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No. ICC-01/04-02/06 OA6
Date: 5 September 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

Judgment
on the appeal of Mr Bosco Ntaganda against the "Decision on Defence request for leave to file a 'no case to answer' motion"

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for the Defence
Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of Victims
Ms Sarah Pellet
Mr Dmytro Suprun

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI entitled "Decision on Defence request for leave to file a 'no case to answer' motion" of 1 June 2017 (ICC-01/04-02/06-1931),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The "Decision on Defence request for leave to file a 'no case to answer' motion" is confirmed.

REASONS

I. KEY FINDINGS

1. While the Court's legal texts do not explicitly provide for a 'no case to answer' procedure in the trial proceedings before the Court, it nevertheless is permissible. A Trial Chamber may, in principle, decide to conduct or decline to conduct such a procedure in the exercise of its discretion.

2. The discretion of the Trial Chamber as to whether or not to conduct a 'no case to answer' procedure was not limited by internationally recognised human rights or as a result of the adoption of an adversarial trial structure.

II. PROCEDURAL HISTORY

A. Proceedings before the Trial Chamber

3. On 2 June 2015, Trial Chamber VI ("Trial Chamber") issued the "Decision on the conduct of proceedings"[1] ("Decision on the Conduct of Proceedings"), stipulating, *inter alia*, that should the Defence wish to file a motion "asserting that there is no case

[1] ICC-01/04-02/06-619.

for it to answer", it should seek leave to do so "no later than five days after the end of the Prosecution's presentation of evidence, or, if applicable, the presentation of evidence by the [legal representatives of the victims]".[2]

4. On 25 April 2017, Mr Bosco Ntaganda ("Mr Ntaganda") filed a "Request for leave to file motion for partial judgment of acquittal"[3] ("Request for leave to file motion for partial judgment of acquittal") with respect to Counts 1 to 5, 7-8, 10-13 and 17-18 as they relate to the 'Second Attack' which is alleged to have occurred in the Walendu-Djatsi *collectivité* on or about 12 February 2003 and on or about 27 February 2003 and with respect to Count 17 concerning alleged attacks against protected objects in or around Mongbwalu, Sayo and Bambu.[4]

5. On 1 June 2017, following receipt of responses from the victims participating in the proceedings ("Victims") and the Prosecutor,[5] the Trial Chamber issued its "Decision on Defence request for leave to file a 'no case to answer' motion"[6] ("Impugned Decision"), rejecting the request.[7]

6. On 6 June 2017, Mr Ntaganda filed an "Urgent Request for leave to appeal 'Decision on Defence request for leave to file a "no case to answer" motion', 1 June 2017, ICC-01/04-02/06-1931".[8]

7. On 14 June 2017, the Trial Chamber, by oral decision, granted Mr Ntaganda leave to appeal with respect to (i) "[w]hether the Chamber erred in permitting the trial to proceed in respect of charges for which the Chamber declined to consider the

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[2] Decision on the Conduct of Proceedings, para. 17.
[3] ICC-01/04-02/06-1879-Conf.
[4] Request for leave to file motion for partial judgment of acquittal, paras 2-3. *See also* Office of the Prosecutor, "Updated Document Containing the Charges", 16 February 2015, ICC-01/04-02/06-458-AnxA, pp. 60-65.
[5] "Joint Response by the Common Legal Representatives of the Victims to the Defence 'Request to file motion for partial judgment of acquittal'", 8 May 2017, ICC-01/04-02/06-1891-Conf; "Prosecution's response to the 'Request for leave to file motion for partial judgment of acquittal', 8 May 2017, ICC-01/04-02/06-1879-Conf".
[6] ICC-01/04-02/06-1931.
[7] Impugned Decision, p. 11.
[8] "Urgent Request for leave to appeal 'Decision on Defence request for leave to file a 'no case to answer' motion', 1 June 2017, ICC-01/04-02/06-1931", dated 5 June 2017 and registered on 6 June 2017, ICC-01/04-02/06-1937.

sufficiency of the Prosecution's evidence" and (ii) "[w]hether declining to entertain a Defence motion for a judgement of partial acquittal is a discretionary matter".[9]

B. Proceedings before the Appeals Chamber

8. On 14 June 2017, Mr Ntaganda filed a "Notice of appeal and urgent request for suspensive effect".[10] On 19 June 2017, following an order by the Appeals Chamber[11] and a response[12] by the Prosecutor, the Appeals Chamber rejected Mr Ntaganda's request for suspensive effect.[13]

9. On 27 June 2017, Mr Ntaganda filed the "Appeal from decision denying leave to file a 'no case to answer motion'" ("Appeal Brief").[14] In addition to arguing the merits of his appeal, Mr Ntaganda again requested the immediate suspension of the trial proceedings pending resolution of this appeal. On 28 June 2017, the Appeals Chamber dismissed the request for suspension of the trial proceedings *in limine*.[15]

10. On 10 July 2017, the Prosecutor[16] and the Victims[17] filed their responses to the Appeal Brief ("Prosecutor's Response to the Appeal Brief" and "Victims' Response to the Appeal Brief" respectively).

III. MERITS

A. Standard of Review

11. The Appeals Chamber set out the relevant standard of review for a decision involving the exercise of a Trial Chamber's discretion in a previous judgment in the case of *Prosecutor v. Uhuru Muigai Kenyatta*:[18]

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[9] Transcript of 14 June 2017, ICC-01/04-02/06-T-209-Red-ENG (WT), p. 24, lines 23-25, p. 25, lines 3-4 and p. 26, lines 11-13.
[10] ICC-01/04-02/06-1960 (OA6).
[11] "Order on the filing of responses", 15 June 2017, ICC-01/04-02/06-1964 (OA 6), p. 3.
[12] "Response to Mr Ntaganda's urgent request for suspensive effect", 15 June 2017, ICC-01/04-02/06-1966 (OA 6).
[13] "Decision on suspensive effect", ICC-01/04-02/06-1968 (OA 6), para. 10.
[14] ICC-01/04-02/06-1975 (OA 6).
[15] "Decision on request to suspend the trial proceedings", ICC-01/04-02/06-1976 (OA 6), para. 9.
[16] "Response to Bosco Ntaganda's appeal against the decision denying leave to file a 'no case to answer motion'", ICC-01/04-02/06-1982 (OA 6).
[17] "Joint Response of the Common Legal Representatives of Victims to the Defence 'Appeal from decision denying leave to file a "no case to answer motion"'", ICC-01/04-02/06-1983 (OA 6).

22. The Appeals Chamber recalls that it will not interfere with the Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling.[19] The Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made.[20] In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion.[21] Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision.[22]

23. With respect to an exercise of discretion based upon an alleged erroneous interpretation of the law, the Appeals Chamber will not defer to the relevant Chamber's legal interpretation, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law.[23]

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[18] *Prosecutor v. Uhuru Muigai Kenyatta*, "Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute'", 19 August 2015, ICC-01/09-02/11-1032 (OA 5), paras 22-25.

[19] [Footnote 36 in the original] *Prosecutor v. Joseph Kony et al*., "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19(1) of the Statute' of 10 March 2009", 16 September 2009, ICC-02/04-01/05-408 (OA 3) ("*Kony et al.* OA 3 Judgment"), para. 79; *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the 'Decision on Sentence pursuant to Article 76 of the Statute'", ICC-01/04-01/06-3122 (A 4 A 6) ("*Lubanga* A 4 A 6 Judgment"), para. 41. *See also Prosecutor v. Mathieu Ngudjolo Chui*, "Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute'", 27 February 2015, ICC-01/04-02/12-271 (A) ("*Ngudjolo* A Judgment"), para. 21.

[20] [Footnote 37 in the original] *See Kony et al.* OA 3 Judgment, para. 80; *Prosecutor v. Abdallah Banda Abakaer Nourain*, "Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain against Trial Chamber IV's issuance of a warrant of arrest", 3 March 2015, ICC-02/05-03/09-632-Red (OA 5) ("*Banda* OA 5 Judgment"), para. 30; *Prosecutor v. Dominic Ongwen*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters'", 17 June 2015, ICC-02/04-01/15-251 (OA 3) ("*Ongwen* OA 3 Judgment"), para. 35.

[21] [Footnote 38 in the original] *Kony et al.* OA 3 Judgment, paras 80-81; *Banda* OA 5 Judgment, para. 30; *Ongwen* OA 3 Judgment, para. 35.

[22] [Footnote 39 in the original] *Kony et al.* OA 3 Judgment, para. 80; *Banda* OA 5 Judgment, para. 30; *Ongwen* OA 3 Judgment, para. 35.

[23] [Footnote 40 in the original] *See Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", 1 December 2014, ICC-01/04-01/06-3121-Conf (A 5) with a public redacted version, ICC-01/04-01/06-3121-Red (A 5) ("*Lubanga* A 5 Judgment"), para. 18; *Prosecutor v. Simone Gbagbo*, "Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo'", 27 May 2015, ICC-02/11-01/12-75-Conf (OA) with a public redacted version, (ICC-02/11-01/12-75-Red) (OA) ("*S. Gbagbo* Admissibility OA Judgment"), para. 40. *See also Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-

24. With regard to an exercise of discretion based upon an incorrect conclusion of fact, the Appeals Chamber applies a standard of reasonableness in appeals pursuant to article 82 of the Statute, thereby according a margin of deference to the Chamber's findings.[24] The Appeals Chamber will not interfere with the factual findings of a first instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts.[25] Regarding the misappreciation of facts, the Appeals Chamber will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion.[26] It will interfere only where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it.[27]

25. In addition, the Appeals Chamber may interfere with a discretionary decision [when it] amounts to an abuse of discretion. Even if an error of law or of fact has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable[28] as to "force the conclusion that the

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03/09-199) and additional instructions on translation'", 17 February 2012, ICC-02/05-03/09-295 (OA 2), para. 20.

[24] [Footnote 41 in the original] *See* *Lubanga* A 5 Judgment, paras 24, 27; *S. Gbagbo* Admissibility OA Judgment, para. 39.

[25] [Footnote 42 in the original] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release", 9 June 2008, ICC-01/04-01/07-572 (OA 4), para. 25; *Ngudjolo* A Judgment, para. 22; *S. Gbagbo* Admissibility OA Judgment, para. 38.

[26] [Footnote 43 in the original] *Prosecutor v. Callixte Mbarushimana*, "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the 'Defence Request for Interim Release'", 14 July 2011, ICC-01/04-01/10-283 (OA) ("*Mbarushimana* OA Judgment"), para. 17; *Ngudjolo* A Judgment, para. 22; *S. Gbagbo* Admissibility OA Judgment, para. 38.

[27] [Footnote 44 in the original] *Mbarushimana* OA Judgment, para. 17; *Ngudjolo* A Judgment, para. 22; *S. Gbagbo* Admissibility OA Judgment, para. 38.

[28] [Footnote 45 in the original] *See* *Kony et al.* OA 3 Judgment, para. 81, referring to International Criminal Tribunal for the former Yugoslavia ("ICTY"), Appeals Chamber, *Slobodan Milošević v. Prosecutor*, "Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel", 1 November 2004, IT-02-54-AR73.7 ("*Milošević* Decision"); *Ongwen* OA 3 Judgment, para. 35. The Appeals Chamber notes that the part of the paragraph of the *Milošević* Decision that was cited in the *Kony et al.* OA 3 Judgment referred to a decision that was "so unreasonable *or* plainly unjust" (emphasis added). The Appeals Chamber finds the use of the alternative to be preferable and more consistent with case-law of the ICTY, the International Criminal Tribunal for Rwanda ("ICTR") and the Special Court for Sierra Leone ("SCSL"). *See e.g.* ICTY, Appeals Chamber, *Prosecutor v. Slobodan Milošević*, "Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder", 18 April 2002, IT-01-50-AR73, para. 6; *Milošević* Decision, para. 10; *Prosecutor v. Radovan Karadžić*, "Decision on appeal from decision on duration of Defence case", 29 January 2013, IT-95-5/18-AR73.10 ("*Karadžić* Decision"), para. 7; *Prosecutor v. Vojislav Šešelj*, "Decision on appeal against decision on continuation of proceedings", 6 June 2014, IT-03-67-AR15bis ("*Šešelj* Decision"), para. 34; ICTR, Appeals Chamber, *The Prosecutor v. Édouard Karemera et al.*, "Decision on Interlocutory Appeal Regarding Witness Proofing", 11 May 2007, ICTR-98-44-AR73.8, para. 3; SCSL, Appeals Chamber, *Prosecutor v. Samuel Hinga Norman et al.*, "Fofana – Appeal against decision refusing bail", 11 March 2005, SCSL-04-14-T-371, para. 20. The Appeals Chamber therefore uses the formulation in the alternative in the above text, in place of the conjunctive that the Appeals Chamber has previously used in referring to a decision being "so unfair *and* unreasonable" (emphasis added).

Chamber failed to exercise its discretion judiciously".[29] The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion.[30] The degree of discretion afforded to a Chamber may depend upon the nature of the decision in question.

12. The above standard of review will guide the analysis of the Appeals Chamber.

B. Relevant part of the Impugned Decision

13. In rejecting the Request for leave to file motion for partial judgment of acquittal, the Trial Chamber noted "its broad discretion as to whether or not to pronounce upon" the matter under consideration.[31] It subsequently considered that it was not "appropriate to entertain the proposed 'no case to answer' motion in the present circumstances".[32]

14. The Trial Chamber noted, on the one hand, that "permitting such a motion may contribute to a shorter and more focused trial", but, on the other hand, it "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".[33] Accordingly, it held that such a motion "ought to be entertained only if it appears sufficiently likely to the Chamber that doing so would further the fair and expeditious conduct of the proceedings".[34] Furthermore, the Trial Chamber considered that, "[s]hould it appear to the Chamber that the expeditiousness and/or fairness of the trial so warrants, it may *proprio motu*, 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".[35]

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[29] [Footnote 46 in the original] *See* *Milošević* Decision, para. 10.
[30] [Footnote 47 in the original] *See* *Lubanga* A 4 A 6 Judgment, para. 43; *Kony et al.* OA 3 Judgment, para. 81, citing *Milošević* Decision, para. 10. *See also* ICTY, *Karadžić* Decision, para. 7; *Šešelj* Decision, para. 34.
[31] Impugned Decision, para. 25.
[32] Impugned Decision, para. 25.
[33] Impugned Decision, para. 26.
[34] Impugned Decision, para. 26.
[35] Impugned Decision, para. 27.

15. Further, the Trial Chamber found that "the present case is distinguishable from the *Ruto and Sang* case".[36] It noted the undertaking of the *Ruto and Sang* Trial Chamber "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'".[37] It also observed that, in the *Ruto and Sang* 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".[38] On this basis, the Trial Chamber concluded that it "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".[39]

C. Mr Ntaganda's Submissions

16. Under the first ground of appeal, Mr Ntaganda avers that "[t]he Trial Chamber erred in law and in fact in requiring the Accused to elect to present evidence without a prior determination that the Prosecution has made out a *prima facie* case capable of leading to conviction".[40] According to Mr Ntaganda, this requirement places "an undue burden on the exercise of the right to remain silent and its corollary, the privilege against self-incrimination".[41]

17. Mr Ntaganda's main contention under his first ground of appeal is that, having adopted an adversarial trial structure, the Trial Chamber was "required to ensure that Article 67(1)(g) of the Statute is protected in a matter corresponding to that procedure".[42] Accordingly, in Mr Ntaganda's submission, the Trial Chamber's "failure to determine whether the Prosecution has adduced evidence sufficient to

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[36] Impugned Decision, para. 28.
[37] Impugned Decision, para. 28.
[38] Impugned Decision, para. 28.
[39] Impugned Decision, para. 28.
[40] Appeal Brief, para. 9.
[41] Appeal Brief, para. 9.
[42] Appeal Brief, para. 16. *See also* Appeal Brief, para. 22.

support a conviction before calling on an accused to choose whether to present evidence" amounts to "a violation of the privilege against self-incrimination".[43]

18. In support of this contention Mr Ntaganda presents a number of arguments based on the approaches to fair trial guarantees or a 'no case to answer' procedure in international human rights law, domestic systems of criminal procedure, and other international courts and tribunals.[44] First, citing a judgment of the European Court of Human Rights ("ECtHR"), Mr Ntaganda asserts that "[t]he right to remain silent […] can be violated not only by its direct infringement, but also by procedures that interfere with its reasonable exercise".[45] Second, Mr Ntaganda is of the view that "[t]he vast majority of adversarial systems, either by legislation or practice, vindicate the right to silence by ensuring that the Accused can know whether or not a *prima facie* case has been made out requiring a defence",[46] both in trials by jury and trials by professional judges.[47] In this regard, he advances that adversarial systems require such a procedure because "an accused is under no obligation to respond until the state has succeeded in making out a *prima facie* case against him or her".[48] Furthermore, he argues that adversarial systems "lack certain judicial and other safeguards that are characteristic of inquisitorial systems".[49] Third, Mr Ntaganda asserts that "[e]very international tribunal applying a predominantly adversarial form of trial"[50] conducts a 'no case to answer' procedure and that the "fundamental purpose of […] [such a] procedure is the protection of the rights of the accused".[51]

19. Mr Ntaganda also advances a number of arguments derived from the law or jurisprudence of the Court in support of the central contention underpinning his first ground of appeal. First, relying on the corresponding decision of Trial Chamber V(a)

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[43] Appeal Brief, para. 17.
[44] Appeal Brief, para. 21. Mr Ntaganda explains that he relies on the reasoning of national and international courts "as providing a cogent and correct interpretation of the right to silence and the privilege against self-incrimination which is applicable in ICC proceedings by virtue of Article 67(1)(g) and Article 21(3) of the Statute".
[45] Appeal Brief, para. 9, footnote 12.
[46] Appeal Brief, para. 17.
[47] Appeal Brief, para. 11.
[48] Appeal Brief, para. 9 referring to Canada, Supreme Court, *R. v. P. (M.B.)*, 14 April 1994, [1994] 1 SCR 555, p. 577, 579. *See also* Appeal Brief, para. 15.
[49] Appeal Brief, para. 15.
[50] Appeal Brief, para. 17.
[51] Appeal Brief, para. 10.

regarding a 'no case to answer' procedure,[52] Mr Ntaganda asserts that "the Trial Chamber cannot rely on the silence of the ICC Statute and Rules to infer that particular rules or procedures are unnecessary"[53] and, in addition, that a 'no case to answer' procedure is required "to protect the 'fundamental rights' of the accused".[54] Mr Ntaganda further argues, in connection with the latter aspect, that "[t]he Impugned Decision suggests that the predominant purpose of the no case to answer motion is efficiency", which "would clearly violate the right of the accused to remain silent, and demonstrates an erroneous understanding of the fundamental purpose of the no case to answer procedure".[55] Furthermore, in the view of Mr Ntaganda, "the Chamber's apparent concern about efficiency is overstated", since "[s]everal no case to answer motions in trials just as complex as the *Ntaganda* case have been adjudicated at the ICTY in less time than it took for the Chamber to reject the request for leave to file such an application".[56] Second, according to Mr Ntaganda, "[t]he confirmation of charges procedure is no substitute for the no case to answer procedure", as the former "permits the presentation of 'summary evidence'"[57] and, in addition, "many adversarial systems also require a 'preliminary hearing' of the Prosecution's evidence before allowing a case to proceed to trial".[58]

20. Under the second ground of appeal, Mr Ntaganda avers that "[t]he Trial Chamber erred in pronouncing that it possesses 'a broad discretion as to whether or not to pronounce upon such matters at this stage of proceedings,' on the apparent basis of which it decided that it was not 'appropriate to entertain the proposed "no case to answer motion"'".[59] Mr Ntaganda presents six arguments in relation to his second ground of appeal.

21. First, Mr Ntaganda argues that "[t]he Trial Chamber's assertion that it possesses discretion not to *hear* submissions is contrary to the express and limited

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[52] Trial Chamber V(A), *Prosecutor v. William Samoei Ruto & Joseph Arap Sang*, "Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions)", 3 June 2014 ("*Ruto and Sang* Decision"), ICC-01/09-01/11-1334.
[53] Appeal Brief, para. 12. *See also* Appeal Brief, para. 13.
[54] Appeal Brief, para. 14.
[55] Appeal Brief, para. 19.
[56] Appeal Brief, para. 20.
[57] Appeal Brief, para. 18.
[58] Appeal Brief, para. 18.
[59] Appeal Brief, para. 23.

circumstances in which the Statute and Rules impose a leave requirement for filing a motion" [emphasis in original].[60] Second, according to Mr Ntaganda, "the Trial Chamber indicated that the subject-matter of the intended submissions would be kept under *proprio motu* review" and, therefore, "it should have been important enough to give the Accused a right to be heard".[61] Third, it is the submission of Mr Ntaganda that "the absence of an express provision concerning a no case to answer motion does not confer discretion not to hear submissions on the issue".[62] Fourth, Mr Ntaganda asserts that "Trial Chambers have an obligation pursuant to Article 64(2) to ensure the fairness of trial proceedings and respect of the rights of the accused, and a corresponding authority under Article 64(6) to prescribe procedures necessary to safeguard those rights".[63] Fifth, Mr Ntaganda is of the view that "pronouncing on the sufficiency of the evidence at the end of the prosecution case […] is not a discretionary matter" and, therefore, "[a] Trial Chamber has no discretion to deny submissions on an issue that it has no discretion not to adjudicate".[64] Finally, Mr Ntaganda submits that "[t]he Trial Chamber does have discretion to determine the form of the no case to answer procedure, but not to dispense with it".[65]

D. Prosecutor's Submissions

22. The Prosecutor avers that Mr Ntaganda's arguments under his first ground of appeal "lack merit".[66] Accordingly, the Prosecutor is of the view that this ground of appeal "should be dismissed".[67]

23. The Prosecutor argues that "[t]he Defence's reliance on jurisprudence from the UN *ad hoc* Tribunals and other international courts […] is inapposite", considering that "the Court's Basic Documents do not provide for a 'no case to answer' procedure, let alone impose a *duty* on a trial [sic] Chamber to entertain a motion to that effect" [emphasis in original].[68] The Prosecutor submits, instead, that "it is through the exercise of its general case management functions that a Chamber may, as

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[60] Appeal Brief, para. 24.
[61] Appeal Brief, para. 25.
[62] Appeal Brief, para. 26.
[63] Appeal Brief, para. 27.
[64] Appeal Brief, para. 28.
[65] Appeal Brief, para. 29.
[66] Prosecutor's Response to the Appeal Brief, para. 6.
[67] Prosecutor's Response to the Appeal Brief, para. 18.
[68] Prosecutor's Response to the Appeal Brief, para. 7.

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)" of the Statute.[69]

24. The Prosecutor further asserts that, contrary to the submission of Mr Ntaganda, the adversarial nature of the proceedings is not a determinative factor "for the purposes of determining the manner in which an ICC Trial Chamber should approach a 'no case to answer' motion".[70] In this regard, the Prosecutor argues that "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'".[71]

25. The Prosecutor also submits that Mr Ntaganda's arguments underpinning his comparison of "the proceedings in this case to adversarial proceedings in typical common law jurisdictions […] are not convincing".[72] According to the Prosecutor, Mr Ntaganda "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" and "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".[73]

26. In addition, the Prosecutor contends that, in contrast to certain other international criminal jurisdictions,[74] "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 and to ensure that only cases and charges based on sufficient evidence go to trial", which "establishes the case which the accused must answer, and fully protects his or her rights".[75] The Prosecutor adds that, contrary to

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[69] Prosecutor's Response to the Appeal Brief, para. 7.
[70] Prosecutor's Response to the Appeal Brief, para. 10.
[71] Prosecutor's Response to the Appeal Brief, para. 10.
[72] Prosecutor's Response to the Appeal Brief, para. 11.
[73] Prosecutor's Response to the Appeal Brief, para. 11.
[74] Prosecutor's Response to the Appeal Brief, para. 12.
[75] Prosecutor's Response to the Appeal Brief, para. 13.

Mr Ntaganda's submissions, "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" and "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".[76] Therefore, in the view of the Prosecutor, the confirmation of the charges against Mr Ntaganda by a Pre-Trial Chamber "is comparable to a decision that there is a 'case to answer' as articulated in the case law of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") or the International Criminal Tribunal for Rwanda ("ICTR") on rule 98*bis*, and that of other common law jurisdictions".[77]

27. The Prosecutor argues, furthermore, that "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".[78] In this respect, the Prosecutor asserts that "[e]ach Chamber must exercise its discretion in a manner that best fits the specific circumstances of the case before it".[79] In the submission of the Prosecutor, "the *Ruto et al.* and the *Ntaganda* cases […] present very different circumstances".[80]

28. In respect of Mr Ntaganda's challenge to the Trial Chamber's finding that, in the present circumstances, a 'no case to answer' motion would not further the expeditious conduct of the proceedings, the Prosecutor contends that these "arguments merely disagree with the Chamber's exercise of discretion".[81]

29. With regard to Mr Ntaganda's second ground of appeal, the Prosecutor avers that his "six additional arguments fail to show any error in the [Impugned] Decision

[76] Prosecutor's Response to the Appeal Brief, para. 14.
[77] Prosecutor's Response to the Appeal Brief, para. 15.
[78] Prosecutor's Response to the Appeal Brief, para. 16.
[79] Prosecutor's Response to the Appeal Brief, para. 16.
[80] Prosecutor's Response to the Appeal Brief, para. 16.
[81] Prosecutor's Response to the Appeal Brief, para. 17.

and should therefore be rejected".[82] Accordingly, the Prosecutor submits that this ground of appeal "should be dismissed" as well.[83]

30. In the Prosecutor's view, "the [Impugned] Decision does not violate the Defence's right to be heard", considering that, "[i]n its 'Decision on the conduct of the proceedings', the Chamber, consistent with 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" and Mr Ntaganda "eventually filed that motion".[84]

31. The Prosecutor submits, in addition, that Mr Ntaganda's argument "that because the Chamber held that it would keep the matter under review it follows that the Accused should have been given a right to be heard in the first place […] is illogical".[85] In her view, in order to decide on whether changed circumstances would require additional arguments to be heard on the need to conduct a 'no case to answer' procedure, "the Chamber need not have first entertained the merits of a 'no case to answer' motion".[86]

32. Moreover, relying on her arguments regarding Mr Ntaganda's first ground of appeal, the Prosecutor argues that Mr Ntaganda does not support his "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".[87]

33. Furthermore, the Prosecutor asserts that, "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, it does not *oblige* it to do so in all cases" [emphasis in original], contrary to Mr Ntaganda's "unsupported" argument to this effect.[88]

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[82] Prosecutor's Response to the Appeal Brief, para. 19.
[83] Prosecutor's Response to the Appeal Brief, para. 26.
[84] Prosecutor's Response to the Appeal Brief, para. 20.
[85] Prosecutor's Response to the Appeal Brief, para. 21.
[86] Prosecutor's Response to the Appeal Brief, para. 21.
[87] Prosecutor's Response to the Appeal Brief, para. 22.
[88] Prosecutor's Response to the Appeal Brief, para. 23.

34. Finally, according to the Prosecutor, Mr Ntaganda'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 is unsustainable".[89] In this regard, the Prosecutor refers to her submission that, "through the exercise of its general case management functions, a Chamber may, as a 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)" of the Statute.[90]

E. Victims' Submissions

35. The Victims submit that "[t]he requested relief should be denied and the Impugned Decision affirmed".[91]

36. As for Mr Ntaganda's second ground of appeal, the Victims assert that "the Trial Chamber enjoys general discretionary powers in relation to managing the trial assigned to it".[92] Therefore, in the submission of the Victims, the Trial Chamber's "procedure of *seeking leave* to file a 'no case to answer motion' […] was not only squarely within in the powers of the Trial Chamber […] but also took into account the submissions of the parties on the matter" [emphasis in original].[93] Furthermore, the Victims argue that, in light of the Trial Chamber's discretion, "[t]he decision of the *Ruto and Sang* Chamber as well as what the Trial Chamber 'could have' done are irrelevant",[94] contrary to Mr Ntaganda's submission in this regard. The Victims further contend that "[i]t is equally flawed to assert that a Trial Chamber, in the exercise of its inherent discretion, has no discretion '*not to hear*'", since "broad discretion to manage the trial proceedings includes powers not to entertain certain motions" [emphasis in original].[95] Finally, in response to Mr Ntaganda's assertion "that a Trial Chamber's trial management functions require it to hear 'no case to answer' motions as an extant of the fair trial rights of the Accused", the Victims submit that Mr Ntaganda "negates the possibility" that, in the exercise of its

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[89] Prosecutor's Response to the Appeal Brief, para. 25.
[90] Prosecutor's Response to the Appeal Brief, para. 25.
[91] Victims' Response to the Appeal Brief, para. 3.
[92] Victims' Response to the Appeal Brief, para. 15.
[93] Victims' Response to the Appeal Brief, para. 17.
[94] Victims' Response to the Appeal Brief, para. 19.
[95] Victims' Response to the Appeal Brief, para. 20.

discretion, the Trial Chamber may consider a 'no case to answer' procedure to be inappropriate.[96]

37. With regard to the first ground of appeal, the Victims aver that Mr Ntaganda "fails to show that the Chamber committed a discernible error by either failing to give sufficient or any weight to relevant considerations, or giving weight to irrelevant facts".[97]

38. The Victims submit that, contrary to Mr Ntaganda's assertion,[98] "it was legitimate for the Chamber, to state that "*[h]aving considered the nature and scope of the Request" it did "not consider it appropriate to entertain the proposed 'no case to answer' motion*" [emphasis in original].[99] In this regard, the Victims submit that "[t]he bench heard all witnesses who testified before it and received all material entered into evidence", which means "that the Judges are in a position to discern whether the case presented by the Prosecution is riddled with substantive flaws or other obvious special circumstances that would otherwise significantly affect the case against the Accused".[100]

39. In addition, in relation to Mr Ntaganda's argument "that the Trial Chamber placed undue weight on the notion of 'efficiency', and that it considered that the predominant purpose of a 'no case to answer' motion was '*a projected net saving of time*'" [emphasis in original], the Victims argue that "the reasoning provided in the Impugned Decision does not allow for such a reading".[101] It is the submission of the Victims "that the [Trial] Chamber assessed the expeditiousness of the trial as defined by the Appeals Chamber, namely advancing the proceedings, moving the proceedings forward, or '*ensuring that the proceedings follow the right course*', rather than a '*net saving of time'* as submitted by the Defence" [emphasis in original].[102] According to the Victims, the Trial Chamber also found that a 'no case to answer' procedure

[96] Victims' Response to the Appeal Brief, para. 21.
[97] Victims' Response to the Appeal Brief, para. 23.
[98] Victims' Response to the Appeal Brief, para. 25.
[99] Victims' Response to the Appeal Brief, para. 27.
[100] Victims' Response to the Appeal Brief, para. 26.
[101] Victims' Response to the Appeal Brief, para. 29.
[102] Victims' Response to the Appeal Brief, para. 30.

"would not contribute to fulfilling this attribute of a fair trial by advancing the proceedings" for a lack of "'special circumstances' prevailing in the present case".[103]

40. Finally, regarding Mr Ntaganda's contention "that the Trial Chamber erred in requiring the Accused to elect to present evidence without a prior determination that the Prosecution has presented a *prima facie* case capable of leading to conviction", the Victims assert that "[i]t is misconceived that the Impugned Decision would result in a reversal of the burden of proof that would positively require the Accused to present evidence".[104] In the view of the Victims, presenting evidence on the counts and charges […] [the Accused] believes not to be made out by the Prosecution is exercising his choice, including his choice to take the stand".[105]

F. Determination of the Appeals Chamber

41. The Appeals Chamber notes that the two issues in relation to which Mr Ntaganda was granted leave to appeal concern the Trial Chamber's finding that it has "broad discretion" in deciding whether or not to "pronounce upon" a motion of 'no case to answer' at the end of the Prosecutor's presentation of evidence.[106] The Appeals Chamber understands Mr Ntaganda to be raising two grounds of appeal that are linked in so far as they allege errors impacting on his right to a fair trial.[107] Consequently, these grounds of appeal will be addressed together.

1. Whether the Court's legal framework permits a 'no case to answer' procedure

42. As a prerequisite to assessing Mr Ntaganda's grounds of appeal, the Appeals Chamber must first consider whether a 'no case to answer' procedure is permissible under the legal framework of the Court.

43. In this regard, the Appeals Chamber observes that the Court's legal texts do not expressly provide for a 'no case to answer' procedure. Moreover, the Appeals Chamber is not aware of any proposals made or discussions held during the drafting

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[103] Victims' Response to the Appeal Brief, para. 31.
[104] Victims' Response to the Appeal Brief, para. 32.
[105] Victims' Response to the Appeal Brief, para. 32.
[106] Impugned Decision, para. 25. *See also* Transcript of 14 June 2017, ICC-01/04-02/06-T-209-Red-ENG (WT), p. 24, lines 23-25 and p. 25, lines 3-4.
[107] Appeal Brief, paras 8, 23. *See also* Transcript of 14 June 2017, ICC-01/04-02/06-T-209-Red-ENG (WT), p. 25, lines 8-10.

of the Statute or the Rules of Procedure and Evidence ("Rules") in relation to such a procedure.

44. Nevertheless, in the view of the Appeals Chamber, a 'no case to answer' procedure is not inherently incompatible with the legal framework of the Court. A Trial Chamber may decide to conduct such a procedure based on its power to rule on relevant matters pursuant to article 64 (6) (f) of the Statute and rule 134 (3) of the Rules. A decision on whether or not to conduct a 'no case to answer' procedure is thus discretionary in nature and must be exercised on a case-by-case basis in a manner that ensures that the trial proceedings are fair and expeditious pursuant to article 64 (2) and 64 (3) (a) of the Statute.[108]

45. In view of the foregoing, the Appeals Chamber finds that while the Court's legal texts do not explicitly provide for a 'no case to answer' procedure in the trial proceedings before the Court, it nevertheless is permissible. A Trial Chamber may, in principle, decide to conduct or decline to conduct such a procedure in the exercise of its discretion.

2. Mr Ntaganda's fair trial rights

46. Given the above finding, the Appeals Chamber finds that the Trial Chamber was, in principle, correct in asserting that it had "broad discretion" in deciding whether or not to conduct a 'no case to answer' procedure.[109] However, in light of Mr Ntaganda's arguments on appeal, the Appeals Chamber will next determine whether the Trial Chamber's exercise of discretion in the circumstances of this case was limited by Mr Ntaganda's fair trial rights so as to require a 'no case to answer' procedure to be conducted. In this regard, the Appeals Chamber notes that the application and interpretation of the law of the Court "must be consistent with internationally recognised human rights" pursuant to article 21 (3) of the Statute and that, in addition, article 67 of the Statute enshrines the rights of the accused. The Appeals Chamber further observes that, as stated by the ICTY, a 'no case to answer' procedure protects "the right of an accused not to be called on to answer a charge unless there is credible evidence of his implication in the offence with which he is

[108] *See also* *Ruto and Sang* Decision, paras 15, 16.
[109] Impugned Decision, para. 25.

charged".[110] In the context of the Statute, such a procedure is, therefore, most directly connected with the right of the accused "to raise defences and to present other evidence admissible under this Statute" pursuant to article 67 (1) (e) of the Statute and, in addition, with the right "[n]ot to be compelled to testify […] and to remain silent" pursuant to article 67 (1) (g) of the Statute.

47. The Appeals Chamber understands Mr Ntaganda to put forward two arguments in this regard. First, relying on a judgment of the ECtHR, Mr Ntaganda argues that having to decide whether or not to testify in the absence of a 'no case to answer' procedure "places an undue burden on the exercise of the right to remain silent".[111] Second, with regard to the configuration of the trial proceedings, the mainstay of Mr Ntaganda's submissions is that "[t]he *Ntaganda* Trial Chamber has adopted a form of trial that is essentially identical to that of the *Ruto* Trial Chamber: sequential presentation of evidence by the parties; party-driven collection and presentation of evidence subject to rules typical of adversarial proceedings; and requiring the Prosecution to formally close its case […]".[112] Thus, according to Mr Ntaganda, "having chosen this form of trial, the Trial Chamber is required to ensure that Article 67(1)(g) of the Statute is protected in a manner corresponding to that procedure" by conducting a 'no case to answer' procedure.[113] In connection with this argument, Mr Ntaganda also generally refers to the Trial Chamber's "obligation pursuant to Article 64(2) to ensure the fairness of trial proceedings and respect of the rights of the accused, and a corresponding authority under Article 64(6) to prescribe procedures necessary to safeguard those rights"[114] and adds that, as a consequence, "pronouncing on the sufficiency of the evidence at the end of the prosecution case […] is not a discretionary matter".[115]

48. The Appeals Chamber is not persuaded that the judgment of the ECtHR invoked by Mr Ntaganda, that is *Stojkovic v. France and Belgium*, establishes that a 'no case to answer' procedure constitutes an indispensable safeguard against interference with

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[110] ICTY, Trial Chamber II, Prosecutor v. Strugar, "Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98 bis", 21 June 2004, para. 13.
[111] Appeal Brief, para. 9.
[112] Appeal Brief, para. 16.
[113] Appeal Brief, para. 16.
[114] Appeal Brief, para. 27.
[115] Appeal Brief, para. 28. *See also* Appeal Brief, para. 29.

the right of accused persons not to incriminate themselves.[116] The Appeals Chamber observes that this case is primarily concerned with the accused's right to legal assistance under the ECtHR,[117] which is not under consideration in this appeal. Accordingly, the ECtHR's reference to the right of the accused not to incriminate himself or herself[118] does not indicate that, in general, a 'no case to answer' procedure is required as a safeguard of the right to a fair trial. Moreover, whilst the ECtHR referred to a 'no case to answer' procedure as a safeguard in respect of the right to silence and the right not to incriminate oneself in another case, namely *John Murray v. the United Kingdom*, it did so in relation to the specific question whether incriminating inferences may be drawn from the silence of the accused.[119] This matter also falls outside the scope of this appeal and the Appeals Chamber notes that, in any event, the accused in proceedings before the Court are shielded from such inferences under article 67 (1) (g) of the Statute. Therefore, this case does not support a general requirement to conduct a 'no case to answer' procedure to ensure a fair trial either.

49. The Appeals Chamber has, in addition, not been able to deduce from the views of the Human Rights Committee or other jurisprudence of the ECtHR that a 'no case to answer' procedure is necessarily required to protect any of the other rights of the accused pursuant to article 14 of the International Covenant on Civil and Political Rights and article 6 of the European Convention on Human Rights.

50. Turning to Mr Ntaganda's submission regarding the configuration of the trial proceedings against him, the Appeals Chamber notes that the presentation of evidence in this case is primarily party-driven: pursuant to the Decision on the Conduct of Proceedings, there are several evidentiary phases of the trial (with evidence first being led by the Prosecutor, potentially followed by presentation of evidence by the

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[116] Appeal Brief, footnote 12 referring to ECtHR, *Stojkovic v. France and Belgium*, "Judgment", 27 October 2011, application no. 25303/80, para. 54.
[117] ECtHR, *Stojkovic v. France and Belgium*, "Judgment", 27 October 2011, application no. 25303/80, paras 28, 49-50.
[118] ECtHR, *Stojkovic v. France and Belgium*, "Judgment", 27 October 2011, application no. 25303/80, para. 50.
[119] ECtHR, *John Murray v. the United Kingdom*, "Judgment", 8 February 1996, application no. 18731/91, paras 41, 51. The Appeals Chamber further observes that the ECtHR has found that a "trial judge did not invite the jury to consider firstly whether the prosecution case was so strong that it called for an answer before directing them that they could draw an adverse inference from the applicant's failure to testify" and concluded, nonetheless, that "this did not render his summing up deficient in any way for the purposes of Article 6 § 1". ECtHR, *O'Donnell v. the United Kingdom*, "Judgment", 7 April 2015, application no. 16667/10, paras 59-60.

Victims, and the presentation of evidence by the Defence) and the examination of the witnesses is being conducted primarily by the parties, resulting in a comparatively passive role of the Judges of the Trial Chamber.[120] The Appeals Chamber considers that these are features that are typically associated with "adversarial" proceedings in Common Law systems, while not necessarily found in "non-adversarial" systems following the Romano-Germanic tradition. The Appeals Chamber accepts that Common Law systems[121] and international and internationalised criminal jurisdictions[122] following an adversarial trial structure typically provide for a 'no case to answer' procedure. In this regard, the Appeals Chamber notes, in particular, that a trial format consisting of a prosecution case followed by a defence case is more procedurally suited to a 'no case to answer' procedure, given that the conclusion of the presentation of inculpatory evidence by the prosecution is a particularly appropriate juncture for such a procedure to be conducted.[123]

51. However, this does not mean that, having decided to adopt elements of an adversarial trial structure, the Trial Chamber in the case at hand was obliged to provide for such a procedure as well. In the view of the Appeals Chamber, by comparing the trial proceedings in his case to adversarial systems on the domestic and international level,[124] Mr Ntaganda fails to appreciate that, for the purposes of this appeal, the primary question is whether the decision of the Trial Chamber not to conduct a 'no case to answer' procedure contravenes Mr Ntaganda's fair trial rights within the legal framework of the Court.

52. The Appeals Chamber recalls that the Court's legal framework combines elements from the Common Law and Romano-Germanic legal traditions. Notably, it contains certain fair trial safeguards that are not typically found in Common Law systems, such as the obligation of the Prosecutor to "investigate incriminating and exonerating circumstances equally" under article 54 (1) (a) of the Statute and the need

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[120] *See* Decision on the Conduct of Proceedings, paras 12, 21 et seq.
[121] Appeal Brief, footnote 29 referring to South Africa, Singapore, United States, Scotland, New Zealand, and Canada (Quebec).
[122] Appeal Brief, footnote 31 referring to Rule 98 *bis* ICTY Rules of Procedure and Evidence, Rule 98 *bis* ICTR Rules of Procedure and Evidence, Rule 98 SCSL Rules of Procedure and Evidence, Rule 167 Special Tribunal for Lebanon Rules of Procedure and Evidence, Rule 127 Kosovo Specialist Chambers & Specialist Prosecutor's Office Rules of Procedure and Evidence.
[123] *See also* Decision on the Conduct of Proceedings, para. 17.
[124] Appeal Brief, para. 17.

for a Pre-Trial Chamber to "determine whether there is sufficient evidence to establish substantial grounds to believe that the persons concerned committed each of the crimes charged" prior to committing the person concerned to trial pursuant to article 61 (7) of the Statute. Thus, whilst other jurisdictions may strive to protect the rights of the accused through procedures not found in the Court's legal texts, the latter espouse other safeguards aimed at protecting these rights. The safeguards defined in the Statute and Rules ensure, on the whole, that the accused before the Court receive a fair trial. In such circumstances, reference to particular domestic and international systems does not, as such, establish that Mr Ntaganda's fair trial rights required the Trial Chamber to conduct a 'no case to answer' procedure.

53. The Appeals Chamber notes that Mr Ntaganda's more specific argument that "[t]he confirmation of charges procedure is no substitute for the 'no case to answer' procedure", since the former "permits the presentation of 'summary evidence'" and "statements of witnesses who never testified or whose testimony deviated substantially from their statements",[125] is closely connected with the preceding determination. The Appeals Chamber is not persuaded by Mr Ntaganda's submission in this regard either. In the view of the Appeals Chamber, the confirmation of charges procedure is not intended to replace a 'no case to answer' procedure or any other procedure for that matter. It is, rather, a distinctive component of the protection of the rights of the accused within the procedural framework of the Court. On this basis, the Appeals Chamber finds that the possibility that the nature or content of the evidence presented during confirmation of charges proceedings may potentially diverge from the evidence presented during trial proceedings does not alter this conclusion. In any event, as discussed above, the Trial Chamber retains the authority to conduct a 'no case to answer' procedure in the exercise of its discretion.

54. The Appeals Chamber further observes that Mr Ntaganda relies, to a great extent, on the decision of Trial Chamber V(a) to conduct a 'no case to answer' procedure in support of his submission.[126] In so far as Mr Ntaganda intends to demonstrate that the Trial Chamber erred in the exercise of its discretion by adopting a different approach in his case, the Appeals Chamber considers this argument to be

[125] Appeal Brief, para. 18.
[126] Appeal Brief, paras 14, 16.

devoid of merit. A Trial Chamber is expected to exercise its discretion bearing in mind the specific circumstances of the case before it. The Trial Chamber's reasoning indeed reflects such an assessment, given that it explicitly referred, in general, to the "present circumstances" in the proceedings against Mr Ntaganda[127] and, more specifically, contrasted the circumstances giving rise to a 'no case to answer' procedure in the proceedings against Mr Ruto and Mr Sang against those in the proceedings against Mr Ntaganda.[128] In light of the differences between these trials,[129] the Appeals Chamber is of the view that the fact that a 'no case to answer' procedure was conducted in the specific circumstances of the trial against Mr Ruto and Mr Sang does not establish, as such, an obligation on the part of the Trial Chamber to entertain Mr Ntaganda's request for such a procedure.

55. As to Mr Ntaganda's submissions that the Trial Chamber found that a 'no case to answer' procedure "should be entertained only where there is a projected net saving of time",[130] the Appeals Chamber considers that Mr Ntaganda mischaracterises the Impugned Decision. The Trial Chamber was "[m]indful of its obligations under Article 64 of the Statute" and explicitly took into account its obligation to ensure fair proceedings.[131] Accordingly, the Appeals Chamber finds that, rather than demonstrating "an erroneous understanding of the fundamental purpose of the 'no case to answer' procedure"[132] or overstating its "concern about efficiency",[133] the Trial Chamber appropriately balanced both expediency and fairness in the circumstances of Mr Ntaganda's trial.

56. In light of the foregoing, the Appeals Chamber finds that the discretion of the Trial Chamber as to whether or not to conduct a 'no case to answer' procedure was not limited by internationally recognised human rights or as a result of the adoption of an adversarial trial structure. Accordingly, Mr Ntaganda has failed to demonstrate that the Trial Chamber erred in the exercise of its discretion by declining to entertain his request for a 'no case to answer' procedure.

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[127] Impugned Decision, para. 25.
[128] Impugned Decision, para. 28.
[129] Prosecutor's Response to the Appeal Brief, para. 16, footnote 58.
[130] Appeal Brief, para. 19.
[131] Impugned Decision, paras 26-27.
[132] Appeal Brief, para. 19.
[133] Appeal Brief, para. 20.

3. The procedure adopted by the Trial Chamber concerning a request for 'no case to answer'

57. The Appeals Chamber observes that Mr Ntaganda argues that "[t]he Trial Chamber's assertion that it possesses discretion not to *hear* submissions is contrary to the express and limited circumstances in which the Statute and Rules impose a leave requirement for filing a motion" [emphasis in original].[134] The Appeals Chamber understands Mr Ntaganda to contend that the procedure requiring Mr Ntaganda to seek leave from the Trial Chamber to file a 'no case to answer' motion infringes on his right to be heard. As a consequence, it appears that Mr Ntaganda avers that, whilst the Trial Chamber could have declined to rule on a 'no case to answer' motion, it should have allowed him to file such a motion unconditionally.

58. In the view of the Appeals Chamber, Mr Ntaganda's arguments are misconceived. The Appeals Chamber recalls that, in the Decision on the Conduct of Proceedings, the Trial Chamber held that it "takes no position […] on whether it will entertain a motion by the Defence asserting that there is no case for it to answer" and that, "[s]hould the Defence wish to file such a motion, it should seek leave to do so".[135] Mr Ntaganda did not seek to appeal this decision. Instead, he subsequently availed himself of this opportunity and sought leave of the Trial Chamber to file a 'no case to answer' motion.[136] Thus, the leave requirement as such is outside the scope of this appeal.

IV. APPROPRIATE RELIEF

59. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules). In the present case it is appropriate to confirm the "Decision on Defence request for leave to file a 'no case to answer' motion" as no error in the Impugned Decision has been identified.

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[134] Appeal Brief, para. 24. *See also* Appeal Brief, paras 25-26.
[135] Decision on the Conduct of Proceedings, para. 17.
[136] Request for leave to file motion for partial judgment of acquittal.

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

Judge Sanji Mmasenono Monageng
Presiding Judge

Dated this 5th day of September 2017

At The Hague, The Netherlands