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Date: **27 June 2017**

THE APPEALS CHAMBER

Before: **Judge Sanji Mmasenono Monageng**
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

Appeal from decision denying leave to file a 'no case to answer motion'

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

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 Nicole Samson

Counsel for the Defence
Me Stéphane Bourgon
Me Christopher Gosnell

Legal Representatives of Victims
Mr Dmytro Suprun
Ms Sarah Pellet

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants (Participation / Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

INTRODUCTION

1. This appeal concerns a refusal by a Trial Chamber to determine, before requiring the accused to elect whether to present evidence, whether the Prosecution has presented *prima facie* evidence of guilt.[1]

2. This is not a mere procedural question. The right of an accused not to be conscripted against himself or herself is one of the most fundamental protections of criminal law and human rights. Each legal system safeguards this right in its own way. Adversarial systems, in which the parties are responsible for producing and presenting the evidence and do so sequentially, protect this right by not calling upon an accused to choose whether to present evidence until a judicial determination has been made that evidence capable of supporting a conviction has been presented – *i.e.* that there is a "case to answer."

3. The Trial Chamber declined to make such a determination, or even to hear submissions on the issue. It held that it had a "broad discretion as to whether or not to pronounce upon such matters at this stage."[2] Reliance was placed on the fact that such a motion, "even if successful in part," might "entail a lengthy process" which "may thus not necessarily positively affect the expeditiousness of the trial."[3]

4. This reasoning is legal error. Requiring an accused to elect to present evidence without first finding that the Prosecution has presented evidence *prima facie* capable of supporting a conviction places an undue burden on the exercise of the privilege against self-incrimination. The Impugned Decision disregards or under-rates this consideration, and/or gives undue weight to Trial Chamber's perception of the potential inefficiency of a no-case procedure.

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[1] "Decision on Defence request for leave to file a 'no case to answer' motion", 1 June 2017, ICC-01/04-02/06-1931 ("Impugned Decision").
[2] Impugned Decision, para. 25.
[3] *Id*. para. 26.

5. The Impugned Decision involves the following errors, which have been certified by the Trial Chamber:[4]

a) 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 Ground of Appeal); and

b) The Chamber erred in declining to entertain a Defence motion for a judgement of (partial) acquittal on the basis that it is a discretionary matter (Second Ground of Appeal).[5]

6. The Appeal Chamber is requested, upon reviewing this submission, to immediately, and on an interim basis, suspend trial proceedings pending resolution of the appeal. If the Appeal Chamber does not issue this order by, at the latest, 28 June 2017, then areas that concern the proposed request for judgment of acquittal may start to be addressed in Mr Ntaganda's testimony. Once that point is reached, then it would no longer be appropriate to interrupt proceedings.

SUBMISSIONS

(i) First Ground of Appeal: 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

7. This is not an appeal from a decision denying a request for judgment of acquittal. This is an appeal, instead, from a decision declining to consider, entertain, or adjudicate such a request.[6] Trial is now continuing even in respect of the charges on which the accused has been prevented from arguing that the

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[4] *See* ICC-01/04-02/06-T-209-ET, p. 4 ln 6-15 ("[t]he Chamber grants leave to appeal in relation to issues one and three. Reasons for this decision will follow shortly.") No written reasons have been issued by the Trial Chamber as of the moment of this filing. *See also* Urgent Request for leave to appeal "Decision on Defence request for leave to file a 'no case to answer' motion", 5 June 2017, ICC-01/04-02/06-1937, para. 2 (defining the three issues for which leave to appeal was sought).
[5] ICC-01/04-02/06-1937, para. 2 (i) and (iii).
[6] ICC-01/04-02/06-T-209-ET, p. 4, ln 9.

Prosecution, on a *prima facie* standard, had presented no evidence capable of supporting a conviction.

8. The Impugned Decision proceeds from the proposition that the Trial Chamber possesses "broad discretion as to whether or not to pronounce upon such matters at this stage of proceedings."[7] This statement is followed by the observation that an exercise of that discretion in favour of the Accused would be "inappropriate" in "the present circumstances."[8] The Impugned Decision then sets out what appears to be a framework for assessing "present circumstances":

> The Chamber notes that permitting such a motion may contribute to a shorter and more focused trial, because an acquittal on one or more of the counts as a result of a (partially) successful motion would lead to greater judicial economy and efficiency in a manner that promotes the proper administration of justice and the rights of an accused. *However, 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*.[9]

Immediately following this passage, the Chamber declared that it ought only to adjudicate the issue "if it appears sufficiently likely to the Chamber that doing so would further the fair and expeditious conduct of the proceedings."[10] The only concrete observation made by the Chamber about the "circumstances" that it considered relevant was a contrast with the "special circumstances" in the *Ruto* case which had "severely affected" the Prosecution's evidence.[11]

9. The Trial Chamber erred in law and in fact in requiring the Accused to elect to present evidence without a prior determination that the Prosecution has made out a *prima facie* case capable of leading to conviction. The requirement places

[7] Impugned Decision, para. 25.
[8] *Id*.
[9] *Id*. para. 26.
[10] *Id*.
[11] *Id*. para. 28.

an undue burden[12] on the exercise of the right to remain silent and its corollary, the privilege against self-incrimination. The nature of the violation, and the connection between the "no case to answer" procedure and the right to silence in an adversarial setting, is explained by an eminent jurist:

> Perhaps the single most important organizing principle in criminal law is the right of an accused not to be forced into assisting in his or her own prosecution [….] This means, in effect, that an accused is under no obligation to respond until the state has succeeded in making out a *prima facie* case against him or her. In other words, until the Crown establishes that there is a "case to meet", an accused is not compellable in a general sense (as opposed to the narrow, testimonial sense) and need not answer the allegations against him or her. The broad protection afforded to accused persons is perhaps best described in terms of the over-arching principle against self-incrimination [….] [I]t is up to the state, with its greater resources, to investigate and prove its own case and […] the individual should not be conscripted into helping the state fulfil this task. Once, however, the Crown discharges its obligation to present a *prima facie* case […] the accused can legitimately be expected to respond, whether by testifying him or herself or calling other evidence.[13]

10. ICTY Chambers have likewise recognized that the fundamental purpose of the procedure is the protection of the rights of the accused. The *Strugar* Trial Chamber explained that the "fundamental concept is the right of an accused *not to be called on to answer a charge* unless there is credible evidence of his implication in the offence with which he is charged."[14] The *Milosević* Trial Chamber likewise described its "main rationale" as being that "an accused

[12] *Stojkovic v. France and Belgium*, 25303/80, 27 October 2011, para. 54 offers a useful example of the imposition of an undue burden on the exercise of the right to remain silent arising from the failure to ensure the presence of counsel: "[c]ertes, le requérant a été informé des dispositions légales prévoyant que ses propos pourraient servir de preuve en justice. Pour autant, outre qu'aucun droit à garder le silence ne lui a été expressément notifié, il a pris sa décision sans être assisté d'un conseil. Or, la Cour constate qu'il n'avait renoncé de manière non équivoque ni à son droit au silence, ni à l'assistance d'un avocat. A ce titre, sa demande de bénéficier de l'assistance d'un avocat français, bien qu'interprétée par le gouvernement français comme concernant uniquement la suite de la procédure, ne peut, en toute hypothèse, être assimilée à une renonciation non équivoque dans le contexte de l'audition litigieuse.") The right to remain silent, accordingly, can be violated not only by its direct infringement, but also by procedures that interfere with its reasonable exercise.

[13] Canada, Supreme Court, *R. v. P. (M.B.)*, [1994] 1 SCR 555, 577, 579.

[14] ICTY, Trial Chamber II, *Prosecutor v. Strugar*, "Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98 *bis*" ("*Strugar* Decision"), 21 June 2004, para. 13 (italics added).

charged with a crime should not be called upon to answer that charge if, at the end of the prosecution case, there is insufficient evidence on which a jury acting reasonably could convict him."[15] In *Kordić*, the procedure's "broad purpose" was characterised as being "to determine whether the Prosecution has put forward a case sufficient to warrant the Defence being called upon to answer it."[16]

11. This rationale does not apply only in jury trials. As pointed out in *Strugar*, a case which involved a bench trial before professional judges:

> in common law jurisdictions the issue arises in trials by jury and also in trials before a judge or other judicial officer sitting without a jury. The same principles are applied in each setting although, typically, these are expressed in the context of a trial by jury. This would appear to be the case because the fundamental concept is the right of an accused not to be called on to answer a charge unless there is credible evidence of his implication in the offence with which he is charged.[17]

12. The need for the no case to answer procedure arises from the form of trial adopted by the Trial Chamber. The ICC Statute and Rules are, in many respects, silent about the form of trial proceedings.[18] Once a decision has been made about the form that is to be followed, then the Trial Chamber must, pursuant to Article 64(8)(b), adopt rules and procedures necessary to safeguard the fairness and vindicate the fundamental rights of the accused within that form of procedure. Since the precise form of trial proceedings is not prescribed in the Statute and Rules, it follows that the Trial Chamber cannot rely on the

[15] ICTY, Trial Chamber, *Prosecutor v. S. Milosević*, "Decision on Motion for Judgement of Acquittal", 16 June 2004, para. 11.
[16] ICTY, Trial Chamber, *Prosecutor v. Kordić & Cerkez*, "Decision on Defence Motions for Judgement of Acquittal", 6 April 2000, para. 11.
[17] *Strugar* Decision, para. 13. *See e.g.* Northern Ireland, Court of Appeal, *Chief Constable v. LO*, [2006] NICA 3, 2 February 2006.
[18] Although the Statute and Rules address many specific issues, such as the presence of the accused through video-technology, the scope of questioning permitted to victims of sexual violence, and the form of the testimonial oath, the "order and manner in which the evidence shall be submitted to the Trial Chamber," as described in Rule 140 of the Rules, is not prescribed in the Statute or the Rules. In the absence of agreement between the parties, Rule 140 states only that the Presiding Judge "shall issue directions." This may be contrasted with, for example, Rule 85 of the ICTY Rules, which expressly provides for the sequence of the presentation of evidence.

silence of the ICC Statute and Rules to infer that particular rules or procedures are unnecessary. As correctly observed by the *Ruto* Trial Chamber in adopting a "no case to answer" procedure:

> the Statute does not prescribe a fixed structure for the manner or order in which evidence should be presented at trial. It is therefore for individual Trial Chambers, *in light of the structure adopted in any particular case*, to consider whether or not a "no case to answer" motion would be apposite for such proceedings.[19]

13. That trial, according to the *Ruto* Trial Chamber, had been conducted "according to the general practice in the administration of international criminal justice," namely, "an arrangement in which the defence presents its own case following the conclusion of the case for the prosecution."[20] The Trial Chamber could have added that the collection and presentation of evidence had been directed primarily by the parties; that the manner of questioning followed the adversarial mode; and that the accused would not be allowed to offer testimony without being under oath.

14. The *Ruto* Trial Chamber determined that the "no case to answer" procedure was appropriate for that form of proceedings not just as a matter of discretion or efficiency, but because it was necessary to protect the "fundamental rights" of the accused subjected to an adversarial proceeding:

> 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*.[21]

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[19] Trial Chamber V(A), *Prosecutor v. William Samoei Ruto & Joseph Arap Sang*, "Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions)", 3 June 2014, ICC-01/09-01/11-1334, para. 17 ("*Ruto* Decision") (italics added).

[20] *Ruto* Decision, para. 17.

[21] *Id*. para. 12 (italics added).

15. The sequence of the presentation of evidence is not the only aspect of an adversarial proceeding that compels the "no case the answer" procedure. Adversarial proceedings lack certain judicial and other safeguards that are characteristic of inquisitorial systems, including: collecting evidence at the direction, or under the supervision, of a judicial officer;[22] giving the parties, at the end of the collection of the evidence and before the start of trial, an opportunity to review all evidence collected and ask for the charges to be dismissed on the basis of its insufficiency;[23] conferring primary responsibility for the presentation of evidence at trial on the judges;[24] allowing the accused to comment on evidence contemporaneous with its presentation;[25] and allowing – or even requiring – that testimony of an accused at any time during trial is not

[22] *See e.g.* W. van Caenegem, *Advantages and disadvantages of the adversarial system in criminal proceedings*, Review of the criminal and civil justice system (Law Faculty Publications, Paper 224, 1999) p. 73 ("[t]he advantage of an investigating magistrate is that a judicial figure, closely engaged with the investigation, will be able to exercise effective control over the conduct of the investigation by the police. He will also be well placed to judge the real necessity of measures that affect the freedom, rights and integrity of the accused"); A. Di Amato, *Criminal Law in Italy* (Wolters Kluwer, 2011), para. 569 ("[i]n fact, Article 189 CCP states that once the judge has considered the evidence admissible, he has the further task of actually defining the way the proof must be gathered, after having conferred with the parties"); W.T. Pizzi and Mariangela Montagna, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, (17 Yale J. Int'l L., 1992), at fn. 21; Belgium, Code d'instruction criminelle, sec. 230-20.

[23] *See e.g.* France, Code de procédure pénale, art. 80-1 ("[le juge d'instruction] ne peut procéder à cette mise en examen qu'après avoir préalablement entendu les observations de la personne ou l'avoir mise en mesure de les faire, en étant assistée par son avocat, soit dans les conditions prévues par l'article 116 relatif à l'interrogatoire de première comparution, soit en tant que témoin assisté conformément aux dispositions des articles 113-1 à 113-8"); C. Buisman, M. Bouazdi and M. Costi, "Principles of Civil Law", in *Principles of Evidence in International Criminal Justice* (Oxford University Press, 2010), p. 23 ("[o]nce the investigation has been finalised, the Prosecution office, or in some countries, the investigative judge produces a dossier detailing every investigative step taken throughout the investigations. […] The Defence has a right to inspect the entirety of the dossier and may challenge the dossier for incompleteness.")

[24] T. Weigend, "Germany" in *The Handbook of Comparative Criminal Law* (Stanford Law Books, 2011), p. 257 ("[a]ccording to the Code of Criminal Procedure (s. 244 (2) Code of Criminal Procedure), the trial court is responsible for gathering all evidence that is needed to arrive at a decision"); J. Haley, "Japan" in *The Handbook of Comparative Criminal Law* (Stanford Law Books, 2011), p. 397 ("[t]hus in contested cases the judge plays a leading role in putting questions to the defendant and witnesses"); W. van Caenegem, p. 73 ("[o]nly the judge questions witnesses.")

[25] M. Bohlander, *Principles of German Criminal Procedure*, (Hart Publishing, 2012) ("Bohlander") p. 7 ("the defendant is not a witness in her own cause, not an object of but a subject in the proceedings), fn. 4 ("the defendant retains the right to ask questions of witnesses and experts, to make motions and seize the court directly of any matter even if she is represented by counsel. She is not relegated by either law or custom to sitting in the dock and merely watching the efforts of her counsel, as appears in the common law systems.")

under oath.[26] These procedures diminish the role of the parties in the presentation of evidence and decrease the danger of an accused being placed in the position of presenting self-incriminating evidence. This danger, on the other hand, is very high in an adversarial proceeding, which compels the imposition of a judicial safeguard before the accused is called upon to present evidence.

16. The *Ntaganda* Trial Chamber has adopted a form of trial that is essentially identical to that of the *Ruto* Trial Chamber: sequential presentation of evidence by the parties;[27] party-driven collection and presentation of evidence subject to rules typical of adversarial proceedings; and requiring the Prosecution to formally close its case, thus indicating a formal end of the presentation of the Prosecution evidence.[28] The choice to adopt this form of trial falls within the latitude accorded under the ICC Statute; and having chosen this form of trial,

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[26] *See e.g.* Bohlander, p. 7 ("[t]he defendant is protected by the rule of *nemo tenetur se ipsum accusare*, *i.e* no one need cooperate in her own prosecution and conviction, to which fact the corollary is that the defendant is not a witness in her own cause, not an object of but a subject in the proceedings. She cannot therefore incur liability for perjury because she does not *testify* and is never under oath, a situation that has come to be called by many common lawyers the (in)famous : 'right to lie'"); M. D. Dubber, "The Criminal Trial and the Legitimation of Punishment", in A. Duff et al. (eds), *The Trial on Trial: Truth and Due Process*, (Hart Publishing, 2004), p. 94 ("[c]ontinental criminal procedure to this day disqualifies from testifying under oath. German criminal procedure law, for instance, categorically exempts the defendant from the oath requirement, along with children and the insane") (referring to art. 60(2) of the German Code of Criminal Procedure); Daniel E. Murray, *A comparative study of Peruvian criminal procedure* (21 U. Miami L. Rev. 607, 1967), p. 622 ("[the judge] must exhort the accused to tell the truth, but he may not demand an oath nor a "promise of honor." This latter rule is quite common in the civilian systems"); Nuevo Codigo Procesal Penal Decreto Legislativo N°957, 4 de julio de 2004, art. 71 (2)(d) CPP; Erwin Alexi Rodriguez Barreda, Revista Electronica Del Trabajador Judical, El Derecho a Guardar Silenco, ("En el Art. 71º, inciso 2, d) del CPP 2004 que los imputados tienen el derecho de "Abstenerse de declarar", luego el artículo 87º, incisos 1 y 2 que: "Antes de comenzar la declaración del imputado, se le comunicará detalladamente el hecho objeto de imputación, los elementos de convicción y de pruebas existentes y las disposiciones penales que se consideren aplicables", luego "se le advertirá que tiene derecho a abstenerse de declarar y que esa decisión no podrá ser utilizada en su perjuicio"), online: https://trabajadorjudicial.wordpress.com/el-derecho-a-guardar-silencio-2/.

[27] "Decision on the conduct of proceedings", 2 June 2015, ICC-01/04-02/06-619, para. 12.

[28] "Prosecution's Notice of the Close of its Case-in-Chief", 29 March 2017, ICC-01/04-02/06-1839; "Decision on Prosecution's request for admission of documentary evidence", 28 March 2017, ICC-01/04-02/06-1838, p. 39 ("CONSIDERS the phase for the presentation of evidence by the Prosecution closed and directs the Prosecution to file a formal notice forthwith").

the Trial Chamber is required to ensure that Article 67(1)(g) of the Statute is protected in a matter corresponding to that procedure.

17. A failure to determine whether the Prosecution has adduced evidence sufficient to support a conviction before calling on an accused to choose whether to present evidence is, accordingly, not merely a minor procedural deviation. The consequence is a violation of the privilege against self-incrimination, which would be compounded if the Trial Chamber were ultimately to convict the Accused in respect of the challenged charges on the basis of his own evidence. The vast majority of adversarial systems, either by legislation[29] or practice,[30] vindicate the right to silence by ensuring that the Accused can know whether or not a *prima facie* case has been made out requiring a defence. Every international tribunal applying a predominantly

[29] *See e.g.* South Africa, Criminal Procedure Act, 1977 s. 174 ("[i]f, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty"); Singapore, 189(1), Criminal Procedure Code, Chap 68, 1985 Rev Ed, s. 189(1) ("[w]hen the case for the prosecution is concluded the court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction, shall record an order of acquittal or, if it does not so find, shall call on the accused to enter on his defence"); United States, Federal Rules of Criminal Procedure, Rule 29 ("[m]otion for a Judgment of Acquittal (a) Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so"); W. LaFave *et al.*, *Criminal Procedure*, (West, 5th ed., 2009), p. 1167 ("[a]lmost all jurisdictions [in the United States] provide for a motion for judgment of acquittal that can be presented at the end of the prosecution's case"); Scotland, Criminal Procedure (Scotland) Act 1975 ss. 140A and 345A; New Zealand, Criminal Procedure Act 2011, s. 147(4); Quebec, Code of Penal Procedure, s. 210.

[30] *See e.g.* UK, *Galbraith* [1981] 1 W.L.R. 1039 (English Court of Appeal); Australia, *Doney v. R.* [1990] HCA 51; Canada, *Dubois v. The Queen* [1985] 2 S.C.R. 350 (Supreme Court Judgment), para. 11 ("[t]he Crown's "burden of establishing guilt" and the "right of silence", i.e., the concept of a "case to meet", which are essential elements of the presumption of innocence, also underlie the non-compellability right [….] The important protection is not that the accused need not testify, but that the Crown must prove its case before there can be any expectation that he will respond, whether by testifying himself, or by calling other evidence"); Trinidad & Tobago, *State v. Smith and Moses*, Ruling on No Case Submission, CR00085 of 2006 (High Court of Justice), pp. 1-2; Ireland, *DPP v McManus* [2011] IECCA 32 (Court of Criminal Appeal).

adversarial form of trial does so by statute,[31] and, prior to the adoption of statutory provisions, in practice.[32]

18. The confirmation of charges procedure is no substitute for the no case to answer procedure. An ICC confirmation hearing permits the presentation of "summary evidence"[33] which, in the *Ntaganda* case, included not only wide-ranging reports of NGO's or the United Nations that were not admitted in their entirety,[34] but also statements of witnesses who never testified[35] or whose testimony deviated substantially from their statements.[36] Indeed, many adversarial systems also require a "preliminary hearing" of the Prosecution's evidence before allowing a case to proceed to trial. A confirmation decision provides no assurance that the prosecution evidence as presented at trial is sufficient to convict, and is no substitute for a no case to answer procedure.

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[31] 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.

[32] ICTY, Trial Chamber, *Prosecutor v. Tadić*, IT-94-1-T, "Decision on Defence Motion to Dismiss Charges", 13 September 1996, p. 1; ICTY, Trial Chamber, *Prosecutor v. Delalić et al.*, IT-96-21-T, "Order on the Motions to Dismiss the Indictment at the Close of the Prosecutor's Case", 18 March 1998, p. 2; ICTY, Trial Chamber II, *Prosecutor v. Kunarać et al.*, "IT-96-23-T & IT-96-23/1-T, Decision on Motion for Acquittal", 3 July 2000, ("*Kunarac* Decision") para. 2 ([Rule 98 *bis*] was, however, adopted in 1998 in order to deal with a situation – which by that time had developed in every trial heard by the Tribunal – where the accused applied at the close of the prosecution case for a determination that there was no case to answer on one or more or all of the charges in the indictment.")

[33] Article 61(5); Pre-Trial Chamber II, *Prosecutor v Bemba*, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08, 19 June 2009, ICC-01/05-01/08-424, fns. 135, 344, 345, 687; Pre-Trial Camber II, *Prosecutor v. Ruto et al.*, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 23 January 2012, ICC-01/09-01/11, fns. 382, 407; Pre-Trial Chamber II, *Prosecutor v. Muthaura et al.*, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 23 January 2012, ICC-01/09-01/11, fns. 174, 187, 216, 263, 270, 275, 310, 430, 460, 466, 474, 504, 505.

[34] See e.g. "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda", ICC-01/04-02/06-309 ("Confirmation Decision"), 9 June 2014, fns. 47, 48, 51, 54, 61, 78, 79, 80-85, 87, 88, 91, 93, 94, 95, 99, 100-104, 108, 110, 112-115, 117, 122, 124-127, 129, 130-131, 134, 136, 137, 143, 145, 146, 149-152, 174, 246, 277, 282, 283, 286, 306, 359, 371-372, 524.

[35] Confirmation Decision, fn. 85 (P-0056); fns. 138-139-141-166-192-238-264-281 (P-0804); fns. 167, 237, 251, 252 (P-0107); and fns. 319 and 354 (P-0806).

[36] *See e.g.* P-0758; Confirmation Decision, paras. 81, 87, 95, fns. 43, 53, 67, 319-326, 353-356, 373, 378, 409-410, 488, 492-494.

19. The Impugned Decision suggests that the predominant purpose of the no case to answer motion is efficiency, which implies that it should be entertained only where there is a projected net saving of time. Hence, the Chamber reasoned that "even if successful in part," a no case to answer motion may not be justified because the length of the submissions relative to the portions of the case rejected "may thus not necessarily positively affect the expeditiousness of the trial."[37] The scenario described would clearly violate the right of the accused to remain silent, and demonstrates an erroneous understanding of the fundamental purpose of the no case to answer procedure. It is unfair to require an accused to remain on trial for a charge or count for which the Prosecution presented no evidence sufficient to convict.

20. Furthermore, the Chamber's apparent concern about efficiency is overstated. Several no case to answer motions in trials just as complex as the *Ntaganda* case have been adjudicated at the ICTY[38] in less time than it took for the Chamber to reject the request for leave to file such an application.[39] As long as the procedure is timed correctly, deliberations can be concurrent with the Defence's preparation of the presentation of evidence, thus occasioning no significant delay to proceedings. Even if some delay were to arise, this is necessary and justified to safeguard the rights of the accused.

21. The reasoning of national and international courts cited above is not relied upon as proof of "general principles of law" under Article 21(1)(c) of the Statute. It is relied upon, instead, as providing a cogent and correct interpretation of the right to silence and the privilege against self-incrimination

[37] Impugned Decision, para. 26.

[38] *See e .g.* ICTY, Trial Chamber I, *Prosecutor v. Krajišnik*, IT-00-39-T, "Judgement", 27 September 2006, para. 1248 (referring to disposition of a motion for acquittal in three days); ICTY, Trial Chamber I, *Prosecutor v. Martić*, IT-95-11-T, "Judgement", 12 June 2007, para. 533 (referring to disposition of a motion for acquittal in eight days); ICTY, Trial Chamber I Section A, *Prosecutor v. Naletilić & Martinović*, IT-98-34-T, "Decision on Motions for Acquittal", 28 February 2002, para. 2 (disposing of motions for acquittal filed 20 and 21 days before); ICTY, Trial Chamber 1 Section A, *Prosecutor v. Blagojević & Jokić*, IT-02-60-T, "Judgement on Motions for Acquittal Pursuant to Rule 98 *bis*", 5 April 2004, para. 1 (deciding motions for acquittal filed 34 days before).

[39] The Impugned Decision was issued 47 days after the filing of the request for leave.

which is applicable in ICC proceedings by virtue of Article 67(1)(g) and Article 21(3) of the Statute. The force of domestic and international decisions interpreting the right to silence and the privilege against self-incrimination derives not from formal authority, but from cogency of reasoning and breadth of application within the context of a particular form of trial proceeding.

22. The form of proceedings chosen by the *Ntaganda* Trial Chamber requires a ruling that sufficient evidence has been presented by the Prosecution to justify calling upon the accused to present evidence. The standard to be met is well-established in domestic and international courts. The requirement derives from the privilege against self-incrimination and the right to silence. The Trial Chamber erred by refusing to even hear the Accused's submissions on the issue, and requiring him to elect to present evidence – including, if he should so elect, to testify – before a ruling had been made on those submissions.

(ii) Second Ground of Appeal: The Chamber erred in declining to entertain a Defence motion for a judgement of (partial) acquittal on the basis that it is a discretionary matter

23. The Trial Chamber erred in pronouncing that it possesses "a broad discretion as to whether or not to pronounce upon such matters at this stage of proceedings," on the apparent basis of which it decided that it was not "appropriate to entertain the proposed 'no case to answer' motion."[40]

24. First, any statement by a judicial organ that it has discretion not to hear submissions is, barring some justification, a violation of the right to be heard. The Statute and Rules of Procedure expressly define narrow exceptions to the principle that parties are entitled to make submissions without prior leave.[41] Indeed, Rule 134 states that "[a]fter the commencement of the trial," the

[40] Impugned Decision, para. 25.

[41] Article 19 (4) (imposing a leave requirement to challenge the admissibility of a case "more than once or at a time later than the commencement of the trial"); Article 82(1)(d); Article 82(2); Rules 103, 133, 154, 155.

Chamber "may rule on issues that arise during the course of the trial." While the use of the word "may" could be interpreted as conferring a discretion not to "rule", it does not confer a discretion not to hear. The Trial Chamber's assertion that it possesses discretion not to *hear* submissions is contrary to the express and limited circumstances in which the Statute and Rules impose a leave requirement for filing a motion.

25. Second, the Trial Chamber indicated that the subject-matter of the intended submissions would be kept under *proprio motu* review.[42] If the subject-matter is important enough to be kept under *proprio motu* review, then it must follow that it should have been important enough to give the Accused a right to be heard. The Trial Chamber is not in a position, without submissions, to know whether it may be committing an error in respect of this important issue. Failing to give the Accused an opportunity to make submissions is a denial of natural justice.

26. Third, the absence of an express provision concerning a no case to answer motion does not confer discretion not to hear submissions on the issue. Parties file motions on many subjects that are not expressly regulated under the Statute or Rules. The absence of express authorization to file a motion on the subject does not imply a requirement of leave, or a discretion to reject submissions.

27. Fourth, Trial Chambers have an obligation pursuant to Article 64(2) to ensure the fairness of trial proceedings and respect of the rights of the accused, and a corresponding authority under Article 64(6) to prescribe procedures necessary to safeguard those rights. Trial Chambers at the ICTY, even before the introduction of Rule 98 *bis*, consistently entertained and decided judgment of acquittal motions under the general authority conferred by Rule 54 of the ICTY

[42] Impugned Decision, para. 29 ("without prejudice to the Chamber's continuing review of the evidence heard thus far, to any further evidence which may be presented in the Defence case, and to its view of the appropriateness of any such course of action in the future.")

Rules.[43] Article 64(6) of the ICC Statute confers the same authority, which is reinforced by the obligation set out in Article 64(2).

28. Fifth, pronouncing on the sufficiency of the evidence at the end of the prosecution case, for the reasons explained in Ground One, is not a discretionary matter. The right to silence and the privilege against self-incrimination requires that the Trial Chamber rule on this issue before requiring the accused to elect to call evidence. The election may, and in the present case does, include the accused's choice to testify. A Trial Chamber has no discretion to deny submissions on an issue that it has no discretion not to adjudicate.

29. Sixth, this should not be confused, however, with the discretion to determine *how* such proceedings should be conducted. Indeed, this appeared to be the subject on which the Trial Chamber was soliciting submissions in requesting submissions on "the applicable standard and procedure" to be followed.[44] The Trial Chamber does have discretion to determine the form of the no case to answer procedure, but not to dispense with it.

STANDARD OF APPELLATE REVIEW

30. The foregoing grounds of appeal raise, primarily or exclusively, issues of law. Such errors are reviewed according to a correctness standard.[45] Errors of fact, to the extent that they are involved, are subject to reversal when they involve a mis-appreciation of the facts, take into account irrelevant facts, or fail to take

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[43] ICTY, Trial Chamber, *Prosecutor v. Blaskic*, IT-95-14-T, "Decision of Trial Chamber I on the Defence Motion to Dismiss", 3 September 1998, p. 2 ("however, that it is appropriate to note that those decisions were taken specifically because the current Rule 98 *bis* did not exist and that, to remedy the fact that the Rules stated nothing in that respect, the Judges based their decision on the general procedural scope established in Rule 54"); *Kunarac* Decision, para. 2.

[44] "Decision on the conduct of proceedings", ICC-01/04-02/06-619, 2 June 2015, para. 17.

[45] *See* Appeals Chamber, *Prosecutor v. Lubanga*, "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", 1 December 2014, ICC-01/04-01/06-3121-Red, para. 18 ("*Lubanga* Appeal Judgment"); *Simone Gbagbo*, "Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo'", 27 May 2015, ICC-02/11-01/12-75-Red, para. 40.

into account relevant facts.[46] The Appeals Chamber may also reverse any exercise of discretion that was not exercised "judiciously."[47] Procedural errors may also be a basis for overturning a decision.[48] The Appeals Chamber may reverse the decision based on one or more errors when they "materially affected the determination."[49]

CONCLUSION AND RELIEF REQUESTED

31. The testimony of the Accused – which is already underway – should not be interrupted between his direct examination, and the cross-examination by the Prosecution. However, the Accused should know as soon as possible – and certainly before offering testimony on these issues – whether a *prima facie* case has been established in respect of the counts and charges that he wished to challenge. The Appeals Chamber is accordingly requested to take interim measures to preserve the integrity of proceedings and the issues arising from the present appeal. The appropriate interim measure is to immediately order the Trial Chamber to suspend proceedings pending resolution of the present appeal. If the Appeal Chamber does not issue this order by, at the latest, 28 June 2017, then areas that concern the proposed request for judgment of acquittal may start to be addressed during Mr Ntaganda's testimony. Once that point is reached, then it would no longer be appropriate to order suspension of proceedings.

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[46] *Lubanga* Appeal Judgment, para. 21.

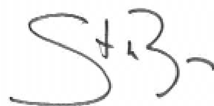
[47] Appeals Chamber, *Prosecutor v. Kenyatta*, "Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute", 19 August 2015, ICC-01/09-02/1 (OA 51), para. 25.

[48] Appeals Chamber, *Prosecutor v. Kony et al.*, "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", 16 September 2009, ICC-02/04-01/05-408 (OA 3), para. 80.

[49] Appeals Chamber, *Prosecutor v. Banda and Jerbo*, "Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain against Trial Chamber IV's issuance of a warrant of arrest", 3 March 2015, ICC-02/05-03/09-632-Red (OA 5), para. 30.

32. The substantive remedy requested, once the interim measures are put in place, is to remand the issue to the Trial Chamber with instructions to hear and adjudicate the Defence's request for judgment of acquittal. Mr. Ntaganda's privilege against self-incrimination requires no less.

RESPECTFULLY SUBMITTED ON THIS 27TH DAY OF JUNE 2017



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands