

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-02/06**

Date: **1 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

Decision on Defence request for leave to file a 'no case to answer' motion

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for Bosco Ntaganda

Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64, 66 and 67 of the Rome Statute ('Statute'), issues the following 'Decision on Defence request for leave to file a "no case to answer" motion'.

I. PROCEDURAL BACKGROUND

1. On 2 June 2015, the Chamber issued its 'Decision on the conduct of proceedings', in which it determined, *inter alia*, that should the defence team for Mr Ntaganda ('Defence') wish to file a motion of 'no case to answer', it must do so no later than five days after the end of the presentation of evidence by the Office of the Prosecutor ('Prosecution'), or, if applicable, the Legal Representatives of Victims ('LRVs').¹
2. On 29 March 2017, the Prosecution filed a notice in which it declared its case-in-chief to be closed² and, on 12 April 2017, the Legal Representative of the Victims of the Attacks completed his presentation of evidence.³
3. On 13 April 2017, the Defence requested an extension until 25 April 2017 to file a request for leave to file a 'no case to answer' motion, which was granted by the Chamber that same day.⁴
4. On 25 April 2017, the Defence requested leave to file a 'motion for a partial judgment of acquittal' ('Request').⁵
5. On 8 May 2017, the LRVs jointly responded to the Request, opposing it ('LRVs Response').⁶ That same day, the Prosecution opposed the Request ('Prosecution Response').⁷

¹ ICC-01/04-02/06-619, para. 17.

² Prosecution's Notice of the Close of its Case-in-Chief, ICC-01/04-02/06-1839.

³ See Transcript of Hearing of 13 April 2017, ICC-01/04-02/06-T-203-ET, page 104, lines 8-11.

⁴ Email communication from the Defence to the Chamber on 13 April 2017 at 12:35; and e-mail communication from the Chamber to the parties and participants on 13 April 2017 at 18:23.

⁵ Request for leave to file motion for partial judgment of acquittal, ICC-01/04-02/06-1879-Conf.

6. On 9 May 2017, the Defence sought leave to reply to six issues raised in the Prosecution Response.⁸ On the same day, the Prosecution opposed the aforementioned request to reply on five of the six issues.⁹
7. On 10 May 2017, the Chamber granted the aforementioned request in part, granting the Defence leave to reply on two issues set out in the request.¹⁰
8. On 12 May 2017, the Defence filed its reply ('Reply').¹¹
9. On 29 May 2017, immediately prior to the start of the presentation of evidence by the Defence, the Chamber orally informed the parties and participants that it decided to reject the Request and that a written decision would be rendered in due course.¹²

II. SUBMISSIONS

Defence

10. The Defence seeks leave to file a motion for partial judgment of acquittal in regard to: i) those parts of Counts 1-5, 7-8, 10-13, and 17-18 related to the 'Second Attack', as defined in the Updated Document Containing the Charges ('UDCC'); and ii) Count 17 in its entirety. With regards to i), the Defence submits that the Prosecution has not adduced any credible or sufficient evidence that Mr Ntaganda performed the *actus reus* or *means rea* of any of these crimes. With regard to ii), the Defence submits that the Prosecution has adduced no evidence, or no sufficient or credible evidence, that the crimes

⁶ Joint Response by the Common Legal Representatives of the Victims to the Defence "Request for Leave to file motion for partial judgment of acquittal", ICC-01/04-02/06-1891-Conf.

⁷ Prosecution's response to the "Request for leave to file motion for partial judgment of acquittal", ICC-01/04-02/06-1879-Conf, ICC-01/04-02/06-1894-Conf.

⁸ E-mail communication from the Defence to the Chamber on 9 May 2017 at 13:19.

⁹ E-mail communication from the Prosecution to the Chamber on 9 May 2017 at 14:04.

¹⁰ E-mail communication from the Chamber to the parties and participants on 10 May 2017 at 10:50.

¹¹ 'Reply to prosecution's Response to the Defence's Request for leave to file motion for partial judgment of acquittal, ICC-01/04-02/06-1894-Conf', ICC-01/04-02/06-1902-Conf.

¹² Transcript of Hearing of 29 Mat 2017, ICC-01/04-02/06-T-206-CONF-ENG ET, page 4, lines 1-4.

were committed, let alone of Mr Ntaganda's *actus reus* or *mens rea* in respect of those crimes.

11. The Defence notes that while the Statute does not expressly authorise the filing of a 'no case to answer' motion, Trial Chamber V(A) in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* ('*Ruto and Sang* case'), pursuant to its general obligation to ensure that the trial is fair and expeditious pursuant to Articles 64(2) and (3)(a), 66(1), and 67(1) of the Statute, held that charges may be dismissed after the close of the Prosecution case.¹³ The Defence further submits, *inter alia*, that 'no statutory language precludes a trial chamber from taking any approach to a "no case to answer" motion that it deems fit',¹⁴ and that the guiding factor, as set out in the *Ruto and Sang* case, is whether the proposed challenge is in the interests of expeditiousness and efficiency.¹⁵
12. The Defence avers that any substantial and discrete factual allegation that constitutes the commission of an offence may properly be challenged in a 'no case to answer' motion,¹⁶ and that the allegations concerning the 'Second Attack' are sufficiently substantial and discrete that a 'no case to answer' motion is appropriate.¹⁷
13. As to the assessment of the evidence, the Defence asserts, *inter alia*, that the Chamber may conduct its own assessment, rather than considering whether another trier of fact could reach a different conclusion.¹⁸ The Defence submits that a *prima facie* analysis of the Prosecution evidence, taken at its highest, does

¹³ Request, ICC-01/04-02/06-1879-Conf, paras 11-12, citing para. 16 of 'Decision No. 5 on the conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions)', 3 June 2014, ICC-01/09-01/11-1334 ('*Ruto and Sang* Decision').

¹⁴ Request, ICC-01/04-02/06-1879-Conf, para. 25.

¹⁵ Request, ICC-01/04-02/06-1879-Conf, para. 27.

¹⁶ Request, ICC-01/04-02/06-1879-Conf, para. 32.

¹⁷ Request, ICC-01/04-02/06-1879-Conf, para. 33.

¹⁸ Request, ICC-01/04-02/06-1879-Conf, para. 14.

not show that Mr Ntaganda intended, knew, or should have known was aware, or should have been aware, of any of the crimes that purportedly would be, or had been, committed during the 'Second Attack'.¹⁹

14. With regards to Count 17, the Defence submits that the evidence does not show that the buildings mentioned in the UDCC were attacked and destroyed, and that evidence of pillaging is insufficient in relation to Count 17.²⁰

15. In its Reply, the Defence addressed the alleged relatedness of the 'First Attack' and the 'Second Attack'. It argued that the Prosecution's claim that the First Attack and the Second Attack are 'significantly interlinked' has no basis, and that the question as to whether Mr Ntaganda's knowledge of the First Attack could constitute circumstantial evidence of his knowledge of the Second Attack is to be evaluated in the context of a 'no case to answer' motion.²¹

Prosecution

16. The Prosecution argues that the Defence Request should be dismissed where it seeks acquittal on one incident alone, stating that requests for partial acquittals on individual incidents, rather than full counts, have been consistently denied at the *ad hoc* tribunals, and that this jurisprudence has been followed at the Court.²² The Prosecution further submits that in the *Ruto and Sang* case, Trial Chamber V(A) held that individual incidents within a count would not be considered separately.²³

¹⁹ Request, ICC-01/04-02/06-1879-Conf, paras 35-36. In this regard, contending that in accordance with the approach taken by Judge Fremr in the *Ruto and Sang* case, the Chamber is not prevented from entering into an assessment of the credibility of witnesses at the 'no case to answer' stage (see Request, ICC-01/04-02/06-1879-Conf, para. 18).

²⁰ Request, ICC-01/04-02/06-1879-Conf, paras 37-38.

²¹ Reply, ICC-01/04-02/06-1902-Conf, paras 2-3.

²² Prosecution Response, ICC-01/04-02/06-1894-Conf, paras 2 and 13.

²³ Prosecution Response, ICC-01/04-02/06-1894-Conf, paras 2 and 9, referring to *Ruto and Sang* Decision, ICC-01/09-01/11-1334, para.27.

17. The Prosecution contends that motions for acquittal on full counts are consistent with the Court's regulatory framework and fall under the Chamber's obligations under Article 64(2) of the Statute 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).²⁴ However, the Prosecution submits that such motions should not be pursued on a speculative basis or as a means of raising credibility challenges that are to be considered at the time of final deliberations.²⁵
18. The Prosecution submits that in the present case, the two incidents and the charged modes of liability are significantly interlinked, and that it therefore is appropriate to retain both incidents.²⁶
19. As a second basis to deny the request, the Prosecution submits that there is ample evidence on record to support a conviction in relation to Counts 1-5, 7-8, 10-13, and 17-18 in relation to the 'Second Attack', and the entirety of Count 17.²⁷
20. The Prosecution submits that for an assessment of a 'no case to answer' motion, the Prosecution evidence at this stage should be taken 'at its highest', and assumed to be entitled to credence unless incapable of belief on any reasonable view,²⁸ and that there is no need for credibility assessments to be made in the present case where, in the Prosecution's submission, the 'evidence on record in relation to these charges and to the Accused's responsibility is multi-layered, direct and voluminous'.²⁹

²⁴ Prosecution Response, ICC-01/04-02/06-1894-Conf, para. 32.

²⁵ Prosecution Response, ICC-01/04-02/06-1894-Conf, para. 32.

²⁶ Prosecution Response, ICC-01/04-02/06-1894-Conf, para. 14.

²⁷ Prosecution Response, ICC-01/04-02/06-1894-Conf, paras 18-21 and paras 24-31.

²⁸ Prosecution Response, ICC-01/04-02/06-1894-Conf, para. 36.

²⁹ Prosecution Response, ICC-01/04-02/06-1894-Conf, para. 42.

LRVs

21. The LRVs oppose the Request, arguing that ‘no case to answer’ motions ‘should not find standard applicability before the Court’. They argue that the Statute does not provide for this procedural step, and that the confirmation process is a sufficient mechanism to guard against spurious cases. The LRVs further assert that there is no benefit to again testing the sufficiency of the Prosecution’s evidence at this juncture, and that to do so would negatively impact the expeditiousness of the proceedings and in turn, the interests of the participating victims.³⁰
22. According to the LRVs, barring exceptional circumstances,³¹ as were found in the *Ruto and Sang* case, ‘it would undermine the legitimacy of the review process, if a further review of the sufficiency of the evidence would be conducted at a later stage’.³² They argue that this case is distinguishable from the *Ruto and Sang* case, since there has not been a fundamental change in the evidence adduced, nor a total collapse of the case.³³
23. In addition, the LRVs refer to the role of the Pre-Trial Chamber in the proceedings before the Court and contrast it to the procedure at the United Nations International Criminal Tribunal for the former Yugoslavia (‘ICTY’) where no pre-trial scrutiny of the sufficiency of the evidence, similar to that at the Court, exists.³⁴
24. If leave to file a ‘no case to answer’ motion were to be granted, the LRVs argue that the standard used should be based on the established procedures and

³⁰ LRVs Response, ICC-01/04-02/06-1891-Conf, paras 3-4.

³¹ LRVs Response, ICC-01/04-02/06-1891-Conf, para. 21.

³² LRVs Response, ICC-01/04-02/06-1891-Conf, para. 13.

³³ LRVs Response, ICC-01/04-02/06-1891-Conf, paras 22-25.

³⁴ LRVs Response, ICC-01/04-02/06-1891-Conf, paras 14-16.

applicable standard of the *ad hoc* tribunals, as endorsed by Trial Chamber V(A).³⁵

III. ANALYSIS

25. At the outset, the Chamber recalls that in its ‘Decision on the conduct of proceedings’, the Chamber indicated that it took no position on ‘whether it will entertain a motion by the Defence asserting that there is no case for it to answer’.³⁶ Having 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.

26. The Chamber notes that permitting such a motion may contribute to a shorter and more focused trial, because an acquittal on one or more of the counts as a result of a (partially) successful motion would lead to greater judicial economy and efficiency in a manner that promotes the proper administration of justice and the rights of an accused.³⁷ However, entertaining such a motion may also entail a lengthy process requiring parties and participants’ submissions and evaluation of the evidence by the Chamber, and may thus not necessarily positively affect the expeditiousness of the trial, even if successful in part. Mindful of its obligations under Article 64 of the Statute, the Chamber therefore considers that a motion arguing that there is no case to answer, in whole or in part, ought to be entertained only if it appears sufficiently likely to

³⁵ LRVs Response, ICC-01/04-02/06-1891-Conf, paras 29-32.

³⁶ ICC-01/04-02/06-619, para. 17.

³⁷ *Ruto and Sang* Decision, ICC-01/09-01/11-1334, para. 16.

the Chamber that doing so would further the fair and expeditious conduct of the proceedings.

27. Should it appear to the Chamber that the expeditiousness and/or fairness of the trial so warrants, it may *proprio motu*,³⁸ having regard to the evidence presented, invite and consider submissions on, and issue, a (partial) judgment of acquittal, provided that the relevant requirements of Article 74(2) of the Statute are complied with.³⁹

28. The Chamber considers that the present case is distinguishable from the *Ruto and Sang* case in this regard. First, it notes the undertaking of Trial Chamber V(A) to ‘in principle, permit the Defence to enter submissions, at the close of the case for the Prosecution, asserting that there is no case for it to answer’.⁴⁰ In addition, in that case, it was already known at the time of the parties’ submissions on whether there was a case to answer for the accused that 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 and assess whether the evidence presented, when taken at its highest, would require any partial acquittal.

29. This position is without prejudice to the Chamber’s continuing review of the evidence heard thus far, to any further evidence which may be presented in the Defence case, and to its view on the appropriateness of any such course of action in the future.

³⁸ It is recalled in this regard that the process in the *Ruto and Sang* case, which has been referred to as an example by both parties, was also a Chamber-led process.

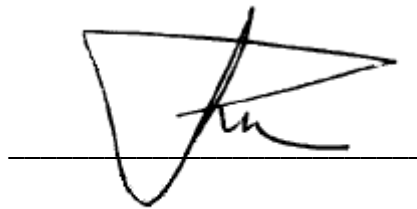
³⁹ The Defence may also request the Prosecution to withdraw certain charges in accordance with Article 61(9) of the Statute.

⁴⁰ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Conduct of Trial Proceedings (General Directions), 9 August 2013, ICC-01/09-01/11-847-Corr, para. 32. See also *Ruto and Sang* Decision, para. 3.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request.

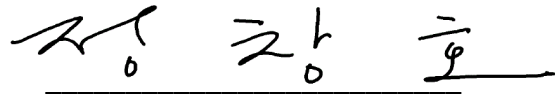
Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of a large, stylized 'F' followed by a cursive 'remr', positioned above a horizontal line.

Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to be 'Kuniko Ozaki', positioned above a horizontal line.

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of Korean characters '정창호' followed by a horizontal line.

Judge Chang-ho Chung

Dated 1 June 2017

At The Hague, The Netherlands