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

Date: **14 June 2017**

THE APPEALS CHAMBER

Before:

**Judge Silvia Alejandra Fernández De Gurmendi
Judge Sanji Mmasenono Monageng
Judge Christine Van Den Wyngaert
Judge Howard Morrison
Judge Piotr Hofmański**

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public

Notice of appeal and urgent request for suspensive effect

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**

Further to the Trial Chamber's ("Chamber") oral decision on Urgent Request for leave to appeal "Decision on Defence request for leave to file a 'no case to answer' motion"¹ issued on 14 June 2017 ("Decision"), Counsel for Mr Ntaganda ("Defence") hereby submit this:

Notice of appeal and urgent request for suspensive effect

"Appeal"

PROCEDURAL BACKGROUND

1. In the Decision on the Conduct of Proceedings the Chamber held that "[s]hould the Defence wish to file such a motion, it should seek leave to do so including, *inter alia*, submissions on the applicable standard and procedure, no later than five days after the end of the Prosecution's presentation of evidence, or, if applicable, the presentation of evidence by the LRVs."²
2. On 29 March 2017 the Prosecution filed its notice of the close of its case-in-chief.³
3. On 12 April 2017 the Legal Representatives of Victims of the Attacks closed their presentation of evidence.⁴
4. On 25 April 2017, the Defence submitted its "Request for leave to file motion for partial judgment of acquittal" ("Defence Request to File No Case to Answer Motion").⁵
5. On 1 June 2017, the Chamber rejected the Defence Request to File No Case to Answer Motion, holding that "[h]aving considered the nature and scope of

¹ ICC-01/04-02/06-T-209-RT, p. 5 ln 2-4.

² Conduct of Proceedings Decision, para. 17.

³ Prosecution's Notice of the Close of its Case-in-Chief, ICC-01/04-02/06-1839.

⁴ 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").

⁵ ICC-01/04-02/06-1879-Conf.

the Request, and noting its broad discretion as to whether or not to pronounce upon such matters at this stage of proceedings, the Chamber does not consider it appropriate to entertain the proposed ‘no case to answer’ motion in the present circumstances”⁶ (“Decision Denying Leave to File No Case to Answer Motion”).

6. On 5 June 2017, the Defence submitted its “Urgent request for leave to appeal ‘Decision on Defence request for leave to file a ‘no case to answer’ motion” pursuant to Article 82(1)(d).⁷
7. On 8 May 2017, the Prosecution⁸ and the Common Legal Representatives of the Victims⁹ submitted their joint response opposing the leave to appeal.
8. On 14 June 2017, the Trial Chamber issued its Decision, granting leave to appeal on the following two issues:¹⁰
 - 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; and
 - ii. Whether declining to entertain a Defence motion for a judgement of (partial) acquittal is a discretionary matter.¹¹

APPLICABLE LAW

9. The present Appeal is submitted pursuant to Article 82(1)(d) of the Statute which provides that “[a] decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the [...] Trial Chamber,

⁶ ICC-01/04-02/06-1931-Conf.

⁷ ICC-01/04-02/06-1937.

⁸ ICC-01/04-02/06-1894-Conf.

⁹ ICC-01/04-02/06-1891-Conf.

¹⁰ ICC-01/04-02/06-T-209-RT, p. 5 ln 2-4 (“The Chamber grants leave to appeal in relation to issues one and three. Reasons for this decision will follow shortly”).

¹¹ ICC-01/4-02/06-1937, para. 2 (i) and (iii).

an immediate resolution by the Appeals Chamber may materially advance the proceedings.”

10. Article 82(3) of the Statute provides that “[a]n appeal shall not itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules and Procedure and Evidence.”
11. Rule 156 of the Rules provides that “[w]hen filing the appeal, the party appealing may request that the appeal have suspensive effect in accordance with article 82, paragraph 3”.
12. The Appeals Chamber has indicated that “the effect of a judicial decision may be suspended pending the outcome of an appeal only if the Appeals Chamber so orders upon request.”¹²
13. The decision on suspensive effect is discretionary and that when addressing a request for suspensive effect, the Appeals Chamber “will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances”¹³

In past decisions, the Appeals Chamber, when deciding on requests for suspensive effect, has considered whether the implementation of the decision under appeal (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”.¹⁴ [Footnotes omitted.]

¹² ICC-01/13 OA, para. 6.

¹³ *Prosecutor v. Thomas Lubanga*, “Decision on the requests of the Prosecutor and the Defence for suspensive effect of the appeals against Trial Chamber I’s Decision on Victim’s Participation on 18 January 2008”, 22 May 2008, ICC-01/04-01/06 OA9 OA10 (“Lubanga Decision”), para. 10.

¹⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the ‘Decision on the Admissibility and Abuse of Process Challenges’”, 9 July 2010, ICC-01/05-01/08-817 (OA 3), para. 11.

SUBMISSIONS

I. LEGAL BASIS FOR THE APPEAL

14. The Defence appeals the Decision Denying Leave to File No Case to Answer Motion pursuant to Article 82(1)(d) and the Trial Chamber's oral decision of 14 June 2017 granting leave on two issues. Appeal is sought on: (i) whether the Chamber erred in permitting the trial and presentation of evidence to proceed on charges for which the Chamber declined to consider the sufficiency of the Prosecution's evidence; and (ii) whether declining to entertain the latter is a discretionary matter.
15. The relief sought is an order addressed to the Chamber to entertain "the [Defence] proposed 'no case to answer' motion in the present circumstances",¹⁵ which implies hearing the parties and examining the evidence on the record with a view to determining whether there is sufficient evidence to warrant the Defence to put a case on counts 1 to 5, 7-8, 10-13 and 17-18 as they relate to the "Second Attack" as defined in the Updated Document Containing the Charges ("UDCC")¹⁶ and Count 17 in its entirety.

II. SUSPENSIVE EFFECT

16. Suspensive effect of the Decision Denying Leave to File No Case to Answer Motion by which the Chamber permitted the presentation of the case for the Defence to proceed in respect of charges for which it declined to consider the sufficiency of the Prosecution's evidence, is sought until the Appeals Chamber pronounces on this Appeal.

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¹⁶ Updated Document Containing the Charges, Pre-Trial Chamber II, 16 February 2015, ICC-01-0402/06-458-AnxA.

a.) The implementation of the Decision Denying Leave to File No Case to Answer Motion during adjudication of this Appeal would create an irreversible situation that could not be corrected, even if the Appeals Chamber were to find in favour of the appellant

17. The implementation of the Decision Denying Leave to File No Case to Answer Motion, thereby allowing the presentation of the case for the Defence to proceed during adjudication of this Appeal, would cause an irreversible situation as Mr Ntaganda will be put in a position of having to respond to charges in UDCC for which Mr Ntaganda might be acquitted following adjudication by the Chamber of the Defence proposed no case to answer motion.
18. At the beginning of the hearing on 29 May 2017, before the Defence supplementary opening statement, the Chamber issued an oral decision with reasons to follow, rejecting the Defence Request to File No Case to Answer Motion. Acknowledging the Chamber's oral decision, the Defence respectfully underscored, with reservation, that denying the Defence the possibility to submit a 'no case to answer motion' was a first directly impacting the expeditious conduct of the proceedings as well as the assessment of the evidence as a whole and accordingly the rights of the Accused.¹⁷
19. On the same day, in the absence of the Chamber's reasoning to reject Defence Request to File No Case to Answer Motion, the Defence proceeded with the testimony of its first witness, taking into consideration that proceedings were scheduled to resume on 14 June 2017 thereby allowing sufficient time to seek leave to appeal the Chamber's Decision Denying Leave to File No Case to Answer Motion and request suspensive effect of the same before the Appeals Chamber, if leave was granted.

¹⁷ T-206 p. 33 ln. 5-15.

20. The presentation of the case for Defence thus began on 29 May 2017 with the testimony of Witness D-0210. It is noteworthy that the evidence elicited from Witness D-0210 was unrelated to the charges concerning the 'Second Attack' and Count 17, which is the substance of the Defence proposed 'no case to answer motion'. In these circumstances, exceptionally, the Defence considered that it was possible to present the evidence of this Witness before seeking leave to appeal the Chamber's Decision Denying Leave to File No Case to Answer Motion.
21. The situation we are in today is altogether different as the next witness to be heard is Mr Ntaganda himself. Mr Ntaganda has the right to know before testifying the case he has to meet and the charges to which he must respond following the close of the Prosecution's case. Fundamentally, Mr Ntaganda should not be held to answer to charges for which the Prosecution failed to meet its burden to adduce sufficient evidence to require the presentation of a Defence.
22. The entirety of Mr Ntaganda testimony as the person accused in this case impacts the assessment of the evidence in respect of all charges, in the sense that it is virtually impossible to segregate his evidence by count. Thus, proceeding with his testimony while the Appeals Chamber is adjudicating this Appeal will lead to questions being put to him regarding charges for which he might not have to respond to if his Appeal is granted and in fact, the Prosecution failed to adduce sufficient evidence to proceed as part of its case-in-chief, as argued.
23. Mr Ntaganda's testimony must thus be considered as a whole and his words cannot be unspoken once he takes the stand. The prejudice to Mr Ntaganda if he is required to testify and respond to charges for which the Prosecution is later found to have led insufficient evidence would be irreversible. This is why a decision on the merits on this Appeal must be rendered before Mr

Ntaganda testifies, which requires the Appeals Chamber ordering suspensive effect of the Decision Denying Leave to File No Case to Answer Motion permitting the proceedings to continue without entertaining a Defence proposed 'no case to answer motion'.

b.) The implementation of the decision would lead to consequences that would be difficult to correct and may be irreversible

24. The consequences should the trial and presentation of case for the Defence continue during adjudication of this Appeal is that Mr Ntaganda will testify and answer to charges for which the Prosecution might have presented insufficient evidence at the end of its case thereby violating his fundamental right to remain silent, the right not to be subjected to any reversal of the burden of proof and the right to be tried without undue delay. Once any evidence is adduced, whether by the Defence or the Prosecution, in relation to the charges for which the Defence posits that the Prosecution failed to meet its burden at the close of its case-in-chief, it will not be possible to undo the consequences if the Defence 'no case to answer motion' is successful.
25. Additionally, the fact that Mr Ntaganda himself is the next witness to testify compounds the irreversible consequences if evidence is elicited from him in respect of charges, it is later determined he does not have to respond to. Undoubtedly, questions related to the contested charges will be asked at the minimum in cross-examination. The minute Mr Ntaganda is held to answer any question on these issues, his fundamental right not to have to defend himself and to remain silent in respect of charges for which the Prosecution failed to meet its burden of proof at the end of the presentation of its case-in-chief, will be violated.

c.) The implementation of the decision could potentially defeat the purpose of the appeal

26. The purpose of the Appeal to determine whether the Defence will have an opportunity to submit the proposed ‘no case to answer motion’ the Chamber declined to entertain. In the event the Defence appeal is granted and the Defence is permitted to submit a ‘no case to answer motion’, the purpose of the Appeal will be defeated if the presentation of the case for the Defence continues at this stage, in particular if the testimony of Mr Ntaganda has begun. Indeed, the aim of a ‘no case to answer motion’ is to determine whether the Prosecution has adduced sufficient evidence at the close of its case-in-chief triggering the need for Mr Ntaganda to respond. Having Mr Ntaganda respond to charges before such determination has been made defeats this purpose.
27. The Appeals Chamber has previously held that in deciding whether to order the suspensive effect of the Decision Denying Leave to File No Case to Answer Motion, it has to “balance the competing interests at stake”.¹⁸ Taking into consideration the competing interests at stake, namely (i) the expeditious conduct of the proceedings which militates in favour of proceeding with the testimony of Mr Ntaganda; and (ii) preventing a violation of the rights of the Accused – the right to remain silent, reversal of the burden of proof, a right not to respond to charges for which the Prosecution fail to adduce sufficient evidence – that cannot be undone and puts the security of the judgement in jeopardy, which supports ordering the suspensive effect of the Decision Denying Leave to File No Case to Answer Motion, the latter must be given priority.

¹⁸ *Jean Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean Jacques Magenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, “Decision on the Prosecutor’s urgent request for suspensive effect of the ‘Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido’ of 21 October 2014”, 22 October 2014, ICC01/05-01/13-718 (OA 9), para. 7.

28. The implementation of the Decision Denying Leave to File No Case to Answer Motion permitting the proceedings to continue including Mr Ntaganda's testimony during adjudication of this Appeal, would thus defeat the purpose of the Appeal. Indeed, Mr Ntaganda will have already begun to present a case against the contested charges.

RELIEF SOUGHT

29. In light of the above, the Defence respectfully seeks suspensive effect of the Decision Denying Leave to File No Case to Answer Motion and thereby the proceedings pursuant to Article 82(3) of the Statute until the Appeals Chamber has pronounced on this Appeal.

RESPECTFULLY SUBMITTED ON THIS 14TH DAY OF JUNE 2017



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands