

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: ICC-01/04-02/06

Date: 15 June 2017

THE APPEALS CHAMBER

Before:

**Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Christine Van den Wyngaert
Judge Howard Morrison
Judge Piotr Hofmański
Judge Raul C. Pangalangan**

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR V. BOSCO NTAGANDA***

Public

Response to Mr Ntaganda's urgent request for suspensive effect

Source: Office of the Prosecutor

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

Ms Helen Brady

Counsel for the Defence

Mr Stéphane Bourgon

Mr Christopher Gosnell

Legal Representatives of the Victims

Ms Sarah Pellet

Mr Dmytro Suprun

REGISTRY

Registrar

Mr Herman von Hebel

Introduction

1. Mr Ntaganda's urgent request for suspensive effect¹ of the Trial Chamber's "Decision on Defence request for leave to file a 'no case to answer' motion"² should be rejected. Contrary to Mr Ntaganda's arguments,³ the Request fails to show how implementation of the Decision (i) would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant; (ii) would lead to consequences that would be very difficult to correct and may be irreversible, or (iii) could potentially defeat the purpose of the appeal. In fact, it is in the interests of fair and expeditious proceedings to continue the trial as scheduled, by hearing the testimony of Mr Ntaganda.
2. In any event, even if the Appeals Chamber finds it necessary to suspend the implementation of the Decision, this does not require the trial to be suspended until the Appeals Chamber has pronounced on this appeal. Because all of Mr Ntaganda's arguments focus on the impact of his own testimony and of other testimony that relates to the "Second Attack" or to Count 17, suspensive effect should be limited to the presentation of that evidence. This would allow the Trial Chamber to continue the proceedings by ordering the Defence to call witnesses whose evidence is unrelated to the "Second Attack" or to Count 17. Mr Ntaganda appears to implicitly concede this to be an option.⁴

Submissions

3. Suspension entails the non-enforcement of the *sub judice* Decision pending the outcome of the appeal. It is designed to sustain the *status quo ante*, that is, the position that existed prior to the issuance of the *sub judice* decision. Suspension is a discretionary power, to be exercised in the interests of justice, foremost for the

¹ ICC-01/04-02/06-1960 ("Request").

² ICC-01/04-02/06-1931 ("Decision").

³ Request, paras. 17-28.

⁴ Request, para. 20.

efficiency of the judicial process. The aim is to guard against errors that may lead the judicial process off course to the detriment of justice.⁵ None of Mr Ntaganda's arguments justify suspending implementation of the Decision.

(a) Implementation of the Decision would not create an irreversible situation

4. Mr Ntaganda's arguments that implementation of the Decision would create an irreversible situation that could not be corrected, even if the Appeals Chamber were to find in his favour,⁶ are unsupported. Although it is true that by continuing the trial proceedings with the testimony of Mr Ntaganda, he will need to respond to all charges contained in the updated Document Containing the Charges, this does not lead to an irreversible situation. As repeatedly held by the Appeals Chamber it is "able to reverse, confirm or amend the Impugned Decision irrespective of whether the proceedings before [the] Trial Chamber [...] continue."⁷
5. Neither will continuation of the trial create unfairness to Mr Ntaganda.⁸ In particular, the Decision does not impact on Mr Ntaganda's right under article 67(1)(a) to be informed of the charges against him. These charges are set out in the Confirmation Decision, as well as the updated Document Containing the Charges.⁹ Mr Ntaganda's argument that he has a right not to answer to charges for which the Prosecution failed to adduce sufficient evidence is unsupported.¹⁰ In fact, this argument is predicated on the unsupported assumption that trials during which a chamber does not make an interim assessment of the evidence

⁵ ICC-01/04-01/06-1444-Anx OA12, paras. 6, 9, 10 Sep. Op; ICC-01/04-01/06-2953 A A2 A3 OA21, para. 81; ICC-01/04-02/12-12 OA, para. 17; ICC-01/04-01/07-3344 OA13, para. 5; ICC-01/11-01/11-387 OA 4, para. 20; ICC-01/09-01/11-862 OA5, para. 8; ICC-01/04-01/07-3344 OA13, para. 5.

⁶ Request, paras. 17-23.

⁷ ICC-01/05-01/08-817 OA3, para. 11. *Contra*, Request, para. 17.

⁸ *Contra*, Request, paras. 21-23.

⁹ As the Appeals Chamber held in the *Lubanga* case, "the decision on the confirmation of the charges defines the parameters of the charges at trial" (ICC-01/04-01/06-3121-Red, para. 124). Auxiliary documents may, depending on the circumstances, provide further details about the charges, provided the information was made available "before the start of the trial hearings" (ICC-01/04-01/06-3121-Red, paras. 124, 128-129, 132).

¹⁰ Request, para. 21.

presented by the Prosecution half way through the proceedings are inherently unfair.

6. Mr Ntaganda's argument that it is "virtually impossible to segregate his evidence by count" and that his upcoming testimony "impacts the assessment of the evidence in respect of all charges"¹¹ undermines his Request. In fact, it demonstrates that by taking the witness stand he will not be able to testify to some charges only, while not also giving evidence that is relevant to other charges. Accordingly, Mr Ntaganda concedes that even if he was acquitted at this stage of counts 1-5, 7-8, 10-13 and 17-18, as they relate to the "Second Attack" and to count 17 in its entirety, this would not impact on his evidence as a whole.
7. In any event, even if, *arguendo*, Mr Ntaganda could give specific evidence that relates exclusively to the charges that are the subject to his request for leave to file a 'no case to answer' motion, this would also not create an irreversible situation.¹² The Judges of the Trial Chamber are professional judges who are perfectly able to disregard discrete portions of Mr Ntaganda's testimony for the purpose of their Judgment under article 74 in this case. In fact, when rejecting Mr Ntaganda's request for an adjournment of his testimony until the Appeals Chamber's resolution of the matter, the Trial Chamber held that neither the Defence nor Mr Ntaganda "would suffer any negative effect or undue prejudice from commencing the testimony of Mr Ntaganda at this stage". This is because the Chamber "is well equipped to appropriately assess the evidence, including in light of any ruling of the Appeals Chamber in relation to the upcoming appeal [...]."¹³

(b) Implementation of the Decision would not lead to consequences that would be difficult to correct

¹¹ Request, paras. 22-23.

¹² *Contra*, Request, paras. 23, 25.

¹³ Transcript of hearing of 14 June 2017. The official version of the transcript is not yet available.

8. Mr Ntaganda does not provide any support for his argument that implementation of the Decision impacts on his rights to remain silent, not to be subject to any reversal of the burden of proof, and to be tried without undue delay.¹⁴ Mr Ntaganda decided to give evidence in his defence—and therefore to waive his right to remain silent—before the Chamber issued the Decision and with full knowledge of all the charges that he is facing in this case. Accordingly, he cannot now claim that suspension of the Decision is necessary to protect his right to remain silent. In addition, while suspension of the Decision does not impact his right not to be subject to any reversal of the burden of proof, suspending the Decision *will* delay the proceedings by requiring a substantial adjournment in the proceedings.

(c) Implementation of the Decision would not defeat the purpose of the appeal

9. Implementation of the Decision would not defeat the purpose of the appeal: i.e. to determine whether the Chamber is obliged to entertain the merits of the Defence's 'no case to answer' motion.¹⁵ Mr Ntaganda's evidence that exclusively relates to the "Second Attack" or to Count 17 can easily be disregarded by the Trial Chamber if the Appeals Chamber were to uphold the appeal and order the Trial Chamber to consider the merits of the motion *and* if the Trial Chamber were to find that there is no case to answer with respect to those charges.¹⁶ Mr Ntaganda merely repeats his arguments. As noted above,¹⁷ he fails to demonstrate how implementation of the Decision would impact on his rights to an expeditious trial, to remain silent, not to be subject to any reversal of the burden of proof or to be informed of the charges.
10. In addition, the Trial Chamber rejected Mr Ntaganda's request for an adjournment noting that his arguments were "premised on unduly speculative

¹⁴ Request, paras. 24-25.

¹⁵ *Contra*, Request, paras. 26-28.


¹⁶ *Contra*, Request, para. 26.

¹⁷ See paras. 4-5, 8 above.

grounds” because the upcoming appeal “relates to whether a no case to answer motion must be entertained rather than necessarily granted or denied in substance”.¹⁸ The same applies to this Request. Accordingly, no suspension of the Decision is required to ensure that the purpose of the appeal is not defeated.

Conclusion

11. For the reasons set out above, the Request should be rejected.



Fatou Bensouda
Prosecutor

Dated this 15th June 2017¹⁹

At The Hague, The Netherlands

¹⁸ Transcript of hearing of 14 June 2017. The official version of the transcript is not yet available.

¹⁹ This submission complies with regulation 36, as amended on 6 December 2016: [ICC-01/11-01/11-565 OA6](#), para. 32.