Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/04-02/06**
Date: **8 May 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

Confidential

Joint Response by the Common Legal Representatives of the Victims to the Defence "Request for Leave to file motion for partial judgment of acquittal"

Source: **Office of Public Counsel for Victims**

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
Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of the Victims
Ms Sarah Pellet
Ms Vony Rambolamanana

Mr Dmytro Suprun
Ms Anne Grabowski

Legal Representatives of the 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

Other

I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks and the Common Legal Representative of the former Child Soldiers (jointly the "Legal Representatives") hereby submit their response to the Defence "Request for leave to file motion for partial judgment of acquittal", dated 25 April 2017.[1]

2. For the reasons set out *infra*, leave should be denied and no such motion be entertained.

3. The concept of a 'no case to answer'[2] motion – derived from the practice of the *ad hoc* International Criminal Tribunals – should not find standard applicability before this Court. It is not a procedural step as of right. This Court is not governed by the same statutory framework as those Tribunals whose legal texts provide for the mechanism of 'no case to answer' motions after the close of the respective Prosecution case. The Rome Statute does not provide for this procedural step as it was intended to use different procedural safeguards to fend off spurious cases, namely the confirmation process before a Pre-Trial Chamber to 'test' the sufficiency of the Prosecution's evidence in any prospective case.

4. Not only is there no benefit gained in again testing the sufficiency of the Prosecution's evidence heard in this case at this juncture, but a renewed "review" would unnecessarily and unjustifiably prolong the proceedings as a whole. This, in turn, would have a negative impact on the expeditiousness of the proceedings and ultimately the interests of the participating victims.

[1] See the "Request for leave to file motion for partial judgment of acquittal", No. ICC-01/04-02/06-1879-Conf, 25 April 2017 (the "Defence Request" or "Request").
[2] The concept of a 'no case to answer' motion is also known as a motion for 'judgment of acquittal'. In the present submissions, the Legal Representatives will use the term 'no case to answer' motion to describe the procedure for which the Defence is seeking leave in its Request.

II. PROCEDURAL BACKGROUND

5. On 2 June 2015, the Trial Chamber VI (the "Chamber") issued its "Decision on the conduct of proceedings" (the "Conduct of Proceedings Decision") in which it stated that "[T]*he Chamber takes no position at this time on whether it will entertain a motion by the Defence asserting that there is no case for it to answer.*"[3] It, however, elaborated 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*".[4]

6. On 10 February 2016, the Chamber authorised six victims to present their views and concerns before the Chamber and further three victims to present evidence before the Chamber.[5] It indicated that the presentation of evidence by the victims was to take place between 10 and 13 April 2017.[6]

7. On 29 March 2017, the Prosecution filed a notice in which it declared its case closed.[7]

8. On 12 April 2017, the Legal Representative of the Attacks closed the presentation of evidence on behalf of the victims of the attacks.

[3] See the "Decision on the conduct of proceedings" (Trial Chamber VI), No. ICC-01/04-02/06-619, 2 June 2015, para. 17.
[4] *Idem*.
[5] See the "Decision on the request by the Legal Representative of the Victims of the Attacks for leave to present evidence and victims' views and concerns" (Trial Chamber VI), No. ICC-01/04-02/06-1780-Red, 10 February 2017, para. 59.
[6] *Idem*.
[7] See the "Prosecution's Notice of the Close of its Case-in-Chief", No. ICC-01/04-02/06-1839, 29 March 2017.

9. On 13 April 2017, the Defence requested[8] and was granted an extension of time to file a request for leave to present a motion for 'no case to answer' until 25 April 2017.[9]

10. On 25 April 2017, the Defence filed its Request.[10]

II. CONFIDENTIALITY

11. Pursuant to regulations 23*bis* (1) and (2) of the Regulations of the Court, the present submissions are classified as confidential, as they respond to submissions bearing the same classification.

III. SUBMISSIONS

12. It is well established that trial chambers exercise discretion in relation to matters of trial management.[11] Such trial management is to be exercised to ensure that a trial is fair and expeditious.[12] In the context of this Court, allowing lengthy and time consuming submissions on a 'no case to answer' motion – which is not expressly provided for within the legal framework of the Court – when the sufficiency of the evidence has already been scrutinised at the confirmation of charges stage against the standard of 'substantial grounds to believe', would squarely run counter to the requirement of expeditious proceedings.

[8] See the "Urgent request on behalf of Mr Ntaganda seeking an extension of the applicable time limit to submit 'no case to answer' motion", No. ICC-01/04-02/06-1861, 13 April 2017.
[9] See the Email communication from the Chamber to the parties and participants of 13 April 2017 at 18:23.
[10] See the Defence Request, *supra* note 1.
[11] See ICTR, *The Prosecutor v. Pauline Nyiramasuhuko et al*., Case No. IT-98-42-A, Appeal Judgment, 14 December 2015, para. 295 available at: http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-98-42/appeals-chamber-judgements/en/151214-judgement.pdf; ICTR *The Prosecutor v. Gaspard Kanyarukiga*, Case No., ICTR-02-78-A, Appeal Judgment, 8 May 2012, para 26 available at: http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-02-78/appeals-chamber-judgements/en/120508-2.pdf.
[12] *Idem*, para. 295.

13. Article 61(3)(b) of the Rome Statute requires that a person shall "[b]*e informed of the evidence on which the Prosecutor intends to rely at the hearing*." According to article 61(5) of the Rome Statute, the Prosecutor "*shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged*." On this basis, the Pre-Trial Chamber shall "*determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged* […]", as set forth in article 61(7) of the Rome Statute. Barring exceptional circumstances,[13] it would undermine the legitimacy of the review process, if a further review of the sufficiency of the evidence would be conducted at a later stage.

14. Indeed, Pre-Trial Chambers of the Court have been "*ascribed, first and foremost, a **'gatekeeper function'**, or **'filter function'** according to which only those cases for which the Prosecutor has presented 'sufficiently compelling charges going beyond the mere theory of suspicion', shall proceed to trial. By implication, the article 61 mechanism 'is designed to protect the rights of the Defence against wrongful and wholly unfounded charges*".[14] Significantly, the Pre-Trial Chamber's enquiry extends to ascertaining whether there is sufficient evidence supporting the facts as alleged by the Prosecutor.[15] If there is no evidence or the evidence is too weak or irrelevant to support a particular factual allegation, the Pre-Trial Chamber will not take it into account and limit the factual scope of the case accordingly.[16] "*This rejection may concern a whole set of facts underlying a particular count*".[17] The control exercised by the Pre-Trial Chambers not only bars unmeritorious cases from proceeding but, more importantly, reduces the factual scope of those cases where the Prosecutor does not have any or sufficient evidence to support the prospective charges.[18] This concept has little resemblance with the way

[13] The Legal Representatives submit that the circumstances of the *Ruto and Sang* case constitute exceptional circumstances. Further argument on this point is made *infra*.
[14] See TRIFFTERER, (O.), "*Rome Statute of the International Criminal Court: a commentary*", 3rd edition, Beck Verlag, München, 2016, p. 1487. Internal references omitted.
[15] *Idem*, p. 1488.
[16] *Ibid*.
[17] *Ibid*.
[18] *Ibid*., p. 1538.

the *ad hoc* Tribunals guarded the integrity of the proceedings against unmeritorious allegations having to be met by a defence.

15. As recalled in the Rule 98*bis*[19] judgment of the Trial Chamber hearing the *Mladić* case before the International Criminal Tribunal for the former Yugoslavia (the "ICTY"), "[r]*ule 98 bis of the Tribunal's Rules of Procedure and Evidence provides […]* [that] *at the close of the Prosecutor's case, the Trial Chamber* ***shall****, by oral decision, and after hearing the oral submission of the parties, enter a judgment of acquittal on any count if there's no evidence capable of supporting a conviction*."[20]

16. The differences could not be more clearly defined. At the ICTY, it was mandatory for Trial Chambers to weed out those allegations that were, at the close of the Prosecution's case, insufficiently supported by the evidence adduced at trial. This was premised upon the fact that there was no pre-trial scrutiny of the sufficiency of the evidence similar to that of the Court's Pre-Trial stage. Rather, a pre-trial judge conducted a review of the relevant indictment pursuant to article 19 of the ICTY Statute to ascertain whether a *prima facie* case existed against a prospective accused,[21] and whether the "*materials produced by the Prosecutor* […] *appear* […] *to provide grounds which justify charging the accused* […] *with the* […] *counts derived therefrom*".[22] As such,

[19] The text of Rule 98*bis* of the ICTY's Rules of Procedure and Evidence is available at: http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf.

[20] See ICTY, *The Prosecutor v. Ratko Mladić*, Case No. IT-09-92, 98*bis* Judgement, 15 April 2014, Transcript p. 20922, (the "*Mladić* 98*bis* Judgment"). Emphasis added. Available at: http://www.icty.org/x/cases/mladic/trans/en/140415IT.htm.

[21] See Article 19 of the ICTY Statute available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf. See also Rule 61 of the ICTY Rules of Procedure and Evidence available at: http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf. See also e.g. ICTY, *The Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-I, Decision on Review of Indictment, 4 March 2005; ICTY, *The Prosecutor v. Radovan Karadžić and Ratko Mladć*, Case No. IT-95-5-R61, Review of the Indictments pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996; ICTY, The *Prosecutor v. Mile Mrkšić et. al.*, Case No. IT-95-13-R61, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 3 April 1996. The aforementioned decisions are all available via the ICTY court records system at http://icr.icty.org/default.aspx.

[22] ICTY, *The Prosecutor v. Milan Kovačević*, Case No. IT-97-24-PT, Review of Indictment, 23 June 1998. The same review was conducted in the event that an indictment was amended by adding new or

there was no Pre-Trial Chamber review of the evidence, once such indictment was confirmed.

17. Not only is the Rome Statue silent on any mid-trial review mechanism, but, as set out *supra*, the structure of the Rome Statute unmistakably obviates the need for a 'no case to answer' review at the end of the Prosecution's case, barring exceptional circumstances undermining the legitimacy of the proceedings in any other way, as shall be discussed in more detail *infra*.[23] The institutional mandate of the Pre-Trial Chambers encompasses the gatekeeping function of determining whether a case should proceed to trial and, if so, in what form.[24] Its task is to protect the rights of the Defence against wrongful and wholly unfounded charges.[25] In the words of the Appeals Chamber in *Mbarushimana*, "*article 61 differs from the relevant ICTY/ICTR rule in two significant ways. First, article 61 imposes a higher evidentiary threshold of 'substantial ground' in place of the ICTY/ICTR's lower 'reasonable grounds' which is used in the context of the issuance of a warrant of arrest under article 58 of the* [Rome] *Statute. Second, and more* [sic] *important, the drafters of the Statute did not import the ICTY/ICTR procedures*".[26]

18. Likewise, the decision on the confirmation of charges cannot be reviewed or altered by the Trial Chamber.[27] Conversely, this means that striking down counts or altering the underlying charges is, as such, not foreseen in the Rome Statute framework.[28] While, as stated by Trial Chamber V(a) in the *Ruto and Sang* case, "[t]*he*

different counts and charges at a subsequent stage, often on the basis that the respective indicted person had been fugitive for a long period of time and new material come to light since the confirmation of the initial indictment. This decision is available via the ICTY court records system at http://icr.icty.org/default.aspx.

[23] See *infra* paras. 20.

[24] See COURTNEY (J.) and KAOUTZANIS (C.) (2015), "*Proactive Gatekeepers: The Jurisprudence of the ICC's Pre-Trial Chambers*", Chicago Journal of International Law, Vol. 15(2), 518-558, pp. 520, 521.

[25] See the "Decision on the Confirmation of Charges" (Pre-Trial Chamber I), No. ICC-01/04-01/06-803-tENG, 14 May 2007, para. 37.

[26] See the "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'" (Appeals Chamber), No. ICC-01/04-01/10-514, 30 May 2012, para. 43.

[27] See TRIFFTERER, (O.), *op. cit.*, *supra* note 14, p. 1535.

[28] With the exception of regulation 55 modification of the charges which follows its own procedure.

primary rationale underpinning the hearing of a 'no case to answer' motion [...] *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*",[29] it must also be borne in mind that in the ordinary course of events there would be no fundamental change between the evidence already scrutinised at pre-trial stage and that presented at trial.

19. The fact that the evidentiary threshold of "substantial grounds to believe" at confirmation stage and "beyond reasonable doubt" at trial stage differs does still not militate in favour of conducting a 'no case to answer' review after the close of the Prosecution case *per se*. It is one of the most fundamental duties of the Trial Chamber to ensure that the proceedings are fair and *expeditious*.[30] As set out *supra*, conducting a second, renewed *review* of the sufficiency of the Prosecutor's evidence after the close of the Prosecution's case is incompatible with the expeditiousness of the proceedings. Exceptional and unforeseen occurrences, such as, for instance, Prosecution witnesses not coming up to proof or other fundamental changes in the evidence introduced by the Prosecution at trial *vis-à-vis* the evidence that was initially relied upon for the confirmation of the charges should remain just this: exceptional circumstances in which conducting a 'no case to answer' review *may* be warranted.

20. It is averred that it is exactly these exceptional circumstances that were envisaged when Trial Chamber V(a) in the *Ruto and Sang* case held that the confirmation stage "*does not obviate a <u>potential subsequent need</u> for a 'no case to answer motion'*"[31] because, *inter alia*, "*the nature and content of the evidence may change between the confirmation hearing and the completion of the Prosecution's presentation of evidence at trial*"[32] or the fact that the Prosecution does not necessarily introduce the same

[29] See the "Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions)" (Trial Chamber V(a)), No. ICC-01/09-01/11-1334, 3 June 2014 (the "Decision No. 5"), para. 12.
[30] See article 64(2) Rome Statute.
[31] See Decision No. 5, *supra* note 29, para. 14. Emphasis added.
[32] *Idem*.

evidence at trial as it did for confirmation. As discussed in more detail *infra*, none of these two possibilities or factors is present in the *Ntaganda* case.

21. The Defence has not shown that exceptional circumstances warranting the Chamber to engage in a 'no case to answer' review exist in this case. Furthermore, the Defence should not be allowed to use this avenue in the absence of a demonstration of exceptional circumstances. As a matter of principle, a 'no case to answer motion' should not be allowed to become a standard procedural step within proceedings before this Court, as in the ordinary course of events it would be an unnecessary time-consuming procedure,[33] incompatible with the expeditious conduct of proceedings.

(i) The Ruto and Sang *case must be distinguished*

22. The Legal Representatives submit that there is good reason to distinguish the present case from the *Ruto and Sang* case and to not entertain a 'no case to answer' motion in the *Ntaganda* case. Indeed, Trial Chamber V(a) stated that "*it is* [...] *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*_".[34] The Legal Representatives submit that it is not apposite in the present

[33] See *e.g.* ICTY, *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98*bis*, (Trial Chamber II), 21 June 2004, para. 20 where the Trial Chamber stated that "[i]t *is worth noting the extent and frequency to which Rule 98*bis *has come to be relied on in proceedings before this Tribunal, and the prevailing tendency for Rule 98*bis *motions to involve much delay, lengthy submissions, and therefore an extensive analysis of evidentiary issues in decisions"*. The decision is available via the ICTY court records system http://icr.icty.org/default.aspx.
It should, however, also be observed that at the time of this Decision a different version of Rule 98 *bis* was applicable. This previous version stated as follows: "*(A) An accused may file a motion for the entry of judgement of acquittal on one or more offences charged in the indictment within seven days after the close of the Prosecutor's case and, in any event, prior to the presentation of evidence by the defence pursuant to Rule 85 (A)(ii).*
(B) The Trial Chamber shall order the entry of judgement of acquittal on motion of an accused or proprio motu *if it finds that the evidence is insufficient to sustain a conviction on that or those charges*." The text of the Rule is available at:
http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev30_en.pdf.
[33] See the Decision No. 5, *supra* note 29, para. 17.
[34] *Idem*. Emphasis added.

proceedings to entertain such motion as neither of the two criteria – a fundamental change in the evidence adduced, or a total collapse of the case – are met in this case.

23. Accordingly, the *Ruto and Sang* case needs to be distinguished from the circumstances of the *Ntaganda* case and treated as an exception.

24. The *Ruto and Sang* case can further be distinguished from the present case in that Trial Chamber V(a) already at a very early stage indicated that it "*would, in principle permit the Defence to enter submissions* […] *asserting that there is no case for it to answer* […]".[35] It then heard submissions on the principles and procedures of 'no case to answer' motions and provided further directions on the applicable standard.[36] In the present case, the Chamber did not take the same approach. Rather, it required the Defence to first request leave to submit such a motion.

25. Second, the *Ruto and Sang* case collapsed because the witnesses called by the Prosecution did not come up to proof, meaning they did not testify at trial what they were expected to testify about based on their prior statements which formed the basis of the pre-trial proceedings. Thus, the basis upon which the Prosecution's case was confirmed at pre-trial no longer existed. This is clearly not the case, nor is it alleged to be the case, in the *Ntaganda* proceedings.[37] The two cases must therefore be distinguished on this basis alone.

26. Furthermore, in paragraphs 35 to 40 of its Request, the Defence puts forth arguments on the merits of its proposed motion of 'no case to answer'. It contends that certain witnesses should not be believed and that, because these witnesses are not to be believed, there is no evidence capable of sustaining the charges under the

[35] See the "Decision on the Conduct of Trial Proceedings (General Directions)" (Trial Chamber V(a)), No. ICC-01/09-01/11-847-Corr, 16 August 2013, para. 32.
[36] See the Decision No. 5, *supra* note 29.
[37] The Defence in its Request rather submits that the Prosecution has not adduced any credible or sufficient evidence that Bosco Ntaganda performed the *actus reus* of any of the crimes charged under counts 1 to 5, 7, 8, 10-13 and 17, 18 in respect of the 'Second Attack', "*let alone performed those acts with the requisite* mens rea". See the Defence Request, para. 2.

counts it seeks to challenge in relation to the Second Attack. It argues that the Chamber should be allowed to evaluate the credibility of the evidence at the 'no case to answer' stage, relying on an extract of the Reasons of His Honour Judge Fremr in the *Ruto and Sang* case.[38] In the Rule 98*bis* jurisprudence of the ICTY and International Criminal Tribunal for Rwanda (the "ICTR") consideration of credibility related issues is not foreseen at that stage.[39] Rather, the evidence adduced by the Prosecution is to be "*taken at its highest*" for the purposes of this specific review.[40] A 'no case to answer' motion should not be used as a short-cut to challenging the credibility of Prosecution witnesses. Rather, if it were to be entertained, the review should follow the established procedures and applicable standard of the *ad hoc* Tribunals, which were specifically endorsed by Trial Chamber V(a) in the *Ruto and Sang* case.[41]

27. As regards the extract of the Reasons of His Honour Judge Fremr in which he stated that "[…] *in* [his] *view a Trial is not prevented from entering into an assessment of the credibility of witnesses testimony at the no case to answer stage*"[42] and on which the

---

[38] See the Defence Request, para. 18 referring to the "Decision on Defence Applications for Judgments of Acquittal - Reasons of Judge Fremr", No. ICC-01/09-01/11-2027-Red-Corr, 5 April 2016 (the "Reasons of Judge Fremr"), para. 144.
[39] See *infra* paras. 30-31. See also *e.g.* ICTR, *The Prosecutor v. Tharcisse Muvunyi*, Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal pursuant to Rule 98*bis*, (Trial Chamber II), Case No. ICTR-2000-55A-T, 13 October 2005, paras. 36-37: "*The Chamber recalls that generally, sufficiency of evidence should be determined without assessing its credibility and reliability; assessment of credibility and reliability is to be made at the end of trial, in light of all the evidence*. […] *The second scenario arises where the Prosecution has adduced some evidence, but it is so incapable of belief that a reasonable trier of fact could not rely upon it to sustain a conviction. The Chamber notes that this is an exception to the general rule against assessing credibility and reliability under Rule 98*bis, *and only arises where the Prosecution's case can be said to have 'completely broken down, either on its own presentation, or as a result of such fundamental questions being raised through cross-examination as to the reliability and credibility of witnesses that the Prosecution is left without a case'.*" Text available at:
http://www.worldcourts.com/ictr/eng/decisions/2005.10.13_Prosecutor_v_Muvunyi_2.pdf.
[40] The jurisprudence of 98 *bis* proceedings is discussed in more detail *infra*.
[41] See the Decision No. 5, *supra* note 29, para. 24 in which the Trial Chamber stated that "*The determination of a 'no case to answer' motion does not entail an evaluation of the strength of the evidence presented, especially as regards exhaustive questions of credibility or reliability. Such matters – which go to the strength of evidence rather than its existence – are to be weighed in the final deliberations in light of the entirety of the evidence presented. In the ad hoc tribunal jurisprudence this approach has been usefully formulated as a requirement, at this intermediary stage, to take the prosecution evidence 'at its highest' and to 'assume that the prosecution's evidence was entitled to credence unless incapable of believe on any reasonable view. The Chamber agrees with this approach*". Emphasis added.
[42] See Reasons of Judge Fremr, *supra* note 3838, para. 144. See also the Defence Request, *supra* note 1, para. 18.

Defence relies, the Legal Representatives submit that it must be placed into its right context. Indeed, His Honour also stated that "*there is no provision in the ICC basic documents that requires a Trial Chamber to continue with the presentation of evidence on behalf of the defence, where the evidentiary case for the prosecution was not, in the judges' view, strong enough to warrant inviting the defence to present their case.* […] [He] *would have had no difficulty in doing so* ***in the present case****, given* ***the state of the Prosecution's evidence****.*"[43] It is submitted that the scenario envisaged by his Honour must be viewed in the context of the case at hand where his Honour, *inter alia*, also recalled that "*if the entirety of the Prosecution's case hinges on the testimony of one witness where it initially intended to rely on a number of witnesses,* […] *the question of whether the one key witness provides a credible account becomes a central issue in determining whether or not there is any point in continuing the trial proceedings. It is then appropriate* […] *to consider the weight that is to be accorded to the testimony of the witness concerned*".[44] The approach set out is generally compatible with the *ad hoc* Tribunals employing the standard of "*a witness is so lacking in credibility and reliability that no reasonable Chamber could find him or her credible or reliable*".[45]

28. Thus, the Defence's request for the Judges to enter into *general* credibility assessments of all witnesses is not supported by the extract of His Honour Judge Fremr's Reasons given in *Ruto and Sang*, and is further inapposite in the circumstances of the present case.

(ii) Applicable Legal Standard for a Potential Motion of Partial Acquittal/No case to answer

29. In the event the Chamber were to nevertheless grant the Defence leave to file a motion for 'no case to answer', the Legal Representatives submit that the applicable

[43] See the Reasons of Judge Fremr, *supra* note 38, para. 146.
[44] *Idem*, para. 57. Emphasis added.
[45] See the *Mladić* 98*bis* Judgment, *supra* note 20, p. 20923.

standard as developed by the ICTY and adopted in Decision No. 5 in the *Ruto and Sang* case[46] should be applied.

30. As recalled by the ICTY Trial Chamber in the *Karadžić* case, the test to be applied is:

> "[W]*hether there is evidence upon which, if accepted, a reasonable trier of fact could be satisfied beyond reasonable doubt of the guilt of the particular accused on the count in question. The test is not whether a Trial Chamber would convict beyond reasonable doubt but, rather, whether it could do so. Therefore, where there is no evidence to sustain a count or where the only relevant evidence is so incapable of belief that it could not properly sustain a conviction even when the evidence is taken at its highest for the Prosecution, a judgement of acquittal will be entered with respect to that count*".[47]

The Trial Chamber in the *Mladić* case – the last case heard by the Tribunal – further recalled that:

> "*Under the case law of that Tribunal, a chamber must examine whether there is evidence upon which a reasonable trier of fact could be satisfied beyond reasonable doubt of the guilt of the accused. Thus, if a reasonable Chamber could be satisfied beyond a reasonable doubt of the guilt of an accused on the basis of the evidence adduced in relation to a count, then the count must stand. There must be sufficient evidence for each element of the alleged crimes and for one of the modes of liability contained in the indictment. The test would not be satisfied if there was no evidence. If the Prosecution has presented evidence, this evidence is entitled to credence unless incapable of belief. At this stage, the evidence should be taken at its highest for the Prosecution. The Chamber will not concern itself with issues of credibility or reliability unless a witness is so lacking in credibility and reliability that no reasonable Chamber could find him or her credible or reliable*".[48]

31. The Legal Representatives submit that the Chamber should apply the test as formulated by the Trial Chambers in *Karadžić*, *Hadžić*[49] and *Mladić* – the last cases to reach this stage in the ICTY, as they most authoritatively set out the applicable

[46] See the Decision No. 5, *supra* note 29, paras. 23-24.
[47] See ICTY, *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18, 98*bis* Judgement (Trial Chamber II), 28 June 2012, Transcript pp. 28732-28733. Text available at: http://www.icty.org/x/cases/karadzic/trans/en/120628ED.htm.
[48] See the *Mladić* 98*bis* Judgment, *supra* note 20, pp. 20922-20923.
[49] See ICTY, *The Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, 98*bis* Judgment, 20 February 2014, Transcript p. 9102 *et seq*. Text available at: http://www.icty.org/x/cases/hadzic/trans/en/140220IT.htm.

jurisprudence.[50] General evaluations of the credibility of witnesses should not be conducted at this stage,[51] as these would require full deliberations of the bench and thus (i) unnecessarily prolong the 'no case to answer' procedure (ii) forestall matters that "*are to be weighed in the final deliberations in light of the entirety of the evidence presented*".[52]

32. Furthermore, if the Chamber were indeed to entertain a motion for 'no case to answer', the Legal Representatives would be opposed to allowing the Defence to challenge individual incidents within a count, as proposed in its Request.[53] In support of its argument in this regard, the Defence relies on jurisprudence of the ICTY in the *Naletilić* case, a case that was decided at a time the wording of Rule 98*bis* still allowed for challenges of charges rather than entire counts.[54] This approach was also requested by the Defence in the *Mladić* case[55] and rejected by the Chamber, as in that Trial Chamber's view:

> "[…] *a failure of the Prosecution to adduce any evidence or insufficient evidence on individual charges has an effect on the proceedings that will follow. For the purpose of preparing and presenting its evidence, the Defence will in effect be left with no case to answer in relation to those individual charges. The Defence is not forced to spend the resources to challenge charges which it believes have not been supported by evidence. The Defence is not forced to present any evidence for that matter. The Prosecution has to establish beyond a reasonable doubt that the charges are proven. If according to the Defence the evidence does not prove the charges, it may decide to refrain from presenting evidence thereon. This may especially be the case in relation to charges where the Defence believes that the Prosecution has not even met the lower threshold applicable at this stage of the proceedings*".[56]

[50] See the Decision No. 5, *supra* note 29, para. 24.
[51] The Legal Representatives aver that there is no evidence on the record that is so incapable of belief that no reasonable Trial Chamber could convict on it, and that, therefore, questions of reliability or credibility should not be raised at this stage.
[52] See Decision No. 5, *supra* note 29, para. 24.
[53] See the Defence Request, *supra* note 1, para. 30.
[54] *Idem*. It is to be observed that at the time *Natelitić* was decided the wording of Rule 98*bis* of the ICTY Rules of Procedure and Evidence had not yet been amended and still provided for individual charges being considered, rather than counts. The rule as applicable rule at the time had the same wording as the version applicable at the time of the *Strugar* case referred to *supra* in note 32.
[55] See the *Mladić* 98*bis* Judgment, *supra* note 20, p. 20920.
[56] *Idem*, pp. 20924-20925.

The Legal Representatives submit that – should the case arise – it would be preferable to follow the approach set out by the *Mladić* Trial Chamber and judge the sufficiency of the evidence in terms of counts rather than individual charges.

IV. CONCLUSION

33. For the reasons set out *supra*, leave for a 'no case to answer' motion should be denied. If, however, leave were to be granted, the applicable standard laid down in the jurisprudence of the *ad hoc* Tribunals as adopted by Trial Chamber V(a) in the *Ruto and Sang* case should serve as the applicable legal standard for such motion.

FOR THE FOREGOING REASONS the Legal Representatives respectfully request that the Chamber

REJECT the Request in its entirety.

Dmytro Suprun
Common Legal Representative of the
Victims of the Attacks

Sarah Pellet
Common Legal Representative of the
Former Child soldiers

Dated this 8th Day of May 2017

At The Hague, The Netherlands