



Original: **English**

No.: ICC-01/09-02/11

Date: 17 February 2014

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

Victims' observations on the *ne bis in idem* principle

Source: Common Legal Representative of Victims

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Benjamin Gumpert

Counsel for the Defence

Mr Steven Kay QC
Ms Gillian Higgins

Legal Representatives of Victims

Mr Fergal Gaynor

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda
Ms Caroline Walter

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

States Representative

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Other

I. Introduction

1. On behalf of the victims in this case, the Common Legal Representative of Victims (“Legal Representative”) respectfully submits that the argument raised by the Defence in relation to the possibility of entering a verdict of acquittal should the charges be withdrawn or the proceedings terminated is without merit.

II. Procedural background

2. On 5 February 2014, the Defence submitted that verdicts of not guilty triggering the application of the *ne bis in idem* principle can be entered by the Chamber should the Prosecutor withdraw charges on the eve of trial.¹
3. In the course of the status conference, the Presiding Judge invited submissions on this issue, to be filed by the Prosecution by 10 February 2014, and by the Legal Representative and the Defence no later than 17 February 2014.²
4. On 10 February 2014, the Prosecution filed the “Prosecution submissions on the *ne bis in idem* principle”, submitting that the argument is premature and need not to be addressed at this stage, and that it is without merit.³

¹ Oral request by the Defence, Status Conference, 5 February 2014, No. ICC-01/09-02/11-T-27-ENG ET WT, p. 64, line 18 to p. 65, line 6.

² *Idem*, p. 67, line 14 to p. 69, line 8.

³ See Prosecution submissions on the *ne bis in idem* principle, No. ICC-01/09-02/11-899, 10 February 2014 (“Prosecution’s submissions”).

III. Submissions

5. The Legal Representative fully supports the Prosecutions' submissions, and provides the following additional observations.

Bemba decision has been upheld on appeal

6. The Appeals Chamber has upheld the *Bemba* Trial Chamber decision⁴ cited by the Prosecution⁵ in support of the view that the *ne bis in idem* principle applies only if there is a decision on the merits of the case resulting in verdict of conviction or acquittal of the accused.⁶

Confirmation of charges decision cannot trigger the ne bis in idem principle

7. The Defence's reliance on the argument that the confirmation stage triggers the *ne bis in idem* principle is misconceived.⁷ As the Defence points out, "we are on the eve of trial". In other words, the trial has not yet started, which means that no evidence has been presented to the Judges of the Trial Chamber, and the Trial Chamber cannot make any decision on the merits of the case resulting in verdict of conviction or acquittal.

⁴ See the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges" (AC), No. ICC-01/05-01/08-962, 19 October 2010, paras. 65 to 75. See also Diane Bernard, 'Ne bis in idem — Protector of Defendants' Rights or Jurisdictional Pointsman?', 23 September 2011, J Int Criminal Justice (2011) 9 (4): 863-880, p. 877, at: <http://jicj.oxfordjournals.org/content/9/4/863.full.pdf+html> (consulted 14 February 2014): "Trial Chamber III decided in the Bemba Case that Article 17(1)(c) could not apply to non-lieu because the latter was not a final decision on the merits. The strict application of *ne bis in idem* to this kind of final decision makes non-lieu an unknown engine in the Statute's terms".

⁵ Prosecution's submissions, para. 14.

⁶ Prosecution's submissions, paras. 12 to 18.

⁷ The Defence argues that "the structure of this Court with the confirmation of charges being the basis of the case ... and is the basis for the proceedings to continue" and "in those circumstances verdicts of not guilty can be entered because the charges for confirmation which have been proceeded to trial have been found to be wanting at the point of trial, and an accused coming that far through the proceedings, we are on the eve of trial". See the Defence oral request, *supra* note 1.

8. The Defence's argument is directly contrary to consistent jurisprudence by the pre-trial chambers of the Court with regard to the nature of the confirmation of the charges at the ICC.⁸
9. Presiding Judge Trendafilova noted recently at the *Ntaganda* confirmation hearings that "it has been highlighted in a number of decisions issued by Pre-Trial Chamber II that the confirmation of charges hearing is neither a trial before trial or a mini trial. In contrast to trial, this Chamber does not have to decide on the guilt of the person".⁹
10. Pre-trial Chamber I has noted that, at the confirmation stage, "the Chamber's consideration of the evidence is not undertaken for the purposes of determining the guilt or innocence of the suspect. A wholesale assessment as to the admissibility of each item of evidence at this stage would unjustifiably delay the proceedings and give rise to an inappropriate pre-determination of evidentiary matters which should be properly decided in light of the whole of the evidence presented at trial."¹⁰

⁸ See *inter alia*, "Corrigendum of the 'Decision on the Confirmation of Charges'" (Pre-Trial Chamber I), No. ICC-02/05-03/09-121-Corr-Red, 7 March 2011, para. 40: "[G]iven the limited purpose of the confirmation hearing, the evidentiary threshold at the pre-trial stage is lower than that applicable at the trial stage." See also "Decision on the Schedule for the Confirmation of Charges Hearing" (Pre-Trial Chamber II, Single Judge), No. ICC-01/09-02/11-321, 13 September 2011, para. 8: "The schedule has been decided (...) taking into consideration the following factors: (i) the confirmation of charges hearing pursuant to article 61 of the Statute is not a mini-trial and there is a need to organize a concise and streamlined hearing given its specific nature, limited scope and purpose"; "Decision on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-01/04-01/07-717, 30 September 2008, par. 64: "Throughout the proceedings, the Chamber consistently reiterated this principle and asserted that the confirmation hearing has a limited scope and purpose and should not be seen as a "mini-trial" or a "trial before the trial"." Furthermore, when the charges are not confirmed at the pre-trial stage, whatever the reason for such a decision, article 61(8) of the Rome Statute clearly indicates that new charges can be entered at a later stage: "Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence."

⁹ See Confirmation of Charges Hearing, *The Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-T-7-ENG ET WT, 10 February 2014, p. 5, lines 9 to 11.

¹⁰ "Decision on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-01/04-01/10-465-Red, 16 December 2011, para. 44.

11. Further, the accused continues to enjoy a presumption of innocence. Presiding Judge Trendafilova emphasized recently at the *Ntaganda* confirmation hearings that a suspect enjoys a “presumption of innocence according to which the suspect ... is presumed innocent until such time as his guilt will be proven with a final decision having *res judicata*”.¹¹ It is clear that the confirmation decision is not a decision having *res judicata*.

Recognition of the ne bis in idem principle in this case would be unconscionable

12. As already submitted,¹² the difficulties in this case have arisen in the context of a policy of state obstruction of access to evidence, carried out in parallel with a policy of domestic non-prosecution of post-election violence (“PEV”) crimes. These policies continue under the present Government of Kenya, which is under the control of the Accused.

13. To withdraw charges or terminate the case in these circumstances would be wholly unconscionable. To apply the *ne bis in idem* principle would be an even greater reward for those who continue to deliberately obstruct the emergence of the truth regarding PEV crimes, would be totally unfair to the victims of those crimes and wholly contradictory to the primary purpose of the Court, which is to put an end to impunity. It would also provide an even stronger incentive for suspects in future cases at this Court to employ a strategy of deliberate obstruction of access to evidence.

14. These concerns apply equally should these proceedings be brought to a halt by withdrawal of the charges or by a decision of the Chamber to terminate the proceedings at this stage.

¹¹ See *supra* note 9, p. 5, lines 24-25 and p. 6, lines 1 to 3.

¹² Legal Representative’s submissions, No. ICC-01/09-02/11-T-27-ENG ET WT, 5 February 2014, pages 17-39.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Fergal Gaynor', with a stylized, cursive script.

Fergal Gaynor

Common Legal Representative of Victims

Dated this 17th day of February 2014

At Lyon, France