**Cour Pénale Internationale**

**International Criminal Court**

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Date: **1 April 2011**

**PRE-TRIAL CHAMBER II**

**Before:** **Judge Ekaterina Trendafilova, Single Judge**

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

**Public Document**

**Decision on 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'"**

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

**The Office of the Prosecutor**
Luis Moreno-Ocampo
Fatou Bensouda

**Counsel for the Defence**
Karim A. A. Khan
Kennedy Ogetto
Steven Kay
Gillian Higgins
Evans Monari
John Philpot
Gershom Otachi Bw'omanwa

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**

**The Office of Public Counsel for the Defence**

**States Representatives**

**Amicus Curiae**

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Silvana Arbia, Registrar
Didier Preira, Deputy-Registrar

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

**Judge Ekaterina Trendafilova**, acting as Single Judge on behalf of Pre-Trial Chamber II (the "Chamber") of the International Criminal Court (the "Court")[1] renders this decision on 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'" (the "Prosecutor's Request").[2]

1. On 15 December 2010, the Prosecutor submitted the "Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali" requesting the Chamber to issue summonses to appear for the persons concerned (the "Prosecutor's Application"), together with a number of annexes attached thereto.[3]

2. On 8 March 2011, the Chamber issued its decision on the Prosecutor's Application, whereby the Chamber, by majority, decided to summon the suspects to appear before the Court, being satisfied that there were reasonable grounds to believe that the suspects were responsible for crimes against humanity within the jurisdiction of the Court and that summonses were sufficient to ensure the persons' appearance (the "8 March 2011 Decision").[4]

3. On 14 March 2011, the Prosecutor filed his Request, whereby he requested the Chamber to grant him leave to appeal the 8 March 2011 Decision on the following issues: (i) "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)" (the "First Issue"); and (ii) "whether the Pre-Trial Chamber properly rejected, without explanation, the Application's characterization of forced circumcision as acts of sexual violence" (the "Second Issue").

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[1] Pre-Trial Chamber II, "Decision Designating a Single Judge", ICC-01/09-02/11-9.
[2] ICC-01/09-02/11-2-Conf.
[3] ICC-01/09-30-Conf-Exp and ICC-01/09-31-Conf-Exp.
[4] Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", ICC-01/09-02/11-01.

4. On 21 March 2011, the Defence for Mohammed Hussein Ali filed its response to the Prosecutor's Request, whereby it requested the Chamber to reject it in its entirety.[5]

5. The Single Judge notes article 82(1)(d) of the Rome Statute (the "Statute").

6. The Single Judge, being mindful of the exceptional character of the remedy of the interlocutory appeal, recalls that for leave to be granted, the following specific requirements must be met:

(a) the decision involves an "issue" that would significantly affect (i) *both* the fair and expeditious conduct of the proceedings (ii) or the outcome of the trial; and

(b) in the opinion of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

7. According to the established jurisprudence of this Court,[6] an "issue" is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or 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. Concerning the other requirements set out in (a) and (b) above, the Single Judge recalls that they are cumulative. Failure in demonstrating that one of the requirements in (a) and (b) is

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[5] ICC-01/09-02/11-12.

[6] See the interpretative findings of the Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", ICC-01/04-168, paras 9-14; Pre-Trial Chamber II, "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, paras 14-16; see also more recently, Pre-Trial Chamber I, "Decision on the 'Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges'", ICC-02/05-02/09-267, pp. 5-6; Trial Chamber III, "Decision on the prosecution and defence applications for leave to appeal the 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence'", ICC-01/05-01/08-1169, paras 23-25; Trial Chamber II, "Décision relative à la Demande d'autorisation d'interjeter appel contre la Décision sur le 'Protocole régissant les enquêtes concernant les témoins bénéficiant de mesures de protection 'présentée par le Procureur'", ICC-01/04-01/07-2375, paras 3-4; Trial Chamber I, "Decision on the prosecution request for leave to appeal the 'Decision on intermediaries'", ICC-01/04-01/06-2463, paras 5-7; Pre-Trial Chamber II, "Decision on a Request for Leave to Appeal", ICC-01/09-43.

fulfilled makes it unnecessary for the Single Judge to address the remaining requirements under article 82(1)(d) of the Statute.

**The First Issue**

8. As already noted, the First Issue presented by the Prosecutor reads as follows: "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)".

9. The Single Judge is of the view that the Prosecutor's submissions in relation to the First Issue touch upon several aspects of the 8 March 2011 Decision, and that discrete examination is required to establish whether the criteria under article 82(1)(d) are met. The Single Judge notes with concern that the Prosecutor has not presented a clear line of argument in support of the First Issue, and has, in several respects, misinterpreted the Decision.

10. Taking due account of the Prosecutor's arguments as well as the different judicial determinations made by the Chamber in its 8 March 2011 Decision, the Single Judge deems it necessary to proceed first with the assessment as to whether the requirements under article 82(1)(d) are fulfilled with respect to the findings made on the events that took place in Kisumu and Kibera. The same examination with regard to the findings of the Chamber on the crimes committed in Nakuru and Naivasha will be conducted thereafter.

*The First Issue with respect to the findings made by the Chamber on the events in Kisumu and Kibera*

11. The Prosecutor asserts that the reason for which the Chamber declined to issue summonses to appear for the three suspects with respect to the events taking place in Kisumu and Kibera was the Prosecutor's failure to plead that the conduct of the

Police was part of a State policy.[7] In so doing, the Prosecutor ignores the Chamber's explicit finding that "the material presented by the Prosecutor [did] not provide reasonable grounds to believe that the events which took place in Kisumu and/or Kibera [could] be attributed to Muthaura, Kenyatta and/or Ali under any mode of liability embodied in article 25(3) of the Statute".[8]

12. It was thus the lack of evidence providing reasonable grounds to attribute to the suspects the events in Kisumu and Kibera that warranted the decision of the Chamber not to include these events in the summonses to appear, which were thus issued only for the crimes committed in Nakuru and Naivasha.

13. Clearly, should the reason for excluding the events of Kisumu and Kibera have been the one alleged by the Prosecutor, *i.e.* the interpretation of the contextual elements of the crimes against humanity, no issue of attribution of those events – in the sense of *imputatio facti* to the suspects – would have arisen at all. In the absence of reasonable grounds to attribute these events to the suspects, the Chamber consequently refrained from proceeding to the analysis and legal qualification of the events which occurred as well as from an assessment as to whether the contextual elements for the events to qualify as crimes against humanity pursuant to the Statute were fulfilled.

14. Therefore, the "issue" identified by the Prosecutor in his submissions with regard to the events in Kisumu and Kibera does not arise from the judicial determinations made by the Chamber in the 8 March 2011 Decision. Accordingly, the request for leave to appeal the determination made by the Chamber with respect to the events which occurred in Kisumu and Kibera must be rejected.

[7] Prosecutor's Request, paras 4 and 11.
[8] 8 March 2011 Decision, para. 32.

*The First Issue with respect to the findings made by the Chamber on the crimes occurred in Nakuru and Naivasha*

15. Turning to the allegations made by the Prosecutor in relation to the findings of the Chamber on the crimes committed in Nakuru and Naivasha, the Single Judge is of the view that the arguments put forward by the Prosecutor in support of his Request are flawed in several respects.

16. In particular, the Prosecutor alleges that the First Issue arises out of the 8 March 2011 Decision since "the Chamber decided that as a matter of law [State actors] cannot be charged with participating in an organizational policy because they are State agents" but that "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".[9] As a consequence, according to the Prosecutor, the 8 March 2011 Decision "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 policy (rather than acting pursuant to an official State policy)".[10]

17. As clarified in the following paragraphs, the Single Judge is of the view that these arguments arise from a misconception of the provisions of the Statute as well as from an erroneous interpretation of the judicial determinations made by the Chamber in the 8 March 2011 Decision. For these reasons, the Single Judge is not satisfied that the First Issue arises out of the 8 March 2011 Decision also with respect to the findings on the contextual elements of the crimes committed in Nakuru and Naivasha.

18. Firstly, the Single Judge recalls that, under the Statute, a person cannot be charged with establishing, participating in or contributing to a *policy* but can only be charged with the *crimes* committed *in the context of* a widespread and systematic

[9] Prosecutor's Request, para. 12.
[10] Prosecutor's Request, para. 14.

attack against the civilian population carried out pursuant to or in furtherance of a State or organizational policy. In this sense, for a person to be considered responsible for crimes against humanity under the Statute, it is not necessary that the policy pursuant to which the attack was carried out be attributable to that person; it is necessary only that the person committed or contributed to the commission of a crime *in the knowledge* that his or her criminal conduct was part of a widespread or systematic attack against a civilian population in furtherance of a State or organizational policy.[11] Therefore, as a matter of law, the concerns raised by the Prosecutor with respect to the prejudice allegedly caused by the 8 March 2011 Decision have no grounds in the statutory documents of the Court.

19. Secondly, the arguments of the Prosecutor completely disregard the findings of the Chamber that there were reasonable grounds to believe that Muthaura and Ali were responsible for the crimes committed in the context of a widespread and systematic attack against the civilian population carried out pursuant to the organizational policy of the Mungiki. The Chamber indeed found that both Muthaura and Ali – pursuant to different modes of liability – contributed to the commission of the crimes in Nakuru and Naivasha, using their authority over the Kenyan Police Forces and thus by virtue of their position within the State apparatus. Summonses to appear were accordingly issued for both suspects.[12] Therefore it is clear that no issue of impunity as presented by the Prosecutor could arise from the 8 March 2011 Decision in relation to State officers that utilized the State machinery for the commission of crimes against humanity committed in the context of an attack conducted pursuant to a non-State organizational policy.

20. Consequently, the "issue" identified by the Prosecutor in his submissions with regard to the events in Nakuru and Naivasha does not arise from the judicial

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[11] See the last element of each crime against humanity as described in article 7 of the Elements of Crimes. Furthermore, as specified by the same Elements of Crimes, this element "should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization" (Elements of Crimes, Introduction to Article 7, para. 2.).

[12] 8 March 2011 Decision, paras 42 and 49.

determinations made by the Chamber in the 8 March 2011 Decision, within the meaning of article 82(1)(d) of the Statute as consistently interpreted by the jurisprudence of the Court recalled in paragraph 7 above. Accordingly, the request for leave to appeal the determination made by the Chamber with respect to those events must be rejected.

21. Nonetheless, although it is not necessary to address any of the other requirements under article 82(1)(d) of the Statute, the Single Judge, for the sake of providing further clarity, will elaborate on the reasons why in any case the First Issue would not affect either the fairness of the proceedings or the outcome of the trial with respect to the findings on the crimes committed in Nakuru and Naivasha.

22. The Prosecutor alleges that the First Issue affects the fairness of the proceedings since he "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".[13] A similar argument is used by the Prosecutor in order to substantiate that the issue affects the outcome of the trial. To prove the latter requirement the Prosecutor asserts that "the Chamber has effectively established a legal standard whereby a State policy is required for the involvement of State actors in Crimes against humanity".[14]

23. Firstly, as already stated, such assertions do not withstand the barest scrutiny in the context of the 8 March 2011 Decision, wherein Muthaura and Ali were found to be responsible, to the requisite threshold, for the crimes against humanity committed in Nakuru and Naivasha pursuant to the organizational policy of the Mungiki.

24. Secondly, the Single Judge underlines that the findings made with respect to the composition of the organization to which the policy to carry out the attack in Nakuru and Naivasha was attributed are without prejudice for the Prosecutor to allege, in the charges for which he will seek confirmation under article 61 of the

[13] Prosecutor's Request, para. 17.
[14] Prosecutor's Request, para. 23.

Statute, a different structure and composition of the organization than that found by the Chamber in the 8 March 2011 Decision. It will thus be on the basis of the evidence presented for the purposes of the confirmation hearing that the Chamber will assess whether the Prosecutor will satisfactorily substantiate his legal and factual allegations according to the evidentiary standard required by article 61(7) of the Statute.

25. Accordingly, the Single Judge is not persuaded by the arguments put forward by the Prosecutor to demonstrate that the First Issue affects the fairness of the proceedings currently before the Chamber or the outcome of the related trial.

26. In view of the above, the Single Judge is not satisfied that the First Issue presented by the Prosecutor arises out the 8 March 2011 Decision and, in any case, that it would affect either the fairness of the proceedings or the outcome of the trial. Accordingly, it is unnecessary for the Single Judge to address the remaining requirements under article 82(1)(d) of the Statute and leave to appeal the 8 March 2011 Decision for the First Issue must be rejected.

**The Second Issue**

27. The Second Issue reads as follows: "whether the Pre-Trial Chamber properly rejected, without explanation, the Application's characterization of forced circumcision as acts of sexual violence".

28. In the 8 March 2011 Decision, the Chamber found that the acts of forcible circumcision alleged by the Prosecutor were to be properly qualified as acts constituting "other inhumane acts" within the meaning of article 7(1)(k) of the Statute as opposed to "other forms of sexual violence" pursuant to article 7(1)(g) of the Statute as asserted by the Prosecutor.[15]

[15] 8 March 2011 Decision, para. 27.

29. Having reviewed the Prosecutor's Request together with the reasoning and the findings made by the Chamber in the 8 March 2011 Decision, the Single Judge is of the view that the Second Issue does not affect either the fairness and the expeditiousness of the proceedings or the outcome of the trial as alleged by the Prosecutor for the reasons elaborated below.

30. The Prosecutor alleges that the Second Issue affects the fairness of the proceedings as well as the outcome of the trial essentially because the findings in question would: (i) infringe on his prerogative to fashion the charges; (ii) require him to prove additional elements, namely the existence of grave suffering or serious injury; and (iii) prevent any adjudication of the charge that forced circumcision constitutes sexual violence.[16] Furthermore, according to the Prosecutor's assertion, the Second Issue affects the expeditious conduct of the proceedings, since it "could lead to a request to the Trial Chamber to invoke Regulation 55" of the Regulations of the Court.[17]

31. The Single Judge notes that the findings made by the Chamber with respect to the appropriate characterization of the acts of forcible circumcision as "inhuman acts" were grounded on the evidence and the information submitted to the Chamber for the purposes of the Prosecutor's Application under article 58. This finding does not preclude the Prosecutor from charging the suspects with acts of forcible circumcision as "other forms of sexual violence", as it does not preclude the Chamber from accepting the Prosecutor's allegation to that effect, if supported by sufficient evidence to meet the evidentiary standard as required by article 61(7) of the Statute. The Single Judge is thus not persuaded by the above-mentioned arguments put forward by the Prosecutor that are all grounded on an alleged prejudice that the relevant finding in the 8 March 2011 Decision would cause in the context of the following proceedings leading to the hearing on the confirmation of charges.

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[16] Prosecutor's Request, paras. 25 and 30.
[17] Prosecutor's Request, para. 29.

32. For this reason, the Single Judge is of the view that the Second Issue does not fulfil any of the requirements recalled under (a) of paragraph 6 above. Accordingly, it is unnecessary for the Single Judge to address the remaining requirements under article 82(1)(d) of the Statute and leave to appeal the 8 March 2011 Decision for the Second Issue must be rejected as well.

**FOR THESE REASONS, THE SINGLE JUDGE HEREBY**

**REJECTS** the Prosecutor's Request for Leave to Appeal.

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

**Judge Ekaterina Trendafilova**
**Single Judge**

Dated this Wednesday, 1 April 2011
At The Hague, The Netherlands