Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/04-02/06**
Date: **10 July 2017**

THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR V. BOSCO NTAGANDA

Public document

Response to Bosco Ntaganda's appeal against the decision denying leave to file a "no case to answer motion"

Source: **Office of the Prosecutor**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
Ms Fatou Bensouda
Mr James Stewart
Ms Helen Brady

Counsel for the Defence
Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of the Victims
Ms Sarah Pellet
Mr Dmytro Suprun

REGISTRY

Registrar
Mr Herman von Hebel

Introduction

1. The Appeal[1] filed by the Defence of Mr Bosco Ntaganda ("Defence") against the Trial Chamber's "Decision on Defence request for leave to file a 'no case to answer' motion"[2] should be dismissed. The Trial Chamber correctly held that it has "broad discretion as to whether or not to [entertain a motion by the Defence asserting that there is no case for it to answer] at this stage of proceedings".[3]

2. Contrary to the procedures followed at other international criminal tribunals or in the domestic jurisdictions relied upon by the Defence, the ICC's procedure does not include a mandatory requirement for a Trial Chamber to entertain a 'no case to answer' motion before the Defence starts presenting its evidence. The Rome Statute establishes a different procedural model, whereby cases undergo an adversarial confirmation of charges procedure in which a Pre-Trial Chamber engages in a first scrutiny of the Prosecution case and ensures that only those cases and charges supported by sufficient evidence establishing "substantial grounds to believe" that the accused committed the crimes charged proceed to trial.[4] In this sense, a decision on the confirmation of charges sets out the case for the accused to answer at trial. It has many parallels to the decision that there is a case to answer used in other international criminal tribunals or common law jurisdictions.

3. Although the Chamber was not required by law to entertain a 'no case to answer' motion from the Defence after having heard the Prosecution's evidence, it correctly held that it had the discretion to do so if, in the circumstances of the case, this would be necessary to ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the accused.[5] That the Chamber, in exercising its discretion, decided *not* to entertain the Defence's no case to answer motion shows no error in and of itself. The Appeal should therefore be rejected.

---

[1] ICC-01/04-02/06-1975 ("Appeal").
[2] ICC-01/04-02/06-1931 ("Decision").
[3] Decision, para. 25.
[4] ICC-01/04-01/07-2259 OA10, para. 40.
[5] Decision, para. 26.

Submissions

A. Preliminary remarks

4. The two issues for which the Chamber granted leave to appeal,[6] and which constitute the basis of the Defence's grounds of appeal, are linked. They both challenge[7] the Chamber's legal finding that it has broad discretion to determine whether or not to entertain a Defence motion asserting that there is no case to answer after the Prosecution has presented its evidence at trial.[8] The scope of this Appeal is essentially limited to this question.[9]

5. The Defence was not granted leave to appeal any error as to how the Chamber exercised its discretion in concluding that "in the present circumstances"[10] it is not "appropriate to entertain the proposed 'no case to answer' motion",[11] because it does not "appear […] sufficiently likely […] that [such a procedure] would further the fair and expeditious conduct of the proceedings".[12] In fact, the Chamber expressly rejected the Defence's application for leave to appeal in this regard.[13] Accordingly, the scope of this Appeal is the confined legal question of *whether* a Trial Chamber has discretion to entertain a 'no case to answer' motion, and not any alleged error as to *how* this particular Chamber exercised its

[6] Appeal, para. 5; ICC-01/04-02/06-T-209-ENG 4:6-15 and 24:15-26:13; ICC-01/04-02/06-1937, para. 2(i) and (iii).
[7] Appeal, para. 30.
[8] First Ground of Appeal: "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 (Appeal, paras. 7-22; see also para. 5(a)). Second Ground of Appeal: "The Chamber erred in declining to entertain a Defence motion for a judgment of (partial) acquittal on the basis that it is a discretionary matter" (Appeal, paras. 23-29; see also para. 5(b)).
[9] *See* ICC-01/04-02/06-T-209-ENG ("Decision Granting Leave to Appeal"), 25:11-16, in which the Trial Chamber held that "the question of whether a Chamber has discretion to grant or reject leave to file a no case to answer motion as set out in issues one and three arises from the impugned decision insofar as the Chamber, at paragraph 25 thereof, noted its broad discretion as to whether or not to pronounce upon matters such as whether it will entertain a motion by the Defence asserting that there is no case for it to answer at this stage of proceedings."
[10] Decision, para. 25; see also paras. 26-28.
[11] Decision, para. 25.
[12] Decision, para. 26.
[13] The Chamber rejected the Defence's application for leave to appeal the Decision on the second issue, namely "whether the Chamber erred in law by considering only expeditiousness and not fairness in declining to evaluate the sufficiency of the evidence", *see* Decision Granting Leave to Appeal, 25:1-2; 26:1-10.

discretion in the present case. The Defence's arguments that exceed the scope of this Appeal[14] should be rejected.[15]

B. The Chamber correctly allowed the trial to proceed in respect of charges for which the Chamber declined to consider the sufficiency of the Prosecution's evidence (First Ground)

6. Under its First Ground, the Defence argues that the Chamber erred in law[16] in holding that it possessed broad discretion as to whether or not to entertain at the end of the Prosecution's case a Defence motion arguing that the Prosecution had not presented sufficient evidence to establish a *prima facie* case or a case for Mr Ntaganda to answer.[17] According to the Defence, this violated Mr Ntaganda's right to remain silent and his privilege against self-incrimination.[18] These arguments lack merit.

7. The Defence's reliance on jurisprudence from the UN *ad hoc* Tribunals[19] and other international courts that have adopted procedural rules governing 'no case to answer' litigation after full presentation of the prosecution's evidence[20] is inapposite. The procedural regimes of these courts and tribunals differ from that at the ICC. First, the Court's Basic Documents[21] do not provide for a 'no case to answer' procedure, let alone impose a *duty* on a trial Chamber to entertain a motion to that effect. Rather, the Trial Chamber in the *Ruto et al.* case—the only Chamber of this Court that has entertained a 'no case to answer' motion—has ruled that it may decide to entertain such a motion under its general regulatory powers enshrined in article 64, including the authority to "[c]onfer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings" (article 64 (3)(a)), to "rule on any other relevant matter" (article 64(6)(f)) and to rule on "any issues concerning the

[14] *See* Appeal, paras. 8-9, 12-16, 19-20, 25, 27.
[15] ICC-02/11-01/11-572 OA5, paras. 61-65.
[16] Appeal, para. 9.
[17] Appeal, paras. 7-8.
[18] Appeal, paras. 9, 21.
[19] Appeal, paras. 10-11, 17.
[20] Appeal, para. 17; *see* references to SCSL, Rule 98; STL, Rule 167; Kosovo Specialist Chambers, Rule 127.
[21] The Rome Statute, the Rules of Procedure and Evidence and the Regulations of the Court.

conduct of the proceedings" and on "issues that arise during the course of the trial" (rule 134).[22] Thus, it is through the exercise of its general case management functions that a Chamber may, as matter of discretion, decide to consider a 'no case to answer' motion or, conversely, decline to do so if it concludes that it would be detrimental to the fair and expeditious conduct of the proceedings, within the terms of articles 64(2) and 64(3)(a).

8. Thus, it is clear that under the Court's legal framework, consideration and disposition of a 'no case to answer' motion does not exist as a regulated procedural step that all Trial Chambers must follow. The nascent importation of this practice into the ICC proceedings is instead a product of the exercise of discretion by ICC Trial Chambers. Accordingly, there could never be a duty of ICC Chambers to entertain and rule on 'no case to answer' motions brought by the Defence, but each Chamber will deal with such motions according to what it considers to be a judicious exercise of its discretion. This is a significant difference between the Court's criminal process and that of other international criminal courts and tribunals, but by no means the only one. Critically, and as it will be developed below, those other jurisdictions lack an equivalent to the ICC's confirmation of charges procedure.

9. In short, the Defence's position portrays arguments which depict its view as to how the law *should* be (*de lege ferenda*) as arguments pertaining to how the law is (*de lege lata*). On this basis alone, the Appeal should fail.

10. Nor is the adversarial nature of the proceedings a determinative factor for the purposes of determining the manner in which an ICC Trial Chamber should approach a 'no case to answer' motion. Indeed, the fact that in this case—similarly to the case against *Ruto et al*.[23]—the Chamber held that the Defence may present its own evidence following the conclusion of the case for the Prosecution, does not mean that the Trial Chamber had to determine whether there was a case

[22] ICC-01/09-01/11-1334, para. 15.
[23] ICC-01/09-01/11-1334, para. 17; Appeal, paras. 12-14.

for the accused to answer.[24] As already advanced, the *Ruto et al*. Trial Chamber did not find that it was mandatory for a Chamber to entertain a 'no case to answer' motion at the end of the Prosecution's case, but held that it had discretion to do so "in appropriate circumstances".[25]

11. The Defence compares the proceedings in this case to adversarial proceedings in typical common law jurisdictions and argues that because they all lack certain safeguards,[26] the Chamber in this case was required to entertain the Defence's 'no case to answer' motion.[27] However, these arguments are not convincing. In particular, the Defence disregards that at the ICC, the Pre-Trial Chamber (and a single judge of the Pre-Trial Chamber) has broad powers under the Statute to oversee the legality of the Prosecution's investigation and to protect the suspect's rights during an investigation.[28] It also ignores that the confirmation of charges proceedings give the Defence a robust opportunity to review and comment on the Prosecution's evidence and to seek a dismissal of the case.[29] The Defence also overlooks that a suspect may make an unsworn statement under article 67(1)(h) and may agree to be questioned by the Prosecution during its investigation pursuant to article 55(2) and rule 112.

12. In this sense, it is important to stress that the lack of a mandatory 'no case to answer' process in the Court's Basic Documents does not mean that there is no filter that would prevent defence teams from having to respond to charges that are wholly unsubstantiated. As already said, the ICC criminal process contains a specific and thorough mechanism for these purposes, the confirmation process, which is unparalleled in other international criminal jurisdictions. For instance,

[24] *Contra*, Appeal, para. 16.
[25] ICC-01/09-01/11-1334, para. 15.
[26] The Defence submits that 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; 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; conferring primary responsibility for the presentation of evidence at trial on the judges; allowing the accused to comment on evidence contemporaneous with its presentation; and allowing, or even requiring, that testimony of an accused at any time during trial is not under oath (Appeal, paras. 15.)
[27] Appeal, paras. 15-16, 22.
[28] See for instance articles 56-58, 60-61, 67.
[29] Articles 61(3) and (6).

under article 19 of the ICTY Statute (article 18 of the ICTR Statute) and rule 47 of the ICTY/ICTR Rules of Procedure and Evidence the Prosecutor may bring an indictment if "there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal."[30] A single judge of the Trial Chamber may confirm the indictment if satisfied that a "*prima facie* case" is established.[31] This procedure is comparable to article 58(1)(a) of the Rome Statue, according to which a Pre-Trial Chamber will issue a warrant of arrest or summons to appear "if it is satisfied that [t]here are reasonable grounds to believe that the person has committed a crime […]". The Special Court for Sierra Leone,[32] the Special Tribunal for Lebanon[33] and the Kosovo Specialist Chambers[34] adopt similar standards for the issuance or approval of an indictment following an *ex-parte* process between the Prosecution and the competent single judge.

13. In contrast, article 61 of the Rome Statute contains a procedure designed to filter out those cases and charges for which the evidence is insufficient to justify a trial[35] and to ensure that only cases and charges based on sufficient evidence go to trial.[36] Based on the confirmation of charges procedure, the decision on the confirmation of charges establishes the case which the accused must answer, and fully protects his or her rights, including the right to remain silent and the privilege against self-incrimination:[37]

[30] Rule 47 (B) of the ICTY and ICTR Rules of Procedure and Evidence.
[31] Article 19 of the ICTY Statute; article 18 of the ICTR Statute.
[32] SCSL, rule 47(E): "The designated Judge shall review the indictment and the accompanying material to determine whether the indictment should be approved. The Judge shall approve the indictment if he is satisfied that: […] the allegations in the Prosecution's case summary would, if proven, amount to the crime or crimes as particularised in the indictment."
[33] STL, rule 68(F): "The Pre-Trial Judge shall examine each of the counts in the indictment and any supporting materials provided by the Prosecutor to determine whether a prima facie case exists against the suspect."
[34] Kosovo Specialist Chambers, rule 83(4): "The Pre-Trial Judge shall examine the supporting material in relation to each of the charges and shall determine whether a well-grounded suspicion has been established against the suspect."
[35] ICC-01/04-01/10-514, OA4, para. 47.
[36] ICC-01/04-01/10-514, OA4, para. 39.
[37] Rule 121((1). ICC-01/04-01/07-2259 OA10, para. 40.

- Unlike the confirmation of an indictment before the ICTY/ICTR which is an *ex parte* procedure,[38] the confirmation of charges hearing at the ICC is a hearing before a Pre-Trial Chamber comprised of three judges and is conducted in an adversarial fashion and, as a general rule, in the presence of the suspect.[39] Prior to the hearing, the suspect has the right to be informed in detail of the charges together with a list of evidence which the Prosecution intends to present at the hearing.[40] In addition, the Prosecution's disclosure obligations under rules 76 and 77 and article 67(2) already arise prior to the confirmation hearing.[41] During the confirmation hearing, the person has the right to object to the charges, to challenge the evidence or matters of statutory interpretation[42] and to present his or her own evidence.[43] Accordingly, during the confirmation of charges proceedings, the suspect can exercise the rights that he or she would otherwise have in filing a 'no case to answer' motion and in addition, may present his or her own evidence.

- According to the ICC's and the ICTY/ICTR's jurisprudence, a Trial Chamber will not evaluate the strength of the Prosecution evidence when deciding on a 'no case to answer' motion, especially as regards questions of the credibility or reliability of witnesses and their testimony. Instead, it will consider the Prosecution's evidence "at its highest' and "assume that the Prosecution evidence is entitled to credence unless incapable of belief" on any reasonable view.[44] On the contrary, in deciding whether to confirm

[38] ICC-01/04-01/10-514, OA4, para. 43.
[39] Article 61(2) allows for an exception to the presence of the suspect in specific circumstances.
[40] Article 61(3); rule 121(3).
[41] Article 61(3), last sentence, rule 121(2). The Appeals Chamber has held that due to the limited scope of the confirmation hearing, "it may be permissible to withhold the disclosure of certain information from the Defence prior to the hearing to confirm the charges that could not be withheld prior to trial." ICC-01/04-01/07-475 OA, 13 May 2008, para. 68.
[42] ICC-01/09-02/11-425 OA4, para. 33.
[43] Article 61(6).
[44] ICC-01/09-01/11-1334, paras. 23-24; ICC-01/09-01/11-2027-Red-Corr, Reasons of Judge Fremr, paras. 17-19, Reasons of Judge Eboe-Osuji, paras. 124-125. *Prosecutor v. Goran Jelisic*, 11-95-10-A, Appeals Chamber, Judgement, 5 July 2001, para. 55; *Prosecutor v. Ferdinand Nahimana, et al*, ICTR-99-52-T, Trial Chamber I, Reasons for Oral Decision of 17 September 2002 on the Motions for Acquittal, 25 September 2002, para. 18; *Prosecutor v. Augustin Bizimungu et al.*, ICTR-00-56-T, Trial Chamber II, Decision on Defence Motions Pursuant to Rule 9*bis*, 20 March 2007, paras. 6-8.

charges, a Pre-Trial Chamber may evaluate the credibility and weight of the Prosecution's evidence and assess it against any evidence presented by the Defence.[45] The Appeals Chamber has held that "[i]n determining whether to confirm charges under article 61 of the Statute, the Pre-Trial Chamber may evaluate ambiguities, inconsistencies and contradictions in the evidence or doubts as to the credibility of witnesses."[46] This approach provides better protection to the accused as it ensures that charges will only be confirmed if they are supported by credible evidence, which has sufficient probative value to meet the standard under article 61(7).

- The standard of proof for confirmation of charges under article 61(7)—substantial grounds to believe that the person committed the crimes charged—is higher than the standard of "reasonable grounds" used at the ICTY/ICTR to confirm an indictment.[47] Although the ICC's confirmation standard of proof is lower than the "beyond reasonable doubt" standard of proof required to convict an accused[48]—like the standard for a "no case to answer" motion[49]—it ensures that cases that are not supported by sufficient evidence to justify going to trial are filtered out.[50] The *Lubanga* Pre-Trial Chamber held that "for the Prosecution to meet its evidentiary burden, it must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations".[51]

14. It does not matter that at the confirmation of charges stage the Prosecution may rely on summary evidence, on documentary evidence such as NGO or UN

[45] ICC-01/04-01/06-803-tEN , para. 39.
[46] ICC-01/04-01/10-514, OA 4, paras. 1, 46.
[47] ICC-01/04-01/10-514, OA4, para. 43.
[48] ICC-01/04-01/06-568 OA3, para. 56.
[49] ICC-01/09-01/11-1334, para. 23. The ICTY Appeals Chamber has formulated the applicable test as being "whether there is evidence (if accepted) upon which a reasonable [trier] of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question', not whether the accused's guilt has been established beyond reasonable doubt" (*Prosecutor v. Radovan Karadzic*, IT-95-5/18-AR98bis.l, Appeals Chamber, Judgement, 11 July 2013, para. 9; *Prosecutor v. Goran Jelisic*, 11-95-10-A, Appeals Chamber, Judgement, 5 July 2001, para. 37; *Prosecutor v. Zedravco Mucié et al.*, IT-96-21-A, Appeals Chamber, 20 February 2001, para. 434).
[50] ICC-01/04-01/10-514 OA4, para. 47.
[51] ICC-01/04-01/06-803-tEN, para. 39; see also ICC-01/04-01/07-717, para. 65.

reports, or on evidence that it may not use at trial,[52] because the Prosecution's choice of evidence at this stage does not derogate from its duty to establish substantial grounds to believe that the person committed the crimes charged.[53] Most importantly, any significant deviation at trial from the evidence relied on by the Prosecution during the confirmation of charges proceedings—for instance if witnesses recant or refuse to cooperate at trial, such as what happened in the *Ruto et al*. case[54]—may inform the Chamber's exercise of discretion on whether or not to entertain a 'no case to answer' motion before hearing the evidence of the Defence. However, the mere possibility that the Prosecution's evidence presented at trial may differ from that relied upon at the confirmation of charges stage does not mean that the Chamber is required, as a matter of law, to entertain a 'no case to answer' motion under all circumstances.

15. In this case, a Pre-Trial Chamber confirmed the charges pursuant to the above procedure, and by doing so, it effectively determined that there is credible and probative evidence implicating Mr Ntaganda in the crimes for which he has been charged and that there is a case for him to answer. Such a determination is comparable to a decision that there is a 'case to answer' as articulated in the caselaw of the ICTY/ICTR on rule 98*bis*,[55] and that of other common law jurisdictions relied upon by the Defence.[56] The confirmation decision clearly sets out the facts that are supported by sufficient evidence and defines the parameters of the charges at trial that the Accused has to answer.[57]

16. Also, the fact that the Trial Chamber in the *Ruto et al*. case exercised its discretion differently from this Chamber and entertained a 'no case to answer' motion from the Defence does not show that the Chamber in this case erred. Each Chamber

[52] Article 61(5); *contra*, Appeal, para. 18.
[53] ICC-01/04-01/10-514 OA4, para. 47.
[54] ICC-01/09-01/11-2027-Red-Corr, Reasons of Judge Fremr, paras. 147-150, Reasons of Judge Eboe-Osuji, paras. 138-192.
[55] Appeal, paras. 10-11, referring to *Prosecutor v. Strugar*, Decision on Defence Motion Requesting Judgment of Acquittal Pursuant to Rule 98*bis*, 21 June 2004, para. 13; *Prosecutor v. Kordic and Cerkez*, Decision on Defence Motions for Judgement of Acquittal, 6 April 2000, para. 11.
[56] Appeal, para. 9 (referring to Supreme Court of Canada, *R. v. P. (M.B.)*, [1994] 1 SCR 555, 557, 579), para. 17, footnotes 29-31.
[57] ICC-01/04-01/06-3121-Red A5, para. 124. *Contra*, Appeal, paras. 2, 4, 10, 16, 17.

must exercise its discretion in a manner that best fits the specific circumstances of the case before it, and no two cases are identical – certainly not the *Ruto et al.* and the *Ntaganda* cases, which present very different circumstances.[58]

17. Finally, the Defence challenges the Chamber's finding that in the present circumstances a 'no case to answer' motion would not further the expeditious conduct of the proceedings.[59] The Defence's arguments merely disagree with the Chamber's exercise of discretion in this case and are irrelevant to the question on appeal, namely whether the Chamber erred by finding that it has a broad discretion to decide whether or not to entertain a 'no case to answer' motion.[60]

18. For the above reasons, the Defence's First Ground should be dismissed.

C. The Chamber correctly declined to entertain a Defence motion for a judgment of (partial) acquittal on the basis that it is a discretionary matter (Second Ground)

19. Like the Defence's First Ground, its Second Ground also concerns the question of whether the Chamber erred in law by finding that it has broad discretion as to whether or not to pronounce upon a 'no case to answer' motion at the end of the Prosecution's case.[61] The Defence's six additional arguments fail to show any error in the Decision and should therefore be rejected.

20. First, the Decision does not violate the Defence's right to be heard.[62] In its "Decision on the conduct of the proceedings",[63] the Chamber, consistent with

[58] In the *Ruto et al*. case the Trial Chamber found that critical Prosecution witnesses failed to give evidence with respect to material aspects included in their prior recorded testimonies and that the witnesses' failure to give evidence has been materially influence by improper interference (see ICC-01/09-01/11-1938-Red-Corr, paras. 47-48, 51-55, 75-79, 89-90, 93-97, 100-102, 104-109, 120-121, 123-126). In the "Decision on Defence Applications for Judgments of Acquittal", Judges Fremr and Eboe-Osuji agreed that direct and indirect interference with Prosecution witnesses had an effect on the proceedings and has "influenced the Prosecution's ability to produce more (credible) testimonies". They held that there was a "disturbing level of interference with witnesses, as well as inappropriate attempts at the political level to meddle with the trial and to affect its outcome." (ICC-01/09-01/11-2027-Red-Corr, Reasons of Judge Fremr, para. 147).
[59] Appeal, paras. 19-20; Decision, para. 26.
[60] Decision, para. 25.
[61] Decision, para. 25; Appeal, para. 23. In its Decision Granting Leave to Appeal (25:11-16), the Trial Chamber held that both issues for which it granted leave to appeal, and which now constitute the basis of the Defence's two grounds of appeal concern "the question of whether a Chamber has discretion to grant or reject leave to file a no case to answer motion".
[62] *Contra*, Appeal, para. 24.
[63] ICC-01/04-02/06-619 ("Conduct of Proceedings Decision"), para. 17.

rule 134, expressly indicated to the Defence that it may file a motion at the end of the Prosecution's case asking the Chamber to entertain an argument that there is no case for the Defence to answer. The Defence eventually filed that motion,[64] and the Chamber rejected it in the Decision. The Defence has no right for its motion to be granted regardless of the surrounding circumstances, including its impact on the proceedings, its timeliness, or lack thereof, or its merits.

21. Second, the Defence argues that because the Chamber held that it would keep the matter under review[65] it follows that the Accused should have been given a right to be heard in the first place.[66] This argument is illogical. The Chamber's finding means that if the circumstances significantly change during the Defence's presentation of evidence, the Chamber would allow the Defence to make additional arguments on whether a 'no case to answer' motion would be justified at that stage of the proceedings. In order to decide on that matter, the Chamber need not have first entertained the merits of a 'no case to answer' motion. In any event, as shown in the previous paragraph, the Chamber fully respected the Accused's right to be heard.

22. Third, as submitted above,[67] the Defence does not support its argument that the absence of an express provision in the Statute on a 'no case to answer' motion does not give the Chamber discretion to decline to hear submissions on the issue.[68]

23. Fourth, although a Trial Chamber's power to ensure the fair and expeditious conduct of the proceeding in full conformity with the rights of an accused authorises that Chamber to entertain a 'no case to answer' motion in appropriate circumstances,[69] it does not *oblige* it to do so in all cases. The Defence's contrary argument is unsupported and merely challenges the Chamber's exercise of discretion in this case.

---

[64] ICC-01/04-02/06-1879-Conf.
[65] Decision, para. 29.
[66] Appeal, para. 25.
[67] *See* paras. 7-9 above.
[68] Appeal, para. 26; see also para. 12.
[69] Appeal, para. 27.

24. The Defence's fifth argument is that pronouncing on the sufficiency of the evidence at the end of the Prosecution case is not a discretionary matter, as this violates Mr Ntaganda's right to remain silent and his privilege against self-incrimination.[70] In support of this submission, the Defence merely refers to its arguments under the First Ground. For the reasons set out above, the Defence's First Ground should be dismissed. Accordingly, the Defence's fifth argument under its Second Ground should be rejected for the same reasons.

25. Finally, the Defence's argument that the Chamber merely has discretion to determine the applicable standards and procedures for *how* to conduct a 'no case to answer' process[71] is unsustainable. As submitted above,[72] through the exercise of its general case management functions, a Chamber may, as matter of discretion, decide to consider a 'no case to answer' motion or, conversely, decline to do so if it concludes that it would be detrimental to the fair and expeditious conduct of the proceedings, within the terms of articles 64(2) and 64(3)(a).

26. For the above reasons, the Defence's Second Ground should be dismissed.

Conclusion

27. For the reasons set out above, the Prosecution submits that the Appeal should be dismissed.

Fatou Bensouda, Prosecutor

Dated this 10th July 2017

At The Hague, The Netherlands

[70] Appeal, para. 28.
[71] Appeal, para. 29.
[72] See paras. 7-9.