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TRIAL CHAMBER V(B)

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR V. UHURU MUIGAI KENYATTA

Public

Prosecution submissions on the *ne bis in idem* principle

Source: **The Office of the Prosecutor**

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

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Introduction

1. The principle of *ne bis in idem* would not apply if the charges against Mr Kenyatta were withdrawn before trial. *Ne bis in idem* applies only if there is a trial. This conclusion is demonstrated by:

    - The plain language of the Statute;
    - ICC case law and in particular the *Muthaura* withdrawal decision;
    - Case law from other international courts; and
    - Policy considerations.

2. To be clear, any consideration of *ne bis in idem* is premature. The principle could conceivably come into play only if the charges were withdrawn, and the case is not yet at that stage. Even in that scenario, the Prosecution submits that *ne bis in idem* would have no application for the reasons explained below. Nevertheless, the Prosecution provides the following submissions now, to the extent that they may assist the Chamber.

Procedural history

3. On 5 February 2014, Defence counsel made the following oral submission:

> When the Prosecutor withdraws charges, the Court then terminates those proceedings. And we submit that the structure of this Court with the confirmation of charges being the basis of the case with the facts underlying the confirmation of charges which have been precisely identified by the Pre-Trial Chamber and is the basis for the proceedings to continue, as also expressed in the document containing charges, that 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 -- well, I think the day after now or a couple of days after -- we would be entitled to verdicts of not guilty being entered. That is fair. 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. [1]

[1] ICC-01/09-02/11-T-27 ENG ET, pages 64-65.

4. The Chamber invited the Prosecution to submit written observations on this matter by 10 February 2014.[2]

Submissions

5. The Prosecution understands the Defence to be advancing an argument based on the principle of *ne bis in idem* – namely, that if charges are withdrawn after confirmation and before trial, the charged individual should be treated as "acquitted" and cannot thereafter be tried again for the same conduct. The Prosecution disagrees.

6. As explained below, *ne bis in idem* applies only if a person is tried. It does not apply where confirmed charges are withdrawn before trial commences, which is the possible scenario in this case.

A. The Defence position is not supported by the Court's statutory law.

7. Defence counsel advanced no statutory authority in support of his argument. In fact, the relevant statutory provisions defeat the argument because they demonstrate that *ne bis in idem* applies only if there is a trial. The operative provision is Article 20, which provides, in relevant part:

> (1) Except 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.
>
> (2) No person shall be tried by another court for a crime referred to in article 5 for which that person has already been *convicted* or *acquitted* by the Court. (emphasis added).[3]

8. The words "convicted" and "acquitted" denote the making of a final decision on the merits of the case, either under Article 65 (following an admission of guilt) or under Article 74 (following the presentation of evidence at trial). A person against whom charges have been withdrawn

[2] ICC-01/09-02/11-T-27 ENG ET, pages 66-68.
[3] While not applicable here, Rule 168, which deals with the *ne bis in idem* principle in the context of Article 70 prosecutions, uses the same operative terms as Article 20.

before trial has begun cannot be said to have been "acquitted" for the simple reason that he has never been tried.

9. Article 61(9) supports this interpretation. That article acknowledges the Prosecutor's authority to withdraw charges against an accused, but states that where this power is exercised "[a]fter commencement of the trial", "permission of the Trial Chamber" must be obtained. The rationale for the judicial approval requirement is that, after the commencement of the trial, the accused person's case is in the hands of the Trial Chamber and it is the Chamber alone that can decide the course of the proceedings. By contrast, ending the proceedings before trial does not result in either a conviction or an acquittal; there is no verdict because there has been no trial.

10. Article 81 further supports this interpretation. That article governs "[a]ppeal against decision of *acquittal* or *conviction* or against sentence" (emphasis added). Article 81(1) clarifies that the only scenario in which an "acquittal" is possible is through a "decision under article 74" *i.e.*, a verdict reached after the presentation of evidence at trial. Indeed, it would be nonsensical if *ne bis in idem* were triggered even before an accused person is required to enter a plea on the charges, which under Article 64(8)(a) happens only "[a]t the commencement of the trial".[4]

11. The *travaux préparatoires* lend further support to this position. Early in the negotiations, delegations made clear that *ne bis in idem* was intended to apply only to proceedings that were adjudicated on the merits, noting that the provisions of the Statute dealing with *ne bis in idem* "should apply only to *res judicata* and not to proceedings discontinued for technical reasons".[5] Academic commentaries support this view, observing that Article 20

[4] As the Chamber has held, the "commencement of trial" occurs at the "true opening of the trial when the opening statements, if any, are made prior to the calling of witnesses". ICC-01/09-02/11-696, n.16 (quoting ICC-01/04-01/06-1084, para. 39). This case has not reached that stage.
[5] 1996 Preparatory Committee Report, Vol I, art, 42, para 170.

"targets the final decision of the ICC" and "covers neither a ruling on admissibility nor decisions on amendment, *withdrawal* or non-confirmation of charges".[6] Accordingly, "[b]efore the final decision is taken . . . paragraph 1 [of Article 20] is not applicable".[7]

B. ICC case law shows that *ne bis in idem* is not triggered by the withdrawal of charges before trial.

12. This Chamber's "Decision on the withdrawal of charges against Mr Muthaura" is instructive.[8] The Chamber did not purport to "acquit" Mr Muthaura when his charges were withdrawn.[9] It simply declared that proceedings against him were terminated, vacated the summons to appear, and declared moot all outstanding requests by the Muthaura Defence.[10]

13. There would be no reason for Mr Kenyatta to be treated differently. The charges against Mr Muthaura were withdrawn for the same reason as they would be against Mr Kenyatta – an insufficiency of evidence. And the charges would be withdrawn in an identical procedural posture – charges having been confirmed but the trial on the merits yet to start. Entering a judgment of "acquittal" against Mr Kenyatta would create a disparity of treatment between two former accused persons whose dealings with the Court have otherwise followed the same trajectories. It would mean that if evidence emerged in the future strongly implicating both Messrs Muthaura and Kenyatta in wrongdoing during the post-election violence, Mr Muthaura could be charged and tried while Mr Kenyatta could not. This

[6] Tallgren, I. & Reisinger, C., *Article 20: Ne bis in idem*, in Commentary on the Rome Statute of the International Criminal Court (Triffterer ed. 2d ed. 2008), p. 684 (emphasis added).
[7] *Ibid*.; *see also* p. 687 (explaining that the same logic applies to Article 20(2), which applies only when there has been "a final decision on the merits of the case").
[8] ICC-01/09-02/11-696.
[9] The Common Legal Representative raised the *ne bis in idem* issue before the Chamber in oral submissions. *See* ICC-01/09-02/11-T-23-ENG ET, page 17. In this context, it is reasonable to conclude that if the Chamber intended for *ne bis in idem* to apply to Mr Muthaura, it would have said so in its decision. It did not.
[10] ICC-01/09-02/11-696, page 8.

unequal treatment of accused persons in identical positions would be inconsistent with basic considerations of fairness and equality before the law.

14. The *Bemba* case is also instructive, although different procedurally. The Bemba defence argued *ne bis in idem* as part of an Article 17 admissibility challenge, asserting that the case was inadmissible "because the CAR judicial authorities initiated valid investigations against the accused for the crimes currently before the ICC, which the CAR thereafter discontinued" through an order of a CAR trial court that "effectively stop[ped] the proceedings".[11] The Trial Chamber rejected the *ne bis in idem* argument because the order of the CAR trial court discontinuing the domestic proceedings "was not in any sense a decision on the merits of the case" and "did not result in a final decision or acquittal of the accused".[12] The same is true here. If the charges are withdrawn against Mr Kenyatta before trial, there will be no "decision on the merits of the case" and therefore no possibility of acquittal.[13] *Ne bis in idem* therefore does not apply.

C. Case law from other international courts demonstrates that *ne bis in idem* applies only if there is a trial on the merits.

15. Case law from the ICTY and ICTR also supports the proposition that *ne bis in idem* does not apply when proceedings have been discontinued before trial. While the wording of the operative provisions of the ICTR and ICTY statutes (Articles 9 and 10, respectively) differs from that of Article 20 of the Rome Statute, the *ne bis in idem* principle enshrined therein is the same, which makes the rulings of those tribunals instructive.

[11] ICC-01/05-01/08-802, paras. 83-94.
[12] ICC-01/05-01/08-802, para. 248.
[13] ICC-01/05-01/08-802, para. 248.

16. The *Nzabirinda* case at the ICTR is on point. Mr Nzabirinda pled guilty and the Prosecution withdrew certain charges as part of the plea agreement.[14] The Prosecution asked the Trial Chamber to rule that "the *non bis in idem* principle applies to counts withdrawn even though no trial on the merits had been held thereon", explaining that "it would not succeed in proving the counts that had been withdrawn 'because the evidence is not there'".[15] The Chamber rejected this argument. Noting that "a trial on the merits was yet to commence",[16] it held that:

> . . . where counts have been withdrawn without a final judgement, the principle of *non bis in idem* does not apply and cannot be invoked to bar potential subsequent trials of the accused before any jurisdiction.[17]

17. The principle is the same at the ICTY. In *Tadic*, the accused argued that his ICTY prosecution was barred under *ne bis in idem* because earlier proceedings against him in Germany constituted a "separate trial which had entered its 'final phase'".[18] The Trial Chamber rejected this argument, holding that *ne bis in idem* is triggered under the ICTY statute only when a person has "already been tried", and that because "the proceedings which were instituted against the accused in Germany do not constitute a trial", there was no bar to his ICTY trial.[19] Notably, the *Tadic* Trial Chamber went on to consider whether Tadic's ICTY prosecution was barred by the *ne bis in idem* provision in Article 14(7) of the International Covenant on Civil and Political Rights, which corresponds more closely to Article 20 of the Rome

[14] ICTR, *The Prosecutor v. Joseph Nzabirinda*, Case No. ICTR 2001-77-T, 23 February 2007, Sentencing Judgement, para. 41.
[15] *Ibid.*, para. 44.
[16] *Ibid.*, para. 47.
[17] *Ibid.*, para. 46; *see also* ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, 31 May 2000, Decision, paras 74-77 (ICTR Appeals Chamber holding that "[t]he *non bis in idem* principle applies only where a person has effectively already been tried" and ruling that extradition proceedings in a third state "did not constitute a trial" because those proceedings did not result in the "deliver[y of] any final judgement on the charges").
[18] ICTY, *Prosecutor v. Tadic*, Case No. IT-94-I-T, 14 November 1995, Decision on the Defence Motion on the Principle of *Non-bis-in-idem*, para. 4.
[19] *Ibid.*, paras. 10-11.

Statute.[20] The Chamber held that it did not, finding that Article 14(7) of the ICCPR "applies only to cases where an accused has already been tried".[21]

18. This principle was affirmed in *Karadzic*. After the Prosecution agreed to remove certain crime sites from its case at trial, the accused sought a ruling that he could not subsequently be prosecuted for those acts that would "not be the subject of evidence at trial".[22] The Chamber rejected the argument, ruling that "the principle of *non-bis-in-idem* applies only in cases where an accused has already been tried."[23]

D. Policy considerations dictate that *ne bis in idem* should be triggered only if there is a trial on the merits.

19. The purpose underlying the *ne bis in idem* principle is to ensure that a person is not unfairly retried on accusations that have been fully adjudicated by a court on a previous occasion.[24] Mr Kenyatta has not been tried upon any matter at all. Bringing new charges against him in the future on the basis of stronger evidence would therefore not infringe the *ne bis in idem* principle and would not constitute any injustice.

20. What *would* constitute an injustice would be any purported "acquittal" prior to the commencement of a criminal trial that may be used to challenge any possible future charges. It is the Prosecution's case that its investigative activities have been impeded in this matter through a failure on the part of the Government of Kenya to comply with its co-operation obligations under the Statute. At some point in the future, the evidence that has been unsuccessfully sought may become available. If this results in the

[20] *Ibid.*, paras. 17-20.
[21] *Ibid.*, para. 20.
[22] ICTY, *Prosecutor v. Karadzic*, Case No. IT-95-5118-T, 16 November 2009, Decision on the Accused's Motion for Finding on *Non-bis-in-idem*, para. 5.
[23] *Ibid.*, para. 13.
[24] *See* Tallgren, I. & Reisinger, C., *Article 20: Ne bis in idem*, in Commentary on the Rome Statute of the International Criminal Court (Triffterer ed. 2d ed. 2008), pp. 671-72.

Prosecution obtaining sufficient evidence to sustain a conviction, it would be antithetical to the Statute's core principles for a future prosecution to be barred. High level obstruction of investigations cannot result – and cannot be seen to result – in immunity from prosecution without there ever having been a trial on the merits.

21. This Court's primary purpose is "to put an end to impunity".[25] With this goal in mind, the drafters of the Statute chose not to impose a statute of limitations upon an individual's liability to be prosecuted for crimes within the Court's jurisdiction. The drafters also chose to include narrow *ne bis in idem* protections, which, for example, may allow a person acquitted by the Court of murder as a crime against humanity to be re-tried in domestic court for the underlying murder(s).[26] Against the intention of the drafters, it would be wrong to impose an artificial barrier to future prosecution that finds no support in the Statute or the Rules, through an incorrect application of the *ne bis in idem* principle enshrined in Article 20.

[25] Preamble of the Rome Statute.
[26] Article 20(2); *see also* C. Van den Wyngaert & T. Ongena, *Ne bis in idem principle, including the issue of amnesty*, in The Rome Statute of the International Criminal Court: a Commentary (Cassesse, Gaeta & Jones ed. 2002), Vol I, p. 723; Lorraine Finlay, *Does the International Criminal Court Protect Against Double Jeopardy: An Analysis of Article 20 of the Rome Statute*, (2009) 15 UC Davis J. of Intl Law & Policy 221', 229-32.

Conclusion

22. Procedurally, the Defence's *ne bis in idem* argument is premature and need not be addressed by the Chamber at this stage. Substantively, the argument is without merit because it is inconsistent with the plain language of the Statute, the applicable case law, and relevant policy considerations. *Ne bis in idem* applies only if there is a trial; it does not apply if charges are withdrawn before trial begins.

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Dated this 10th of February 2014
At The Hague, The Netherlands