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PRE-TRIAL CHAMBER II

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public Redacted Version

**Prosecution's Application for Leave to Appeal the "Decision on the Prosecutor's
Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru
Muigai Kenyatta and Mohamed Hussein Ali"**

Source: Office of the Prosecutor

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Introduction

1. On 15 December 2010, the Prosecution submitted an application pursuant to Article 58(7) requesting that the Pre-Trial Chamber issue summonses for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali to appear (“Application”).¹ On 8 March 2011, Pre-Trial Chamber II (“Chamber”) issued summonses directing the three persons to appear (“Decision”).²
2. As summarized in the Application, following the Kenyan presidential election in late 2007, prominent leaders of the Orange Democratic Movement (ODM) initiated a policy to attack supporters of the Party of National Unity (PNU), the party of the declared winning candidate. In response, the Application alleged that “prominent PNU members and/or Government of Kenya officials, including the [three Suspects in this case] developed and executed a plan to attack perceived ODM supporters in order to keep the PNU in power”.³ The Application specifically stated that in early January 2008 the Suspects utilized the Kenyan Police Forces that, inter alia, used excessive force to shoot and kill, indiscriminately, civilian protestors in Kisumu and Kibera.⁴ The Suspects also organized retaliatory attacks against civilian supporters of the ODM in Nakuru and Naivasha in late January 2008, during which the Kenyan Police Forces were instructed not to intervene to stop the attackers.⁵
3. Two of the three Suspects in this case held State positions in January 2008: Muthaura was head of the Public Service and Secretary to the Cabinet, and Ali was Commissioner of Police. Kenyatta held various positions within the government before and following the post-election violence, but not at the time of the charged events.

¹ ICC-01/09-31-Conf-Exp and Annexes.

² ICC-01/09-02/11-1.

³ Application, paras.1-5.

⁴ Ibid., para. 6.

⁵ Application, paras.7-8

4. The Decision concluded that the Application sufficiently established an organizational policy of the “Mungiki organization” to commit attacks against civilians. It rejected the Application insofar as it charged the Suspects with crimes arising out of the police-led events in Naivasha and Nakuru as being State agents, could be held accountable only if they acted pursuant to a “State policy by abstention”.⁶ And it rejected the contribution of the police to the crimes in Kisumu and Kibera, again on the ground that the Application failed to plead that those crimes were committed pursuant to a “State policy”.⁷ In this manner, the findings on whether crimes against humanity have been committed have been restricted to events in Naivasha and Nakuru, and further only to those acts that are linked to the crimes committed by the Mungiki. The Prosecution submits that in the instant case, and in accordance with the evidence collected there was not a State policy to commit the crimes. Therefore, the standard adopted could, if not corrected, provide impunity for criminal activity directly perpetrated by the Police or encouraged by its deliberate failure to act.

5. The Prosecution applies for leave to appeal two issues which the Prosecution considers require consideration by the Appeals Chamber. One concerns the construction by the Pre-Trial Chamber of the organizational requirement that must be pleaded and proved to convict a person of crimes against humanity. The other concerns whether forcible circumcision of adult males cannot constitute an act of sexual violence and should be qualified as “other inhumane acts” instead. Both issues require immediate appellate consideration. Because they bear on the criminal charges that the Suspects will be called upon to answer, they must be resolved now, else the Prosecution will be irremediably prevented from pursuing its factual and legal theory of the case. Intervention by the Appeals Chamber on these fundamental issues can guarantee that the proceedings continue on a sound basis that is consistent with the Rome Statute.

⁶ Decision, para. 24.

⁷ Ibid., para.31.

Issues Presented

6. The first issue presents the construction of “State or organizational policy” in Article 7(2)(a) of the Rome Statute. The Chamber decided that State actors who, jointly with other actors, establish a non-State network to commit acts pursuant to an “organizational policy” cannot be charged with crimes against a civilian population through their official action or abstention, unless such intervention is part of a separate State policy. This issue requires the Court to resolve whether Article 7(2)(a) permits the prosecution of persons within a network which includes State actors who act pursuant to an “organizational policy”, but not a “State policy”, when they, but not the State itself, use elements within the state apparatus to commit crimes.

7. The second issue addresses the authority of the Pre-Trial Chamber to reject, without explanation or legal support, the Prosecution’s specific characterisation of criminal activity – here, its characterization that forced circumcision constitutes an act of sexual violence -- and to substitute a general charge of “inhumane act” for the Prosecution’s selected charge.

Submissions

8. An Application for Leave to Appeal does not require the Chamber to agree that its Decision is erroneous. It only requires that the issues meet the threshold standards of importance, and that the Court and the parties will benefit from their resolution now rather than later. Thus, the *sole* question is whether the issues on which leave to appeal is sought meet the criteria set out in Article 82(1)(d).⁸ If they do, the Chamber should authorize appeal notwithstanding its view on the merits. The Prosecution submits that this threshold is met with respect to the issues described above.

⁸ ICC-02/04-01/05-20-US-Exp, para.22.

The First Issue: whether State actors may contribute to and thereby participate in an “organizational policy” that is not an official “State policy” within the meaning of Article 7(2)(a).

(a) The Issue arises out of the Decision

9. Crimes against humanity, as defined in the Rome Statute, are specifically proscribed acts committed as part of a widespread or systematic attack directed against a civilian population. Random acts of violence against civilians do not suffice. The “attack directed against a civilian population” means “a course of conduct involving the multiple commission of acts [...] pursuant to or in furtherance of a State or organizational policy to commit such attack.”
10. The Application alleged an “organizational policy” in which State and non-State actors participated jointly. [REDACTED].⁹ With respect to the Kenyan Police Forces, the Application stated that the representatives of State organs authorized the police “to participate in some attacks and not to intervene in other attacks”.¹⁰
11. The Chamber accepted that with respect to certain alleged events in Nakuru and Naivasha State actors were involved in the commission of crimes against humanity through their failure to intervene.¹¹ The Chamber also recognized that the Police use excessive force in Kisumu and that its raid produced deaths, injuries and rapes in Kibera.¹² However the Chamber considered that the Prosecutor had not pleaded that the conduct of the Police was part of a State policy and accordingly refused to consider the police conduct and the criminal behaviour attributed by the Prosecution to the Suspects stemming from it.¹³ The Chamber instead required that the conduct by State actors be in furtherance of a “State policy” for responsibility for Crimes Against Humanity to arise. In so

⁹ Application, paras. 17, 18 and 59.

¹⁰ Application, para. 18.

¹¹ Decision, para. 24.

¹² Ibid., para. 30.

¹³ Decision, paras. 30-32, and 24.

doing, it rejected that the State actors could participate in a network, as alleged by the Prosecution, that furthered an organizational but not an official State policy to attack civilians.

12. The Chamber rejected the Prosecution's case theory with respect to the structure and composition of the organization and the role played by the Kenyan Police Forces in the crimes charged. It did so as a result of its implicit legal conclusions that persons holding official state positions may not form part of an organization and misuse a portion of the State apparatus to implement a non-State organizational policy within the meaning of Article 7(2)(a). As a consequence, State actors who establish a network jointly with others, abuse their State position, and pursue the network's non-State organizational policy to commit attacks against the civilian population may escape prosecution or punishment: under the Chamber's rationale. The Chamber decided that as a matter of law they cannot be charged with participating in an organizational policy because they are State agents. However, they cannot be properly charged with participating in State policy because the attacks to which their conduct contributes are in furtherance of the policy of the *organization*, not the State.¹⁴ The Prosecution submits that in the instant case, and in accordance with the evidence collected there was not a State policy to commit the crimes. Therefore, the standard adopted provides impunity for all criminal activity directly perpetrated by the Police or encouraged by its deliberate failure to act.

13. This Issue thus concerns the interpretation of the substantive law regarding a crime within the jurisdiction of the Court. It is therefore an appealable issue within the meaning of Article 82(1)(d).¹⁵ It also arises out of the Decision, for the purposes of Article 82(1)(d):¹⁶ it constitutes "an identifiable subject or topic

¹⁴Decision, paras. 20, 30-33. [REDACTED]

¹⁵ The Prosecution will not address the merits of this issue in the present application. However, regardless of the position that the Prosecution will take before the Appeals Chamber if and when leave to appeal is granted, this issue does not concern a mere disagreement between the Chamber and the Prosecution.

¹⁶ The Appeals Chamber has held that "only an issue may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which

requiring a decision for its resolution”, and its resolution is “essential for the determination of matters arising under the judicial cause under examination”.¹⁷

14. The consequences of the Decision reach far beyond this case alone, because it threatens to protect an entire category of persons from criminal charges -- State officers who contribute state machinery to an attack against the civilian population in furtherance of a non-State organizational policy (rather than acting pursuant to an official State policy).

(b) The Issue affects the fairness of the proceedings

15. This Issue also affects the fairness of the proceeding. A request for leave to file an appeal requires a showing that the issue affects either the fair and expeditious conduct of the proceedings *or* the outcome of the trial.¹⁸ This issue affects both.

16. “Fairness” within the terms of Article 82(1)(d) incorporates fairness towards the accused, the victims and the Prosecution. It requires that the procedural and substantive rights and obligations of all participants be respected.¹⁹ In particular, that “means that the Prosecutor must be able to exercise the powers and fulfil the duties listed in Article 54”.²⁰ Fairness has also been linked to the ability of a party to present its case.²¹ The Appeals Chamber has further explained that “[t]he principles of a fair trial are not confined to trial proceedings but extend to pre-trial proceedings”,²² and that “[p]urging the pre-trial process of errors

there is disagreement of a conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. It may be legal or factual or a mixed one.” ICC-01/04-168 OA3, paras.9-10. See also ICC-01/04-01/06-1433OA11, Diss. Op., para.4, specifying that “[a] decision ‘involves’ an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

¹⁷ ICC-01/04-168 OA3, para.9.

¹⁸ ICC-01/05-01/08-75, para. 8; ICC-02/04-112, , para. 17; ICC-01/04-01/06-1417, paras. 17-18; ICC-01/04-01/06-1473, paras. 21-22.

¹⁹ See further ICC-01/04-141, para.48; ICC-02/04-01/05-212, paras.10-11; ICC-02/04-01/05-90, para.24; ICC-01/04-135-tEN, para.38. Fairness has also been held to include respect for the principles of equality and adversarial proceedings.

²⁰ ICC-01/04-135-tEN, paras.38-39.

²¹ ICC-02/04-01/05-90, para.24.

²² *Ibid.*

consequential to unfairness is designed as a safeguard of the integrity of the proceedings.”²³

17. The Prosecution will not be able to present its case if the Chamber adheres to an incorrect legal analysis that forecloses the possibility of holding State actors accountable for these crimes.
18. It is the Prosecution’s prerogative to “proffer charges against suspects”.²⁴ The Decision affects the Prosecution’s powers and duties under Article 54 to define the organization and the manner in which it implemented the crimes on the basis of its investigation of the crimes alleged, so long as its definition is legally permissible. The Chamber’s powers under Article 74(2) and Regulation 55 to amend the legal characterization of the charges do not permit it “extend *proprio motu* the scope of a trial to facts and circumstances not alleged by the Prosecutor”.²⁵ By the same token, it cannot narrow the Prosecution’s charges by excluding facts and circumstances unless the narrowing is required by law. A decision that may wrongfully force the Prosecution to forego a significant component of its case (the participation of State actors in their network’s organizational plan to commit crimes) affects the fairness of the proceedings vis-à-vis the Prosecution.²⁶
19. In addition, the Issue affects the fairness of the proceedings through its “direct and detrimental impact on the Chamber’s ability to correctly assess the evidence”.²⁷ As a result of its construction of “organizational policy”,²⁸ the Chamber enunciates a principle that could exclude the State actors’ contribution to the organizational policy (through actions or omissions).

²³ *Ibid.*

²⁴ ICC-01/04-01/06-2205 OA15OA16, para.94.

²⁵ ICC-01/04-01/06-2205 OA15 OA16, para.94.

²⁶ ICC-01/04-01/07-572 OA6, para. 25: “The Appeals Chamber may justifiably interfere if the findings of the Pre-Trial Chamber are flawed on account of a misdirection on a question of law, a misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the *sub judice* issues.” See also ICC-01/04-01/06-773OA5, para.20; and ICC-01/04-01/06-774OA6, para.30: “[T]he right to a reasoned decision is an element of the right to a fair trial and that only on the basis of a reasoned decision will proper appellate review be possible”.

²⁷ ICC-02/05-01/09-21, p.7.

²⁸ Or as a result of a possible misreading of the Prosecution’s submissions by the Chamber.

(c) The Issue affects the expeditious conduct of the proceedings

20. Chambers disagree as to whether an issue must affect both fairness and expeditiousness. Some Chambers require that both prongs be established.²⁹ Other Chambers have granted leave to appeal based only on fairness, without requiring expeditiousness also to be established.³⁰ The Prosecution submits that if an issue affects fairness, the most critical value protected by the Statute and Rules, it is unnecessary to establish that resolution will also make the proceedings more expeditious; expeditiousness is one of several attributes of fairness overall.³¹ In any event, the Prosecution submits that resolution of the issue on interlocutory appeal ultimately provides an opportunity to resolve a significant legal issue before it affects other trial processes; otherwise, a proceeding infected by error will require later correction. In addition, the findings of the Chamber result in a case theory that is, in the view of the Prosecution, ambiguous and inconsistent with other findings within the same Decision.³² This will further result in extensive and time-consuming litigation.

(d) The Issue affects the outcome of trial

21. The Issue also affects the outcome of the trial. It thus satisfies the second prong of Article 82(1)(d), which requires that the issue affect fairness and expeditiousness *or* the outcome of the trial.

22. According to the Appeals Chamber, under this limb the Chamber “must ponder the possible implications of a given issue being wrongly decided on the outcome of the case.”³³ As a result of the legal conclusions drawn by the Chamber, it is the

²⁹ ICC-01/04-01/06- 2463, para.27.

³⁰ ICC-01/04-01/07-2032, para.28; ICC-01/04-01/07-1859, para.18 ; ICC-01/05-01/08-1169, para.35.

³¹ This reflects the consistent position of the Prosecution: see in particular ICC-01/04-141, paras.49-52; ICC-01/04-103, footnote 5; ICC-01/04-01/06-125, footnote 30. The Prosecution considers that this requirement mirrors the obligation to ensure that proceedings are fair and expeditious (see e.g. Article 64(2)).

³² See paras. 33 and 34 below.

³³ ICC-01/04-168 OA3, para.13. “The exercise involves a forecast of the consequences of such an occurrence.”

charges will not fully and properly reflect the nature of the organization whose policy was furthered by the attacks against civilians, the contribution and role of the Kenyan Police Forces in the crimes charged, and the criminal responsibility of State-affiliated actors who, rather than promoting *State* policy, abused their official authority in furtherance of the unlawful *organizational* policy.

23. The Prosecution finally submits that although the Chamber stated that the above findings are “without prejudice to further submissions in this regard to be considered by the Chamber in the future”,³⁴ future submissions by the Prosecution will be unable to correct the error: first, the Chamber has effectively established a legal standard whereby a State policy is required for the involvement of State actors in Crimes Against Humanity, and second, and as already stated, the evidence collected so far does not show that a state policy leading to the crimes was adopted.

The second issue: whether the Pre-Trial Chamber properly rejected, without explanation, the Application’s characterisation of forced circumcision as acts of sexual violence.

(a) The Issue arises out of the Decision

24. This Issue – the Chamber’s decision that forcible circumcision is not a crime involving sexual violence -- arises out of the Decision. The Prosecution alleged that the forcible circumcision of Luo men constituted acts of sexual violence pursuant to Article 7(l)(g)-6.³⁵ The Chamber concluded that “the acts of forcible circumcision cannot be considered acts of a ‘sexual nature’ [...] but are to be more properly qualified as ‘other inhumane acts’ within the meaning of article 7(l)(k) of the Statute. The Chamber reaches this conclusion in light of the serious injury to

³⁴ Decision, para. 24.

³⁵ Application, pp.17-18 (Count 3).

body that the forcible circumcision causes and in view of its character, similar to other underlying acts constituting crimes against humanity”.³⁶

(b) The Issue affects the fairness of the proceedings

25. Like the first issue, this issue affects the fair and expeditiousness of the proceedings. In particular, it implicates fairness to the Prosecution, which has the prerogative to fashion charges and the obligation specifically to take into account the sexual violence in crimes. By changing the charge, the Chamber summarily discounted the sexual component of the crime without explanation. It also requires the Prosecution to prove different elements (grave suffering or serious injury), thus further intruding on the prerogative of the Prosecution.

26. In the instant case, after carefully examining the acts of forcible circumcision, the Prosecution concluded that the most appropriate legal characterization was the crime against humanity of “other forms of sexual violence”, under Article 7(1)(g) of the Statute. It did so since the acts in question were, in its informed view, “acts of sexual nature”, and in light of its statutory duty under Article 54(1)(b) to “take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children”.

27. The Decision prevents the Prosecution from discharging this duty, and further adopts a legal characterization that does not accurately reflect the nature of the acts of forcible circumcision. In this sense, the Decision does not respect the procedural and substantive rights and obligations of the Prosecution. As the Prosecution will argue before the Appeals Chamber if leave to appeal is granted, it is the Prosecution who has the prerogative to select and to present the charges;³⁷ the Pre-Trial Chamber is not entitled to choose the counts that it believes best reflect the harm suffered by victims and the criminality engaged in by the persons

³⁶ Decision, para. 27.

³⁷ ICC-01/04-01/06-2205 OA15 OA16, para.94.

charged, and summarily to reject others as cumulative or redundant. When the charges are supported by the evidence, as here, the choice of counts to prosecute at trial is a right granted to the Prosecutor, not to the Pre-Trial Chamber.³⁸

28. As an immediate consequence of the Decision, serious charges, for which the Prosecution has presented sufficient evidence to establish “reasonable grounds to believe that the person committed each of the crimes charged”, will not go to the next stages of the proceedings. Neither the Pre-Trial Chamber nor the Trial Chamber will be able to pronounce themselves on the crime against humanity of “other sexual violence”, and as a consequence, any decision in this case will not reflect the full range of crimes committed by the Suspects and the nature and degree of victimization suffered.

(c) The Issue affects the expeditious conduct of the proceedings

29. The issue also affects the expeditiousness of the proceedings, because it could lead to a request to the Trial Chamber to invoke Regulation 55. If the Trial Chamber agreed that it could appropriately consider the evidence as proof of the crime of sexual violence, that preliminary determination would trigger the right of all parties and participants to additional time within which to make submissions and possibly to recall witnesses. Those possibilities will inevitably result in delay of the trial proceedings.

(d) The Issue affects the outcome of trial

30. Finally, the Issue will affect the outcome of the trial. An immediate and irrefutable consequence of the Decision is that, absent a Regulation 55 determination, there will be no adjudication of the charge that forcible circumcision constitutes sexual violence. The impact on the outcome of the trial is

³⁸ Article 42(1).

thus apparent: the Trial Chamber will not be able to pronounce itself on, and the judgment will not reflect, the full range criminality or the responsibility of the Suspects.

Immediate resolution of the Issues by the Appeals Chamber may materially advance the proceedings

31. As stated by the Appeals Chamber, this requirement means that “prompt reference of the issue to the court of appeal” and its “authoritative determination” will help the proceedings “‘move forward’ by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings.”³⁹ The Appeals Chamber has also confirmed that proceedings are “not confined to the proceedings in hand but extends to the proceedings prior and subsequent thereto.”⁴⁰
32. The Pre-Trial Chamber has recognised that leave should be granted when “immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings by providing clarity on the law on proof by inference, particularly at the arrest warrant stage”.⁴¹ This principle applies with unquestionable force to both issues. First, immediate resolution will provide clarity with respect the organizational policy element -- the differences between State policy and other organizational policy, and the criminal responsibility of a state agent who uses state facilities in furtherance of a criminal policy not driven officially by the State itself -- and ensure that the correct principles are applied. This will ensure that the evidence that has been and may in the future be presented to the Chamber is correctly assessed.
33. In addition, an immediate resolution by the Appeals Chamber will provide consistency: internal consistency within this Decision but also with respect to that

³⁹ ICC-01/04-168, paras.14-15,18.

⁴⁰ ICC-01/04-168, para.12; see also para. 17.

⁴¹ ICC-02/05-01/09-21, p.8.

issued in the other case within this same situation.⁴² First, the Chamber's conclusion not to examine the role of the Kenyan Police Forces in the alleged attack against the civilian population in the absence of a pleading of a State policy of abstention,⁴³ is inconsistent with its conclusion with respect to the individual responsibility of Muthaura and Ali, which is based on their instructions to the police. In fact, the Chamber found that both Muthaura⁴⁴ and Ali⁴⁵ used his authority to ensure that the Kenyan Police Forces did not interfere with the commission of the crimes directly perpetrated by the Mungiki". These inconsistencies will certainly result in further litigation between the parties and eventually require a resolution by the Chamber or potentially the Appeals Chamber. All this is a time-intense exercise which will materially affect the expeditious conduct of the proceedings.

34. Second, in the case against Ruto, Kosgey and Sang, this same Chamber found the existence of an organization or network integrated by a melange of pre-existing groups, including Police members.⁴⁶ Although the facts are different, the different facts alone do not account for the different result – that in the other case, this Chamber did not require a separate State policy for the crimes attributed to the police. Hence, clarification is needed from the Appeals Chamber so the case can proceed on safe grounds and avoid that an erroneous understanding of the facts by the Pre-Trial Chamber improperly defines the factual scope of the trial or that the final judgment is reversed on appeal due to a misconception of the organizational policy element.

35. In similar fashion, an immediate resolution of the second issue – the authority of the Pre-Trial Chamber to reject without explanation the characterisation of forcible circumcision as an act of sexual violence -- will materially advance the proceedings by ensuring that the respective roles of Prosecutor and Court are

⁴² ICC-01/09-01/11-01.

⁴³ Decision, paras.24.

⁴⁴ Decision, paras.42,49.

⁴⁵ Decision, para.49.

⁴⁶ ICC-01/09-01/11-01, paras.22-23,25

respected and that the case will progress based on legally and factually justifiable charges.

36. Moreover, the proceedings will benefit if there is certainty from the outset regarding the definition of the offenses. It is preferable to avoid a situation wherein the Trial Chamber may be asked, or may determine on its own that it is necessary, to revisit the charges under Regulation 55, a process that will unavoidably impact on the expeditious conduct of the trial.

Conclusion

37. For the reasons set out above, the Prosecution requests that the Trial Chamber grant leave to appeal pursuant to Article 82(1)(d).



Luis Moreno-Ocampo
Prosecutor

Dated this 14th day of March 2011

At The Hague, The Netherlands