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Date: 11 March 2013

**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**

**Prosecution notification of withdrawal of the charges against Francis Kirimi  
Muthaura**

**Source:** The Office of the Prosecutor

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

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Section****Other**

## **Introduction**

1. The Prosecution hereby notifies the Chamber of its withdrawal of all charges against Francis Kirimi Muthaura (hereinafter referred to as “Mr Muthaura”). Having considered the totality of the evidence, the Prosecution considers that, at this stage, it has no reasonable prospect of conviction were it to proceed to trial against Mr Muthaura on the charges as confirmed. The reasons for withdrawing the charges are set out below.

## **The law**

### **A. Discretion to withdraw charges.**

2. The Prosecution has considered the appropriate procedure to be followed in the event of the Prosecutor deciding to withdraw all charges against an accused at this stage of the proceedings. As set out in detail below, the Statute (Article 61(4)) provides that the Prosecution may withdraw charges prior to the confirmation hearing, and must provide reasons to the Pre-Trial Chamber for doing so. The process in the current case has clearly moved past this stage. The Prosecution may withdraw charges after the commencement of trial, with the permission of the Trial Chamber (Article 61(9)). The Prosecution submits that the trial commences with opening statements and the calling of evidence. This stage has not yet been reached in the current proceedings. The proceedings in the current case are at a stage between confirmation of the charges and the commencement of the trial, which is not explicitly provided for in the Statute in terms of withdrawal of charges by the Prosecutor. The Prosecution submits that taking guidance from Articles 61(4) and 61(11) of the Statute, the Prosecutor may, upon notification to the Trial Chamber, and with the provision of the reasons for the withdrawal to the Chamber, withdraw charges at this stage.

3. Article 61(4) of the Statute provides:

Before the [confirmation] hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

4. Article 61(9) of the Statute provides, in its relevant part:

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

5. Article 61(11) of the Statute provides:

Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

6. In the *Lubanga* case, Trial Chamber I held that “trial commences” at “the true opening of the trial when the opening statements, if any, are made prior to the calling of witnesses”.<sup>1</sup> In a different context, Trial Chamber II opined in *Katanga*, in *dictum*, that for the purpose of an admissibility challenge under Article 19 of the Statute, the “commencement of the trial” occurred “as soon as the [Trial] Chamber is constituted”.<sup>2</sup> The Appeals Chamber declined to review Trial Chamber II’s reading of the phrase “commencement of trial” in Article 19 on the basis that it was *dictum*, but took the unusual step of stating that the decision not to review this issue

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<sup>1</sup> *Prosecutor v. Lubanga*, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, ICC-01/04-01/06-1084, 13 December 2007, para 39; *see also* *Lubanga*, Reasons for Oral Decision lifting the stay of proceedings, ICC-01/04-01/06-1644, 23 January 2009, para 36 (holding that trial commences “not when the Chamber was constituted under Article 61(11) or when the charges were confirmed under Article 61, but on the date fixed for trial (Monday 26 January 2009), when the proceedings by way of opening statements and the introduction of evidence commence”).

<sup>2</sup> *Prosecutor v. Katanga*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07-1213-tENG, 16 June 2009, paras 30-50 (quote at para 49).

“does not necessarily mean that the [Appeals Chamber] agrees with the Trial Chamber's interpretation of the term ‘commencement of the Trial’”.<sup>3</sup>

7. The Prosecution submits that Trial Chamber I's interpretation of “commencement of the trial” is correct: trial commences at “the true opening of the trial”.<sup>4</sup> This interpretation is supported by Rule 134(1), which provides that “[p]rior to the commencement of trial, the Trial Chamber . . . may rule on any issue concerning the conduct of proceedings”. This provision expressly contemplates that the Trial Chamber will be constituted and exercise powers before the actual “commencement of trial”; in other words, trial “commences” at the true opening of the trial rather than when the Trial Chamber is constituted. The Prosecution accordingly submits that it is not necessary for the Trial Chamber to grant the Prosecution leave to withdraw the charges in this procedural context – after the charges have been confirmed but before the trial has commenced.
8. Should the Chamber take a different view and find under Article 61(9) that it must grant leave for the charges to be withdrawn, the Prosecution submits that the considerations outlined below warrant such leave being granted.

**B. Basis for withdrawal of charges.**

9. One basis for withdrawing charges is where the Prosecutor considers that the evidence available does not support the charges to the standard of proof, beyond a reasonable doubt, required at trial.<sup>5</sup> In this case, the Prosecution, having considered the totality of all the evidence, is of the view, at this

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<sup>3</sup> *Prosecutor v. Katanga*, 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, 25 September 2009, para 38.

<sup>4</sup> ICC-01/04-01/06-1084, para 39.

<sup>5</sup> Regulation 60(a) of the Regulations of the Office of the Prosecutor; Articles 61(4) and 61(9), and 66(3) of the Statute.

stage, that there is no reasonable prospect of a conviction in the case against Mr Muthaura at trial.

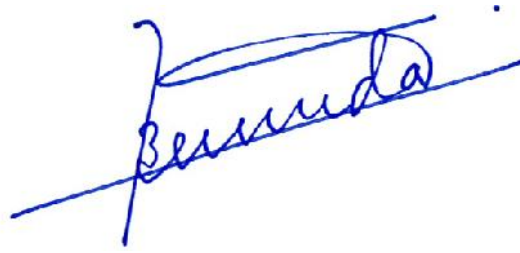
### **Withdrawal of the charges**

10. In advance of trial, the Prosecution has re-reviewed its evidence against both Mr Muthaura and Mr Kenyatta. With respect to Mr Muthaura, the Prosecution is not satisfied that the available evidence is sufficient to meet the Article 66(3) requirement that the accused's guilt be established "beyond reasonable doubt". While the evidence presented during the 2011 confirmation hearing was sufficient for the Pre-Trial Chamber to commit Mr Muthaura to trial under the Article 61(7) "substantial grounds" standard, the evidence has since evolved, and the Prosecution does not consider that there is sufficient evidence at present to prove the charges against Mr Muthaura beyond a reasonable doubt. The Prosecution did not oppose the granting of the remedy sought by Mr Muthaura in his Article 64(4) application, namely, that his case be referred to the Pre-Trial Chamber for reconsideration due to the Prosecution's withdrawal of its key witness against him from its witness list for the trial and a pre-trial disclosure error. However, in light of the withdrawal of the charges against Mr Muthaura, it is no longer necessary to request the Chamber to rule on this matter.

11. A number of factors, summarised here, have weighed on the decision to withdraw the charges. The Muthaura case has presented serious investigative challenges, including a limited pool of potential witnesses, several of whom have been killed or died since the 2007-2008 post-election violence in Kenya, and others who are unwilling to testify or provide evidence to the Prosecution. Despite assurances of its willingness to cooperate with the Court, the Government of Kenya has in fact provided only limited cooperation to the Prosecution, and has failed to assist it in uncovering evidence that would have been crucial, or at the very least, may

have been useful in the case against Mr Muthaura. In addition, there have been post-confirmation developments with respect to a critical witness against Mr Muthaura, who recanted a significant part of his incriminating evidence after the confirmation decision was issued, and who admitted accepting bribes from persons allegedly holding themselves out as representatives of both accused. In all the circumstances, this witness was dropped from the Prosecution's witness list for trial. Investigations have continued until now, but without improving the cogency of the Prosecution's case.

12. The Prosecution has a duty to prosecute the individuals most responsible for the most serious crimes of international concern. With respect to this case, the Prosecution has a duty to the victims of the 2007-2008 post-election violence in Kenya to do its utmost to ensure that the persons most responsible are held accountable. However, the Prosecution also has a duty to proceed to trial only where the evidence against an accused is, in the assessment of the Prosecution, sufficient to prove the guilt of an accused beyond a reasonable doubt. Where the evidence does not meet this standard, withdrawal of the charges is the appropriate course of action. When the current evidentiary record against Mr Muthaura is viewed in its totality, the Prosecution does not consider that it is sufficient to secure a conviction against Mr Muthaura at this stage. Given that in the estimation of the Prosecution there is no reasonable prospect of conviction at this stage, the Prosecution withdraws the charges against Mr Muthaura.



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Fatou Bensouda,  
Prosecutor

Dated this 11<sup>th</sup> of March 2013  
At The Hague, The Netherlands