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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
With Public Annex A**

**Public redacted version of “Prosecution’s response to the ‘Request for leave to file motion for partial judgment of acquittal’, ICC-01/04-02/06-1879-Conf”,
8 May 2017, ICC-01/04-02/06-1894-Conf**

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

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Introduction

1. The Prosecution opposes the Defence request for leave to file a motion for partial judgment of acquittal in relation to Counts 1 to 5, 7-8, 10-13 and 17-18.¹
2. First, the Chamber should deny leave to file a motion to acquit the Accused on one incident within a count because there is no possibility of success. Chambers at the *ad hoc* tribunals have consistently denied requests for partial acquittals on individual incidents, rather than on full counts, and the jurisprudence has been followed at this Court. Where multiple incidents are included in a count, the incidents are not considered individually in the context of a motion for acquittal. To the contrary, where evidence exists on the record in support of *any one of the incidents charged*, the ‘no case to answer’ motion is defeated and all remaining incidents endure.² The Defence concedes that there is evidence on the record sufficient to answer the Prosecution’s case on the other incident in support of the counts (the ‘First Attack’).³ Consequently, the Defence Request should be dismissed where it seeks acquittal on one incident alone.
3. Second, leave should be denied because it would be a waste of judicial resources to entertain such a motion. There is sufficient evidence on record capable of sustaining a conviction for all counts in relation to the Second Attack and for Count 17 in relation to both incidents.
4. In the alternative, should the Chamber grant the Defence leave to file a motion for acquittal in respect of Count 17 or for partial acquittal in respect of Counts 1 to 5, 7-8, 10-13 and 17-18, the Prosecution provides its submissions on the applicable standard and procedure.

¹ ICC-01/04-02/06-1879-Conf (“Defence Request”).

² ICC-01/09-01/11-1334, para. 27.

³ With the exception of Count 17, where the Defence challenges the evidence on the full count.

Confidentiality

5. This filing is classified as “Confidential” pursuant to regulation 23bis(2) of the Regulations of the Court consistent with the classification of the Defence Request.

Background

6. The Chamber instructed the Defence to seek leave to file a motion asserting that there is no case for it to answer, including submissions on the applicable standard and procedure, no later than five days after the Prosecution’s presentation of evidence, or, if applicable, after the presentation of evidence by the legal representatives of victims.⁴
7. The presentation of the evidence by the legal representatives of victims ended on 12 April 2017. On 13 April 2017, the Defence sought an extension to file its motion seeking leave to bring a no case to answer motion.⁵ The Chamber granted the extension until 25 April 2017.⁶
8. On 25 April 2017, the Defence filed the Defence Request.

Prosecution’s Submissions

(i) Request to file a motion for partial acquittal should be dismissed

9. Trial Chamber V(A) in *Ruto* held that while each full count should be considered individually in the context of a ‘no case to answer’ motion, individual incidents *within* a count would not be considered separately.⁷ Rather, the presence of evidence supporting any one of the incidents charged, along with evidence

⁴ ICC-01/04-02/06-619, para. 17.

⁵ ICC-01/04-02/06-1861.

⁶ Email from Trial Chamber VI Communications to the Parties and participant on 13 April 2017 at 18:23.

⁷ ICC-01/09-01/11-1334, para. 27.

supporting at least one mode of liability, would defeat a ‘no case’ motion and permit the count to survive to the end of trial.⁸

10. This is consistent with the jurisprudence of the *ad hoc* tribunals, where rule 98bis expressly permits challenges to full counts only and where it is settled practice that challenges to individual incidents supporting a count are prohibited. For example, in *Nchamihigo*, the Defence sought acquittal on some paragraphs of the indictment but did not assert that the lack of evidence in support of these paragraphs should result in full acquittal on any count. The Chamber denied the request, stating:

Pursuant to the jurisprudence of the Appeals Chamber [*Delalic*, 20 February 2001], and since then applied by the Trial Chambers of the Tribunal [*Semanza* 27 September 2001, *Kamuhanda* 20 August 2002, *Nyiramasuhuko* 16 December 2004, *Bagosora* 2 February 2005, *Muvunyi* 13 October 2005], the scope of Rule 98bis is delimited in relation to the determination of whether the evidence, if believed, is insufficient to sustain a conviction on one or more counts of the Indictment. The test applied is whether there is sufficient evidence upon which, if accepted, a reasonable trier of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question.⁹

11. The Chamber in *Nizeyimana* also decided that it would only consider whether the Prosecution’s evidence is insufficient to sustain particular *counts* of an indictment. Since the Defence request in that case did not encompass entire counts, the Chamber held that “the arguments advanced by the Defence are thus insufficient to enter a judgment of acquittal with respect to any count of the Indictment”.¹⁰

12. In *Hadžić*, the Chamber rejected Defence submissions that rule 98bis allowed the Chamber to examine whether an accused may be acquitted on a portion of a

⁸ ICC-01/09-01/11-1334, para. 27.

⁹ *Prosecutor v. Nchamihigo*, “Decision on Defence Motion for Judgment of Acquittal”, 8 March 2007, para. 11.

¹⁰ *Prosecutor v. Nizeyimana*, Decision on Defence Motion for Judgment of Acquittal pursuant to Rule 98bis of the Rules, 16 March 2011, Case No. ICTR-00-55C-T, para. 7.

count.¹¹ The Defence in that case raised similar arguments as the *Ntaganda* Defence: (i) that the Chamber is not bound by the four corners of the counts as articulated in the Indictment; (ii) that the Chamber should exercise discretion to analyse discrete events charged in the Indictment regardless of whether the Prosecution characterised those events as component parts of a larger count; (iii) that this is fairer to the Defence; (iv) that rule 98bis is an efficiency mechanism that allows chambers to eliminate counts that have no merit and avoid the need for the Defence to call evidence in response; and (v) that it would be paradoxical to the purpose of the rule if a chamber were unable to decide that particular, discrete and identifiable components of a charge in an indictment should not go forward based on a lack of evidence capable of supporting a conviction in relation to them, with reference to the *Dragomir Milošević* decision.¹² After reviewing relevant jurisprudence, the Chamber concluded that “these cases reveal settled practice within the ICTY trial chambers to entertain motions for judgment of acquittal in respect of entire counts and not individual charges within a count”.¹³ Although not indifferent to the *Dragomir Milošević* decision, the Chamber held that “it is appropriate to entertain a motion for judgement of acquittal only with regard to all counts of an Indictment or with regard to entire counts”.¹⁴ Since the Defence in that case did not challenge any count in its entirety, the Chamber found that there was no possibility of a judgment of acquittal and dismissed the Defence application.¹⁵

13. Although this Court’s legal texts do not contain the same express language as that of the rule 98bis of the ICTY Rules of Procedure and Evidence, the same approach

¹¹ *Prosecutor v. Hadžić*, Oral Decision on Defence Motion for Acquittal pursuant to Rule 98bis, IT-04-75-T, Transcript of 20 February 2014, pp.9102-9127.

¹² *Prosecutor v. Hadžić*, Oral Decision on Defence Motion for Acquittal pursuant to Rule 98bis, IT-04-75-T, Transcript of 20 February 2014, pp. 9103-9105.

¹³ *Prosecutor v. Hadžić*, Oral Decision on Defence Motion for Acquittal pursuant to Rule 98bis, IT-04-75-T, Transcript of 20 February 2014, pp. 9105-9107.

¹⁴ *Prosecutor v. Hadžić*, Oral Decision on Defence Motion for Acquittal pursuant to Rule 98bis, IT-04-75-T, Transcript of 20 February 2014, p. 9108.

¹⁵ *Prosecutor v. Hadžić*, Oral Decision on Defence Motion for Acquittal pursuant to Rule 98bis, IT-04-75-T, Transcript of 20 February 2014, p. 9108.

to count-splitting was adopted by the Chamber in the *Ruto* case, as mentioned above. Trial Chamber V(A) stated that “the objective of the ‘no case to answer’ assessment is to ascertain whether the Prosecution has led sufficient evidence to necessitate a defence case, failing which the accused is to be acquitted *on one or more of the counts* before commencing that stage of the trial” (emphasis added).¹⁶ It further held that each individual incident pleaded within a count would not be considered; rather it would consider whether or not there is evidence supporting any one of the incidents charged and the alleged form of participation. If so, the ‘no case to answer’ motion would be defeated.¹⁷ The Chamber specifically noted its consistency with the jurisprudence of the *ad hoc* tribunals, and specifically referred to rule 98*bis*.¹⁸

14. Moreover, in this case the two incidents and the charged modes of liability are significantly interlinked such that keeping both incidents is not only legally correct but also practically and evidentially sound. The Second Attack is one of a series of UPC/FPLC attacks in the Ituri region; the same types of crimes were committed in the First and Second Attacks; the Accused issued orders during the First Attack and commanded the operation from the field; he witnessed the response of the troops to his orders and he participated in the commission of crimes – all of these elements are integral to his actions and those of the troops under his command and to his intent and knowledge of crimes committed during the Second Attack. Comprehensively assessing the Second Attack in isolation from the First Attack could lead to a distorted evaluation of the evidence and is best left to the end of the case.

15. Based on the foregoing, the Defence request for leave to bring a motion for partial acquittal in respects of incidents rather than full counts should be dismissed.

¹⁶ ICC-01/09-01/11-1334, para. 23.

¹⁷ ICC-01/09-01/11-1334, para. 27.

¹⁸ ICC-01/09-01/11-1334, para. 31.

(ii) There is sufficient evidence on record supporting a conviction

16. As a second basis to deny the Defence Request, it would be a waste of judicial resources to allow litigation on issues that are speculative and frivolous, in that they are not capable of success. There is ample evidence on record capable of supporting a conviction in relation to: (i) the Second Attack, charged as one incident in Counts 1 to 5, 7-8, 10-13 and 17-18, and (ii) the entirety of Count 17. The Chamber can dismiss the request for leave to bring a ‘no case to answer’ motion in relation to these incidents and one count on this basis.

17. Although at the stage of a request for leave to bring a motion for partial acquittal there should be few references to the evidence itself, the Defence argues that the Prosecution has relied on “sparse circumstantial evidence” in relation both to the crimes committed during the “Second Attack” and in support of Count 17 (Attacks against Protected Objects) and submits that the applicable legal test to be applied is whether the circumstantial evidence presented is capable of rejecting all realistic possibilities consistent with innocence.¹⁹ The Defence details certain Prosecution’s evidence yet ignores other direct evidence on record that is capable of supporting a conviction, along with corroborative indirect evidence. To the extent necessary to oppose this characterisation of the evidence, and without prejudice to developing further submissions should leave be granted to file a motion for partial acquittal, the Prosecution provides its observations on the breadth of relevant evidence adduced to date on the counts.

i. Crimes committed during the “Second Attack” (Counts 1-5, 7-8, 10-13 and 17-18)

18. The Defence claims that the Prosecution has not adduced any credible or sufficient evidence that the Accused preformed the *actus reus* of any of these

¹⁹ ICC-01/04-02/06-1879, para. 39.

crimes during the Second Attack, or that he did so with the requisite *mens rea*.²⁰

That is incorrect. The Prosecution's evidence in support of the crimes committed by UPC/FPLC forces under the Accused's command and control during the Second Attack is robust.

19. Numerous Prosecution Witnesses testified about crimes committed by the UPC/FPLC forces in the course of the "Second Attack" including: (i) military insiders P-0963,²¹ P-0017,²² [REDACTED],²³ [REDACTED],²⁴ [REDACTED],²⁵ [REDACTED],²⁶ and (ii) crime-base witnesses [REDACTED],²⁷ P-0106,²⁸ P-0805,²⁹ [REDACTED],³⁰ [REDACTED],³¹ P-0103,³² P-0105,³³ [REDACTED],³⁴ [REDACTED],³⁵ [REDACTED],³⁶ P-0301,³⁷ P-0317,³⁸ [REDACTED],³⁹ and [REDACTED]⁴⁰.

20. As to his criminal responsibility for these crimes, the Accused is charged under several modes of liability for the crimes committed during the Second Attack

²⁰ ICC-01/04-02/06-1879, para. 2.

²¹ ICC-01/04-02/06-T-79-CONF-ENG ET, p.43, lns.1-5; p.51, lns.10-18; p.66, ln.16 to p.69, ln.14; p.77, ln.17 to p.78, ln.7.

²² ICC-01/04-02/06-T-60-CONF-ENG ET, p.14, ln.20 to p.25, ln.20; p.29, lns.7-19; p.40, ln.1 to p.43, ln.22.

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ ICC-01/04-02/06-T-44-CONF-ENG ET, p.46, ln.21 – p.48, ln.25.

²⁹ ICC-01/04-02/06-T-26-CONF-ENG ET, p.6, ln.9 – p.8, ln.8.

³⁰ [REDACTED].

³¹ [REDACTED].

³² DRC-OTP-0104-0170, pp.0179-0180, paras.45-49.

³³ ICC-01/04-02/06-T-133-CONF-ENG ET, p.45, ln.20 – p.46, ln.9 ; p.47, ln.5-25 ; p.49, ln.25 - p.51, ln.21; p.53, ln.1 – p.55, ln.8; p.56, ln.22 – p.59, ln.6; p.70, ln.8 – p.71, ln.19 ; ICC-01/04-02/06-T-134-CONF-ENG ET, p.9, ln.17, p.15, ln.16 ; p.16, ln.18 – p.20, ln.4; p.20, ln.22 – p.21, ln.23; p.23, ln.20 – p.24, ln.22 ; ICC-01/04-02/06-T-135-CONF-ENG ET, p.34, ln.13 – p.35, ln.3 ; p.42, ln.4 – p.43, ln.3.

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ ICC-01-04-02-06-T-149-CONF-ENG ET p. 60, ll.6-64; ICC-01-04-02-06-T-149-CONF-ENG ET p.64, ln.19 to p.65, ln.16; ICC-01-04-02-06-T-149-CONF-ENG ET p.65, ln.17 to p.66, ln.11; ICC-01-04-02-06-T-149-CONF-ENG ET p.66, ln.20 to p.68, ln. 18; ICC-01-04-02-06-T-149-CONF-ENG ET p.78, lns.3-6.

³⁸ ICC-01/04-02/06-T-191-CONF-ENG ET p.30, lns.6- 31; ICC-01/04-02/06-T-191-CONF-ENG ET p.50, lns.4-51.

³⁹ [REDACTED].

⁴⁰ [REDACTED].

including: articles 25(3)(a)⁴¹, 25(3)(b)⁴², 25(3)(d),⁴³ 25(3)(f)⁴⁴ and 28(a)⁴⁵. His position within the UPC/FPLC, his contributions to the common plan, the standing orders he issued and his participation in a planning meeting in advance of the attack are relevant to his criminal liability.

21. Bosco NTAGANDA's position as Deputy Chief of Staff in charge of Operations and Organisation in the FPLC between September 2002 and December 2003 is an agreed fact in these proceedings.⁴⁶ Nonetheless, the Prosecution has adduced vast evidence about the position and role of the Accused through the period of the charges, including during the "Second Attack", the command and control he held over his forces and his intent and knowledge.⁴⁷ The logbook also records messages to and from the Accused and his troops at this time.⁴⁸

22. As expanded on below, it is not necessary for the Chamber to undertake an in-depth assessment of this evidence when, on a *prima facie* basis and taking Prosecution evidence at its highest, there is such a wealth of evidence on record about the commission of these crimes and the responsibility of the Accused for them under at least one charged mode of liability, such as command responsibility under article 28(a).

⁴¹ Counts 1-5, 7-8, 10-13 and 18.

⁴² Counts 1-5, 7-8, 10-11.

⁴³ Counts 1-5, 7-8, 10-13, 17 and 18.

⁴⁴ Counts 1 and 2.

⁴⁵ Counts 1-5, 7-8, 10-13, 17 and 18.

⁴⁶ ICC-01/04-02/06-633-Conf-AnxA, no. 79.

⁴⁷ Including direct evidence from UPC/FPLC military and political insiders and other witnesses close to the UPC/FPLC: [REDACTED]; [REDACTED]; **P-0017** (ICC-01/04-02/06-T-60-CONF-ENG ET p.36, ln.7 to p.37, ln.18; ICC-01/04-02/06-T-58-CONF-ENG CT p.23, ln.7 to p.23, ln.15); [REDACTED]; [REDACTED]; **P-0030** (T-144-CONF-ENG ET, p.36, ln.20 - p.37, ln.18); [REDACTED]; **P-0901** (ICC-01-04-02-06-T-28-CONF-ENG ET, p.9, ln. 1 to p.10, ln.20; ICC-01/04-02/06-T-29-CONF-ENG, p. 13, lns. 6-16 to p. 15, lns.6-11;), [REDACTED]; [REDACTED]; **P-0907** (T-89, p.21, lns.3-13; T-89, p.40, lns.3-12; T-90, p.57, ln.23 to p.58, ln.15; T-90, p.70, ln.18 to p.71, ln.4); [REDACTED] and [REDACTED].

⁴⁸ See logbook messages sent by NTAGANDA before and during the Second Attack, namely on 13, 14, 17, 18, 19, and 21 February 2003, at DRC-OTP-0017-0033, pp.0174-0181 (translation at DRC-OTP-0171-0926, pp. 1068-1075); and received by him on 13, 14, 15, 17, 18, 19, 20, 21 February 2003, at DRC-OTP-0017-0033, pp.0157-0172 (translation at DRC-OTP-0171-0926, pp.1051-1066). See also messages of 12, 13, 18 and 19 February 2003: DRC-OTP-0017-0033, at 0182-0184, 0160, 0168, 0176, and 0171 (translation at DRC-OTP-0171-0926, pp.1076-1078, 1051, 1062, 1070, 1065).

23. This is not a situation where the absence of any one witness leaves a gap in the Prosecution's evidence or makes it unlikely that a conviction could follow. There is no need to embark on any further assessment of this evidence at this stage, as it meets the sufficiency requirements to proceed on a *prima facie* basis.

ii. Count 17

24. The Prosecution contests the Defence assertion that it has adduced no evidence, or no sufficient or credible evidence, of the UPC/FPLC's attack on the Mongbwalu Hospital, Mongbwalu Church, Sayo Church, Sayo Health Centre or Bambu Church.⁴⁹

25. The Accused is charged under article 8(2)(e)(iv) with the war crime of intentionally directing an attack against an enumerated list of buildings or places including, *inter alia*, those dedicated to religion, education, hospitals and places where the sick and wounded are collected. While 'attack' (as part of a war crime) is not defined in the Rome Statute or Elements of the Crimes, it is defined in article 49 of Additional Protocol I as "acts of violence against the adversary, whether in offence or in defence."⁵⁰ There is no requirement in this Court's legal texts that actual damage resulted from the attack, let alone that the object was destroyed.⁵¹

26. Prosecution witnesses provided ample evidence of an intentional attack directed against protected objects in Mongbwalu, Sayo and Bambu.

⁴⁹ ICC-01/04-02/06-1879, paras. 3 and 37.

⁵⁰ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 1125 UNTS 3 ('Additional Protocol I'). The prohibition against attacks on hospitals in non-international armed conflict is found in article 11 of the *Protocol Additional to the Geneva Conventions of 12 August 1946, and relating to the Protection of Victims of Non-International Armed Conflicts*, 1125 UNTS 609 ('Additional Protocol II').

⁵¹ ICC-01/04-01/07-717, para. 270 (*Prosecutor v Katanga and Ngudjolo*, Decision on Confirmation of Charges, in relation to the same element under article 8(2)(e)(i)).

27. For instance, [REDACTED].⁵² [REDACTED].⁵³ [REDACTED].⁵⁴ Witness P-0815 also testified that the Sayo Health Centre was entirely emptied of all of its equipment.⁵⁵ This evidence shows an intentional attack on the health centre and that the Health Centre could no longer serve its protected function.
28. [REDACTED].⁵⁶ [REDACTED].⁵⁷ Witness P-0815 also testified to the destruction of the church in Sayo, stating that it was filled with smoke and ash, evidence of the fires that had been made in this protected structure.⁵⁸ Witness P-0886 similarly testified that the UPC/FPLC set up a camp at the Catholic Church in Sayo with weapons positioned around, and that they used the structured to cook.⁵⁹ This evidence constitutes an attack on this protected object.
29. [REDACTED].⁶⁰ Witness P-0017 saw medical equipment he believes was taken from Mongbwalu Hospital in front of the Accused's house in Mongbwalu.⁶¹
30. The Prosecution called ample evidence to demonstrate the UPC/FPLC forces destroyed the hospitals and schools in Bambu. [REDACTED],⁶² [REDACTED].⁶³ [REDACTED].⁶⁴ [REDACTED].⁶⁵ Witness P-0317 similarly testified about the destruction to the Bambu Hospital that she observed as part of her investigatory mission to the point of depriving the population of Bambu to access to health.⁶⁶ Witness P-0046 also referred to looting of the hospital.⁶⁷

⁵² [REDACTED].

⁵³ [REDACTED].

⁵⁴ [REDACTED].

⁵⁵ ICC-01/04-02/06-T-76-CONF-ENG ET (60:2-60:21).

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

⁵⁸ ICC-01/04-02/06-T-76-CONF-ENG ET (56:2-56:22).

⁵⁹ ICC-01/04-02/06-T-37-CONF-ENG ET (10:16-10:21; 14:23-15:23; 16:15-16:25; 18:12-18:19; 63:10-63:25) and ICC-01/04-02/06-T-38-CONF-ENG ET (24:25-25:17).

⁶⁰ [REDACTED].

⁶¹ ICC-01/04-02/06-T-58-CONF-ENG ET (81:14-82:17).

⁶² [REDACTED].

⁶³ [REDACTED].

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

⁶⁶ ICC-01/04-02/06-T-191-CONF-ENG ET (30:9-30:18). *See also* ICC-01/04-02/06-T-191-CONF-ENG ET (53:20-55:2) in which Witness P-0317 comments upon a letter drafted by the director of Kilo-Moto to MONUC

31. The charged modes of liability for this crime are articles 25(3)(d) and 28(a). As set out above,⁶⁸ the Defence has stipulated to the Accused's senior position as Deputy Chief of Staff in charge of Operations and Organisation in the FPLC between September 2002 and December 2003. The Prosecution adduced evidence that he had command and control over his troops and issued standing orders to them,⁶⁹ and that he knew that they had attacked protected objects during the First Attack.⁷⁰

(iii) In the alternative, the applicable standard and procedures for a 'no case to answer' motion

32. The Prosecution does not contest that motions for acquittal (on full counts only) are consistent with the Court's regulatory framework and fall under the Chamber's obligations under article 64(2) to ensure that the trial is fair and expeditious, its obligations under articles 66(1) and 67(1), and its powers under article 64(3)(a). Yet, as cautioned by Trial Chamber V(A) in *Ruto*, "[s]uch motions should not be pursued on a merely speculative basis or as a means of raising credibility challenges that are to be considered at the time of final deliberations. Nor should they be filed merely to shape the Chamber view as to the strength of the Prosecution case thus far presented."⁷¹

33. Trial Chamber V(A) in *Ruto* was the first, and to date only, Chamber of this Court to set⁷² and apply⁷³ the applicable standard and procedure for a 'no case to answer

detailing the destruction of the medical unit, laboratory, medication, equipment, as well as the looting of the schools to the point that there was no education and the looting and destruction of the chapel (DRC-OTP-0065-0006).

⁶⁷ P-0046: ICC-01/04-02/06-T-100-CONF-ENG ET, p.65, lns.6-9.

⁶⁸ ICC-01/04-02/06-633-Conf-AnxA, no. 79.

⁶⁹ See *supra*, footnote 47.

⁷⁰ [REDACTED] ; P-0017: ICC-01/04-02/06-T-58-CONF-ENG ET, p.80, ln.24 to p.82, ln.17.

⁷¹ ICC-01/09-01/11-1334, para.39.

⁷² ICC-01/09-01/11-1334.

⁷³ ICC-01/09-01/11-2027-Red-Corr.

motion', consistent with that of the *ad hoc* tribunals and common law jurisdictions.⁷⁴

I. Applicable Standard

34. The Chamber articulated the standard to be applied in determining a 'no case to answer' motion as "whether there is evidence on which a reasonable Trial Chamber *could* convict."⁷⁵ That Chamber noted that "[t]he emphasis is on the word 'could' and the exercise contemplated is thus not one which assesses the evidence to the standard for a conviction at the final stage of the trial."⁷⁶

35. Trial Chamber V(A) established that in conducting the analysis:

- (i) the evidence to be considered for the purposes of this assessment is limited to what has been submitted and discussed at trial and has been found to be admissible by the Chamber;⁷⁷
- (ii) in respect of the elements to be proven in order to sustain a conviction before the Court, (a) both the legal and factual components of the alleged crime and (b) the individual criminal responsibility of the accused must be established. Therefore, evidence which could support both of those aspects must be present;⁷⁸
- (iii) each count in the Document Containing the Charges will be considered separately and, for each count, it is only necessary to satisfy the test in respect of one mode of liability, as pleaded or for which a regulation 55 of the Regulations notice has been issued by the Chamber;⁷⁹ and (iv) the Chamber will not consider questions of reliability or credibility relating to

⁷⁴ See ICC-01/09-01/11-1334, para.31, fns.53-54.

⁷⁵ ICC-01/09-01/11-1334, para.32 (footnote omitted, emphasis in original).

⁷⁶ ICC-01/09-01/11-1334, para.23.

⁷⁷ ICC-01/09-01/11-1334, para.25.

⁷⁸ ICC-01/09-01/11-1334, para.26.

⁷⁹ ICC-01/09-01/11-1334, para.32.

the evidence, save where the evidence in question is incapable of belief by any reasonable Trial Chamber.⁸⁰

36. With regard to the latter element, Trial Chamber V(A) noted 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 belief' on any reasonable view. The Chamber agrees with this approach.⁸¹

37. Indeed, the *ad hoc* tribunals articulated this review as follows:

Generally, the sufficiency of the evidence shall be determined without consideration of the reliability and credibility of the available evidence, leaving those matters to the final determination of the case. However, there is one situation in which the Chamber is obliged to consider somehow such matters: it is where the Prosecution's case has 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. In this situation, a judgement of acquittal pursuant to Rule 98bis of the Rules should be entered.⁸²

38. In the *Ruto* case, Judge Eboe-Osuji emphasised the need for a Trial Chamber to consider the case for the Prosecution as a whole, not on a standard of beyond reasonable doubt but on a balance of probabilities where the likelihood of conviction is equal to that of acquittal.⁸³

⁸⁰ ICC-01/09-01/11-1334, para.32.

⁸¹ ICC-01/09-01/11-1334, para.24 (footnotes omitted).

⁸² *Prosecutor v. Rwamakuba*, ICTR-98-44C-R98bis, Decision on Defence Motion for Judgement of Acquittal, 28 October 2005, para.7; See also *Prosecutor v. Strugar*, IT-01-42-T, Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98bis, 21 June 2004, para.18.

⁸³ ICC-01/09-01/11-2027-Red-Corr, p.105, para.115. Judge Eboe-Osuji went on to state that "Where, in spite of weaknesses in any respect, the provisional review shows that the case remains appreciably strong in certain

39. Judge Eboe-Osuji concluded that “it may be possible to consider the approach of provisional evaluation of credibility and reliability from the angle of the usual expression that the case for the Prosecution is to be taken ‘at its highest.’”⁸⁴
40. This view is, again, consistent with the approach of the *ad hoc* tribunals where it has been held that “[t]he determination of whether there is evidence on which a tribunal could convict should be made on the basis of the evidence as a whole”⁸⁵ and that the evidence “should not be viewed narrowly, and is entitled to any inferences or presumptions which a reasonable trier of fact could make.”⁸⁶
41. Judge Fremr in *Ruto* further clarified his position that a Trial Chamber is not prevented from entering into an assessment of the credibility of witnesses testimony at the no case to answer stage, beyond situations where the Prosecution’s case can be viewed as being on the brink of breaking down, where

material aspects, in a manner that satisfies a minimum of equal likelihood of both conviction and acquittal, it will be considered that the prosecution has raised a case for the defence to answer. But, where the provisional review reveals the case as generally tenuous, weak or vague, at an overall level that puts the prospect of conviction below the minimum of equal likelihood with the prospect of acquittal, it should be proper to say that the prosecution has raised no case for the defence to answer”, ICC-01/09-01/11-2027-Red-Corr, pp.105-106, para.116. *See also* Judge Herrera Carbuca’s Dissenting Opinion, where the Judge stated that “In my view, the evidence submitted in trial must be considered in its entirety, where different testimonies and exhibits, when pieced together with other evidence, provide a basis for a particular charge. At this midway point of the proceedings, the Chamber must not apply a ‘beyond reasonable doubt’ standard. Moreover, the analysis of evidence, regardless of the standard, must not be done in relation to every single individual piece of evidence, without considering it as a whole. Although some individual items of evidence may be themselves insufficient to establish guilt (particularly circumstantial and hearsay evidence), I consider that, taking them together, their effect may be telling”, ICC-01/09-01/11-2027-AnxI, para.22 (footnotes omitted).

⁸⁴ Judge Eboe-Osuji went on to note that “For purposes of a no-case submission made at the conclusion of the prosecution case in a trial at the ICC, to say that the prosecution’s evidence is to be taken ‘at its highest’ need not amount to standing the prosecution’s evidence up on a pedestal, despite its feet of clay. Appropriately considered in context, the meaning of the expression begins with the correct appreciation of the prosecution’s case as a whole, taking its strengths and weaknesses into account. Having offset the weaknesses against the strengths, the exercise next requires a correct appraisal of what is left of the case at its remaining highest point. There is a case to answer if the remainder of the evidence is still strong enough to raise the case to the minimum level of equal likelihoods of conviction and acquittal. This is in the real sense of a readily appreciable choice of those ultimate outcomes as open to the trier of fact, when called upon *in the end* — not at halftime — to answer the question whether *guilt* has been proved beyond a reasonable doubt. It must of course be stressed that such a choice of ultimate outcomes is a matter of realistic possibilities in the actual administration of justice. It eschews academic mooting points. But a trial should not be prolonged if the exercise described above reveals the prosecution case, at its conclusion, as critically weak, tenuous or vague — making continuation a hopeless academic exercise.”

⁸⁵ *Prosecutor v. Slobadan Milošević*, IT-02-54-T, Decision on Motion for Judgement of Acquittal, 16 June 2004, para.13(4); *See also Prosecutor v. Rwamakuba*, ICTR-98-44C-R98bis, Decision on Defence Motion for Judgement of Acquittal, 28 October 2005, para. 8.

⁸⁶ *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Motion for Judgement of Acquittal, 2 February 2005, para. 10; *Prosecutor v. Muvunyi*, ICTR-2000-55-A-T, Decision on Tharcisse Muvunyi’s Motion for Judgement of Acquittal Pursuant to Rule 98bis, 13 October 2005, para.40.

“the evidence before it, at the close of the Prosecution case, is of an isolated nature and the falling away of any of the testimonies (if found that it could not be relied upon) would cause (significant) gaps in the Prosecution’s theory of the case that would make it unlikely that a conviction in the case could ultimately follow”.⁸⁷

42. In the Prosecution’s submission, the need for credibility assessments as described above will not apply to the present case since the Prosecution’s evidence is not of an isolated nature on any of the counts, nor would the falling away of any of the testimonies cause significant gaps in the Prosecution’s theory of the case that would make it unlikely that a conviction in the case could ultimately follow. To the contrary, the Prosecution evidence on record in relation to these charges and to the Accused’s responsibility is multi-layered, direct and voluminous.

II. Applicable Procedure

43. In *Ruto*, Trial Chamber V(A) noted that differing modalities have been adopted for the hearing of motions for judgments of acquittal at the *ad hoc* tribunals and considered that “being provided with concise and focused written submissions would be most conducive to the efficient consideration of any ‘no case to answer’ motion.”⁸⁸

44. Trial Chamber V(A) initially set a page limit on the Defence’s motion and ordered that responses by the Prosecution and the Legal Representative of Victims were to be filed within 14 days after notification of the motion, or, if considered more efficient by the Chamber, such responses would be made during an oral hearing which would be scheduled within a similar time frame.⁸⁹ The Chamber eventually granted an extension of the page limit for the motion and any responses to 100

⁸⁷ ICC-01/09-01/11-2027-Red-Corr, pp.53-54, para.144.

⁸⁸ ICC-01/09-01/11-1334, para.36. That Chamber noted that “[t]he relevant rule at the ICTY, for example, specifies that decisions on such motions are to be rendered orally, following hearing the oral submissions of the parties. By contrast, Rule 98bis at the ICTR envisages the filing of a written motion”, ICC-01/09-01/11-2027-Red-Corr, p.109, para.124.

⁸⁹ ICC-01/09-01/11-1334, para.37.

pages,⁹⁰ and also heard oral submissions from the Parties and Legal Representatives.⁹¹

45. The Prosecution submits that, if authorised to file such a motion, the Defence should file first with a limit of 50 pages. The Prosecution and Legal Representative of Victims should also have a limit of 50 pages, to be filed 14 days after notification of the motion. No right of reply should be granted; rather, the usual procedure of requesting leave to reply should remain. The Chamber may convene an oral hearing should this be necessary. The proceedings should continue without suspension during the period in which the motion is being litigated.

Conclusion

46. Based on the foregoing, the Prosecution requests that the Chamber reject the Defence Request in its entirety.



Fatou Bensouda
Prosecutor

Dated this 27th day of September 2017
At The Hague, The Netherlands

⁹⁰ See ICC-01/09-01/11-1970.

⁹¹ ICC-01/09-01/11-T-209-CONF-ENG CT; ICC-01/09-01/11-T-210-CONF-ENG ET ; ICC-01/09-01/11-T-211-CONF-ENG ET and ICC-01/09-01/11-T-212-ENG CT.