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TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

**SITUATION IN THE REPUBLIC OF KENYA
IN THE CASE OF THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA AND
UHURU MUIGAI KENYATTA**

Public Document

**Victims' Observations on the "Prosecution's application for notice to be given
under Regulation 55(2) with respect to certain crimes charged"**

Source: Victims' Legal Representative

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Court to:

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I. INTRODUCTION

1. At the Status Conference on 12 June 2012, the Prosecution gave notice of its intention to submit to the Trial Chamber, a written application for formal notice to be given to the parties and participants that certain charged crimes may be subject to legal re-characterization.¹ The Trial Chamber thereafter directed the Prosecution to file any such application by 3 July 2012.² The “Prosecution’s application for notice to be given under Regulation 55(2) with respect to certain crimes charged” was consequently filed on 3 July 2012.³

2. By way of the Application, the Prosecution requests that Chamber “give notice, before or on the first day of trial, that the Chamber may employ Regulation 55(1) in the course of the proceedings to re-characterize the acts of (i) forcible circumcision and penile amputation as ‘other forms of sexual violence’ under Article 7(1)(g); and (ii) looting and property destruction as predicate acts underlying the charge of prosecution under Article 7(1)(h), as well as the charge of deportation or forcible transfer under Article 7(1)(d).”⁴

3. The victims hereby file their observations in respect of the Application, pursuant to Regulation 24(2) of the Regulations of the Court.

II. SUBMISSIONS

4. The victims observe, in the first instance, that had the Prosecution adopted the most appropriate course for bringing the issue of legal re-characterisation of crimes before a Chamber, it should have raised it by way of an appeal pursuant to Article 82(1)(d) of the Pre-Trial Chamber’s Confirmation Decision.⁵ That notwithstanding, the victims are of the view that the relief sought by the Application is consistent with the statutory provisions of the Court and, if granted, would enhance the fairness of

¹ ICC-01/09-02/11-T-18-ENG ET WT, 12 June 2012, p. 32, lines 10-19.

² ICC-01/09-02/11-T-18-ENG ET WT, 12 June 2012, p. 37, lines 15 - 16.

³ ICC-01/09-02/11-445, 3 July 2012 (“Application”).

⁴ Application, para. 13.

⁵ “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute,” ICC-01/09-02/11-382-Red, 23 January 2012 (hereafter, “Confirmation Decision”).

the trial, be in the interests of parties and participants and, generally, in the interests of justice.

Forcible circumcision and penile amputation may be characterised as other forms of sexual violence under Article 7(1)(g)

5. The Pre-Trial Chamber held acts of forcible circumcision and penile amputation did not support the Prosecution's charge of "other forms of sexual violence."⁶ In the Pre-Trial Chamber's view, the Prosecution did not demonstrate that the acts were "of a sexual nature," as required by the Elements of Crimes.⁷ As noted above, the victims opine that this issue ought to have been appealed by the Prosecution at the relevant time. However, the victims avail themselves of this opportunity to present their observations on this matter.

6. The category of the crime against humanity of "sexual violence"⁸ could be said to be a "catch-all" category for the prosecution of crimes against humanity for acts of sexual violence which are not specifically enumerated in the Rome Statute.⁹ As per the Elements of Crimes, five requirements must be fulfilled in order to charge this residual category. The first such requirement is that:

The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.¹⁰

⁶ Confirmation Decision, para. 206.

⁷ Confirmation Decision, para. 206.

⁸ See, Article 7(1)(g)-6, Elements of Crimes.

⁹ See, for e.g., the explicit mention in Article 7(1)(g) of the Statute of crimes such as rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization.

¹⁰ Elements of Crimes, Article 7(1)(g)-6,1.

7. This requires the acts in question to include acts of a sexual nature committed against another person or persons, as well as acts causing a person or persons to engage in an act of a sexual nature by threat of force or coercion.¹¹

8. The second requirement is that the gravity threshold for the act be comparable to that for other offences in Article 7, paragraph 1 (g) of the Statute.¹² As such, the requisite gravity threshold would be comparable to that required for acts such as rape, sexual slavery, enforced prostitution, forced pregnancy or enforced sterilization.

9. The third requirement is that the “perpetrator was aware of the factual circumstances that established the gravity of the conduct.”¹³ The fourth and fifth elements require the conduct be committed as part of a widespread or systematic attack directed against a civilian population and that the perpetrator knew that the conduct was part of, or intended it to be part of, such an attack.¹⁴

10. The Pre-Trial Chamber held that “not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence.”¹⁵ Indeed the Pre-Trial Chamber found that the acts were motivated by ethnic prejudice and were “intended to demonstrate the cultural superiority of one tribe over the other.”¹⁶

11. Although the victims agree that the acts were ethnically-motivated,¹⁷ that fact does not, in itself, preclude them from also being acts of a sexual nature. Indeed, and as has been noted by one Kenyan scholar:

The forced circumcisions were not just acts of violence; they must be understood as occurring within the context of Luo feminization. This feminization fits within the context of a biased history that tells Kenya’s story

¹¹ See D.A Lewis, “Unrecognized Victims: Sexual Violence against Men in Conflict Settings under International Law,” *Wisconsin International Law Journal*, Vol.27, n.1, p. 6.

¹² Elements of Crimes, Article 7(1)(g)-6,2.

¹³ Elements of Crimes, Article 7(1)(g)-6,3.

¹⁴ Elements of Crimes, Article 7(1)(g)-6, 4 – 5..

¹⁵ Confirmation Decision, para. 265.

¹⁶ Confirmation Decision, para. 266.

¹⁷ See Wanjiru Kamau-Rutenberg, Ph.D, “Watu Wazima: A gender analysis of forced male circumcisions during Kenya’s post-election violence”, 17 July 2009, who argues that forced circumcision during the post-election violence was used as a inter-ethnic tool and “deployed as a weapon of inter-ethnic war.”

as that of brave Kikuyu warriors, the Mau Mau, who rescued the state from its colonial masters... Other ethnic groups are constructed as weaker, belonging less, having less of a stake in: as feminine. The forced circumcisions represented Kikuyu men declaring that they wield masculine power over the feminized Luo men whose flesh they mutilated.¹⁸

12. The victims are of the view that the Pre-Trial Chamber erred in failing to characterize forced circumcision and penile amputation as “other forms of sexual violence” and a more expansive definition is warranted. Indeed, it may rightly be argued that the Pre-Trial Chamber seeming relied on an outdated conceptualization of sexual violence; namely, that such acts are purely about sex and not about the complex power dynamics at play.

13. The concept of power is an essential defining factor in all forms of sexual violence, whether it is rape or forced circumcision. For example, Dustin Lewis argues that in examining male against male sexual violence in conflict settings (irrespective of the setting), the acts may be motivated less by sexual gratification than by an attempt to exert power and dominance over the victim and potentially the victim’s community.¹⁹

14. This is clearly demonstrated by the instances of forced circumcision and penile amputations in Nakuru and Naivasha in 2007. At present, three of the participating male victims were forcibly circumcised.²⁰ One victim recounts how he was ambushed by twenty men and forcibly circumcised with a broken glass bottle.²¹ All the victims state that the act of forcible circumcision has had a detrimental effect on them physically and psychologically, including on their ability to have sexual intercourse.²²

¹⁸ Wanjiru Kamau-Rutenberg, Ph.D, “Watu Wazima: A gender analysis of forced male circumcisions during Kenya’s post-election violence,” Oxford Transitional Justice Research Working Paper Series 17 July 2009, p. 3.

¹⁹ D.A Lewis, ‘Unrecognized Victims: Sexual Violence Against Men in Conflict Settings under International Law’, *Wisconsin International Law Journal*, Vol.27, n.1, p. 6. Lewis further argues that in examining male-male sexual violence in conflict settings, it becomes crucial to recognise that the perpetrator may gain power and dominance through a complex psychosocial process in which homosexual and/or feminine attributes are imputed to the male victim -- attributes that may obtain a large, even more damaging significance in wartime.

²⁰ a/9249/11, a/9250/11 and a/9251/11.

²¹ a/9251/11.

²² See for example: a/9251/11 who states that he is unable to sustain an erection and suffers from premature ejaculation; a/9250/11 who is unable to have sexual intercourse with his wife; and a/9249/11 who has had to have a pipe fitted in his urethra in order to urinate.

It is clear that the attacks have had a severe effect on the victims' masculinity and sense of manhood.²³

15. As such, the victims maintain that an indicium of the sexual nature of the crimes of forced circumcision and penile amputation is the effect that the crime has had on the sexual lives of the victims in question and the purpose behind why the crime was committed, as well as the element of force. The facts in question confirm that the purpose behind the attacks was sexual in nature, and was not exclusively an attempt to enforce one community's cultural norms upon another community.²⁴

16. Reading Article 7(1)(g) to exclude crimes such as, penile amputations and forced circumcisions would be an unduly narrow interpretation. Indeed, the *ad hoc* Tribunals have taken a more progressive approach to sexual violence in some of their decisions.²⁵ The Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict defined sexual violence as "any violence, physical or psychological, carried out through sexual means or by targeting sexuality," thus including "both physical and psychological attacks directed at a person's sexual characteristics, such as forcing a person to strip naked in public, mutilating a person's genitals, or slicing off a woman's breasts," as well as "situations in which two victims are forced to perform sexual acts on one another or to harm one another in a sexual manner."²⁶

²³ See for example, Sandesh Sivakumaran, *Sexual Violence against Men in Armed Conflict*, 18 *Eur.J.Int'l L.* 274-275 (2007) who argues that "the castration of a man is considered to emasculate him, to deprive him of his power. The castration of a man may also represent the symbolic emasculation of the entire community. This is particularly pronounced in an ethnic conflict where 'the castration of a single man of the ethnically defined enemy is symbolic appropriation of the masculinity of the whole group. Sexual humiliation of a man from another ethnicity is, thus, a proof not only that he is a lesser man, but also that his ethnicity is a lesser ethnicity.'"

²⁴ See for example, B.M Ahlberg, K.Njoroge and P.Olsson, "We Cannot be Led by a Child": Forced Circumcision during the Post-Election Violence in Kenya, Paper to be presented at the Fourth European Conference on African Studies -ECAS 4, 15 – 18 June 2011, in Uppsala, Sweden, who state that "ironically, male circumcision is one of the most important rites of passage... through which manhood, adulthood and related responsibilities are conferred on to the next generation... The point here is that this same notion was reversed and used to humiliate, traumatize, intimidate and hence emasculate the men in question. It was in other words an attack on the symbol of manhood for those communities that do not practice it."

²⁵ See for example, *Prosecutor v. Tadic*, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 206, where the crime of genital violence and mutilation was characterized as a form of sexual violence. D.A Lewis *supra* note 13, states that in the ITCR decision in *Akayesu* "an effect of using the term "invasion" is that rape could encompass acts such as forced masturbation and sexual mutilation, neither of which involved physical penetration."

²⁶ UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Special Rapporteur, "Contemporary Forms of slavery. Systematic rape, sexual slavery and slavery-like practices during armed

17. In light of the foregoing, the victims support the Prosecution's view that "the harm caused by the amputation or disfigurement of one's sexual organs is not merely physical; it also attacks the victim's sexuality."²⁷ Furthermore, this is consistent with and clearly illustrated by the facts relayed by the three participating victims of the crime of forced circumcision.

Looting and destruction of property may be considered as predicate acts for the charge of persecution under Article 7(1)(h)

18. The question of the legal characterisation of the alleged acts of looting and destruction of property was raised for the first time by the victims during the Confirmation of the Charges Hearing ("Confirmation Hearing"). In particular, the Legal Representative submitted that: "[t]he law allows your Honours in a case like this to consider the propriety of [...] the legal characterisation of the facts. The document containing the charges makes [...] certain factual allegations. I mentioned the issue of destruction of property. At the end of the hearing the issue may arise [...] whether or not acts of burning and destruction of property may be charged as a crime against humanity of [...] persecution."²⁸

19. This matter was addressed in detail in the victims' "Written Observations in relation to the Confirmation of Charges Hearing"²⁹ wherein the Pre-Trial Chamber was requested to "exercise its authority under Article 61(7)(c)(ii) and request the Prosecutor to consider amending the legal characterisation of the facts because the evidence submitted [...] provides substantial grounds to believe that acts of destruction, looting, and/or theft of property were committed as underlying acts of the crime against humanity of persecution."³⁰

conflict," Final Report of the Special Rapporteur G.J. McDougall, E/CN.4/Sub.2/1998/13, 22 June 1998, paras 21-22.

²⁷ Application, para. 19.

²⁸ ICC-01/09-02/11-T-4-ENG ET WT, 21 September 2011, page 68, lines 9-19.

²⁹ "Victims' Observations in relation to the Confirmation of Charges Hearing" (Hereafter, "Victims' Observations"), ICC-01/09-02/11-360, 28 October 2011.

³⁰ Victims' Observations, para. 49.

20. In support of the relief sought, the victims submitted that the evidence relied upon by the Prosecution, both in the Amended DCC and at the Confirmation Hearing, as well as the evidence presented by the Defence, established substantial grounds to believe that acts of destruction and looting of private and commercial property were committed as part of the attack against perceived ODM supporters in Naivasha and Nakuru.³¹ In addition, the victims pointed out that at the Confirmation Hearing, the Prosecution “expressly acknowledged that looting and destruction of property were amongst those acts whose execution by the perpetrators severely deprived perceived ODM supporters of their fundamental rights, contrary to international law.”³²

21. Finally, victims also pointed out that the evidence relied upon by the Prosecution at the Confirmation Hearing, as well as in the Amended DCC, established that the acts of destruction and looting of property had been carried out with a discriminatory intent, as required under Article 7(1)(h). Specifically, the victims referred to the Prosecution’s submission at the Confirmation Hearing that “in carrying out the acts of destruction and looting of property, the perpetrators who were mobilized and directed by the suspects, targeted the victims by reason of their identity as a group and did it on political grounds.”³³

22. In the Confirmation Decision, the Pre-Trial Chamber denied the request advanced by the victims, relying, in large measure, on the argument that since “the Prosecutor decided to charge as persecution only the alleged destruction of property causing great mental suffering of a degree which would qualify it as other inhuman acts [...] but not destruction of property and looting as such” granting the victims’ “would mean [going] beyond the factual ambit of the charges in the present case and

³¹ Victims’ Observations, paras 41-45.

³² ICC-01/09-02/11-T-6-ENG ET WT, 23 September 2011, page 4, lines 11-25.

³³ Victims’ Observations, para. 48.

it would be tantamount to requesting the Prosecutor to consider adding a new charge".³⁴

23. In its Application, the Prosecution asserts that "the Pre-Trial Chamber misconstrued and incorrectly circumscribed the Prosecution's allegations regarding looting and property destruction"³⁵ and, as a result of this faulty premise, reached the conclusion that looting and destruction of property could not be considered as underlying acts of persecution under Article 7(1)(h). In particular, the Prosecution submits that "the factual allegations in the DCC regarding [these acts] are [...] not limited to any particular charge" and that "[at the confirmation hearing it] was relying on the evidence of looting and property destruction in support of the prosecution charge".³⁶ Accordingly the Prosecution put forward that the "Trial Chamber should take a different approach and consider the evidence regarding looting and property destruction as predicate acts supporting the prosecution charge".³⁷

24. In the victims' view, the Prosecution's application raises two questions: first, whether the Trial Chamber *is entitled*, in light of the Court's provisions, to grant the Prosecution's request; second, in case of affirmative answer to the first question, whether the Trial Chamber *should* grant the Prosecution's request.

25. In *Lubanga* the Appeals Chamber stated that "article 74(2) of the Statute confines the scope of Regulation 55 to the facts and circumstances described in the charges and any amendments thereto. If applied with such limitation, Regulation 55 is consistent with article 74(2)"³⁸ and defined the term "facts" for this purpose as the "factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by

³⁴ "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute" (Hereafter, "Decision on the Confirmation of Charges"), ICC-01/09-02/11-382-Red, 23 January 2012, paras 284-286.

³⁵ Prosecution's Application, para. 25.

³⁶ Prosecution's Application, para. 25.

³⁷ Prosecution's Application, para. 25.

³⁸ "Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", ICC-01/04-01/06-2205, para. 93.

the Prosecution at the confirmation hearing to support a charge [...] as well as from background or other information that [...] does not support the legal elements of the crime charged”³⁹. Accordingly, the Trial Chamber is entitled to re-characterise only those facts which have been found by the Pre-Trial Chamber to support the legal elements of the crimes charged.

26. In the present case, the Pre-Trial Chamber made the following factual findings with regard to the alleged acts of looting and destruction of property:

- a) “the Chamber finds substantial grounds to believe that the attack in or around Nakuru and Naivasha resulted in [...] destruction of property”⁴⁰;
- b) “in the view of the Chamber the evidence establishes that destruction of homes in residential areas [...] amounted to coercion, which caused the attacked residents to leave their homes and seek shelter in IDP camps”⁴¹;
- c) “the acts of destruction of property were [...] carried out as alleged by the Prosecutor”⁴²;
- d) “the evidence presented [...] reveals that homes and businesses belonging to ODM supporters were destroyed by the Mungiki as part of the attack”⁴³;
- e) “in the view of the Chamber the evidence [...] indicates that the attackers chose their individual targets based upon the assumed political allegiance of particular ethnic groups. [...] the identification of the targeted population was essentially on political grounds”⁴⁴.

27. In light of the Pre-Trial Chamber’s factual findings, it is possible to conclude that acts of destruction of property in the present case constitute “facts described in the charges” as per the definition provided by the Appeals Chamber in *Lubanga*. Therefore, the victims submit that the Trial Chamber is entitled to exercise its power as provided under Regulation 55(1).

28. The next question is whether the Trial Chamber, in the victims’ opinion, should give notice to the parties and participants that in its decision pursuant to Article 74(2) it may re-characterise the acts of looting and destruction of property as

³⁹ *Ibid.*, page 33, fn. 163.

⁴⁰ Decision on the Confirmation of Charges, para. 145.

⁴¹ Decision on the Confirmation of Charges, para. 244.

⁴² Decision on the Confirmation of Charges, para. 279.

⁴³ Decision on the Confirmation of Charges, para. 279.

⁴⁴ Decision on the Confirmation of Charges, para. 144.

underlying acts of the crime against humanity of persecution under Article 7(1)(h) as well as underlying acts of the crime against humanity of forced displacement or forcible transfer under Article 7(1)(d).

29. While the victims are aware that the acts of looting and destruction of property are already encompassed within the existing charges, they, however, submit that there are a number of significant reasons why the Trial Chamber should also include these acts *per se* amongst the underlying acts of persecution.

30. First of all, as rightly submitted by the victims in the *Ruto and Sang* case⁴⁵, it would be contrary to the interests of justice if the accuseds' conviction for the acts of destruction and looting of property was to depend on the satisfaction not only of the specific elements of these acts but also of other elements specific to forced displacement. The victims would run the risk that the accuseds could be acquitted for forced displacement and persecution in respect of the acts of destruction and looting of property, acts whose consequences victims are still suffering from and for which they seek reparations before the Court.

31. Second, the victims concur with the submissions of the victims in the *Ruto and Sang* case that the characterisation of the crimes may be relevant to sentencing.⁴⁶ There is the possibility that the sentence could vary depending on whether the acts of destruction and looting of property were considered by the Trial Chamber as such or only as acts through which the crime of forced displacement was committed.

32. Finally, as the victims submitted in their Observations, "vindicating the victims' right to the truth and justice [...] implicates charges that accurately reflect the true nature and extent of the harm they suffered"⁴⁷. In the present case, practically the totality of the participating victims suffered loss of, or damage to, their property because of their perceived political affiliation and still today have to live with the very tangible consequences of those acts. The inclusion of acts of destruction

⁴⁵ "Submissions of the Victims' Representative on Regulation 55 and Article 25(3)", ICC-01/09-01/11-436, 4 July 2012, para. 34.

⁴⁶ ICC-01/09-01/11-436, para. 37.

⁴⁷ Victims' Observations, para. 39.

and looting of property *per se* as separate acts of persecution would allow these persons to feel and to know that the trial taking place in The Hague is about what happened to them. This would represent a significant contribution to the fulfillment of the victims' right to justice.

III. CONCLUSION AND RELIEF

33. The victims support the Prosecution's assertion that the crimes of forced circumcision and penile amputation are inherently sexual in nature and therefore requests that the Trial Chamber consider characterising these acts as forms of sexual violence under Article 7(1)(g).

34. In addition, the victims join the Prosecution's application and requests that the Trial Chamber, prior to or at the beginning of the trial, give notice pursuant to Regulation 55(2) that there is the possibility that in the decision under Article 74(2), it may re-characterise the acts of looting and destruction of property as underlying acts of persecution under Article 7(1)(h), as well as underlying acts of forced displacement or forcible transfer under Article 7(1)(d).

Respectfully submitted,



Morris Anyah

Victims' Legal Representative

Dated this 24th day of July 2012
At The Hague, The Netherlands.