber in the case *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* confirmed recently these two limbs of a decision on admissibility under article 17 (1) (a) and (b) of the Statute.[42]

20. At the root of understanding matters relevant to complementarity is that "the assessment of complementarity is the outcome of an ongoing process".[43] Considering the provisions of article 19, and specifically article 19 (10) of the Statute, it appears that an inadmissible case can become admissible and *vice versa*, as also confirmed by the jurisprudence of the Appeals Chamber.[44] Under article 19 (4) of the Statute, a State may no longer challenge the admissibility of a case based on article 17 (1) (a) and (b) of the Statute once the trial has started. Nevertheless, until that point in time, it is the sovereign right of a State to start the investigation or prosecution of a case and challenge the admissibility of that case before the Court.[45] By so doing and subject to the exceptions stipulated in article 17 of the Statute, the case becomes inadmissible before the Court and the State's jurisdiction prevails over that of the Court.

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[42] "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", 25 September 2009, ICC-01/04-01/07-1497, OA8, para 78.

[43] F. Gioia, "Comments on chapter 3 of Jann Kleffner", J. Kleffner, G. Kor (eds) *Complementary Views on Complementarity* (Asser Press, 2006), p. 109; the author also found the characterization of a "procedural dialogue"; *see* also J. T. Holmes, "Complementarity: National Courts versus the ICC", in: A. Cassese, P. Gaeta, J. R.W.D. Jones (ed.) *The Rome Statute of the International Criminal Court: A Commentary, Volume 1* (Oxford, 2002), p. 683.

[44] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "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", 25 September 2009, ICC-01/04-01/07-1497, OA8, para. 56 reads: "[...] Thus, a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States and *vice versa*. Article 19 (10) of the Statute gives the Prosecutor the right to submit a request for a review of a previous decision that a case is inadmissible if he or she is satisfied "that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17 [...] 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."

[45] Important in this context is also the scheme of State cooperation relevant to the arrest and surrender of persons.

21. In the judgment mentioned above,[46] the Appeals Chamber held 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. 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."[47] This statement of the Appeals Chamber concerned an appeal where the case was admissible during the entire admissibility proceedings. Nevertheless, if a State has the right to start an investigation and prosecution and to bring an admissibility challenge at any time before the start of the trial before the Court, then it stands to reason that the State may also start its investigation and prosecution when the admissibility challenge has already been made. In this context, one may note that article 19 (5) of the Statute provides: "A State [...] shall make a challenge at the earliest opportunity." This is in the interest of the Court and the proper administration of justice because it will avoid potentially lengthy and expensive proceedings before the Court that may have to be stopped at a later stage because the case has become inadmissible. This also supports that a State, acting in good faith,[48] may use the mechanism of a State challenge as early as possible, even though the State has not yet reached the stage of fully investigating or prosecuting a given case and intends to start to do so in the course of the proceedings on the admissibility challenge.

22. The broad discretion given to the Chamber under rule 58 (2) of the Rules of Procedure and Evidence provides the Chamber with the power to adapt the procedure to the needs of the proceedings at hand by balancing all interests at stake, including the sovereign rights of the State. In so doing, the Chamber must also consider that a State may raise a second challenge to the admissibility of a case only with the leave of the Chamber and in "exceptional circumstances", as provided for in article 19 (4) of the Statute. Accordingly, a State making use of its right to challenge the admissibility of a case may expect the Court fully to respect the State's rights when framing the

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[46] *See supra* para. 19.
[47] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "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", 25 September 2009, ICC-01/04-01/07-1497, OA8, para. 56.
[48] The concept of "good faith" is important in public international law and related proceedings; *see* R. Kolb, General Principles of Procedural Law, in: A. Zimmermann, C. Tomuschat, K. Oellers-Frahm (eds), *The Statute of the International Court of Justice, A Commentary*, (Oxford, 2006), p. 830, para. 64.

procedure for determining the admissibility challenge. This procedure must take into account the specific circumstances put forward by the State, including the State's clearly evinced intentions. The understanding that the rights of the State are at the core of decision-making is confirmed by the drafting history of rule 58 of the Rules of Procedure and Evidence and related rules about which a commentator concluded: "The Rules ensure a form of 'due process' for States".[49] Such rules of "due process" for States will develop over time. The Chamber may seek guidance from procedural rules applicable at the Court as well as from other courts where States are applicants in proceedings and sovereignty of States is at issue.[50]

23. The sovereign rights of the State, while important, are however not the only consideration in determining the procedure under rule 58 (2) of the Rules of Procedure and Evidence. Those rights must be balanced with the need to pursue the goals of international criminal justice by assuring the efficacy of the investigation and the prosecution of a case.[51] In addition, the overall interests of justice as well as the interests of victims have to be respected. Finally, the Chamber has to adapt the procedure to the specific issues arising in the case at hand, such as uncertainties as to the legal and factual situation at hand or the fact that proceedings are conducted for the first time. By taking into account those criteria, a procedure needs to be implemented that "best meet[s] the needs of transparency, efficiency, respect for national primacy and urgent action where doubts about national proceedings are raised".[52]

24. Turning to the case at hand, it appears that the Pre-Trial Chamber set the procedure merely according to procedural minimum requirements, as stipulated by rules 58 (3) and 59 (3) of the Rules of Procedure and Evidence. The Pre-Trial Chamber also rejected nearly all requests to add to this procedure, for example by not allowing for an oral hearing or the filing of additional documentation within specified

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[49] J. T. Holmes "Jurisdiction and Admissibility" in: R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence,* (Transnational Publishers, 2001) p. 348.
[50] *See* e.g. C. F. Amerasinghe, *Evidence in International Litigation,* (Brill, 2005) compiling and comparing rules of evidence of several tribunals.
[51] *See* also J. T. Holmes in: R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, (Kluwer Law International, 1999), pp. 74 -75.
[52] *See* J. T. Holmes, Complementarity: National Courts versus the ICC, in: A. Cassese, P. Gaeta, J. R.W.D. Jones (ed.) *The Rome Statute of the International Criminal Court: A Commentary, Volume 1* (Oxford 2002), p. 684.

periods of time after the filing of the Reply of 16 May 2011.[53] Further, the Pre-Trial Chamber treated the Appellant's prayer for an oral hearing[54] in the same way as the Appellant's request for a status conference to discuss the procedure to be put in place according to rule 58 (2) of the Rules of Procedure and Evidence. The Pre-Trial Chamber's suggestion that the Appellant should have appealed the Decision of 4 April 2011 if it wished to object to the manner in which the Pre-Trial Chamber organised the proceedings indicates that the Pre-Trial Chamber did not consider that it was able to add to or adapt the procedure adopted in that decision.[55] Instead, the Pre-Trial Chamber ruled on the Admissibility Challenge within eight weeks of its filing. It appears therefore that the Pre-Trial Chamber did not fully appreciate the scope of its discretionary powers and, in consequence, did not consider that it could take the steps necessary to adapt the admissibility proceedings to the needs of the specific proceedings, not only at the beginning but throughout the admissibility proceedings.

25. The Pre-Trial Chamber did not sufficiently take into account that the proceedings at hand were triggered by the first admissibility challenge of a State and that there were many legal and factual uncertainties.[56] The Pre-Trial Chamber, as well as the Appellant and the Prosecutor, were aware that the definition of the "case" was to be discussed and decided. However, the Chamber did not seek specific submissions on such pivotal matters as the definition of "investigation" and "prosecution", the standard of proof, and the type of evidence that was required to meet the burden, even though the Appellant had requested a hearing on those matters, making the Chamber aware of the need for guidance.[57] In the Impugned Decision, however, the Chamber applied what appear to be a high burden of proof and a demanding definition of "investigation".

26. The Pre-Trial Chamber did not consider whether it should have taken any additional procedural steps in order to shed light on the evidentiary situation. The Appellant indicated that investigations were recently ordered or were ongoing, in the

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[53] *See supra* paras 7, 8.
[54] *See* Request of 18 May 2011.
[55] *See* Impugned Decision, para. 41.
[56] The fact that there are many legal uncertainties with respect to article 17, was also acknowledged by the drafters of the Rome Statute, *see* J. T. Holmes, Complementarity: National Courts versus the ICC, in: A. Cassese, P. Gaeta, J. R.W.D. Jones (ed.) *The Rome Statute of the International Criminal Court: A Commentary, Volume 1* (Oxford, 2002), p. 672.
[57] *See supra*, paras 11, 12.

three annexes that were considered relevant.[58] Rule 58 (2) of the Rules of Procedure and Evidence gives the Chamber power to take all measures necessary, including requesting more information or extending time to allow the State to present additional material. In the specific context of the case at hand, the Pre-Trial Chamber should have properly considered to make use of such powers. In addition, while the other 26 Annexes might not be relevant to the first limb of the admissibility decision, they perhaps were not without relevance to the second limb of the finding on admissibility.

27. While there is no need to provide a definition of "investigation" and "prosecution" in this Dissenting Opinion, a note of caution is necessary in relation to the understanding of the terms "investigation" and "prosecution". The terms used in the various official language versions of the Statute appear to differ in their meaning too, especially with respect to the distinction between investigation and prosecution. This is not surprising, given that the terminology is based on the criminal law traditions of the countries in which the official languages are spoken. There are important differences not only between, for instance, Common Law and Civil Law systems, but also between the various national jurisdictions belonging to the same tradition.[59] In determining whether a State is indeed investigating or prosecuting a case, the Chamber will need to be made aware of and be provided with documentation on the national criminal justice system of the State in question.[60] Any standard and evaluation of evidence in this respect will need to be based upon the principle that States should be treated according to equal or similar standards. In this context, it is also important to mention the difference between "inactivity" as the first limb of admissibility determinations and "unwillingness" or "inability" as its second limb.[61] The drafters of the Statute agreed to establish a high threshold when they drafted the legal and factual requirements for unwillingness and inability in paragraphs 2 and 3 of article 17. The Court should not circumvent this threshold created by unwillingness or

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[58] *See supra* paras 8, 12.
[59] *See* D. Turns, "National Implementation of the Rome Statute", in: D. McGoldrick, P. Rowe, E. Donnelly (eds), *The Permanent International Criminal Court. Legal and Policy Issues* (Oxford, 2004), p. 337, at p. 387, discussing the differences in the national implementation of the Rome Statute based on different legal systems; see also M. Benzing, *The Complementarity Regime of the ICC*, Max Planck Yearbook of United Nations Law, volume 7, 2003, p. 591, at p. 602.
[60] *See* also J. T. Holmes in: R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, (Kluwer Law International, 1999), p. 65, indicating that criminal enforcement agencies in different countries are organized in different ways and that their responsibilities vary.
[61] *See supra* para. 19.

inability by requiring a State to prove e.g. the existence of a full-fledged investigation or prosecution of a case in order to establish that there is no situation of inactivity. It is important to adhere to the spirit of the Statute when giving such interpretations.

28. Returning to the case at hand, it can further be concluded that the Pre-Trial Chamber did not give sufficient weight to the sovereign rights of Kenya in balancing the interests at stake. Specifically, the Pre-Trial Chamber did not take into account that complementarity implies that during the admissibility proceedings Kenya could start with taking investigative steps or prosecuting a case[62] and that the Pre-Trial Chamber has the power to adapt the admissibility proceedings to such changing circumstances. There is nothing in the Appellant's submissions that would indicate that the Appellant did not act in good faith when stating that it intends to conduct the investigations in Kenya. And nothing in the Impugned Decision indicates whether the Pre-Trial Chamber considered that it could facilitate the Appellant by asking for more information or awaiting additional evidence on the start of investigations. Instead, the Pre-Trial Chamber focused merely on the non-existence of an investigation into a "case" in the period between the filing of the Admissibility Challenge and the Reply of 16 May 2011. The Admissibility Challenge was rejected within eight weeks of the date of filing. The period between the issuance of the decision summoning the persons in question and the Impugned Decision did not even amount to three months. The Appellant presented a plan on how it would continue with the investigations. It indicated that it required a maximum of a few months to show additional proof of ongoing investigations. The relevant submissions by the Appellant were merely touched upon by the Pre-Trial Chamber in the Impugned Decision. More importantly though, the Pre-Trial Chamber did not fully consider this matter in light of the fact that, within a short period of time, Kenya would reach the level of an investigation that would satisfy the standards of the Pre-Trial Chamber. Therefore, the Pre-Trial Chamber misapprehended the breadth and impact of the rights of the Appellant during the admissibility proceedings as well as its own powers and obligations, i.e. to consider such factors, under rule 58 (2) of the Rules of Procedure and Evidence.

29. The Pre-Trial Chamber's prevailing consideration was that the proceedings had to be conducted expeditiously. However, the Pre-Trial Chamber did not explain why

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[62] *See supra* paras 20, 21.

this was the case or why the efficacy of proceedings before the Court was at stake. Neither article 19 of the Statute nor rule 58 of the Rules of Procedure and Evidence specifically use the term "expeditious". The criminal proceedings before the Pre-Trial Chamber were, at the time of the admissibility proceedings, at a very early stage. The suspects were not in detention as the Pre-Trial Chamber had issued summonses to appear. Nor can it be said that the suspects' right to be tried without undue delay (article 67 (1) (c) of the Statute) would have been compromised by a decision of the Pre-Trial Chamber to slightly prolong the admissibility proceedings. Finally, as there was no ongoing conflict in Kenya, the impact of the admissibility proceedings on the investigation of the Prosecutor, which is according to article 19 (7) of the Statute suspended during such proceedings, was probably limited. Therefore, it must be concluded that expeditiousness was unduly emphasized in the Pre-Trial Chamber's exercise of discretion and given too much weight, especially in comparison to the Appellant's sovereign right to investigate and prosecute the case itself.

III. CONCLUSION

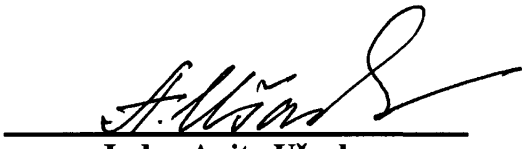
30. In conclusion, I am of the view that in exercising its discretion under rule 58 (2) of the Rules of Procedure and Evidence, the Pre-Trial Chamber did not completely account for the sovereign rights of Kenya and the principle of complementarity. Instead, the Chamber, on the basis of its understanding of what constitutes a 'case' in terms of article 17 (1) (a) of the Statute, gave too much weight to considerations of expeditiousness. Finally, despite the Appellant's requests and submissions, the Pre-Trial Chamber did not give sufficient weight to the fact that it was hearing the first challenge to admissibility brought by a State and that many legal issues had not been previously addressed in the Court's jurisprudence. The Pre-Trial Chamber therefore did not properly balance the various factors mentioned in determining the procedure under rule 58 (2) of the Rules of Procedure and Evidence. This failure led to an abuse of discretion.

31. As it cannot be said how the Pre-Trial Chamber would have decided the Admissibility Challenge, if it had not made this procedural error, the error materially affected the Impugned Decision. I therefore hold that the Impugned Decision should be reversed. In my opinion, the Pre-Trial Chamber should reconsider the Admissibility Challenge and the matters arising from it after conducting the

proceedings in a way that fully balances all relevant interests, as required by the principle of complementarity.

32. There is no need to address in more detail the other errors alleged by the Appellant as the Impugned Decision should be reversed. In addition, if the Pre-Trial Chamber had properly exercised its discretion, it might have reached different conclusions with respect to all or some of the legal and evidentiary issues. According to this Dissenting Opinion therefore, the Pre-Trial Chamber would have had to revisit those matters when reconsidering the Admissibility Challenge.

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



Judge Anita Ušacka

Dated this 20th day of September 2011
At The Hague, The Netherlands