

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 13 March 2015

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

Decision on the withdrawal of charges against Mr Kenyatta

Decision 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 Uhuru Muigai Kenyatta

Mr Steven Kay

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

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

States Representatives

Government of the Republic of Kenya

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(B) ('Chamber')¹ of the International Criminal Court ('Court') in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, pursuant to Article 64(2) and (10) of the Rome Statute ('Statute'), Rule 134(1) of the Rules of Procedure and Evidence and Regulations 23bis(3) and 42 of the Regulations of the Court ('Regulations'), renders the following 'Decision on the withdrawal of charges against Mr Kenyatta'.

I. Procedural history and submissions

1. On 8 March 2011, Pre-Trial Chamber II summonsed Mr Kenyatta to appear before the Court and put in place certain conditions relevant to the summons ('Summons to Appear'),² which have remained in effect throughout the duration of the proceedings.³
2. On 23 January 2012, Pre-Trial Chamber II confirmed the charges against Mr Kenyatta.⁴ On 29 March 2012, the Presidency referred the case against Mr Kenyatta to the Chamber.⁵
3. On 3 December 2014, the Chamber issued a decision in which it, *inter alia*, directed the Office of the Prosecutor ('Prosecution') to file a notice, within one week of the date of the decision, indicating either (i) its withdrawal of the charges in the case; or (ii) that the evidentiary base had improved to a degree which would justify proceeding to trial ('Decision of 3 December 2014').⁶

¹ Where 'Chamber' is used in this decision it refers to both Trial Chamber V(b) as composed by the Presidency's 'Decision replacing a Judge in Trial Chamber V(b)', 30 January 2014, ICC-01/09-02/11-890, and to the chamber in its previous compositions as Trial Chamber V(b) and Trial Chamber V.

² Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11-1, pages 23-24.

³ Transcript of hearing dated 14 February 2013, ICC-01/09-02/11-T-22-ENG, page 6, lines 4-11.

⁴ Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red.

⁵ Decision referring the case of *The Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* to Trial Chamber V, ICC-01/09-02/11-414.

⁶ Decision on Prosecution's application for a further adjournment, 3 December 2014, ICC-01/09-02/11-981, page 26.

4. On 5 December 2014, the Prosecution filed a notice stating, *inter alia*, that it ‘withdraws the charges against Mr Kenyatta’, without prejudice to the possibility of bringing new charges at a later date on the same or similar factual circumstances should it obtain sufficient evidence to do so (‘Notice’).⁷ The Prosecution stated that the evidence remained insufficient to prove Mr Kenyatta’s alleged criminal responsibility beyond reasonable doubt.⁸
5. On the same day, the Chamber shortened the deadline for responses, if any, to the Notice to 16:00 on 9 December 2014.⁹
6. On 9 December 2014, the Legal Representative of Victims (‘LRV’) filed a response to the Notice.¹⁰ In the response the LRV, *inter alia*, calls on the Government of the Republic of Kenya and the Prosecution to continue efforts to hold accountable those responsible for the crimes committed in Naivasha and Nakuru in the context of the post-election violence, and stresses the need for assistance to be provided to the victims of those crimes. By way of an annex, the LRV also provides a sample of the views of 41 of the victims in the case regarding the withdrawal of charges in this case.¹¹
7. The defence team for Mr Kenyatta did not file a response.

II. Analysis of the Chamber

8. The Chamber recalls that in the Decision of 3 December 2014 it had directed the Prosecution to file, within one week, a notice of its withdrawal of charges,

⁷ Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, 5 December 2014, ICC-01/09-02/11-983.

⁸ Notice, ICC-01/09-02/11-983, para. 2.

⁹ E-mail from Legal Officer of the Chamber to parties and participants dated 5 December 2014 at 16:11.

¹⁰ Victims’ response to the ‘Prosecution’s notice of withdrawal of the charges against Uhuru Muigai Kenyatta’, 9 December 2014, ICC-01/09-02/11-984.

¹¹ ICC-01/09-02/11-984-Anx.

or an indication that the evidentiary base had improved to a degree which would justify proceeding to trial.¹²

9. The Chamber had also indicated its view that, in the event of a withdrawal of charges by the Prosecution at this time, the principle of *ne bis in idem* would not attach, and it would be open to the Prosecution to bring 'new charges against the accused at a later date, based on the same or similar factual circumstances, should it obtain sufficient evidence to support such a course of action'.¹³
10. In this particular context, and in light of the Notice filed and the fact that the last pending party request has now been resolved,¹⁴ the Chamber considers it appropriate to terminate the present proceedings. Accordingly, the Chamber notes that the Summons to Appear should now be formally discharged and that the conditions therein will cease to have effect. However, pursuant to Article 70 of the Statute, it is noted that the Court retains jurisdiction over any interference with a witness or with the collection of evidence. The Chamber additionally emphasises that, pursuant to Regulation 42 of the Regulations, '[p]rotective measures once ordered in any proceedings in respect of a victim or witness [...] shall continue after proceedings have been concluded, subject to revision by a Chamber'.
11. The Chamber considers that, although the present proceedings will now be terminated, the Chamber retains a limited residual jurisdiction to consider certain procedural matters, including any review and possible reclassification of confidential filings in the case record, which shall remain confidential unless otherwise decided. The Chamber further notes that it may be necessary to reconsider this decision, and resume a certain limited further jurisdiction,

¹² Decision of 3 December 2014, ICC-01/09-02/11-981, page 26.

¹³ Decision of 3 December 2014, ICC-01/09-02/11-981, para. 56.

¹⁴ Decision on the Prosecution's request for leave to appeal, 9 March 2015, ICC-01/09-02/11-1004.

depending on the manner in which the Prosecution's appeal of the Chamber's 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute'¹⁵ is resolved.

12. Finally, the Chamber considers that the termination of these proceedings is without prejudice to the continuation of the mandate of the LRV for such limited period as may be necessary to enable him to properly inform and advise the victims regarding the impact of the withdrawal of charges in this case and of the present decision, as well as, if applicable, to participate in the outstanding proceedings before the Appeals Chamber.¹⁶

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

NOTES the Prosecution's withdrawal of charges against Mr Kenyatta;

TERMINATES the proceedings in this case, subject to paragraphs 10 and 11 of the present decision; and

VACATES the Summons to Appear.

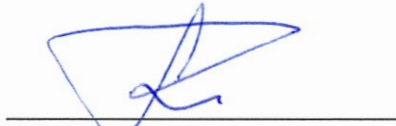
¹⁵ ICC-01/09-02/11-982.

¹⁶ See Decision on the Prosecution's request for leave to appeal, 9 March 2015, ICC-01/09-02/11-1004.

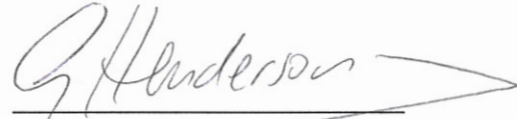
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Geoffrey Henderson

Dated 13 March 2015

At The Hague, The Netherlands