

1 International Criminal Court

2 Appeals Chamber

3 Situation: Democratic Republic of the Congo

4 In the case of The Prosecutor v. Bosco Ntaganda - ICC-01/04-02/06

5 Presiding Judge Sanji Mmasenono Monageng

6 Appeals Judgment - Courtroom 2

7 Tuesday, 5 September 2017

8 (The hearing starts in open session at 9.30 a.m.)

9 PRESIDING JUDGE MONAGENG: [9:30:57] Good morning.

10 Would the court officer please call the case.

11 THE COURT OFFICER: [9:31:02] Thank you, Madam President.

12 The situation in the Democratic Republic of the Congo, in the case of The Prosecutor
13 versus Bosco Ntaganda, case reference ICC-01/04-02/06.

14 We are in open session.

15 PRESIDING JUDGE MONAGENG: [9:31:19] My name is Sanji Mmasenono

16 Monageng and I am the Presiding Judge on the appeal arising from the case of the

17 Prosecutor against Bosco Ntaganda. The other Judges of the Appeals Chamber on

18 this appeal are Judge Christine Van den Wyngaert, Judge Howard Morrison,

19 Judge Piotr Hofmański and Judge Raúl Pangalangan. I am joined today by legal

20 staff of the Appeals Division, Ms Natasha Naidoo, Mr Drazan Djukic,

21 Ms Juliana Borenstein and Ms Mary Basconi.

22 May I ask the parties and participants to introduce themselves for the record, starting
23 with the Office of the Prosecutor.

24 MS BRADY: [9:32:17] Good morning, your Honour. Helen Brady, senior appeals
25 counsel, appearing on behalf of the Prosecution, and today I'm with Nicole Samson,

1 senior trial attorney, and Reinhold Gallmetzer, appeals counsel. Thank you very
2 much.

3 PRESIDING JUDGE MONAGENG: [9:32:31] Thank you very much.
4 The Defence, please.

5 MS MARTINEAU: Good morning, your Honour. Today present in the courtroom
6 are Ms Sandrine De Sena, Salomé Biet, David Wagen-Magnon, Benjamin Nodet,
7 Maître Stéphane Bourgon and myself, Maître Isabelle Martineau, and Mr Ntaganda is
8 also present in the courtroom. Thank you.

9 PRESIDING JUDGE MONAGENG: [9:32:54] Thank you very much.
10 Legal Representatives.

11 MS PELLET: [9:32:58] (Interpretation) Thank you, your Honour. The former
12 child soldiers are represented by Vony Rambolamanana and myself, Sarah Pellet.

13 PRESIDING JUDGE MONAGENG: [9:33:12] Thank you very much.

14 MS GRABOWSKI: [9:33:15] Good morning, Madam President. The victims of the
15 attacks are today represented by myself, Anne Grabowski.

16 PRESIDING JUDGE MONAGENG: [9:33:21] Thank you. Thank you so much.
17 Today the Appeals Chamber is delivering its judgment on the appeal of Mr Ntaganda
18 against the decision of Trial Chamber VI entitled "Decision on Defence request for
19 leave to file a 'no case to answer' motion". In today's summary, I will refer to this
20 decision as the "Impugned Decision".

21 In a moment, I shall summarise the Appeals Chamber's judgment, which was taken
22 unanimously. This summary is not part of the written judgment, which is the only
23 authoritative account of the Appeals Chamber's ruling and reasons. The written
24 judgment will be made available to the parties and participants at the conclusion of
25 this hearing.

1 By way of background, on 25 April 2017, Mr Ntaganda filed before the Trial Chamber
2 a request for leave to file a motion for partial judgment of acquittal with respect to
3 certain charges against him. On 1 June 2017, the Trial Chamber rejected the request,
4 stating that it had broad discretion with respect to pronouncing on such matters and
5 that in the circumstances it was not appropriate to entertain the motion.

6 On 27 June 2017, following leave to appeal the Impugned Decision being granted,
7 Mr Ntaganda filed his appeal brief and, on 10 July 2017, the Prosecutor and the
8 Victims participating in the proceedings submitted their respective responses thereto.
9 I shall now turn to the merits of the present appeal.

10 The Appeals Chamber notes that the two issues in relation to which Mr Ntaganda
11 was granted leave to appeal concern the Trial Chamber's finding that it has "broad
12 discretion" in deciding whether or not to "pronounce upon" a motion of no case to
13 answer at the end of the Prosecutor's presentation of evidence. The Appeals
14 Chamber understands Mr Ntaganda to be raising two grounds of appeal that are
15 linked insofar as they allege errors impacting on his right to a fair trial.

16 Consequently, these grounds of appeal will be addressed together.

17 Under his first ground of appeal, Mr Ntaganda avers that "[t]he Trial Chamber erred
18 in law and in fact in requiring the accused to elect to present evidence without a prior
19 determination that the Prosecution has made out a prima facie case capable of leading
20 to a conviction". According to Mr Ntaganda, this requirement places "an undue
21 burden on the exercise of the right to remain silent and the privilege against
22 self-incrimination".

23 Mr Ntaganda's main contention is that having adopted an adversarial trial structure,
24 the Trial Chamber was "required to ensure that Article 67(1)(g) of the Statute is
25 protected in a manner corresponding to that procedure". Accordingly, in

1 Mr Ntaganda's submission, the Trial Chamber's "failure to determine whether the
2 Prosecution has adduced evidence sufficient to support a conviction before calling on
3 an accused to choose whether to present evidence" amounts to "a violation of the
4 privilege against self-incrimination".

5 In support of this contention, Mr Ntaganda presents a number of arguments based on
6 the approaches to fair trial guarantees or a 'no case to answer' procedure in
7 international human rights law, domestic systems of criminal procedure, and other
8 international courts and tribunals. In his view, adversarial systems require such a
9 procedure because "an accused is under no obligation to respond until the state has
10 succeeded in making out a prima facie case against him or her". Furthermore, he
11 argues that adversarial systems "lack certain judicial and other safeguards that are
12 characteristic of inquisitorial systems". In addition, he asserts that "[e]very
13 international tribunal applying a predominantly adversarial form of trial" conducts a
14 'no case to answer' procedure and that the "fundamental purpose of [...] [such a]
15 procedure is the protection of the rights of the accused".

16 Under the second ground of appeal, Mr Ntaganda avers that "[t]he Trial Chamber
17 erred in pronouncing that it possesses a broad discretion as to whether or not to
18 pronounce upon such matters", arguing inter alia that "the absence of an express
19 provision concerning a no case to answer motion does not confer discretion not to
20 hear submissions on the issue" and that "pronouncing on the sufficiency of the
21 evidence at the end of the prosecution case [...] is not a discretionary matter" and
22 therefore "[a] Trial Chamber has no discretion to deny submissions on an issue that it
23 has no discretion not to adjudicate".

24 As a prerequisite to assessing Mr Ntaganda's grounds of appeal, the Appeals
25 Chamber must first consider whether a 'no case to answer' procedure is permissible

1 under the legal framework of the Court.

2 In this regard, the Appeals Chamber observes that the Court's legal texts do not
3 expressly provide for a 'no case to answer' procedure. Moreover, the Appeals
4 Chamber is not aware of any proposals made or discussions held during the drafting
5 of the Statute or the Rules of Procedure and Evidence ("Rules") in relation to such a
6 procedure.

7 Nevertheless, in the view of the Appeals Chamber, a 'no case to answer' procedure is
8 not inherently incompatible with the legal framework of the Court. A Trial Chamber
9 may decide to conduct such a procedure based on its power to rule on relevant
10 matters pursuant to Article 64(6)(f) of the Statute and Rule 134(3) of the Rules. A
11 decision on whether or not to conduct a 'no case to answer' procedure is thus
12 discretionary in nature and must be exercised on a case-by-case basis in a manner that
13 ensures that the trial proceedings are fair and expeditious pursuant to Article 64(2)
14 and 64(3)(a) of the Statute.

15 Thus the Appeals Chamber finds that the Trial Chamber was, in principle, correct in
16 asserting that it had "broad discretion" in deciding whether or not to conduct a 'no
17 case to answer' procedure. However, in light of Mr Ntaganda's arguments on appeal,
18 the Appeals Chamber will next determine whether the Trial Chamber's exercise of
19 discretion in the circumstances of this case was limited by Mr Ntaganda's fair trial
20 rights so as to require a 'no case to answer' procedure to be conducted.

21 At the outset the Appeals Chamber notes that the application and interpretation of
22 the law of the Court "must be consistent with internationally recognised human
23 rights" pursuant to Article 21(3) of the Statute and that, in addition, Article 67 of the
24 Statute enshrines the rights of the accused.

25 The Appeals Chamber considers that a 'no case to answer' procedure, in the context of

1 the Statute, is most directly connected with the right of the accused "to raise defences
2 and to present other evidence admissible under this Statute" pursuant to Article
3 67(1)(e) of the Statute and, in addition, with the right "[n]ot to be compelled to testify
4 [...] and to remain silent" pursuant to Article 67(1)(g) of the Statute.

5 The Appeals Chamber is not persuaded that the judgment of the European Court of
6 Human Rights invoked by Mr Ntaganda, that is *Stojkovic v. France and Belgium*,
7 establishes that a 'no case to answer' procedure constitutes an indispensable
8 safeguard against interference with the right of accused persons not to incriminate
9 themselves. The Appeals Chamber observes that this case is primarily concerned
10 with the accused's right to legal assistance under the European Court of Human
11 Rights, which is not under consideration in this appeal. Accordingly, the European
12 Court of Human Rights' reference to the right of the accused not to incriminate
13 himself or herself does not indicate that, in general, a 'no case to answer' procedure is
14 required as a safeguard of the right to a fair trial. Moreover, whilst the European
15 Court of Human Rights referred to a 'no case to answer' procedure as a safeguard in
16 respect of the right to silence and the right not to incriminate oneself in another case,
17 namely *John Murray v. the United Kingdom*, it did so in relation to the specific
18 question whether incriminating inferences may be drawn from the silence of the
19 accused. This matter also falls outside the scope of this appeal and the Appeals
20 Chamber notes that, in any event, the accused in proceedings before the Court are
21 shielded from such inferences under Article 67(1)(g) of the Statute. Therefore, this
22 case does not support a general requirement to conduct a 'no case to answer'
23 procedure to ensure a fair trial either.

24 Turning to Mr Ntaganda's submission regarding the configuration of the trial
25 proceedings against him, the Appeals Chamber notes that the presentation of

1 evidence in this case is primarily party-driven: There are several evidentiary phases
2 of the trial (with evidence first being led by the Prosecutor, potentially followed by
3 presentation of evidence by the Victims, and the presentation of evidence by the
4 Defence) and the examination of the witnesses is being conducted primarily by the
5 parties, resulting in a comparatively passive role of the Judges of the Trial Chamber.
6 The Appeals Chamber considers that these are features that are typically associated
7 with "adversarial" proceedings in Common Law systems, while not necessarily found
8 in "non-adversarial" systems following the Romano-Germanic tradition. The
9 Appeals Chamber accepts that Common Law systems and international and
10 internationalised criminal jurisdictions following an adversarial trial structure
11 typically provide for a 'no case to answer' procedure. In this regard, the
12 Appeals Chamber notes that a trial format consisting of a prosecution case followed
13 by a defence case is more procedurally suited to a 'no case to answer' procedure,
14 given that the conclusion of the presentation of inculpatory evidence by the
15 prosecution is a particularly appropriate juncture for such a procedure to be
16 conducted.

17 However, this does not mean that, having decided to adopt elements of an adversarial
18 trial structure, the Trial Chamber in the case at hand was obliged to provide for such a
19 procedure as well. In the view of the Appeals Chamber, by comparing the trial
20 proceedings in this case to adversarial systems on the domestic and international level,
21 Mr Ntaganda fails to appreciate that, for the purposes of this appeal, the primary
22 question is whether the decision of the Trial Chamber not to conduct a 'no case to
23 answer' procedure contravenes Mr Ntaganda's fair trial rights within the legal
24 framework of the Court.

25 The Appeals Chamber recalls that the Court's legal framework combines elements

1 from the Common Law and Romano-Germanic legal traditions. Notably, it contains
2 certain fair trial safeguards that are not typically found in Common Law systems,
3 such as the obligation of the Prosecutor to "investigate incriminating and exonerating
4 circumstances equally" under Article 54(1)(a) of the Statute and the need for a
5 Pre-Trial Chamber to "determine whether there is sufficient evidence to establish
6 substantial grounds to believe that the persons concerned committed each of the
7 crimes charged" prior to committing the person concerned to trial pursuant to
8 Article 61(7) of the Statute. Thus, whilst other jurisdictions may strive to protect the
9 rights of the accused through procedures not found in the Court's legal texts, the
10 latter espouse other safeguards aimed at protecting these rights. The safeguards
11 defined in the Statute and Rules ensure, on the whole, that the accused before the
12 Court receive a fair trial. In such circumstances, reference to particular domestic and
13 international systems does not, as such, establish that Mr Ntaganda's fair trial rights
14 required the Trial Chamber to conduct a 'no case to answer' procedure.
15 The Appeals Chamber finds that the discretion of the Trial Chamber as to whether or
16 not to conduct a 'no case to answer' procedure was not limited by internationally
17 recognised human rights or as a result of the adoption of an adversarial trial structure.
18 Accordingly, Mr Ntaganda has failed to demonstrate that the Trial Chamber erred in
19 the exercise of its discretion by declining to entertain his request for a 'no case to
20 answer' procedure.
21 For these reasons, the Appeals Chamber rejects Mr Ntaganda's grounds of appeal and
22 decides to confirm the Impugned Decision.
23 This concludes my summary of the judgment. I thank the interpreters, court
24 reporters and parties and participants.
25 The session is now closed.

- 1 THE COURT USHER: [9:52:57] All rise.
- 2 (The hearing ends in open session at 9.53 a.m.)