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PRE-TRIAL CHAMBER II

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

SITUATION IN KENYA

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

Public Document

**Response by the Defence of General Mohammed Hussein Ali to the
"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 Mohammed Hussein Ali""**

Source: Defence of General Mohammed Hussein Ali

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

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Other

1. The 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" (Request for Leave to Appeal) should be rejected due to the fact that the Prosecution has failed to establish that either the first or second issue arises from the Decision, that either the first or second issue affect the fairness and expeditiousness of the proceedings or the outcome of the trial, or that an immediate resolution of either issue by the Appeals Chamber is necessary to advance the proceedings.

Procedural History

2. The Defence for General Mohammed Hussein Ali filed its power of attorney with the Registry of the International Criminal Court (ICC) on 20 January 2011 (See Annex).
3. On 8 March 2011, the Honourable Pre-Trial Chamber issued its 'Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali' (the Impugned Decision), in which the Chamber found that there were reasonable grounds to believe that the three suspects had committed crimes under the Rome Statute, and issued a summons for them to appear in accordance with article 58(7) of the Statute.¹
4. On 15 March 2011, Court Management registered the public redacted version of the Prosecution's Request for Leave to Appeal.²
5. The Prosecution sought leave to appeal in relation to firstly, "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",³ and secondly, "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."⁴

¹ ICC-01/09-02/11-01.

² ICC-01/09-02/11-2-RED.

³ Request for Leave to Appeal at para 6.

⁴ Request for Leave to Appeal at para. 7.

6. The Defence was directly not notified of the confidential version of the filing, and was only able to access the public redacted version as of 15 March 2011, which was when the Registry transmitted the public version of the filing to other participants, such as the Office of Public Counsel for the Defence.
7. Under Regulation 65 of the Regulations of the Court, participants may file a response within three days of notification of an application for leave to appeal. Since Regulation 33 of the Regulations of the Court specifies that neither the date of notification nor the date of filing are included in the calculation of a time limit, the deadline for filing a response to the public redacted version of the Prosecution Request for Leave to Appeal is Monday 21 March 2011.

Standing of the Defence

8. In the situation phase, the Pre-Trial Chamber held that there was no legal basis for the Defence to submit observations concerning the Prosecution's application for a summons, because the procedure for obtaining an arrest warrant or summon was inherently *ex parte*, and the text of Article 58 precluded the Chamber from being able to take into account submissions from any participant other than the Prosecutor.⁵ The Defence respectfully submits that this decision can be clearly distinguished from the present situation, for the following reasons.
9. Firstly, in its decision of 11 February 2011, this Pre-Trial Chamber expressly recognised that there was a clear distinction between a decision of the Pre-Trial Chamber to issue a summons or arrest warrant, which is based exclusively on the evidence submitted by the Prosecution, and appellate proceedings concerning a point of law arising from the decision on the summons/arrest warrant; whereas the former are inherently *ex parte*, the latter are not.⁶ Indeed, the Appeals Chamber has expressly

⁵ Kenya Situation, Decision on Application for Leave to Submit Amicus Curiae Observations, ICC-01/09-35, 18 January 2011, at para. 10.

⁶ "The Chamber is of the view that the ratio behind the right of participation granted to victims and amici curiae by the Appeals Chamber cannot be applied to the current proceedings due to the intrinsic difference with respect to the subject-matter and the nature of the two proceedings. In fact, the evaluation to be carried out by the Pre-Trial Chamber in the current proceedings is centred on a determination as to the sufficiency of evidence and material presented by the Prosecutor in establishing reasonable grounds to believe that the conditions provided for in article 58 of the Statute have been met. Conversely, the Appeals Chamber, in the above-mentioned appeal, was called upon to determine whether the Pre-Trial Chamber had applied an incorrect evidentiary standard when assessing the Prosecutor's application under article 58 of the Statute: only the existence of an error in law made in the impugned decision was thus in question before the Appeals Chamber in the interlocutory appeal to which the Applicant refers." Kenya Situation, Decision on the "Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application under Article 58(7)", ICC-01/09-42, 11 February 2011, at para 10.

countenanced the participation of *amicus curiae*, in order to ensure that the Appeals Chamber can reach its decision after having heard views other than those of the Prosecutor.⁷

10. Secondly, the jurisprudence of the ICC demonstrates that a distinction should be made between the situation preceding the issuance of a summons/arrest warrant, and the situation post-dating the Chamber's confirmation of the summons/arrest warrant, which marks the official commencement of the case.
11. For example, in connection with a request for leave to appeal a decision of the Pre-Trial Chamber that the defendant had no standing to submit observations concerning the application for a summons, the Pre-Trial Chamber held that "*until the Chamber has ruled on the Prosecutor's applications for summons to appear*, none of the persons under the Court's investigation is allowed to participate even by way of submitting observations on the said applications" (emphasis added).⁸ This wording implicitly envisages that the defendants could participate in the proceedings after the Chamber has ruled on the Prosecutor's application for the summons to appear.
12. Similarly, in the Mbarushimana case, prior to the suspect's appearance before the ICC, counsel for the suspect filed a challenge to the arrest warrant,⁹ a motion for an order to protect the impartiality of the proceedings,¹⁰ and a request for disclosure of materials.¹¹
13. The Pre-Trial Chamber rendered substantive decisions on all three requests. In the disclosure decision, the Pre-Trial Chamber implicitly rejected the Prosecution's argument that the Defendant had no standing to request disclosure prior to the Defendant's appearance before the Court, as the Chamber ordered the Prosecution to implement the requested disclosure.¹²
14. The Counsel had filed his power of attorney with the Counsel Support Section prior to the initial appearance. The Chamber placed Counsel on the cover page of all

⁷"Turning to the Application itself, the Appeals Chamber noted that the Applicants proposed putting forward another view to that of the Prosecutor who was the only participant to have made submissions before the Appeals Chamber on the merits of the appeal. In light of the issue on appeal, the Appeals Chamber considered it desirable for the proper determination of this appeal to grant the Applicants leave to submit observations." Prosecutor v. Bashir, Reasons for "Decision on the Application of 20 July 2009 for Participation under Rule 103 of the Rules of Procedure and Evidence and on the Application of 24 August 2009 for Leave to Reply", ICC-02/05-01/09-51, 9 November 2009, at para 9.

⁸ Pre-Trial Chamber II, "Decision on a Request for Leave to Appeal", ICC-01/09-43, para. 4.

⁹ Prosecutor v. Mbarushimana, Defence Challenge to the Validity of the Arrest Warrant, ICC-01/04-01/10-32, 10 January 2011.

¹⁰ Defence Request for an Order to Preserve the Impartiality of the Proceedings, ICC-01/04-01/10-14, 18 October 2010.

¹¹ Defence Request for Disclosure, ICC-01/04-01/10-29, 14 December 2010.

¹² Decision on the Defence Request for Disclosure, ICC-01/04-01/10-47, 27 January 2011.

subsequent court decisions and filings, notwithstanding the fact that the defendant had not yet been transferred to the ICC and had not had his initial appearance.¹³

15. If the Pre-Trial Chamber finds that as a technical matter, the Defence have no standing until after the Defendants have first appeared before the Court, then this date would also be the date from which the Defence is officially notified of all court filings in the case record. As such, the deadline for filing a response would not expire until 11 April 2011, and the Defence respectfully requests the Pre-Trial Chamber to defer its decision until after this date.
16. However, in the event that the Pre-Trial Chamber finds that the Defence do not presently have *locus standi* and renders its substantive decision on the Prosecutor's Request for Leave to Appeal before the Defendant's initial appearance, then the Defence respectfully submits that the fact that the Defence have not been able to participate in connection with these issues strongly militates against a finding that granting leave to appeal would be consistent with the fairness of the proceedings, or that an immediate decision of the Appeals Chamber, which would be made without the benefits of the adversarial process, would materially advance the proceedings.

The Criteria for interlocutory appeal under article 82(1)(d) are not fulfilled with respect to the first issue.

The issue does not arise from the decision

17. In order to meet the criteria for interlocutory appeal under article 82(1)(d) of the Statute, the Prosecution must identify a subject or topic, the resolution of which has been necessary for the judicial determination in question.¹⁴
18. The first appellate issue identified by the Prosecution – “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”- does not accurately reflect the judicial findings of the Pre-Trial Chamber, and as such, the issue does not derive from the Impugned Decision.

¹³ See for example, Recommandations adressées à la Chambre d'instruction de la Cour d'Appel de Paris en vertu de l'article 59 du Statut de Rome ICC-01/04-01/10-15. The initial confidential version of this decision was filed on 18 October 2010, which was approximately four months prior to the defendant's transfer to The Hague.

¹⁴ Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC/01/04-168 at para. 9.

19. In the Impugned Decision, the Pre-Trial Chamber states that in order to meet the chapeau requirements of Article 7, the Prosecution must establish the existence of a State or organisational policy. The Pre-Trial Chamber defined the characteristics of an organisation as follows:

- (i) whether the group is under a responsible command, or has an established hierarchy;
- (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population;
- (iii) whether the group has criminal activities against the civilian population as a primary purpose; and
- (iv) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population.¹⁵

20. These criteria were decided upon by the Pre-Trial Chamber in its earlier decision confirming the opening of the Kenya situation,¹⁶ which was not appealed by the Prosecution.

21. At paragraph 22, the Pre-Trial Chamber found that the Mungiki met the aforementioned criteria, and could thus be considered as an organisation. It is clear from the Decision, however, that following the above criteria, the Kenyan police could not be considered to fall within the same organisation as the Mungiki, and that the Prosecution had failed to establish that they were operating as the same organisation. For example, the Kenyan police would have had to have fallen within the hierarchical structure of the Mungiki, and the primary purpose of the police should have been related to criminal activities against the civilian population.

22. The Pre-Trial Chamber's ultimate conclusion that it could not take into consideration the alleged inactivity of the Kenyan police due to the Prosecutor's failure to allege "the existence of a State policy by abstention", should therefore be considered in light of firstly, the Chamber's prior finding that the "attack in Nakuru and Naivasha was carried out pursuant to a policy established to that effect by the Mungiki organization",¹⁷ and secondly, the failure of the Prosecution to plead or establish that the Kenyan police were operating as part of the Mungiki organisation. The same considerations also apply to the Chamber's finding at paragraph 31 that the

¹⁵ Impugned Decision at para 21.

¹⁶ Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya ICC-01/09-19, 31 March 2010 Decision, para. 93.

¹⁷ Impugned Decision at para 23.

Prosecution “failed to provide an accurate factual and legal submission which would require the Chamber to examine whether the acts of violence were part of an attack pursuant to or in furtherance of a State policy.”

23. The Chamber therefore did not exclude the possibility that members of the State apparatus could be charged for crimes against humanity, if they are acting pursuant to a non-State organisational policy; however, such a possibility would only have arisen if the Prosecution had established that the Kenyan police fell within the hierarchical structure and shared the organisation’s primary purpose of criminal activities directed against the civilian population.
24. Accordingly, the Pre-Trial Chamber should reject the Prosecution’s request for leave to appeal in connection with the issue due to the failure of the Prosecution to clearly identify an issue, which arose for judicial determination in the Impugned Decision.

The first issue does not affect the fairness of the proceedings

25. Article 58(1)(a) of the Statute only requires the Chamber to find that there are reasonable grounds to believe that the person has committed ‘a crime’ within the jurisdiction of the Court. The decision of the Chamber that the evidential threshold is met with respect to some alleged crimes but not others has no legal consequences for the validity and scope of the summons.
26. There is also nothing in the Statute or Rules which precludes the Prosecution from including these alleged crimes in its charging document, and relying upon the same body of evidence (or additional evidence) at the confirmation hearing.
27. As the Pre-Trial Chamber clearly states in the Impugned Decision, its findings are “without prejudice to further submissions in this regard to be considered by the Chamber in the future”.¹⁸ In the same manner that a preliminary decision that there are reasonable grounds to believe that the Defendant committed the other alleged crimes, does not prejudice the ability of the Defence to contest the opposite at the confirmation hearing, a preliminary decision that there are not reasonable grounds to believe that the Defendant committed certain crimes, is not prejudicial to the Prosecution’s ability to subsequently charge these alleged crimes at the confirmation hearing.
28. Moreover, as noted above, the Chamber’s finding ultimately turns on an evidential issue: whether the Kenyan police can be considered to be part of the same organisation as the Mungiki, and thereby shared the organisational policy of the Mungiki, or

¹⁸ At para 33. See also para 24.

whether, as an independent State apparatus, its actions were committed in furtherance of a State policy. There is therefore no legal impediment or findings which would prejudice the ability of the Prosecution to obtain confirmation of these charges, if it is able to adduce evidence, which demonstrates that there are reasonable grounds to believe that the Kenyan police can be considered to be part of the same organisation as the Mungiki, and that the police thereby shared the organisational policy of the Mungiki.

29. Thus, in contradistinction to arguments set out in the Prosecution's Request for Leave to Appeal,¹⁹ there are no impediments as concerns the Prosecution's subsequent ability to present its case, nor does the Impugned Decision affect the ability of the Chamber to fairly consider the evidence at the confirmation hearing.

The issue does not affect the expeditiousness of the proceedings

30. The Prosecution has failed to submit any arguments as to why this particular issue affects the expeditiousness, and as such, the Request for Leave to Appeal should be dismissed due to the Prosecution's failure to establish that the issue affects both the fairness and the expeditiousness of the proceedings.²⁰

The issue does not affect the outcome of the trial

31. As submitted above, the Impugned Decision does not affect or prejudice the ability of the Prosecution to seek the confirmation of these particular charges, and to obtain their confirmation if the Prosecution is able to adduce sufficient evidence to establish reasonable grounds that the Defendants committed these particular crimes. The Impugned Decision does not have the legal consequence that the Prosecution can only charge the Kenyan police if the Prosecution is able to demonstrate the existence of a State policy. The Prosecution can charge the Kenyan police for acting pursuant to an

¹⁹ At para 17 and 19.

²⁰“ The Chamber further wishes to clarify that, according to the explicit wording of article 82(l)(d) of the Statute, the first alternative as set out in (a) is twofold, consisting of two cumulative conditions: the issue on which the appeal is sought must significantly affect the proceedings both in terms of fairness and in terms of expeditiousness. Repeated submissions of the Prosecutor alleging that only one element need to be proven cannot alter the established interpretation of this Court.” Prosecutor v. Bemba, Decision on the Prosecutor's Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, ICC-01/05-01/08-532, 18 September 2009, at para 16.

organisational policy if the Prosecution can establish that the Kenyan police adhered to the organisational criteria adumbrated at paragraph 21 of the Impugned Decision.

32. The outcome of the trial will ultimately be determined by the quality of Prosecution evidence on this issue, and not by the legal findings in the Impugned Decision. The Prosecution has thus failed to establish that this issue affects the outcome of the trial.

An immediate resolution of this issue would not advance the proceedings

33. The Prosecution's incorrectly surmises that an appellate decision is necessary to provide clarity in relation to the alleged inconsistency between the findings in the Impugned Decision, and the Chamber's 'Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang'.²¹
34. These two decisions can be easily reconciled: in one case, the Prosecution submitted sufficient evidence to demonstrate that the network comprising State authorities meets the definition of an organisation,²² in the present case, the Prosecution did not. Indeed, the Ruto *et alia* decision clearly demonstrates that there is no legal impediment, which bars the Prosecution from relying upon its theory before the Chamber at the confirmation hearing, provided that they have sufficient evidence to demonstrate that the Kenyan police could be considered to fall within the same organisation as the Mungiki.
35. Moreover, if the matter is referred to the Appeals Chamber, the Appeals Chamber will essentially be rendering a final adjudication on a factual issue, which was litigated at first instance without the benefit of defence submissions. The principle of equality of arms, and the right of the Defence under article 67(1)(i) not to have imposed on him any reversal of the burden of proof, militate against obtaining an appellate adjudication of an issue which was not subjected to the adversarial process at first instance.²³
36. Since there is no legal or factual impediment (apart from a lack of evidence) to the Prosecution presenting these arguments and charges at the confirmation hearing, referring the matter to the Appeals Chamber would not materially advance the

²¹ ICC-01/09-01/11-01

²² ICC-01/09-01/11-01 at para 23.

²³ See Decision of the ECCC, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC71), Decision on Ieng Sary's Appeal Against Co-Investigating Judges' Decision Refusing to Accept the Filing of Ieng Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings', 20 September 2010 at para 16, in which the Pre-Trial Chamber found that the fact that the defence could appeal a decision, was no substitute for being granted a right to be heard at first instance.

proceedings, but would simply divert the resources of the parties from essential pre-confirmation preparation, which would have the ultimate result of retarding the proceedings.

The criteria for interlocutory appeal under article 82(1)(d) are not fulfilled with respect to the second issue.

The issue does not arise from the decision

37. The Chamber's finding that forcible circumcision should be considered as inhumane treatment rather than sexual violence, does not prevent the Prosecution from subsequently charging the Defendants with sexual violence in connection with these acts. The Prosecutor has not filed its charging document at this point in time, and, when it does so, it is not limited to the crimes which formed the basis of the decision to issue a summons.
38. Contrary to the Prosecution assertions, the Impugned Decision does not have the legal consequence of rejecting the Prosecutor's preferred charge and substituting another one: the Pre-Trial Chamber has simply indicated that the Prosecution has thus far failed to adduce reasonable evidence to establish that these particular acts of forcible circumcision satisfy the requirements of article 7(1)(g), but that this standard is met as concerns article 7(1)(k). Indeed, having found that the requirements of article 7(1)(g) were not met, the Chamber was statutorily bound by article 58(1)(a) to consider whether, on the basis of the Prosecution's application and evidence, the acts of forcible circumcision could be considered to be 'a crime within the jurisdiction of the Court'.
39. It falls entirely within the prerogative of the Prosecution as to whether it wishes to maintain its position at the confirmation hearing. As such, the issue as to 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", does not arise from the Impugned Decision.

The issue does not affect the fairness of the proceedings

40. As noted above, the Impugned Decision does not affect the Prosecutor's "prerogative to fashion the charges", ²⁴ and the Prosecutor incorrectly argues that the Impugned Decision requires the Prosecution to prove additional elements, namely, the existence of grave suffering or serious injury.
41. Article 7(1)(g) refers to "any other form of sexual violence of comparable gravity" to rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization. The commentary to article 7(1)(k) (inhumane treatment) in the Elements of the Crimes specifies that the nature and gravity of the act must be similar to any other act referred to in article 7(1) of the Statute, which necessarily includes acts falling under article 7(1)(g). It therefore follows that if the act in question is sufficiently grave to trigger the application of article 7(1)(g), then it would also fulfil the requirements of article 7(1)(k).
42. It is also disingenuous and somewhat concerning for the Prosecution to argue that the Impugned Decision prevents the Prosecution from fulfilling its duties under article 54(1)(b).²⁵ Article 54(1)(b) imposes a mandatory obligation on the Prosecution to "take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, [...] take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children." The words 'in particular' simply highlight these categories of crimes, and do not restrict the Prosecutor's duty of care to these categories of crimes.

The issue does not affect the expeditiousness of the proceedings

43. It is both premature and incorrect for the Prosecution to argue that the expeditiousness of the proceedings will be affected because "it could lead to a request to the Trial Chamber to invoke Regulation 55."²⁶
44. This argument is patently premature as it is based on an assumption that the Pre-Trial Chamber will confirm the charges and the case will proceed to trial. In any case, such a hypothesis directly contradicts the Prosecution's arguments in connection with fairness that its ability to obtain a confirmation of the charges has been prejudiced by the Impugned Decision.

²⁴ Request for Leave to Appeal at para. 25.

²⁵ Request for Leave to Appeal at para. 27.

²⁶ Request for Leave to Appeal, at para 29.

45. The Prosecution's argument also erroneously assumes that Regulation 55 would be more likely to be triggered in the event that the Defendants are charged with inhumane treatment than if they were charged with sexual violence. To the contrary, if the Prosecution has been unable to submit sufficient legal and factual argumentation to convince the Pre-Trial Chamber that the lowest statutory evidential threshold is satisfied with respect to sexual violence, it follows that it would have much greater difficulty in establishing such a case in accordance with the standard of beyond reasonable doubt. Proceeding to trial with charges of sexual violence would thus be more likely to trigger the application of Regulation 55, than if the Prosecution charged with Defendants with inhumane acts.

The issue does not affect the outcome of the trial

46. As submitted at paragraph 40 *supra*, the Impugned Decision does not prevent the Prosecution from charging the Defendants with sexual violence at the confirmation hearing, nor indeed does it preclude the possibility that the Prosecution might be successful in obtaining a confirmation of this charge, if the Prosecution submits sufficient factual and legal authority to establish substantial grounds to believe that the elements of sexual violence are satisfied. The Prosecution's assertion that "absent a Regulation 55 determination, there will be no adjudication of the charge that forcible circumcision constitutes sexual violence",²⁷ is thus incorrect.

An immediate decision of the Appeals Chamber would not materially advance the proceedings

47. The Prosecution is essentially postulating that a decision of the Appeals Chamber concerning firstly, the respective roles of the Prosecution and the Chamber, and secondly, in relation to the definition of sexual violence, would create legal certainty and guidance for the future proceedings.²⁸ This objective is not consistent with the purpose of interlocutory appellate review at the ICC.
48. The ICC Appeals Chamber has consistently refrained from rendering advisory opinions, or adjudicating upon issues which are purely hypothetical or abstract;²⁹ it

²⁷ Request for Leave to Appeal at para. 30.

²⁸ Request for Leave to Appeal, at paras. 35-36.

²⁹ Prosecutor v. Katanga and 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, at para

will only adjudicate upon issues which have materially affected the ultimate outcome of the decision.³⁰

49. The findings in the Impugned Decision concerning whether the particular acts of forcible circumcision met the requirements for sexual violence, did not materially affect the outcome of the decision. The Pre-Trial Chamber was obliged under article 58(1) to issue either an arrest warrant or summons if, on the basis of the information and evidence submitted by the Prosecution, the Chamber was satisfied that there were reasonable grounds to believe that the Defendants committed a crime within the jurisdiction of the Court. The Pre-Trial Chamber ultimately affirmed this, and issued summons against the Defendants. The decision as to whether or not summons should be issued was therefore not impacted by the question as to whether the Pre-Trial Chamber should have concluded that the acts were sexual violence rather than inhumane treatment.
50. Finally, the Defence's submissions set out at paragraph 36 and 37 *supra*, are equally applicable to the second issue.

Relief Sought

51. For the reasons set out above, the Defence respectfully requests the Honourable Pre-Trial Chamber to accept the present response, and reject the Prosecution's Request for Leave to Appeal.
52. In the event that the Pre-Trial Chamber finds that the Defence lacks standing at this point in time, then the Defence respectfully requests the Honourable Pre-Trial Chamber to either defer its decision on the Prosecution Request for Leave to Appeal until after the Defendants have appeared before the Court, or take into consideration the absence of Defence participation in deciding whether the criteria for interlocutory appeal are met.

38, citing Situation in the Democratic Republic of the Congo, "Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 24 December 2007", 30 June 2008, ICC-01/04-503, para. 30; Situation in Darfur, Sudan, "Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 6 December 2007", 18 June 2008, ICC-02/05-138, para. 19; Prosecutor v. Thomas Lubanga Dyilo, "Decision of the Appeals Chamber upon the Registrar's Requests of 5 April 2007", 27 April 2007, ICC-01/04-01/06-873.

³⁰ B. Batros, 'The Judgment on the *Katanga* Admissibility Appeal: Judicial Restraint at the ICC', *Leiden Journal of International Law*, 23 (2010), pp. 343–362, at p. 348.



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Dated this 21 March 2011

At The Hague, The Netherlands