Dissenting Opinion of Judge Anita Ušacka

1. I regret that I am unable to join the majority of the Appeals Chamber in confirming the "Decision on the Defence's Application for Interim Release"[1] (hereinafter: "Impugned Decision"). My divergence from the majority relates to the first ground of appeal raised by Mr Bosco Ntaganda (hereinafter: "Mr Ntaganda") in the document in support of the appeal filed on 26 November 2013[2] (hereinafter: "Document in Support of the Appeal"). For the reasons set out hereunder, I would have found that Pre-Trial Chamber II (hereinafter: "Pre-Trial Chamber") committed an error of fact in exclusively relying on anonymous hearsay evidence contained in two United Nations group of experts reports and press and blog articles in order to support most of the factual findings relevant to its conclusion that the continued detention of Mr Ntaganda appears necessary. On this basis, I would have reversed the Impugned Decision and remanded it to the Pre-Trial Chamber for a new decision. I would not have addressed the second ground of appeal.

Introduction

2. Mr Ntaganda challenges the Pre-Trial Chamber's decision on his first request for interim release under article 60 (2) of the Statute.[3] Article 60 (2) of the Statute provides:

> A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

3. In line with article 21 (3) of the Statute, the Appeals Chamber has previously held that "[t]he provisions of the Statute relevant to detention, like every other provision of it, must be interpreted and applied in accordance with 'internationally

[1] ICC-01/04-02/06-147.
[2] "Document in support of the Defence for Mr Ntaganda's appeal against *Decision on the Defence's Application for Interim Release* rendered on 18 November 2013", ICC-01/04-02/06-158-Conf-Exp-tENG with a public redacted version in French ICC-01/04-02/06-158-Red.
[3] Although Mr Ntaganda contends under the first ground of appeal that the Pre-Trial Chamber's error in relying on anonymous hearsay, purely speculative opinions, or documents with no legal probative value constituted an error of law. *See* Document in Support of the Appeal, para. 17. I agree with the conclusion of the majority that his arguments are more appropriately characterised as errors of fact and should be assessed against the more deferential standard of review for factual errors.

recognized human rights'".[4] The significance of a decision granting or denying the release of a detained person, who is in a particularly vulnerable situation, and its impact on the human rights of a person is demonstrated by the fact that it may be directly appealed under article 82 (1) of the Statute.

4. The principle that everyone shall be presumed innocent until proved guilty before the Court is enshrined in article 66 (1) of the Statute.[5] The Appeals Chamber has previously stated, in the context of an appeal of a decision reviewing a ruling on detention under article 60 (3) of the Statute, that "[t]his procedural safeguard must also be seen in the context of the detained person's right to be presumed innocent".[6] In addition to the right to be presumed innocent until proved guilty, the human right to personal liberty, the right to not be detained for an unreasonable period of time and the right to challenge the lawfulness of detention are of particular importance in the context of a decision granting or denying the release of a person being prosecuted.[7] In line with this human rights framework, the jurisprudence of the Pre-Trial Chambers has been that "when dealing with the right to liberty, one should bear in mind the fundamental principle that deprivation of liberty should be an exception and not the

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[4] *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 of the Appellant for Interim Release", 9 June 2008, ICC-01/04-01/07-572 (OA 4), para. 15.

[5] According to the jurisprudence of the European Court of Human Rights, the presumption of innocence "requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused". *See* ECtHR, Court (Plenary), *Barberà, Messegué and Jabardo v. Spain*, "Judgment", 6 December 1988, application number 10590/83, para. 77; Grand Chamber, *Allen v. the United Kingdom*, "Judgment", 12 July 2013, application no. 25424/09, para. 93. The United Nations Human Rights Committee has indicated that "[t]he presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. It is a duty for all public authorities to refrain from prejudging the outcome of a trial [...]". *See* United Nations Human Rights Committee, *General comment no. 32*, 23 August 2007, CCPR/C/GC/32, para. 30.

[6] *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled 'Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence'", 19 November 2010, ICC-01/05-01/08-1019 (OA 4), para. 49.

[7] *Universal Declaration of Human Rights*, 10 December 1948, General Assembly, Resolution 217 A (III), U.N. Doc A/810, articles 9-11; *International Covenant on Civil and Political Rights*, 16 December 1966, 999 United Nations Treaty Series 14668, articles 9, 14; *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, as amended by Protocols Nos. 11 and 14, , 213 United Nations Treaty Series 2889, articles 5, 6; *American Convention on Human Rights, "Pact of San José, Costa Rica"*, 22 November 1969, 1144 United Nations Treaty Series 17955, articles 7, 8; *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 United Nations Treaty Series 26363, articles 6, 7.

rule" (footnotes omitted).[8] These principles must be at the forefront of any consideration of an application under article 60 (2) of the Statute.

5. The Appeals Chamber has previously stated that:

> Article 60 (2) of the Statute aims to provide the detainee with an early opportunity to contest his or her arrest and sequential detention. This he may do by reference to article 58 of the Statute, which defines the legal framework within which justification of his detention may be examined. Thereupon, the Chamber must address anew the issue of detention in light of the material placed before it.[9]

6. Thus, a decision under article 60 (2) of the Statute is a decision *de novo*, in the course of which the Pre-Trial Chamber must determine whether the conditions of article 58 (1) of the Statute are met, hearing the submissions of the defence for the first time. Accordingly, the Pre-Trial Chamber is bound to assess the application for interim release in light of the circumstances prevailing at the time of the application, rather than at the time of the issuance of the warrant of arrest.[10] In the context of the present case, it is worth noting that the first warrant for Mr Ntaganda's arrest was issued by Pre-Trial Chamber I, composed of Judges Claude Jorda, Akua Kuenyehia and Sylvia Steiner, on 22 August 2006,[11] and was unsealed on 28 April 2008.[12] Fatou Bensouda was sworn in on 15 June 2012, replacing Luis Moreno Ocampo as

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[8] Pre-Trial Chamber I, *Prosecutor v. Callixte Mbarushimana*, "Decision on the 'Defence Request for Interim Release'", 19 May 2011, ICC-01/04-01/10-163, para. 33. *See also* Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga", 18 March 2008, ICC-01/04-01/07-330, pp. 6-7; Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the Conditions of the Pre-Trial Detention of Germain Katanga", 21 April 2008, ICC-01/04-01/07-426, p. 6; Pre-Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo* "Decision on Application for Interim Release", 16 December 2008, ICC-01/05-01/08-321, para. 31; Pre-Trial Chamber II, *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on Application for Interim Release", 14 April 2009, ICC-01/05-01/08-403, para. 36; Pre-Trial Chamber II, *Prosecutor v. Jean-Pierre Bemba Gombo,* "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa", 14 August 2009, ICC-01/05-01/08-475, para. 77.

[9] *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. 12.

[10] Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, "Separate Opinion of Judge Georghios M. Pikis", 13 February 2007, ICC-01/04-01/06-824 (OA 7), para. 10.

[11] "Decision on the Prosecution Application for a Warrant of Arrest", dated 22 August 2006 and registered on 24 August 2006, ICC-01/04-02/06-1-US-Exp-tEN. A redacted version was filed on 6 March 2007 and the decision was made public on 29 September 2010, *see* public redacted version in French ICC-01/04-02/06-1-Red. *See also* "Warrant of Arrest", 22 August 2006, ICC-01/04-02/06-2-tENG. A redacted corrigendum of the redacted version was filed on 7 March 2007, *see* "Warrant of Arrest - Corrigendum", ICC-01/04-02/06-2-Corr-tENG-Red.

[12] "Decision to Unseal the Warrant of Arrest against Bosco Ntaganda", ICC-01/04-02/06-18.

Prosecutor. A second warrant for Mr Ntaganda's arrest was issued by Pre-Trial Chamber II,[13] composed of Judges Ekaterina Trendafilova, Hans-Peter Kaul and Cuno Tarfusser, on 13 July 2012.[14] Mr Ntaganda's initial appearance before the Court took place on 26 March 2013.[15]

7. The circumstances relating to Mr Ntaganda that led the Pre-Trial Chambers to conclude that his arrest appeared necessary have also radically altered since the issuance of the two warrants of arrest against him. Mr Ntaganda argues that, despite the fact that between the issuance of the first and second warrant of arrest he held the rank of General in the *Forces Armées de la République Démocratique du Congo*, took part in the peace process in the Democratic Republic of the Congo and participated in joint peacekeeping operations with MONUC/MONUSCO, the Prosecutor "did not update the material substantiating [her] contention that Mr Ntaganda's detention was warranted [...]".[16] Regarding current circumstances, Mr Ntaganda argues that the fact that he surrendered voluntarily to the Court on 20 March 2013 demonstrates that he does not harbour the intention to evade justice.[17] On this basis, Mr Ntaganda requests conditional release in the territory of the Netherlands subject to any conditions that the Pre-Trial Chamber considers necessary in accordance with rule 119 of the Rules of Procedure and Evidence.[18] It is significant that Mr Ntaganda is now present on the territory of the Kingdom of the Netherlands rather than the Democratic Republic of the Congo,[19] having apparently voluntarily surrendered.[20] The Impugned Decision represents the first time a Chamber of the Court has considered the impact of a suspect's voluntary surrender to the Court on the appearance of necessity of his continued detention.

Analysis of the Legal Framework

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[13] The situation in the Democratic Republic of the Congo, and with it the case against Mr Ntaganda, was reassigned to Pre-Trial Chamber II on 15 March 2012. *See* The Presidency, "Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the Congo, Darfur, Sudan and Côte d'Ivoire situations", 15 March 2012, ICC-01/04-02/06-32.
[14] "Decision on the Prosecutor's Application under Article 58", ICC-01/04-02/06-36-Conf-Exp..
[15] Transcript of 26 March 2013, ICC-01/04-02/06-T-2-ENG (ET WT).
[16] Pre-Trial Chamber II, "Defence application for the interim release of Mr Bosco Ntaganda", 20 August 2013, ICC-01/04-02/06-87-Conf-Exp-tEng (hereinafter: "Interim Release Application") with a public redacted version in French ICC-01/04-02/06-87-Red, paras 33-40.
[17] Interim Release Application, paras 41-46.
[18] Interim Release Application, paras 63-67.
[19] *See* G. Sluiter et al. (eds), *International Criminal Procedure Principles and Rules* (Oxford University Press, 2013), p. 332.
[20] Impugned Decision, para. 40.

8. Although the appeal relates to the question of interim release, Mr Ntaganda's arguments under the first ground of appeal primarily relate to the law of evidence and the question of the kind of evidence on which a Pre-Trial Chamber may reasonably rely for factual findings underpinning a holding that continued detention appears necessary.

9. The most salient provisions of the legal framework regarding evidence are article 69 (4) of the Statute and rules 63 and 64 of the Rules of Procedure and Evidence. Article 69 (4) of the Statute provides that:

> The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

Rule 63 of the Rules of Procedure and Evidence provides that:

> 1. The rules of evidence set forth in this chapter, together with article 69, shall apply in proceedings before all Chambers.
> 2. A Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69.
> [...]
> 4. Without prejudice to article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.

Rule 64 (2) of the Rules of Procedure and Evidence provides that "[a] Chamber shall give reasons for any rulings it makes on evidentiary matters".

10. These provisions must be read in light of the established principles of human rights. The jurisprudence of human rights bodies shows that the requirement of a fair trial necessitates that courts indicate with sufficient clarity the grounds on which they base their decisions.[21] A reasoned decision contributes to the acceptance of the decision by the parties and to preserving the rights of the defence. Moreover, the reasoning provided by the first instance Chamber forms the basis for an appeal by the person affected and allows the appellate body to review the decision.

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[21] Appeals Chamber, *Prosecutor v. Laurent Koudou Gbago*, "Dissenting Opinion of Judge Anita Ušacka", 26 October 2012, ICC-02/11-01/11-278-Red (OA), paras 8-14. *See* G. Sluiter et al. (eds), *International Criminal Procedure Principles and Rules* (Oxford University Press, 2013), p. 1144.

11. Notwithstanding rule 64 (2) of the Rules of Procedure and Evidence, in response to Mr Ntaganda's challenge to the type of evidence ultimately relied upon for the purposes of the Impugned Decision, the Pre-Trial Chamber simply found that "the evidence presented in relation to the necessity of continued detention for the purpose of article 58 (1) (b) of the Statute does not have to be of the same nature and strength as the evidence required to establish reasonable grounds to believe that the person has committed one or more crimes referred to in the Prosecutor's application, in accordance with article 58 (1) (a) of the Statute".[22] The Pre-Trial Chamber did not, however, provide any indication as to why it found the evidence presented by the Prosecutor to be reliable and to have probative value that would not be outweighed by its prejudicial effect. The Pre-Trial Chamber also did not provide an assessment of the weight accorded to each type of evidence in reaching its conclusions. In this regard, it is also notable that the Pre-Trial Chamber did not refer to the relevant provisions of the Statute and the Rules of Procedure and Evidence regarding the assessment of evidence. This lack of reasoning on the part of the Pre-Trial Chamber has rendered the assessment of the first ground of appeal problematic.

12. It is, moreover, regrettable that the majority of the Appeals Chamber did not deem it necessary to set out their analysis of this legal framework and its application to determinations under articles 58 (1) (b) and 60 (2) of the Statute. It may be noted that article 69 (4) of the Statute, although placed in Part VI of the Statute under the heading "The Trial", does not refer to the Trial Chamber but indicates more generally that the "Court may rule on the relevance or admissibility of any evidence [...]". This appears to be taken up in rule 63 (1) of the Rules of Procedure and Evidence, which clarifies that "[t]he rules of evidence set forth in this chapter, together with article 69, shall apply in proceedings before all Chambers".[23] These provisions demonstrate that the criteria applicable to the assessment of evidence apply beyond the context of the trial itself. At the same time, it is important to note that the principles applicable to the

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[22] Impugned Decision, para. 47.

[23] Donald K. Piragoff suggests that the question of the application of article 69 (4) of the Statute was "resolved in the context of the Rules by creating one chapter on rules relating to various stages of the proceedings (Chapter 4) and a separate chapter for those rules applicable exclusively to the trial procedure (Chapter 6). Since those rules that relate directly to article 69 were included in Chapter 4, it is likely that article 69 is intended to apply beyond the context of the trial itself", *see* D. K. Piragoff, "Article 69 Evidence", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (C.H. Beck-Hart-Nomos, 2nd ed, 2008), p. 1301, at p. 1327. Other academic commentators have raised this question but left it unanswered. *See* G. Sluiter et al. (eds) *International Criminal Procedure Principles and Rules* (Oxford University Press, 2013), p. 1020.

assessment of the evidence are distinct from and should not be confused with the standard of proof, which differs at each stage of the proceedings.[24]

13. An analysis of the applicable legal framework shows that the flexible provisions of the Statute and the Rules of Procedure and Evidence allow judges broad discretion in their assessment of evidence. It is clear that any evidence may, in fact, be relied upon, with only two exceptions explicitly set out, relating to evidence obtained by means of a violation of the Statute or internationally recognised human rights and evidence of the prior or subsequent sexual conduct of a victim or witness.[25] Nevertheless, article 69 (4) of the Statute and the relevant provisions of the Rules of Procedure and Evidence highlight the importance of the Pre-Trial Chamber examining the relevance, probative value and prejudicial effect of specific items of evidence. It has been suggested that although article 69 of the Statute "does not refer directly to the requirement of reliability [...] [a]ny assessment of relevance and probative value must involve some consideration of the reliability of the evidence – it must be *prima facie* credible".[26] The ability of the opposing party to investigate and test the reliability of the source of an item of evidence is an important consideration in assessing its potential prejudicial effect. In our case, the question remains as to whether the appearance of necessity of detention under articles 58 (1) (b) and 60 (2) of the Statute may be satisfied by reliance exclusively on anonymous hearsay evidence.

14. Before turning to an assessment of the type of evidence challenged in the context of the present appeal, it is useful for present purposes to have regard also to the jurisprudence of the ad hoc tribunals. It may be observed that, in common with the Court, the ad hoc tribunals apply a flexible framework for the evaluation of evidence, representing "a crucial civil law element in a predominantly adversarial system".[27]

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[24] *See* articles 58 (1), 61 (7) ,66 (3) of the Statute.
[25] Article 69 (7) of the Statute provides that "[e]vidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings". Rule 71 of the Rules of Procedure and Evidence provides that "subject to article 69, paragraph 4, a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness".
[26] H. Brady, "The System of Evidence in the Statute of the International Criminal Court", in F. Lattanzi and W. A. Schabas, (eds) *Essays on the Rome Statute of the International Criminal Court* Vol., 1 (Editirice il Sirente, 1999), p. 279, at p. 290.
[27] A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009), p. 314.

However, despite the apparent flexibility of the legal framework, a jurisprudential evolution has taken place at the ad hoc tribunals, which demonstrates an increasingly cautious approach to the use of certain types of documentary evidence.[28]

15. There are good reasons for a cautious approach towards the use of reports of states, international organisations or non-governmental organisations, whose "mandates and objectives are usually quite different from those of international staff appointed with a specific mandate to carry out independent investigations and prosecutions".[29] Problems relating to reliance on such reports have been highlighted in the following terms:

> [T]he process of the investigations by the OTP [at the International Criminal Tribunal for the former Yugoslavia] started with the review and analysis of reports from the U.N. Commission of Experts, governments, and NGOs. By and large those reports fell into two categories. They were designed to either present an overall picture of the conflict or to address certain characteristics of the conflict, depending on the character or interest of the particular organization or group preparing the report. All of them, however, were prepared from the perspective of establishing a historical record of what occurred either to answer to or influence the actions of some group of decision makers, as opposed to the more exacting process of establishing a legally sufficient case for prosecution.[30]

16. At the ICC, Pre-Trial and Trial Chambers generally attach low probative value to anonymous hearsay evidence and adopt a cautious approach to the use of such evidence for the purposes of establishing the truth of its contents.[31] In general, such evidence is relied upon to corroborate other evidence. The recent "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute" in the case of the *Prosecutor v. Laurent Gbagbo* indicates the

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[28] A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009), p. 314; G. Sluiter et al. (eds), *International Criminal Procedure Principles and Rules* (Oxford University Press, 2013), p. 1054-1060.

[29] L. Reydams et al. (eds), *International Prosecutors* (Oxford University Press, 2012), p. 581.

[30] M. J. Keegan, "Preparation of Cases for the ICTY",,7 *Transnational Law and Contemporary Problems* (1999), p. 119, at p. 124.

[31] Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo* "Decision on the confirmation of charges", 29 January 2007, ICC-01/04-01/06-803-tEN, paras 99-106; Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the confirmation of charges", 30 September 2008, ICC-01/04-01/07-717, paras 119-120, 131-141, 221-223; Pre-Trial Chamber II, *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 15 June 2009, ICC-01/05-01/08-424, paras 47-52.

emergence of a more stringent approach to the use of anonymous hearsay documentary evidence for the purposes of the confirmation of charges.[32]

17. In the case of the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II indicated that "there is no finite list of possible criteria that are to be applied in determining reliability" but listed key factors that will normally be considered, including the source of the evidence, the nature and characteristics of the item of evidence, the contemporaneousness of the evidence with the events to which it pertains, the purpose for which the document was created, and the question of whether the information and the way in which it was gathered can be independently verified or tested.[33] Trial Chamber II concluded that:

> Although there is no prohibition on hearsay before the Court, the Chamber is conscious of the inherent risks in this type of evidence. It may therefore take such risks into consideration when attributing the appropriate probative value to items of evidence consisting mainly or exclusively of hearsay.[34]

18. Trial Chamber II considered UN reports *prima facie* reliable (as reports from independent, direct observers of the facts being reported), but cautioned that if the author's identity and the sources of the information provided are not revealed with sufficient detail, the Chamber would be unable to assess the reliability of the contents and would not admit them into evidence.[35] Moreover, Trial Chamber II found that, "where such reports are based, for the most part, on hearsay information, especially if that information is twice or further removed from its source, the reliability of their content is seriously impugned".[36]

19. Trial Chamber II has also expressed reservations about the probative value of media reports, finding that they "often contain opinion evidence about events said to have occurred and rarely provide detailed information about their sources".[37] Trial Chamber II declined to admit press releases into evidence as the Prosecutor had "failed to inform the Chamber either of the background and qualifications of the

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[32] Pre-Trial Chamber I, "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute", 3 June 2013, ICC-02/11-01/11-432, paras 28-30.
[33] "Decision on the Prosecutor's Bar Table Motions", 17 December 2010, ICC-01/04-01/07-2635 (hereinafter: "*Katanga* and *Ngudjolo* Decision of 17 December 2010"), para. 27.
[34] *Katanga* and *Ngudjolo* Decision of 17 December 2010, para. 27.
[35] *Katanga* and *Ngudjolo* Decision of 17 December 2010, para. 29.
[36] *Katanga* and *Ngudjolo* Decision of 17 December 2010, para. 29.
[37] *Katanga* and *Ngudjolo* Decision of 17 December 2010, para. 31.

journalists or of their sources, in order to satisfy the Chamber as to their objectivity and professionalism".[38]

20. Finally, in the context of decisions on interim release under article 60 (2) of the Statute, none of the five decisions that have previously been issued by Pre-Trial Chambers were based exclusively on anonymous hearsay evidence.[39] It can be concluded that a more rigorous approach to the assessment of evidence is developing in the context of article 60 (2) of the Statute.

Specific analysis of the evidence relied on in the Impugned Decision

21. The findings in the Impugned Decision were heavily based on the 2013 Midterm report of the Group of Experts on the Democratic Republic of the Congo[40] (hereinafter: "2013 Group of Experts Midterm Report") and the Final report of the

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[38] *Katanga* and *Ngudjolo* Decision of 17 December 2010, para. 31. In considering the probative value of hearsay evidence, the indicia of reliability as set out by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the "*Prosecutor v. Zlatko Aleksovski* may also be noted. The ICTY Appeals Chamber stated in this relation: Since such evidence is admitted to prove the truth of its contents, a Trial Chamber must be satisfied that it is reliable for that purpose, in the sense of being voluntary, truthful and trustworthy, as appropriate; and for this purpose may consider both the content of the hearsay statement and the circumstances under which the evidence arose; or, as Judge Stephen described it, the probative value of a hearsay statement will depend upon the context and character of the evidence in question. The absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is "first-hand" or more removed, are also relevant to the probative value of the evidence". *See Prosecutor v. Zlatko Aleksovski*. "Decision on Prosecutor's Appeal on Admissibility of Evidence", 16 February 1999, IT-95-14/1 (hereinafter: "*Aleksovski* Decision"), para. 15. *See also* Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the admissibility of four documents" 13 June 2008, ICC-01/04-01/06-1398-Conf, para. 28 with a public redacted version ICC-01/04-01/06-1399, referring to the *Aleksovski* Decision, para. 15 . This jurisprudence was followed up by a direction from the ICTY Appeals Chamber that various indicia of reliability should be considered before hearsay evidence is admitted, including whether the statement was (i) given under oath, (ii) subject to cross-examination, (iii) first-hand or removed, (iv) made through many layers of translation, (v) made contemporaneously to the events, or (vi) given under formal circumstances, such as before a judge. The evidence in question was witness testimony. Nevertheless, the same indicia could also – potentially with some modification – be applied to other circumstances. *See* M. Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events* (Martinus Nijhoff Publishers, 2013), p. 371, referring to *Prosecutor v. Dario Mario Kordić and Mario Čerkez*, "Decision on Appeal Regarding Statement of a Deceased Witness", 21 July 2000, IT 95-14/2, paras 7-8, 23.

[39] *See* Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the Application for Interim Release of Mathieu Ngudjolo Chui", 27 March 2008, ICC-01/04-01/07-345; Pre-Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on application for interim release", 20 August 2008, ICC-01/05-01/08-73; Pre-Trial Chamber I, *Prosecutor v. Callixte Mbarushimana*, "Decision on the 'Defence Request for Interim Release'", 19 May 2011, ICC-01/04-01/10-163; Pre-Trial Chamber I, *Prosecutor v. Laurent Gbagbo*, "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'", 13 July 2012, ICC-02/11-01/11-180-Red.

[40] Midterm report of the Group of Experts on the DRC submitted in accordance with paragraph 5 of Security Council resolution 2078 (2012), 19 July 2013, UN Doc. S/2013/433.

Group of Experts on the Democratic Republic of the Congo[41] (hereinafter: "2011 Group of Experts Final Report").[42] I am of the view that, in the circumstances of the present case, it was unreasonable for the Pre-Trial Chamber to base its findings on the 2011 Group of Experts Final Report and the 2013 Group of Experts Midterm Report. In this regard, I find it highly problematic that the reports do not clearly identify the sources that they rely upon for the relevant information. As a result, the ability of Mr Ntaganda to challenge the evidence relied upon and to present new evidence was compromised. The ability of a suspect to properly defend himself is of crucial importance in the context of a decision under article 60 (2) of the Statute as this decision identifies the circumstances that ground the appearance of necessity of detention. It is in light of the decision under article 60 (2) of the Statute and the circumstances identified as relevant therein that future reviews of the suspect's detention under article 60 (3) will be carried out.

22. It may also be noted that the reports in question present information on flows of arms and related material and on networks operating in violation of the arms embargo in the Democratic Republic of the Congo, in order to identify individuals and entities on whom sanctions should be imposed and to monitor sanctioned individuals and entities. It must be underlined that the standards applicable to information gathering for such purposes are very different to those applicable in criminal trials and decisions to deprive an individual of their liberty. Although the methodology set out in the reports appears to have been quite rigorous, there is no guarantee that this methodology was applied in practice at all times. It is notable in this regard that, although the group of experts indicate on a number of occasions that they received information from Mr Ntaganda, he denies having made a statement to the group of experts.[43]

23. In this regard it is, in my view, of significance that the group of experts was composed of six experts in the fields of arms, customs and aviation (or logistics), regional issues, armed groups, natural resources and finance.[44] This composition

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[41] Final report of the Group of Experts on the DRC submitted in accordance with paragraph 5 of Security Council resolution 1952 (2010)", 2 December 2011, UN Doc. S/2011/738.
[42] *See* "Prosecution's response to the Defence appeal against the 'Decision on the Defence's Application for Interim Release'", 2 December 2013, ICC-01/04-02/06-Conf-Exp (OA), para. 21.
[43] Document in Support of the Appeal, footnote 38.
[44] *See* 2013 Group of Experts Midterm Report, paras 1, 2; 2011 Group of Experts Final Report, para. 3.

reflected the mandate of the group of experts set out above. An investigation for the purpose of a criminal trial requires specific expertise, which, the group of experts lacked. It must be borne in mind that the process of investigating in the international context is a complex exercise, often rendered even more difficult by problems in translation and understanding stemming from linguistic and cultural differences.[45] This background means that it is of vital importance for the Prosecutor to carry out her own independent investigation to verify the facts rather than relying on reports of external organisations.

24. The Pre-Trial Chamber relied on information in blog articles and press releases to corroborate its findings as to the circumstances of Mr Ntaganda's surrender.[46] Furthermore, the Pre-Trial Chamber relied exclusively on blog articles and press releases to support its determination that "Mr Ntaganda's decision [to surrender] was likely to have also been influenced by [...] pressure imposed on him by the Rwandan Government to surrender", which forms an important part of its overall conclusion that "[t]he evidence or material available before the [Pre-Trial Chamber] suggests that Mr. Ntaganda's voluntary surrender was prompted by the likelihood of him being killed or by pressure imposed on him by the Rwandan Government" (footnotes omitted).[47] The extent of the Pre-Trial Chamber's reliance on press releases and blog articles to support this finding is not clear from the Impugned Decision, which indicates that the "possibility finds support in a number of non-anonymous sources provided in the Second Registry's Report".[48] For the purposes of clarity, the report in question noted that since primary sources were lacking, the Registrar could only use secondary sources, such as media coverage and NGO articles, to provide information regarding the reasons behind the surrender of Mr Ntaganda.[49] The same report stated that "no source can confirm with certainty the underlying circumstances of the surrender of Mr. Ntaganda".[50] This was illustrated by reference to an article from Human Rights Watch and an article from CNN, both stating that the reasons behind

[45] *See* L. Reydams et al. (eds), *International Prosecutors* (Oxford University Press, 2012), pp. 582-583.
[46] Impugned Decision, para. 45.
[47] Impugned Decision, paras 43, 45.
[48] Impugned Decision, para. 45.
[49] Pre-Trial Chamber II, "Registry report following the decision of the Single Judge of 19 September 2013 (ICC-01/04-02/06-109-Conf)", 3 October 2013, ICC-01/04-02/06-120-Conf (hereinafter: "Registrar's Report of 3 October 2013"), para. 8.
[50] Registrar's Report of 3 October 2013, para. 9.

Mr Ntaganda's surrender were unclear.[51] The Registrar added that, in his view, other sources cited in the media provided "speculative reasons" for Mr Ntaganda's surrender and provided in an annex a list of such press articles.[52]

25. A careful review of the excerpts from the blog and news articles relied on by the Pre-Trial Chamber show that none of these materials identify the sources of the information presented with regard to the circumstances of Mr Ntaganda's surrender.[53]

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[51] Registrar's Report of 3 October 2013, para. 10, referring to Human Rights Watch, "DR Congo: Congolese Warlord Should Face Justice", 18 March 2013, accessed at http://www.hrw.org/news/2013/03/18/send-bosco-ntaganda-icc (hereinafter: "Human Rights Watch article"); CNN, "Why Bosco Ntaganda trial is just first step towards justice for DRC", 28 March 2013, accessed at http://www.edition.cnn.com/2013/03/28/opinion/amnesty-bosco-ntaganda/index.html (hereinafter: "CNN article").

[52] Registrar's Report of 3 October 2013, para. 11, referring to Al Jazeera, "The surrender of Bosco Ntaganda", 20 March 2013, accessed at http://blogs.aljazeera.com/blog/africa/surrender-bosco-ntaganda (hereinafter: "Al Jazeera blog"); LeMonde.fr, "Pourquoi le général congolais Bosco Ntaganda se livre à la justice", 20 March 2013, accessed at http://www.lemonde.fr/afrique/article/2013/03/20/pourquoi-le-general-congolais-bosco-ntaganda-se-livre-a-la-justice_1850854_3212.html# (hereinafter: "Le Monde article"). *See also* ICC-01/04-02/06-120-Conf-Anx1 (hereinafter: "Annex 1 of Registrar's Report of 3 October 2013").

[53] *See* Congo Siasa, "Amid good news, doubts" 18 March 2013, accessed at http://congosiasa.blogspot.nl/2013/03/amid-good-news-doubts.html (hereinafter : "Congo Siasa blog"), which states in the relevant part: "[T]he Rwandan government probably either forced him to hand himself over or he was so afraid of what would happen if they arrested him (or Makenga got a hold on him) that he made a run for the embassy"; The Human Rights Watch article states in the relevant part: "It is unclear why Ntaganda suddenly turned himself in to the US embassy and asked to be transferred to the ICC. A recent outbreak of hostilities between two factions of the M23 rebel group, headed by Ntaganda and other commanders, resulted in the faction opposed to Ntaganda apparently gaining the upper hand". The CNN article reads in the relevant part: "[I]n a surprising move, the Congolese Army general and ex-rebel leader turned himself in at the U.S. embassy in Rwanda after spending the past few months in hiding in North Kivu in the Democratic Republic of Congo (DRC)" and that "his decision to turn himself in on March 18, and the exact reasons behind his 'self-referral', remain unclear". The Al Jazeera blog states in the relevant part: "There are also unanswered questions, like why would the former general hand himself over. 'The Rwandan government probably either forced him to hand himself over', says Jason Stearns from the Rift Valley Institute. 'Or he was so afraid of what would happen if they arrested him, (or [Sultani] Makenga got a hold of him) he made a run for the embassy". It should be noted that the latter information replicates the reason provided in the Congo Siasa blog excerpt. The Al Jazeera blog adds that "[t]he surrender of Ntaganda, probably has less to do with justice, and more about the bloody battles we have seen in recent weeks for control of M23 rebel group based in eastern Dr Congo". The Le Monde article reads in the relevant part: "Les raisons pour lesquelles Bosco Ntaganda s'est soudain rendu à l'ambassade des Etats-Unis et a demandé à être déféré devant la CPI ne sont pas claires. Sa reddition pourrait avoir un lien avec les récents affrontements armés, dans l'est de la RDC, entre les factions du M23. La situation de Bosco Ntanga [*sic*] pourrait aussi être le résultat de la perte du soutien de la part des autorités rwandaises. Kigali a récemment été accusé par des experts de l'ONU, malgré ses dénégations, de soutenir le M23" and that "Kinshasa a affirmé dimanche 17 mars que Bosco Ntaganda a franchi la frontière entre l'est de la RDC et le Rwanda, dans la foulée de centaines de combattants de la faction mise en déroute qu'il est accusé de diriger. Selon Tony Gambino, ancien président du programme américain Usaid au Congo '*la meilleure supposition est que ses solutions se sont réduites à [choisir entre] La Haye ou se faire tuer*'".
See also Annex 1 of Registrar's Report of 3 October 2013, referring to Afrik.com, "RDC : le chef du M23, Bosco Ntaganda, se rend à la CPI", 19 March 2013, accessed at http://www.afrik.com/rdc-le-chef-du-m23-bosco-ntaganda-se-rend-a-la-cpi, which states in the relevant part: "Pour le moment, aucune information crédible ne permet de déterminer les raisons exactes de sa reddition. Mais l'on évoque la vulnérabilité du chef rebelle au sein du mouvement M23. Les récents tiraillements au sein de

In the absence of such information, it is impossible to establish to what extent they corroborate or merely repeat the relevant information in the United Nations group of experts reports (the 2011 Group of Experts Final Report and 2013 Group of Experts Midterm Report). Furthermore, they do not provide detailed information regarding the alleged pressure imposed by Rwanda; nor do they provide any indication of how their authors arrived at the conclusion that Rwanda had in fact applied pressure to Mr Ntaganda to surrender. Given that the nature of the information cited in these sources is rather speculative and in the absence of any evidence confirming such an allegation,

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la rébellion ne lui permettent plus d'assurer son hégémonie. Lâché par le Rwanda qui est accusé de soutenir la rébellion du M23, Bosco Ntaganda aurait préféré se livrer à la justice pour échapper à la mort"; RFI,, "RDC: les raisons de la reddition surprise de Bosco Ntaganda", 19 March 2013, accessed at http://www.rfi.fr/afrique/20130319-rdc-raisons-reddition-surprise-bosco-ntaganda, indicating that "[i]l y a d'abord la version officielle. Selon le département d'Etat américain, cet ancien chef rebelle tutsi [...] se serait rendu librement à l'ambassade des Etats-Unis à Kigali [...]. Une autre version est avancée par plusieurs autres sources. Bosco Ntaganda était acculé. Il avait tenté [...] de rejoindre le Masisi en passant par le parc des Virunga. Mais il avait été arrêté dans sa progression par les milices hutues [*sic*] du FDLR (Forces démocratiques de libération du Rwanda). Il a donc dû faire demi-tour et avait participé aux combats contre la faction du M23 de son rival, Sultani Makenga. Faute de munitions et de logistique suffisante, le général Bosco Ntaganda a fini par traverser la frontière rwandaise [...]. [C]ette reddition a été sans doute préparée par Kigali et Washington dans les heures qui ont suivi son entrée en territoire rwandais"; Le Nouvel Observateur, "Les Etats-Unis s'interrogent sur le sort à réserver à Ntaganda", 19 March 2013, accessed at http://tempsreel.nouvelobs.com/monde/20130319.REU9991/les-etats-unis-s-interrogent-sur-le-sort-a-reserver-a-ntaganda.html, which reads in the relevant part: "Recherché dans le cadre d'un mandat d'arrêt international, Bosco Ntaganda craint certainement d'être livré aux autorités congolaises dans le cadre d'un éventuel accord de paix, a écrit Jason Stearns, de l'Institut de la Vallée du Rift [...]"; Le Figaro, "RD Congo : la reddition de « Terminator »", 20 March 2013, accessed at http://www.lefigaro.fr/international/2013/03/19/01003-20130319ARTFIG00658-rd-congo-la-reddition-de-terminator.php, which reads in the relevant part: "Lâché par ses frères d'armes et par le Rwanda, Bosco Ntaganda s'est livré lundi à l'ambassade américaine de Kigali. [...] Abandonné par son propre camp, le chef de guerre ne semble plus bénéficier du soutien que lui prodigue habituellement le Rwanda. [...]Laura Seay, une experte sur le Congo à l'université de Morehouse au [*sic*] États-Unis. Sa décision de se rendre suggère qu'il a perdu le soutien de ses puissants alliés au sein du gouvernement et de l'armée rwandaise."; Digital Congo, "La reddition de Bosco Ntaganda pourrait avoir été planifié par Kigali", 20 March 2013, accessed at http://www.digitalcongo.net/article/90545, states in relevant part: "Autant que le confirment plusieurs sources, après avoir traversé la frontière, Ntaganda a été pris en charge par le gouvernement rwandais. Les faits sur le terrain attestent superbement cette thèse. Nombre d'observateurs soutiennent que la reddition de Ntaganda à l'ambassade a 'été planifiée par Kigali"; The Guardian, "Notorious warlord gives himself up to international criminal court", 19 March 2013, accessed at http://www.theguardian.com/world/2013/mar/19/africa-congo, which provides in the relevant part: "His request to be transferred to the Hague surprised many. However, he has made many powerful enemies in Kigali and Kinshasa; for him international justice was probably preferable to the consequences of handing himself over to Congolese or Rwandan authorities, or staying on the run. He had nowhere else to go. 'He must have been so afraid for his life that a long sentence in the Hague looked like his best option', said Jason Stearns, a political analyst who specialises in Congo. 'He must have been pretty scared'. [...] Stearns said: 'This surrender marks his fall from favour with the Rwandan government. He had become a liability because of his notoriety. He's a reliable general but he's also a thug. The Rwandans realised that it was better to let M23 implode and see who came out of it'"; allAfrica.com, "Rwanda: U.S. State Department Daily Press Briefing: General Bosco Ntaganda", 18 March 2013, accessed at http://allafrica.com/stories/201303191193.html, which reads in the relevant part: "QUESTION: [...] can you explain in any manner how this process came about, or was it just a complete surprise to you that he showed up at the Embassy today? MS. NULAND: I don't think that we had any advance notice that he would plan to walk in".

I would have found that the Pre-Trial Chamber was unreasonable in according weight to these documents for the purposes of reaching its determination that Mr Ntaganda's surrender was likely to have been influenced by pressure imposed by Rwanda and in using these documents to corroborate the information in the two United Nations group of experts reports.

26. Therefore, on the basis of the reasoning set out above, I would have found that the Pre-Trial Chamber committed an error of fact in basing the majority of the factual findings relevant to its conclusion that the continued detention of Mr Ntaganda appears necessary, based exclusively on speculation and anonymous hearsay contained in press releases, blog articles and two United Nations group of experts reports. I would not have proceeded to an assessment of the second ground of appeal as the challenged findings of the Pre-Trial Chamber are affected by the error found under the first ground of appeal, either because they are based on the same type of evidence or because they are dependent on factual findings affected by this error. Accordingly, I would have reversed the Impugned Decision and remanded it to the Pre-Trial Chamber.

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

Judge Anita Ušacka

Dated this 5 day of March 2014

At The Hague, The Netherlands