Cour
Pénale
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International
Criminal
Court

Original: **English**

No.: **ICC-01/04-02/06**
Date: **5 June 2017**

TRIAL CHAMBER VI

Before: **Judge Robert Fremr, Presiding Judge**
Judge Kuniko Ozaki
Judge Chang-ho Chung

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR V. BOSCO NTAGANDA

Public – Expedited Ruling Requested

Urgent Request for leave to appeal "Decision on Defence request for leave to file a 'no case to answer' motion", 1 June 2017, ICC-01/04-02/06-1931

Source: **Defence Team of Mr Bosco Ntaganda**

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

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Further to the Trial Chamber's (the "Chamber") "Decision on Defence request for leave to file a 'no case to answer' motion" issued on 1 June 2017 ("Impugned Decision"),[1] Counsel for Mr Ntaganda (the "Defence") submits this:

Urgent Request for leave to appeal "Decision on Defence request for leave to file a 'no case to answer' motion"

INTRODUCTION

1. No accused should be required to continue to face trial when the Prosecution in an adversarial proceeding has failed, by the end of its case, to present evidence sufficient to convict. Allowing a trial to go forward in such circumstances violates the rights of the accused to be tried without undue delay, to remain silent and not to be subject to a reversal of the burden of proof. The Impugned Decision, however, declined to even consider whether the Prosecution had presented sufficient evidence to convict on specified charges, thus failing to ensure that these rights are not infringed by proceeding with trial on those charges.[2]

2. Leave is sought to appeal the Impugned Decision in respect of three issues (the "Issues"):

    i. Whether the Chamber erred in permitting trial to proceed in respect of charges for which the Chamber declined to consider the sufficiency of the Prosecution's evidence ("First Issue");[3]

    ii. Whether the Chamber erred in law by considering only expeditiousness, and not fairness, in declining to evaluate the sufficiency of the evidence ("Second Issue");[4] and

[1] ICC-01/04-02/06-1931-Conf.
[2] Impugned Decision, para. 28.
[3] Impugned Decision, paras. 26, 28.
[4] Impugned Decision, para. 26.

iii. Whether declining to entertain a Defence motion for a judgement of (partial) acquittal is a discretionary matter ("Third Issue").

3. The Issues are appealable. They significantly affect the fair conduct of proceedings, if not also its expeditiousness. Immediate resolution is the only way that this issue can be addressed before the course of the trial is tainted in a way that cannot be remedied on final appeal.

APPLICABLE LAW

4. A decision is subject to interlocutory appeal, pursuant to Article 82(1)(d), where it:

> involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and for which, in the opinion of the […] Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

5. The Appeals Chamber has defined an "issue" as

> an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is a disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.[5]

6. The issue must further be one for which

> immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.[6]

7. The Chamber may reformulate appealable issues at its discretion.[7]

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[5] *Situation in the Democratic Republic of the Congo*, Judgment on Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168 ("Leave to Appeal Judgment"), para. 9.
[6] Leave to Appeal Judgment, para. 14.
[7] Leave to Appeal Judgement, para. 20.

PROCEDURAL BACKGROUND

8. The Prosecution closed its case on 29 March 2017,[8] followed by the Legal Representatives of Victims of the Attacks on 12 April 2017.[9]

9. The Defence, pursuant to the Chamber's Conduct of Proceedings Decision,[10] sought leave on 25 April 2017 to make submissions requesting dismissal of certain charges.[11]

10. The Trial Chamber denied the request on 1 June 2017.

SUBMISSIONS

I. The Issues Satisfy the Criteria of Rule 82(1)(d)

a. The Impugned Decision Involves Issues that Significantly Affect Trial Fairness

11. The Impugned Decision involves issues that significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial. The Chamber decided that it would not hear submissions on, and would not adjudicate, whether evidence had been presented by the Prosecution during its case that could possibly lead to conviction. The consequence is that Mr. Ntaganda is now required to answer charges on which the Prosecution may have presented no evidence sufficient to convict. The Chamber even expressly contemplates the possibility that it may be proceeding on those charges in the absence of such evidence.[12]

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[8] Prosecution's Notice of the Close of its Case-in-Chief, ICC-01/04-02/06-1839.
[9] ICC-01/04-02/06-T-203-ET, p. 104, ln. 8-11 ("Now I state that this testimony or concluded testimony also concluded presentation of evidence by the Legal Representative of Victims of the attacks, so I highlight that any related deadlines therefore start running as of today.")
[10] Decision on the conduct of proceedings, ICC-01/04-02/06-619, para. 17.
[11] Request for leave to file motion for partial judgment of acquittal, ICC-01/04-02/06-1879-Conf. The Request was opposed by the Prosecution (ICC-01/04-02/06-1902-Conf) and the LRV (ICC-01/04-02/06-1891-Conf).
[12] Impugned Decision, para. 26 ("entertaining such a motion may also entail a lengthy process […] and may thus not necessarily positively affect the expeditiousness of trial, *even if successful in part*") (italics added).

12. The question here is not whether Mr Ntaganda's rights have been violated by a decision denying a request to dismiss the charges; the question, rather, is whether Mr Ntaganda's rights have been violated by a decision refusing to consider the issue.

13. A person should not be put on trial and required to answer charges when the Prosecution has not presented sufficient evidence on which the Trial Chamber *could* convict the accused. Subjecting a person to trial in such circumstances infringes the right to remain silent,[13] the right not to be subjected to any reversal of the burden of proof,[14] and – taking the proceedings as a whole – the right to be tried without undue delay.[15]

14. The *Ruto & Sang* Trial Chamber correctly explained that the "primary rationale" of a no case to answer motion is not expeditiousness of proceedings *per se*, but rather vindicating the rights of the Accused:

> The primary rationale underpinning the hearing of a 'no case to answer' motion – or, in effect, a motion for a judgment of (partial) acquittal – is the principle that an accused should not be called upon to answer a charge when the evidence presented by the Prosecution is substantively insufficient to engage the need for the defence to mount a defence case. *This reasoning flows from the rights of an accused, including the fundamental rights to a presumption of innocence and to a fair and speedy trial, which are reflected in Article 66(1) and 67(1) of the Statute*.[16]

15. Further confirmation that a no case to answer motion is a fundamental component of a fair adversarial trial is found in the Rules of the ICTY, ICTR, SCSL, STL and Kosovo Specialist Chambers.[17] The Rules of these international tribunals uniformly prescribe that a trial chamber has no discretion <u>not</u> to

[13] ICC Statute, Art. 67(1)(g).
[14] ICC Statute, Art. 67(1)(i).
[15] ICC Statute, Art. 67(1)(c).
[16] *Ruto & Sang*, Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case No Answer' Motions), 3 June 2014, para. 12 (italics added).
[17] ICTY, Rules of Procedure and Evidence, Rule 98 *bis*; ICTR, Rules of Procedure and Evidence, Rule 98 *bis*; SCSL, Rules of Procedure and Evidence of the Special Court for Sierra Leone, Rule 98; STL, Rules of Procedure and Evidence, Rule 167; Kosovo Specialist Chambers, Rules of Procedure and Evidence before the Kosovo Specialist Chambers, Rule 127.

dismiss charges where there is no sufficient evidence on which an accused could be convicted at the end of trial.[18] Trial Chambers have even acknowledged that this right is so fundamental that a trial chamber has an independent obligation to evaluate the sufficiency of the Prosecution's evidence at the end of its case even in the absence of a motion by the Defence:

> So the first message, or the first conclusion to be drawn on the face of it from this new Rule 98 *bis* -- Rule 98 *bis* is that it has become mandatory now for the Trial Chamber to embark on this Rule 98 *bis* acquittal exercise at the end of the Prosecutor's case and need not wait for the Defence to file or to make any application for the acquittal of the client.[19]

16. Further support for the view expressed in *Ruto & Sang* that the requirement of a no case to answer motion "*flows from the rights of an accused, including the fundamental rights to a presumption of innocence and to a fair and speedy trial*" is to be found in the overwhelming practice and jurisprudence of domestic jurisdictions.[20]

17. The absence of an express requirement or express power in the ICC Rules to entertain a motion to dismiss at the end of the Prosecution case does not mean that this is not an essential requirement of a fair trial. Just as a Trial Chamber

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[18] ICTY Rule 98 *bis* (original version, IT/32/Rev.13, 9 and 10 July 1998).

[19] *Prosecution v. Oric*, transcript, Case No. IT-03-68-T, T. Ch. II, 4 May 2005, p. 7853.

[20] Belgium, *Luigi Marcuccio v Commission européenne*, 17 December 2010, Ordonnance du Tribunal (Chambre des pouvoirs) para. 41 ("dès lors que le Tribunal de la fonction publique était obligé d'entendre les parties avant de constater, d'office, qu'il n'y avait plus lieu de statuer, il était, a fortiori, tenu de verser au dossier une demande en ce sens de l'une ou de l'autre des parties"); Canada, *Tran v. Kerr*, 2014 ABCA 350, para. 16, ("Well, you're wrong. […] I don't even have to look at your brief. The application for a non-suit is dismissed. Thank you, Sir"; "[…] whether the respondent was entitled to succeed without expert evidence is an issue discussed *infra,* paras. 21 ff. The immediate problem, however, was the refusal of the trial judge to listen to argument before ruling, and his refusal to look at the brief that had been prepared. All litigants are entitled to have their arguments considered, even if the trial judge suspects that the argument will ultimately be unsuccessful"); United States, *U.S. v. Ubl*, 472 F. Supp. 1236 (1979) ("Through a motion for a judgment of acquittal pursuant to applicable adjudged until close of Government's presentation of evidence, a ruling is proper if at an earlier stage basic facts appear, or do not appear, inescapably leading to conclusion that, irrespective of whatever other evidence may be introduced, prosecution must fail, since to continue trial after it is apparent that prosecution cannot introduce sufficient evidence to support a guilty verdict *would be a waste of everyone's time and extremely unfair to defendant, and it would simply be a travesty of justice*") (italics added).

may have inherent powers implied from its character as a judicial institution,[21] so too must the character of a criminal proceeding – fortified by the rights set out expressly in the Statute – compel procedures to ensure fairness. Entertaining a motion to dismiss is an essential corollary of the right to remain silent, the right to be tried without undue delay, and the right not to be subject to a reversal of the burden of proof – all of which mean that an accused person must not be required to answer charges in the absence of the presentation by the Prosecution of sufficient evidence.

18. The decision to deny a hearing on the sufficiency of the Prosecution's evidence violated these rights and, accordingly, "significantly affected the fair […] conduct of the proceedings." The First Issue accordingly satisfies the requirements of Article 82(1)(d).

19. The Trial Chamber's reasoning also relied on the following reasoning:

> entertaining such a motion may also entail a lengthy process requiring parties and participants' submissions and evaluation of the evidence by the Chamber, and may thus not necessarily positively affect the expeditiousness of the trial, *even if successful in part*.[22]

20. The Trial Chamber accordingly contemplated the possibility that the trial should proceed against Mr Ntaganda *even in respect of charges on which no sufficient evidence was presented by the Prosecution*. This reasoning expressly sacrifices fairness to purported expeditiousness. This is an issue that directly affects the fair conduct of proceedings and, in the long run, its expeditiousness.

21. The Chamber's reference to its "continuing review of the evidence" does not mitigate the sacrifice of fairness to efficiency reflected in paragraph 26 of the Impugned Decision. In fact, if the Trial Chamber recognizes that fairness requires that the issue be kept under review, then it follows that the principle

[21] *Ruto & Sang*, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, ICC-01/09-01/11-1274, para. 74.
[22] Impugned Decision, para. 26 (italics added).

audi alteram partem requires the parties to be heard on an issue vitally affecting their interests, particularly in criminal proceedings that are adversarial. Denial of that right is a violation of natural justice that, in turn, violates the underlying substantive and procedural rights concerned. The Second Issue, accordingly, satisfies the requirements of Article 82(1)(d).

22. An unstated premise of the Trial Chamber's decision is the understanding that it has the discretion to decline to consider whether no evidence has been presented that justifies proceeding with the case on those charges. This, in turn, implies a discretion -- as was even expressly acknowledged by the Trial Chamber -- to proceed with the trial for charges upon which the Prosecution has presented no sufficient evidence. This is not consistent with the rights of the accused, and is an error that was essential to the reasoning of the Impugned Decision. The Third issue, accordingly, satisfies the requirements of Article 82(1)(d).

b. Immediate Resolution May Materially Advance the Proceeding

23. The possibility of Mr Ntaganda being convicted of a charge despite the Prosecution having failed to adduce sufficient evidence during its case could lead to reversal of any such conviction on appeal and, potentially, require a re-trial. Security of the Judgement and fairness will both be served by immediate appellate resolution.

24. Furthermore, although a no case to answer motion might take a modest amount of time to adjudicate,[23] the savings of time arising from even a partial judgment of acquittal would more than compensate for the time spent safeguarding the rights of the accused. This may materially advance the proceedings not only by ensuring the soundness of the procedure to be

[23] Some no case to answer motions at the ICTY have been adjudicated in as little as just over a month – less than the time taken to decide the Defence's motion seeking leave to bring a no case to answer motion.

followed and securing the rights of the accused, but also potentially reducing the scope of the charges to be litigated.

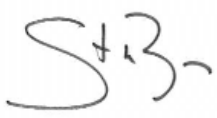
II. The Issues Are Appealable

25. All three Issues are manifestly appealable. They were essential to the Trial Chamber's reasoning, and they arise from the Impugned Decision. The Defence does, of course, disagree with the reasoning upon which the Impugned Decision is based, but the Issues are not a "mere disagreement." The disagreement is based on an alleged error in respect of an essential aspect of the Chamber's reasoning, for which an appeal is appropriate. Further, the Issues are specifically and precisely articulated, as is their connection to the Impugned Decision.

RELIEF SOUGHT

26. The Defence respectfully seeks leave pursuant to Article 82(1) of the Statute to appeal the Impugned Decision in respect of the three Issues identified above. In light of the imminent start of the next evidentiary block on 14 June 2017, the Defence hereby requests that the present motion be determined on an expedited basis.

RESPECTFULLY SUBMITTED ON THIS 5TH DAY OF JUNE 2017



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