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Date: **7 June 2017**

TRIAL CHAMBER VI

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public

Prosecution's response to the "Urgent Request for leave to appeal 'Decision on Defence request for leave to file a 'no case to answer' motion', 1 June 2017, (ICC-01/04-02/06-1931)" (ICC-01/04-02/06-1937)

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Introduction

1. The Defence request¹ seeking leave to appeal the decision² denying leave to file a ‘no case to answer’ motion should be dismissed. It fails to meet the cumulative requirements for leave to appeal under article 82(1)(d) of the Rome Statute.

2. At the outset of its decision, the Chamber stated that “[h]aving considered the nature and scope of 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.”³ It further found that it would continue to monitor the presentation of evidence and, in light of the need to ensure expeditiousness and fairness of the proceedings, it may, on its own initiative, invite and consider submissions and issue a (partial) judgment of acquittal at a later time.

3. The Defence merely disagrees with the Chamber’s assessment and decision, both of the relevant circumstances and the measures appropriate to safeguard the expeditiousness and fairness of this trial. Thus, none of the issues identified in the Request constitutes an ‘appealable’ issue, genuinely arising from the Decision. Nor does the Defence demonstrate that any of the proposed issues significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, or that the Appeals Chamber’s intervention may materially advance the proceedings. The Chamber has stated that it will continue to monitor the presentation of evidence and may allow leave to file a ‘no case to answer’ motion, if warranted, at a later time. These conditions are cumulative; failure of any is fatal to the application.⁴

¹ ICC-01/04-02/06-1937 (“Request”).

² ICC-01/04-02/06-1931 (“Decision”).

³ Decision, para. 25.

⁴ *Contra* Request, para. 3.

4. Indeed, the Chamber ruled two years ago – on 2 June 2015 – that it took “*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*”.⁵ The Chamber authorised the Defence to seek leave to file such a motion but never guaranteed that such leave would be granted. The Defence did not seek leave to appeal this decision. The Defence now contends that such a motion is a *right* of the Accused, that *requires* the Chamber to delve into assessments of the Prosecution’s evidence in *all* cases; otherwise the Accused’s right to be tried without undue delay, to remain silent and not to be subject to a reversal of the burden of proof are violated.⁶ These arguments lack merit and legal foundation. Given that the Defence had every opportunity to seek leave to appeal the 2 June 2015 decision but did not, it should not be allowed to challenge this finding now.

Prosecution Submissions

5. The Request primarily argues that leave to appeal should be granted on the basis of the Defence opinion that the proposed issues “*significantly affect the fair conduct of proceedings, if not also its expeditiousness*” and that “*immediate resolution is the only way that this issue can be addressed before the course of the trial is tainted in a way that cannot be remedied on final appeal*”.⁷ The Request further states that, “*allowing a trial to go forward in such circumstances violates the rights of the accused to be tried without undue delay, to remain silent and not to be subject to a reversal of the burden of proof*”.⁸ Yet these statements are incorrect.

6. First, the Request fails to acknowledge that the Defence did not challenge the Chamber’s express statement that it would exercise discretion as to *whether* it would entertain a motion that there is no case for the Defence to answer upon a request for leave to file such a motion. It is now out of time to seek leave to appeal this decision.

⁵ ICC-01/04-02/06-619, para. 17.

⁶ Request, para. 1.

⁷ Request, para. 3.

⁸ Request, para. 1. *See also* paras. 17 and 18.

Nor did the Defence argue, in its request for leave to file a ‘no case to answer’ motion, that the Chamber did not have discretion to grant or to deny its request.⁹ To the contrary, the Defence accepted that “[n]one of the ICC’s statutory instruments expressly authorise or regulate the filing of a motion seeking dismissal of charges prior to the issuance of a judgment under Article 74”.¹⁰ It conceded that the *Ruto* Trial Chamber grounded its authority to entertain a ‘no case to answer’ motion in statutory provisions that “permit a Chamber ‘to adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings’”.¹¹ The Defence further acknowledged that the Chamber’s authority to entertain a ‘no case to answer’ motion is discretionary when it stated that: “the precise modalities and scope of a ‘no case to answer’ procedure is therefore a matter that falls within the Chamber’s inherent authority and discretion as deemed necessary and appropriate to ensure the fairness and expeditiousness of the proceedings”.¹²

7. This fatally undermines the Defence’s arguments now that a ‘no case to answer motion’ must *always* be entertained or the Accused’s rights are violated.¹³ To the contrary, the decision is discretionary and may properly be denied *in limine*. In *Ruto*, Trial Chamber V(A) found that Chambers had the necessary authority to consider ‘no case to answer’ motions “in appropriate circumstances”.¹⁴ It further observed “that 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”.¹⁵ The ICC jurisprudence is clear that this is a matter of discretion.

⁹ ICC-01/04-02/06-1879-Conf.

¹⁰ ICC-01/04-02/06-1879-Conf, para. 11.

¹¹ ICC-01/04-02/06-1879-Conf, para. 12.

¹² ICC-01/04-02/06-1879-Conf, para. 12.

¹³ *Contra* Request, para. 1.

¹⁴ ICC-01/09-01/11-1334, para. 14.

¹⁵ ICC-01/09-01/11-1334, para. 17.

8. Second, there is no basis to consider that the Trial Chamber in any way “contemplated the possibility that the trial should proceed against Mr Ntaganda even in respect of charges on which no sufficient evidence was presented by the Prosecution”.¹⁶ The Chamber stated that it had “considered the nature and scope” of the Defence request.¹⁷ It then described its “broad discretion” to pronounce upon such matters and noted - in general and not specifically referring to the present case - that permitting such motions may contribute to a shorter and more focused trial but may also entail delays and may thus not necessarily positively affect the expeditiousness of trial, even if successful in part.¹⁸ It concluded that a ‘no case to answer’ motion should be entertained “only if it appears sufficiently likely to the Chamber that doing so would further the fair and expeditious conduct of the proceedings”.¹⁹ This is not – as the Defence contends²⁰ - a pronouncement by the Chamber that there *is* or even may be insufficient evidence *in this case* upon which to proceed to convict the Accused on the charges. The Defence not only misinterprets the Chamber’s decision; it also advances an inherently contradictory argument – on the one hand, that the Chamber erred by not making any assessment of the evidence, but on the other hand, that it decided to proceed despite insufficient evidence on some charges.

9. Moreover, and in any event, in the Decision the Chamber expressly set out the means by which it would continue to review whether to entertain a ‘no case to answer’ motion. It held that if it appears to the Chamber that the fairness and/or expeditiousness of the trial so warranted, it may invite and consider submissions on a partial judgment of acquittal²¹ and that it would continue its review of the evidence heard thus far and during the Defence case to determine whether to entertain such a motion in future.²² Although the Defence may disagree with these measures, there is

¹⁶ *Contra* Request, para. 20.

¹⁷ Decision, para. 25.

¹⁸ Decision, para. 26.

¹⁹ Decision, para. 26.

²⁰ Request, paras. 11 and 20.

²¹ Decision, para. 27.

²² Decision, para. 28.

no basis to consider that they are inadequate. Accordingly, the Defence arguments concerning the alleged impact on the fairness of these proceedings²³ are purely abstract and speculative. Leave to appeal cannot be granted on such a basis.²⁴

10. Moreover, the proposed issues do not significantly affect the fair and expeditious conduct of the trial.

11. Each of the issues proposed for certification rests on, and is flawed by, these fundamental misconceptions. They also do not constitute ‘appealable’ issues,²⁵ which require showing “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.”²⁶

First Issue: whether the Chamber erred in permitting the trial to proceed in respect of charges for which the Chamber declined to consider the sufficiency of the Prosecution’s evidence

12. The first issue is not ‘appealable’ because it does not genuinely arise from the Decision. The Chamber determined that it may - or may not - entertain a ‘no case to answer’ motion in June 2015. The Defence did not challenge this decision and is out of time to do so now. The Defence’s first and third issues in fact address the same point: whether the Chamber is at liberty to decline to hear a ‘no case to answer motion’ at all. Indeed, the Defence Request frames the question as “whether Mr Ntaganda’s rights have been violated by a decision refusing to consider the issue”.²⁷ The Defence merely disagrees with the Chamber’s conclusion (in June 2015 and again now) that it has the discretion to decline to entertain such a motion, and disagrees

²³ Request, paras. 11-22.

²⁴ See e.g. [Bemba Stay ALA Decision](#), paras. 6, 9.

²⁵ See generally [ICC-01/04-168](#), para. 9; [ICC-02/11-01/15-117](#), paras. 19-22; [ICC-01/05-01/08-532](#), para. 17; [ICC-02/05-02/09-267](#), para. 22; [ICC-01/04-01/06-1557](#), para. 30; [ICC-01/04-01/07-2035](#), para. 25; [ICC-02/05-03/09-179](#), para. 27.

²⁶ [ICC-01/04-02/06-760-Red](#), para. 21, fn. 37 (citing [ICC-01/04-168](#), para. 9).

²⁷ Request, para. 12.

with the outcome of the Chamber's proper exercise of its discretion. This does not make it an "issue" arising from the Decision.²⁸

13. The Prosecution refers to its submissions above, at paragraphs 6-7, on the Defence's express acknowledgement that the determination is a discretionary one and on the jurisprudence in *Ruto* to the same effect.

14. The Chamber must assess the need for a 'no case to answer' determination made in light of many factors, including that there has already been a first independent review of the Prosecution's case, albeit under a lower evidentiary standard, at the confirmation hearing stage.²⁹ Each Trial Chamber is free to determine whether in the specific circumstances of its case there is a true need for a 'no case to answer' process. The *Ruto* Trial Chamber considered relevant factors and concluded that there was such a need, based on the unique circumstances of that case, where, as noted, the "nature and content of the evidence" had changed significantly between confirmation and completion of the Prosecution's case. That is not the case here. Indeed, the Chamber considered the *Ruto* scenario and distinguished it, holding that "*the present case is distinguishable from the Ruto and Sang case*" where "*the presentation of evidence by the Prosecution had been severely affected by the special circumstances of that case. The Chamber does not consider that the situation in the present case meets the conditions which would warrant the Chamber, at this stage of proceedings, granting leave to file a 'no case to answer' motion*".³⁰

15. In any event, the Defence fails to show that the proposed issue significantly affects the fair and expeditious conduct of the proceedings, or the outcome of the trial.³¹ On the one hand, the Defence's arguments are speculative: "the consequence is

²⁸ ICC-01/04-168, para. 9.

²⁹ See ICC-01/09-01/11-1334, para. 14. The Prosecution notes that the *Ruto* Chamber found that the confirmation hearing procedure does not obviate the potential subsequent need for a 'no case to answer' motion.

³⁰ Decision, para. 28.

³¹ *Contra* Request, para. 26.

that Mr Ntaganda is now required to answer charges on which the Prosecution *may* have presented no evidence sufficient to convict”.³²

16. On the other hand, the Defence argues as if the Chamber found that there *is* insufficient evidence upon which the Chamber could convict the Accused on certain charges yet opted to proceed to trial anyway, and that this resulted in a violation of the Accused’s rights.³³ In doing so, the Defence misunderstands the Decision.³⁴ The Chamber did not find that there was insufficient evidence upon which it could convict the Accused on any charges in this case or find that the trial would proceed even in respect of charges on which no sufficient evidence was presented by the Prosecution.³⁵ To the contrary, the Chamber made general pronouncements on the balancing exercise it must conduct in the proper exercise of its discretion. It stated that it must consider the expeditiousness and fairness of the proceedings.³⁶ It found that, as a general premise, in some cases even partly successful applications “*may thus not necessarily positively affect the expeditiousness of the trial*”.³⁷ It held that applications to bring a ‘no case to answer’ motion ought only to be entertained “*if it appears sufficiently likely to the Chamber that doing so would further the fair and expeditious conduct of the proceedings*”.³⁸ It then turned to its analysis of the application and distinguished this case from that of *Ruto* on the basis of the evidence before it.³⁹ Indeed, the Chamber expressly stated that it declined to grant leave to bring a ‘no case to answer’ motion “*[h]aving considered the nature and scope of the Request*”.⁴⁰

17. In its request, the Defence referred, rather extensively, to the Prosecution’s evidence itself.⁴¹ Although this went beyond the scope of the Chamber’s order, it

³² Request, para. 11. Emphasis added.

³³ Request, para. 13.

³⁴ Request, paras. 11, 19 and 20.

³⁵ Request, paras. 11 and 20.

³⁶ Decision, para. 26.

³⁷ Decision, para. 26.

³⁸ Decision, para. 26.

³⁹ Decision, para. 28.

⁴⁰ Decision, para. 25.

⁴¹ ICC-01/04-02/06-1879-Conf, paras. 35-38, 40 and fns. 37-41.

required the Prosecution to refer, again rather extensively, to the evidence on record supporting the charges that the Defence sought to dismiss.⁴² As such, the Chamber has already been seized, to an extent, with substantive arguments as to the evidence related to the charges that the Defence would have liked the Chamber to dismiss. The Chamber is not bound to provide *every* reason that led to its decision.

18. Moreover, the Chamber emphasised that it would continue to safeguard the fairness of these proceedings by monitoring the evidence and, if warranted, inviting submissions and deciding on a judgment of (partial) acquittal at a later stage.⁴³ The Defence merely disagrees with the conclusion reached by the Chamber. Accordingly, the proposed issue does not significantly affect the fair and expeditious conduct of the proceedings.

Second Issue: whether the Chamber erred in law by considering only expeditiousness, and not fairness, in declining to evaluate the sufficiency of evidence

19. The second proposed issue does not genuinely arise from the Decision. Contrary to the Defence's assertion that the Chamber only considered expeditiousness and not fairness in reaching its decision,⁴⁴ the Chamber expressly considered the fairness of the proceedings in articulating the test for the exercise of its discretion, and that a 'no case to answer' motion "*ought to be entertained only if it appears sufficiently likely to the Chamber that doing so would further the fair and expeditious conduct of proceedings*".⁴⁵ It further held that if it appeared to the Chamber that either

⁴² ICC-01/04-02/06-1894-Conf, paras. 19, 21, 27-30 and fns. 21-40, 47-48, 52-67.

⁴³ Decision, paras. 27 and 29.

⁴⁴ Request, para. 2 (ii).

⁴⁵ Decision, para. 26. Emphasis added.

the expeditiousness and/or the fairness of the trial so warranted, it may on its own initiative invite and consider submissions on a partial judgment of acquittal.⁴⁶

Third Issue: whether declining to entertain a Defence motion for a judgment of (partial) acquittal is a discretionary matter

20. The third proposed issue does not genuinely arise from the Decision. The Prosecution refers to its submissions herein at paragraphs 5-8 and 12-17.

21. Furthermore, and in any event, the Request fails to show how the proposed issue significantly affects the fair and expeditious conduct of the proceedings, or the outcome of the trial. It is neither “certain” that a different approach by the Chamber concerning the proposed issue would have altered the outcome of its decision, let alone the fairness of the proceedings more generally.

Resolution by the Appeals Chamber will not materially advance the proceedings

22. In any event, resolution of any of the three issues by the Appeals Chamber will not materially advance the proceedings. The Chamber expressly stated that it will continue to review the evidence and may subsequently invite submissions on partial acquittal. The Chamber’s decision denying leave to bring a motion for partial acquittal *at this stage* in the proceedings does not mean that it will never do so. Such relief is still available before the Trial Chamber; Appeals Chamber intervention at this stage is not warranted. If the Chamber declines to consider a motion for partial acquittal by the end of the trial, the Defence can consider whether to raise the issue in final appeal.

⁴⁶ Decision, para. 27. Emphasis added.

Conclusion

23. For all the reasons above, the Request should be dismissed.



Fatou Bensouda
Prosecutor

Dated this 7th day of June 2017
At The Hague, The Netherlands