

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding
Judge Robert Fremr
Judge Geoffrey Henderson

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. UHURU MUIGAI KENYATTA***

**PUBLIC
With CONFIDENTIAL ANNEX**

**Defence Response to the 'Prosecution submissions
on the *ne bis in idem* principle' (ICC-01/09-02/1-899)**

Source: Defence for Uhuru Muigai Kenyatta

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

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I. INTRODUCTION

1. The Defence for Uhuru Muigai Kenyatta ('Defence') hereby responds to the 'Prosecution submissions on the *ne bis in idem* principle' ('Prosecution Submissions').¹ The Annex is filed confidentially as it contains information that has been so designated.
2. The Prosecution was formally granted permission to open an investigation into Kenya's 2007-2008 post-election violence on 31 March 2010.²
3. Mr Kenyatta has been subject to a summons since 8 March 2011.³
4. The Pre-Trial Chamber, by majority, confirmed the charges against Mr Kenyatta on 23 January 2012.⁴ The evidence underlying those charges is now known to be false as conceded by the Prosecution in its decision to abandon Witness 4,⁵ and in its 'Notification of the removal of a witness from the Prosecution's witness list and application for an adjournment of the provisional trial date.'⁶
5. Since confirmation, the Prosecution has sought to strengthen its case through further investigations, which included putting the false evidence relied on by the Pre-Trial Chamber to those it was interviewing (*see the example annexed hereto*).⁷
6. As a consequence of the Prosecution's disproportionate post-confirmation investigations and disclosure regime, the trial has been

¹ ICC-01/09-02/11-899.

² ICC-01/09-19.

³ ICC-01/09-02/11-01.

⁴ ICC-01/09-02/11-382.

⁵ *See the Defence's previous analysis at* ICC-01/09-02/11-878, para. 4, footnotes 6-8.

⁶ ICC-01/09-02/11-875. KEN-OTP-0123-0247 at 0265, line 651: 'OK. So instead of all that, then you can just move it. I was not there.'

⁷ *See* KEN-OTP-0074-0903 annexed hereto. In particular at 0917 and 0919.

repeatedly delayed to afford the Defence time to prepare in accordance with Article 67 of the Statute.⁸

7. On 4 December 2013, Witness 12 admitted that he had been lying.⁹
8. On 20 December 2013, the Prosecution sought a three-month adjournment in order to undertake further investigations in an effort to replace its case.
9. On 31 January 2014, the Prosecution abandoned its previous request, conceding that its proposed investigations had 'not yielded evidence upon which the Prosecution intends to rely,'¹⁰ and requested an indefinite adjournment pending the determination of its application for a finding of non-compliance against the Government of Kenya.¹¹
10. On 5 February 2014, at the Status Conference held on the date previously fixed for trial, the Prosecution conceded that it did not consider that any information requested has 'any reasonable prospect of leading to evidence which could in combination with the existing evidence persuade a court beyond doubt of Mr Kenyatta's guilt.'¹²
11. In the circumstances, the Defence submits that the proceedings against Mr Kenyatta must be terminated and that he is entitled to the full and final determination of the charges against him. The Accused must be formally acquitted in a decision of the Trial Chamber under the *lex generalis* of Article 64(6)(f) and protected from further trial before the Court with respect to the alleged conduct that has formed the basis of

⁸ ICC-01/09-02/11-451, ICC-01/09-02/11-677, ICC-01/09-02/11-763, ICC-01/09-02/11-847, and ICC-01/09-02/11-886.

⁹ KEN-OTP-0123-0247 at 0265, line 651.

¹⁰ ICC-01/09-02/11-892, para. 9.

¹¹ ICC-01/09-02/11-892, para. 29.

¹² ICC-01/09-02/11-T-27-ENG, p. 3, lines 10-13.

the charges pursuant to the principle of *ne bis in idem* under Article 20 of the Statute.

II. PROCEDURAL HISTORY

12. On 20 December 2013, the Prosecution filed its 'Notification of the removal of a witness from the Prosecution's witness list and application for an adjournment of the provisional trial date' ('Prosecution Adjournment Request').¹³
13. On 13 January 2014, the Defence filed the 'Defence Response to the Prosecution's "Notification of the removal of a witness from the Prosecution's witness list and application for an adjournment of the provisional trial date"' ('Termination Request'),¹⁴ in which it requested that Trial Chamber V(B) ('Chamber') dismiss the Prosecution Adjournment Request and terminate the proceedings under Article 64(2) of the Statute on the grounds of insufficiency of evidence.
14. On 15 January 2014, the Prosecution sought leave to reply to the Defence Adjournment Response, on the basis of the nature of the issues raised and the relief sought therein.¹⁵
15. On 23 January 2014, the Chamber vacated the trial date of 5 February 2014 in order to consider the pending requests and scheduled a Status Conference for 5 February 2014.¹⁶ The Chamber also granted the Prosecution's request for leave to reply, stating that, 'given the new and distinct issues of law raised by the Defence Response and the nature of the relief requested therein, the Chamber finds that it is appropriate to

¹³ ICC-01/09-02/11-875.

¹⁴ ICC-01/09-02/11-878.

¹⁵ ICC-01/09-02/11-881.

¹⁶ ICC-01/09-02/11-886.

treat it as a new request to which the Prosecution is entitled to fully respond.’¹⁷

16. On 31 January 2014, the Prosecution filed the ‘Prosecution opposition to the Defence request for the termination of the Kenyatta case.’¹⁸ In this filing, the Prosecution conceded that its proposed investigative activities had yielded nothing of use,¹⁹ and acknowledged that, even if Witness 11 were to agree to testify, the evidence would remain insufficient.²⁰ Abandoning its previous request, the Prosecution sought an indefinite adjournment pending the determination of its application for a finding of non-compliance against the Government of Kenya.²¹ The Prosecution claimed that such an adjournment ‘would not be unfairly prejudicial to the Accused,’ and, further, that ‘it is reasonable to impute any failure on the part of the GoK to comply with its obligations to the Accused.’²²
17. On 5 February 2014 at a Status Conference, the Prosecution argued that ‘it is plain that ... the withdrawal of the charges by the Prosecutor would not’ ‘prevent any further proceedings against the same person.’²³ The Prosecution characterised the prevention of the possible resurrection of the charges on the basis of newly discovered evidence as ‘fundamentally unjust and contrary to the principle of impunity on which this Court is based.’²⁴ The Prosecution requested permission to submit written arguments concerning ‘whether or not there should be a verdict entered following any withdrawal of this matter by the Prosecution.’²⁵

¹⁷ ICC-01/09-02/11-886, para. 8.

¹⁸ ICC-01/09-02/11-892.

¹⁹ ICC-01/09-02/11-892, para. 7.

²⁰ ICC-01/09-02/11-892, para. 11.

²¹ ICC-01/09-02/11-892, para. 29.

²² ICC-01/09-02/11-892, para. 24.

²³ ICC-01/09-02/11-T-27-ENG, p. 62, lines 19-22.

²⁴ ICC-01/09-02/11-T-27-ENG, p. 63, lines 11-12.

²⁵ ICC-01/09-02/11-T-27-ENG, p. 67, lines 12-13.

18. On 10 February 2014, the Prosecution filed the Prosecution Submissions, arguing that the principle of *ne bis in idem* ‘applies only if there is a trial’ and not ‘if charges are withdrawn before trial begins.’²⁶ The Prosecution’s submissions were premised upon the presumption that it retains an unfettered discretion to withdraw the charges after the confirmation of charges but before the commencement of trial.

III. APPLICABLE LAW

19. Article 74(2) of the Statute stipulates the requirements for the rendering of a decision to acquit or convict an accused once the trial has started:

The Trial Chamber’s decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at trial.

20. Article 20(1) of the Statute guards the doctrine of *ne bis in idem* which provides that ‘[e]xcept as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.’
21. Article 84 of the Statute provides for the revision of convictions or sentences in prescribed circumstances including the discovery of new evidence,²⁷ the discovery that decisive evidence taken into account at trial was false, forged or falsified,²⁸ and instances of serious misconduct or breaches of duty by one or more of the trial judges.²⁹ Article 84 does not provide for the revision of acquittals.³⁰

²⁶ ICC-01/09-02/11-899, para. 22.

²⁷ Article 84(1)(a).

²⁸ Article 84(1)(b).

²⁹ Article 84(1)(c).

³⁰ Article 84.

22. Article 64(2) of the Statute requires that the Chamber ‘shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.’
23. Article 64(6)(f) of the Statute provides that ‘[i]n performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary...[r]ule on any other relevant matters.’
24. Regulation 60 of the Regulations of the Office of the Prosecutor stipulates the following:

If at any stage in the proceedings, the Office considers that the evidence available, including both incriminating and exonerating evidence, does not support an element of the charges pleaded or supports a different charge, or that any charge pleaded otherwise cannot be pursued, in particular due to the individual circumstances of the accused, then the Office shall promptly seek to either:

 - (a) amend or withdraw the charges pursuant to article 61, paragraphs 4 and 9; or
 - (b) submit the matter for consideration to the Trial Chamber in the light of its powers under regulation 55 of the Regulations of the Court.
25. Pursuant to the Chamber’s ‘Decision on the withdrawal of the charges against Mr Muthaura’ (‘Muthaura Withdrawal Decision’), once the charges have been confirmed, the Prosecution requires judicial permission to withdraw the charges.³¹ Furthermore, in circumstances where the Prosecution ought to seek to withdraw the charges but does not do so, the Chamber may exercise its power to terminate the proceedings *proprio motu*.³²

³¹ ICC-01/09-02/11-696, para. 11 and disposition.

³² ICC-01/09-02/11-696, para. 11 and disposition. *See also*: ICC-01/ 09-02/11-698, paras 1 and 3. The Defence has previously dealt with this in detail at ICC-01/09-02/11-878, paras 11-13.

IV. SUBMISSIONS

A. The Chamber should terminate the proceedings against Uhuru Kenyatta

26. The Prosecution has stated clearly that it does not consider that the evidence available can support the charges,³³ nor can it state even on a balance of probabilities that any evidence it seeks from the Government of Kenya, even if considered incriminatory, will be sufficient to bolster its case.³⁴ The Prosecution has described this as ‘really just the wildest speculation.’³⁵
27. Notwithstanding the Prosecution’s observations on the lack of evidence against Mr Kenyatta, and its obligations under Regulation 60 of the Regulations of the Prosecutor, the Prosecution has not sought judicial permission from the Chamber to withdraw the charges against Mr Kenyatta.³⁶
28. The Prosecution has premised its recent submissions on the erroneous argument that it retains an unfettered discretion to withdraw the charges *proprio motu*.³⁷ In rejecting this approach, the Defence submits that to allow the Prosecution the unfettered discretion to withdraw the charges ‘at the door of the Court’ would be to afford it undue power over the Accused and the Court. It is incorrect in law for the Prosecution to insinuate that the Accused’s case is currently ‘in the hands of’ the Prosecutor rather than the Chamber.³⁸

³³ ICC-01/09-02/11-875, para. 3.

³⁴ ICC-01/09-02/11-T-27-ENG, p. 11, line 23.

³⁵ ICC-01/09-02/11-T-27-ENG, p. 11, line 22.

³⁶ ICC-01/09-02/11-696, para. 11 and disposition.

³⁷ ICC-01/09-02/11-899, para. 1.

³⁸ ICC-01/09-02/11-899, para. 9.

29. The wording of Article 61(9) of the Statute recognises that the Prosecution does not hold complete power over confirmed charges:

After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges.

After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.’

On a narrow reading of Article 61(9), the withdrawal of charges between their confirmation and the commencement of trial is not accommodated. The Statute’s silence on the appropriate way in which the Prosecution should seek to withdraw charges in this intervening period demonstrates that the drafters of the Statute did not countenance such circumstances.³⁹ Furthermore, since the Prosecution requires judicial permission to *amend* charges after their confirmation, to allow it an unfettered discretion to *withdraw* the charges risks the creation of an unacceptable ‘loophole’ through which judicial oversight might be evaded.

30. In the Muthaura Withdrawal Decision, this Chamber stated the following:

In the present case, the Prosecution has submitted that current evidence does not support the charges against Mr Muthaura and that it has no reasonable prospect of securing evidence that could sustain proof beyond reasonable doubt. Significantly, the Muthaura Defence does not contest the Prosecution’s withdrawal. In these circumstances, the Chamber, acting pursuant to Article 64(2) of the Statute, considers that the withdrawal of the charges against Mr Muthaura may be granted.⁴⁰

By granting permission to the Prosecution to withdraw the charges against Mr Muthaura, the Chamber, by majority, demonstrated that it considered it necessary for the Prosecution to seek permission to

³⁹ See also: Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II, 1996, p. 127. It was at one point considered that confirmed charges could be withdrawn before trial only with the leave of the Presidency.

⁴⁰ ICC-01/09-02/11-696, para. 11.

withdraw confirmed charges. Further, by considering the Muthaura Defence's acceptance of the withdrawal to be 'significant,' the Chamber implied that the views of the Defence were important, and that it should remain open to the Defence to oppose a withdrawal in order to ensure that the *ne bis in idem* principle attaches.

31. As noted by Her Honour Judge Ozaki in her Partially Dissenting Opinion:

The primary reason to impose a requirement on the Prosecutor to seek permission for a withdrawal of charges would be to safeguard the rights of an accused who may object to a proposed withdrawal on the grounds that he or she is entitled to an acquittal in order to ensure the *ne bis in idem* principle attaches.⁴¹

32. In his Concurring Opinion, His Honour Judge Eboe-Osuji held that:

The power [to withdraw] should not also encompass the ability to stake a claim in perpetuity over the defendant's freedom from fear and the right to a good name, by being able to withdraw confirmed charges at will (before the Court has had a chance to examine them definitively on their merits) and then hold them over the head of the accused forever.

[...]

In the circumstances, a defendant against whom charges had once been confirmed in this Court at the insistence of the Prosecutor who had insisted that he or she had sufficient evidence to establish reasonable grounds to believe that the defendant committed the crimes, should have the right to insist that there be a comprehensive answer on the merits of the question of guilt or innocence once and for all.⁴²

33. At this stage in the proceedings, were the Prosecution to seek to withdraw the charges, it would clearly require judicial permission to do so.⁴³ In such circumstances, it would be open to the Defence to oppose the withdrawal of charges in order to ensure the application of the principle of *ne bis in idem* following the entry of a not guilty verdict by the Chamber on the evidence submitted by the Prosecution, which has

⁴¹ ICC-01/09-02/11-698, Partially Dissenting Opinion of Judge Ozaki, para. 4.

⁴² ICC-01/09-02/11-698, Concurring Opinion of Judge Eboe-Osuji, para. 30.

⁴³ ICC-01/09-02/11-696, para. 11 and disposition.

been conceded to be insufficient in this case to reach the necessary threshold to secure a conviction.⁴⁴

34. The Defence submits that in the circumstances of this case, notwithstanding the separate and pending issue of potential non-compliance by the Government of Kenya, the Chamber must intervene and terminate these proceedings in accordance with its statutory powers and obligations under Articles 64, 66, and 67, in order to protect the rights of the Accused. To allow the proceedings to continue against the Accused would be contrary to basic fair trial rights and the administration of justice.
35. For the reasons set out below, the Defence submits that the Chamber's termination of these proceedings should not deprive the Accused of a full and final determination on the charges.

B. The Accused is entitled to a final decision on the charges

36. The Defence seeks the termination of these proceedings against Mr Kenyatta by the Chamber and the entry of a not guilty verdict in circumstances where the Prosecution's case has failed and there is insufficient evidence to proceed to trial.
37. On 23 January 2012, charges were confirmed against Mr Kenyatta⁴⁵ 'at the insistence of the Prosecutor who had insisted that he or she had sufficient evidence to establish reasonable grounds to believe that the defendant committed the crimes.'⁴⁶ It is now known that the evidence on which the charges were confirmed was false.⁴⁷

⁴⁴ ICC-01/09-02/11-875, para. 3.

⁴⁵ ICC-01/09-02/11-382.

⁴⁶ ICC-01/09-02/11-698, Concurring Opinion of Judge Eboe-Osuji, para. 30.

⁴⁷ See para. 4 *supra*.

38. The original drafters of the Statute did not envisage that confirmation of charges could have been obtained on the basis of such a degree of false evidence as to be unsustainable before trial. The purpose of the confirmation hearing is to ensure that trial proceedings are commenced in respect of 'only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought.'⁴⁸ The Appeals Chamber has emphasised the important role of the proper evaluation of evidence at the confirmation stage in order to avoid 'the risk of cases proceeding to trial although the evidence is so riddled with ambiguities, inconsistencies, contradictions or doubts as to credibility [of witnesses] that it is insufficient to establish substantial grounds to believe the person committed the crimes charged.'⁴⁹ The Court and the Accused have been cheated of this safeguard by the provision of insufficiently tested evidence by the Prosecution.
39. The Prosecution has offered no evidence on the eve of trial. In the event the trial had 'commenced' in accordance with the articulation of Article 64(8)(a) of the Statute and the jurisprudence of Trial Chamber I in *Lubanga*,⁵⁰ Mr Kenyatta would clearly have been entitled to a decision under Article 74 of the Statute. The Defence submits that the offering of no evidence on the eve of trial in a failed case cannot and should not deprive Mr Kenyatta of a final decision upon the charges. In rendering a decision on whether or not to terminate these proceedings, the Defence requests the Chamber to examine the charges 'definitively on their merits' and enter a not guilty verdict. It is submitted that the Chamber is

⁴⁸ *The Prosecutor v. Lubanga*, Pre-Trial Chamber I, ICC-01/04-01/06-803-tEN, para. 37.

⁴⁹ *The Prosecutor v. Mbarushimana*, Appeals Chamber, ICC-01/04-01/10-514, para. 46.

⁵⁰ *The Prosecutor v. Lubanga*, Trial Chamber I, ICC-01/04-01/06-1644, para. 36.

clearly able to do so by reason of the admissions of the insufficiency of evidence made by the Prosecution.⁵¹

40. The Defence submits that 'it should not be the case that a stigma in relation to reputation is allowed to remain in circumstances where a case fails. That is not fair justice.'⁵² Where the Prosecution has conceded that it has insufficient evidence to proceed to trial, the Defence submits that in the circumstances the Chamber has the power to terminate the proceedings and enter a not guilty verdict.
41. The Defence submits that Article 74 of the Statute is the *lex specialis*, which sets out the requirements for the Chamber's decision of guilty or not guilty, following the commencement of trial. Before trial has commenced, the Defence submits that the *lex generalis* of Article 64(6)(f) applies, whereby the Chamber 'in performing its functions prior to trial or during the course of a trial...may, as necessary...rule on any other relevant matters.' Article 64(6)(f) would enable the Chamber to examine the case on its merits, consider the Prosecution's concession of insufficient evidence and enter a verdict of not guilty on the charges confirmed by the Pre-Trial Chamber.
42. The Defence submits that in circumstances where Mr Kenyatta has been the subject of a summons to appear before the Court since 8 March 2011, the charges against him were confirmed on the basis of evidence which is false, and where it has been conceded by the Prosecution that there is insufficient evidence to proceed to trial, Mr Kenyatta 'should have the

⁵¹ ICC-01/09-02/11-875, ICC-01/09-02/11-T-27-ENG.

⁵² ICC-01/09-02/11-T-27-ENG, p. 65, lines 5-6.

right to insist that there be a comprehensive answer on the merits of the question of guilt or innocence once and for all.’⁵³

43. The Prosecution thwarted the opening of proceedings set for 5 February 2014, having necessitated several previous adjournments, with a desperate request to undertake further investigations. Anything less than a comprehensive answer to the charges and the entry of a verdict of not guilty by the Chamber following termination of these proceedings would result in the staking of a ‘claim in perpetuity over the defendant’s freedom from fear and the right to a good name.’⁵⁴ The Prosecution’s manoeuvring to avoid the technical start of trial cannot and should not be allowed to deny the Accused the right to the entry of a verdict in this case.
44. In response to the Prosecution’s argument that the Chamber did not purport to ‘acquit’ Mr Muthaura when the proceedings were terminated,⁵⁵ the Defence submits that this issue was not raised by the parties or requested on behalf of Mr Muthaura. The issue therefore has not been fully appraised on the facts of this case on any previous occasion.
45. The Defence submits that, in these circumstances, it would be capricious to deny the Accused the benefits of a full and final determination on these charges simply because the trial has not yet ‘commenced’ within the meaning of the jurisprudence of the Court. It is misleading and disingenuous of the Prosecution to suggest that the proceedings against Mr Kenyatta will be ‘discontinued for technical reasons.’⁵⁶ The position

⁵³ ICC-01/09-02/11-698, Concurring Opinion of Judge Eboe-Osuji, para. 30.

⁵⁴ ICC-01/09-02/11-698, Concurring Opinion of Judge Eboe-Osuji, para. 30.

⁵⁵ ICC-01/09-02/11-899, para. 12.

⁵⁶ ICC-01/09-02/11-899, para. 11.

of the Prosecution is more concerned with how the matter reflects upon its image in respect of a failed case than with the truth relating to the charges.

46. The Defence submits that the Accused is therefore entitled to a final decision on the charges. The Prosecution cannot be permitted to frustrate the proceedings at this late hour in order to deny the Accused his rights at trial. The acute unfairness is compounded when it is considered that the failed case is attributable to the action and inaction of the Prosecution. It would be wrong to afford the Prosecution the opportunity to bring the same charges against Mr Kenyatta again; this would be to grant the Prosecution further benefit from the fundamental failings of its conduct of this case.

V. RELIEF

47. For the reasons set out herein, the Defence respectfully requests that the Chamber:
 - a. Terminate the proceedings under Article 64(2) of the Statute on the grounds of insufficiency of evidence; and
 - b. Issue a decision on the charges under Article 64(6)(f) acquitting Mr Kenyatta.

Respectfully submitted,

 

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Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

Dated this 17th day of February 2014

At London, England