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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

Public Redacted Version of the 13 March 2013 "Prosecution observations on the impact of the withdrawal of the charges against Mr Muthaura on Mr Kenyatta"

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of the Court to:

The Office of the Prosecutor

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Introduction

1. The Prosecution does not consider that the withdrawal of the charges against Mr Muthaura has any legal or factual impact on Mr Kenyatta's case. The reasons are detailed below.

Confidentiality

2. This document is filed confidentially because it quotes a document bearing that classification. A public redacted version will be filed.

Procedural history

3. On 11 March 2013, the Prosecution informed the Chamber of the withdrawal of the charges against Mr Muthaura.¹ At the status conference held the same day, the Presiding Judge instructed the Prosecution to provide written submissions, by 13 March 2013, on the "impact of the withdrawal on the charges against Mr Kenyatta, given that the accused are charged as indirect co-perpetrators".²

Submissions

A. The withdrawal has no legal impact on Mr Kenyatta's case.

4. In the Prosecution's submission, the withdrawal of charges against one alleged indirect co-perpetrator (Mr Muthaura) has no legal consequence with respect to a co-accused, who is also charged as an indirect co-perpetrator and against whom charges remain in place (Mr Kenyatta).³

¹ ICC-01/09-02/11-687.

² ICC-01/09-02/11-T-23-ENG ET, pages 7 and 24.

³ See Final Updated Document Containing the Charges, ICC-01/09-02/11-591-AnxB, para 73 (charging Messrs Muthaura and Kenyatta as "indirect co-perpetrators" under Article 25(3)(a) of the Statute).

5. *First*, Article 25(3) itself demonstrates that the legal status of one alleged indirect co-perpetrator has no bearing on the guilt or innocence of another alleged co-perpetrator. Article 25(3) provides, in relevant part:

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; (emphasis added).

6. Under a plain reading of Article 25(3)(a), the final clause of the article (“regardless of whether that other person is criminally responsible”) clarifies that the terms “jointly with another” and “through another person” does not necessarily mean that the other person be charged as well. Thus, the withdrawal of charges against Mr Muthaura can have no bearing on Mr Kenyatta’s alleged criminal responsibility.
7. *Second*, logic dictates that the withdrawal of charges against one indirect co-perpetrator does not have an automatic knock-on effect with the respect to the charges against another alleged indirect co-perpetrator. The fact that multiple individuals are charged in the same DCC under the same mode of liability does not require lock-step decisions to be taken with respect to each co-accused. In many cases where multiple accused are charged with participation in the same criminal transaction under the same mode of liability, different verdicts are reached for individual accused on the basis of the evidence available.⁴

⁴ In the international context, *see, e.g., Prosecutor v. Milutinovi et al.*, Trial Chamber Judgment (Vol. III), Case No. IT-05-87-T, 26 February 2009, paras 1207-1212 (acquitting one of six accused charged with participation in a joint criminal enterprise and sentencing the other five to between 15 and 22 years); *Prosecutor v. Bizimungu et al.*, Trial Chamber Judgment, Case No. ICTR-99-50-T, 30 September 2011, paras 1905, 2021-2026 (acquitting two of four accused charged with participation in a joint criminal enterprise and sentencing the other two to 30 years).

8. *Third*, precedent from this Court demonstrates that a trial may proceed against an individual charged as co-perpetrator under Article 25(3)(a), even if others alleged to be co-perpetrators are not charged, or are not present at trial. In the *Lubanga* case, for example, Thomas Lubanga Dyilo was charged as a co-perpetrator under Article 25(3)(a).⁵ Charges against Mr Lubanga were confirmed,⁶ and he was tried and convicted even though other alleged co-perpetrators were either at large (Bosco Ntaganda), or not charged (*e.g.*, Floribert Kisembo, Chief Kahwa, and commanders Tchaligonza, Bagonza and Kasangaki).⁷ The Trial Chamber's express factual findings on the role of Mr Lubanga's co-perpetrators demonstrate that there is nothing unusual about a trial proceeding against only one of several alleged co-perpetrators.⁸
9. In the *Ruto and Sang* case, the Prosecution charged William Ruto and Henry Kosgey as indirect co-perpetrators under Article 25(3)(a).⁹ The Pre-Trial Chamber confirmed charges against Mr Ruto, but not against Mr Kosgey.¹⁰ The non-confirmation of charges against Mr Kosgey has not affected the progress of Mr Ruto's case to trial. Similarly, Omar Al Bashir's arrest warrant was issued "under article 25(3)(a) of the Statute as an indirect

⁵ *Prosecutor v. Lubanga*, Public Redacted Amended Document Containing the Charges, Article 61(3)(a), 23 December 2008, ICC-01/04-01/06-1573-Anx1, para 20, pages 28-29.

⁶ *Prosecutor v. Lubanga*, Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, 29 January 2007, para 410 (confirming charges under an Article 25(3)(a) co-perpetration theory).

⁷ *Prosecutor v. Lubanga*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, paras 1352.

⁸ ICC-01/04-01/06-2842, paras 1351-1352 ("The accused and his co-perpetrators agreed to, and participated in, a common plan to build an army . . . the Chamber has concluded that from late 2000 onwards, Thomas Lubanga acted with his co-perpetrators, who included Floribert Kisembo, Bosco Ntaganda, Chief Kahwa, and commanders Tchaligonza, Bagonza and Kasangaki.").

⁹ *Prosecutor v. Ruto et al*, Document Containing the Charges, 15 August 2011, ICC-01/09-01/11-261-AnxA, paras 98-123.

¹⁰ *Prosecutor v. Ruto et al*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373, page 138 (disposition).

perpetrator, or as an indirect co-perpetrator”,¹¹ even though other alleged co-perpetrators named in the arrest warrant decision were not charged.¹²

10. The Prosecution acknowledges that if the Chamber follows the Court’s current jurisprudence on indirect co-perpetration, the Prosecution will need to prove at trial the existence of a common plan between two or more persons, including Mr Kenyatta. The Prosecution alleges that a large number of people were members of the common plan, some of whom are identified in the Prosecution’s pre-trial brief.¹³ In addition to these individuals, the Kenyatta Defence itself has taken the position that the confirmation decision characterizes [REDACTED], *i.e.*, a co-perpetrator or indirect co-perpetrator.¹⁴ There has never been the suggestion that the case cannot proceed unless these individuals are tried alongside Mr Kenyatta.

11. In sum, nothing contained in the Statute or in the jurisprudence of the Court contemplates that the case against Mr Kenyatta under Article 25(3)(a) would be affected by the withdrawal of the charges against Mr Muthaura. Further, and without prejudice to the submissions above, the Prosecution underscores that indirect co-perpetration under Article 25(3)(a) is not the only mode of liability available to the Chamber with respect to Mr Kenyatta. On 3 July 2012, at the Chamber’s invitation,¹⁵ the Prosecution submitted an application for notice to be given under Regulation 55(2) that the accused’s mode of liability may be subject to recharacterisation under Articles 25(3)(b), 25(3)(c) and 25(3)(d).¹⁶ The Prosecution’s pre-trial brief gave further notice

¹¹ *Prosecutor v. Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, para 223.

¹² *See* ICC-02/05-01/09-3, paras 214, 216 (reaching factual findings regarding “other high-ranking Sudanese political and military leaders” who allegedly acted jointly with Al Bashir to implement the common plan).

¹³ *See, e.g.*, ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, paras 44, 46-51 and the individuals named therein.

¹⁴ ICC-01/09-02/11-468-Conf-AnxB

¹⁵ ICC-01/09-02/11-T-18-ENG CT WT, pages 36-37.

¹⁶ ICC-01/09-02/11-444, paras 24-37.

that these additional modes of liability could be used to characterise the accused's criminal responsibility.¹⁷ While the Trial Chamber has not yet ruled on the Prosecution's Regulation 55(2) application, the parties are on clear notice that indirect co-perpetration under Article 25(3)(a) is not the only mode of liability open to the Chamber with respect to Mr Kenyatta. Thus, even if the withdrawal of Mr Muthaura's charges could be said to affect the indirect co-perpetration mode of liability with respect to Mr Kenyatta – and as explained above, it cannot – there would be nothing to prevent the case from proceeding on alternate modes of liability.

B. The withdrawal has no factual impact on Mr Kenyatta's case.

12. The withdrawal of the charges against Mr Muthaura does not impact upon the factual case the Prosecution will present against Mr Kenyatta at trial. That case remains unaltered.
13. While Messrs Muthaura and Kenyatta were allegedly linked together as members of the common plan, they are alleged to have played different roles in that plan. The distinct nature of their roles was summarised by the Pre-Trial Chamber in the following way: whereas Mr Kenyatta was allegedly "in charge of the provision of financial and logistical support to the direct perpetrators",¹⁸ Mr Muthaura allegedly "secur[ed] the support of the Mungiki and direct[ed] the latter to commit the crimes in Nakuru and Naivasha", as well as "provided institutional support for the execution of the crimes on behalf of the PNU Coalition".¹⁹
14. Consistent with the confirmation decision, the Prosecution's pre-trial brief details the different roles allegedly played by Messrs Muthaura and

¹⁷ ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, paras 130-133.

¹⁸ ICC-01/09-02/11-382-Red, para 384. This summary is not exhaustive. For example, elsewhere in the confirmation decision, the Pre-Trial Chamber made factual findings with respect to Mr Kenyatta's alleged role in securing the assistance of Mungiki for the attacks. *See, e.g., id.*, paras 363-364.

¹⁹ ICC-01/09-02/11-382-Red, para 377.

Kenyatta in the post-election violence. A comparison of paragraphs 116 and 117 of the pre-trial brief highlights this contrast. Because the two accused are alleged to have had different roles, the evidence against them is different, and any insufficiency of evidence with respect to Mr Muthaura's particular role would not apply to Mr Kenyatta.

15. Finally, the withdrawal of charges does not affect the Prosecution's allegations regarding the nature of the common plan, Mr Kenyatta's alleged role in the plan, or the evidence the Prosecution will rely upon to prove its case against him at trial. In sum, the Prosecution's factual case against Mr Kenyatta is unaltered.



Fatou Bensouda,
Prosecutor

Dated this 13th of March 2013
At The Hague, The Netherlands