Dissenting Opinion of Judge Christine Van den Wyngaert

1. Like Judge Ušacka, I am also regretfully unable to join the Majority of the Appeals Chamber in confirming the "Decision on the Defence's Application for Interim Release" (hereinafter: "Impugned Decision").[1] I am also of the opinion that the Pre-Trial Chamber II (hereinafter: "Pre-Trial Chamber") erred in its sole reliance on anonymous hearsay evidence contained in press releases, blog articles and two UN group of expert reports. Such evidence must be treated with utmost caution in the context of a criminal trial and without considerably more, independently verified, information cannot, in my view, be safely relied upon to justify the continued detention of Mr Bosco Ntaganda. I offer only a few additional observations that are not intended to detract from my agreement with all aspects of Judge Ušacka's Dissenting Opinion.

2. The International Criminal Court (hereinafter: "ICC") and *ad hoc* tribunals have traditionally employed a flexible approach to the admissibility of evidence, ostensibly a civil law influence within a broadly adversarial system. Rather than systematically rejecting the admissibility of any particular category of evidence, judges have been afforded broad discretion to balance probative value with prejudicial effect. However, the fact that certain types of evidence, such as anonymous hearsay, are not automatically excluded from the proceedings does not mean that they are therefore safe to rely on. Whether they are or not can only be determined on a case-by-case basis, which, in the case of anonymous hearsay is a difficult task, considering the sources of the information are unknown.

3. As Judge Ušacka observes, a jurisprudential evolution has taken place at the ad hoc tribunals, reflecting an increasingly cautious approach to the use of certain

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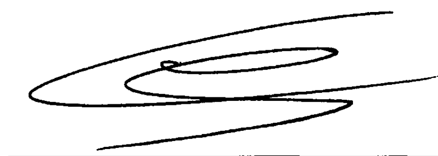
[1] ICC-01/04-02/06-147.

types of documentary evidence.[2] At the ICC too, Pre-Trial and Trial Chambers are more and more relegating anonymous hearsay evidence to something which can, at best, potentially corroborate other evidence, rather than as stand-alone source of information that possesses significant probative value *per se*.[3] There is no reason why this approach should not also apply in the context of decisions under article 60(2) of the Statute.

4. What I think warrants emphasis, however, is that this more cautious approach to anonymous hearsay evidence is not something that derives from the whim of a number of judges. Instead, it brings us closer to the standard that always should have been applied when assessing such evidence. Indeed, I am not aware of any other system of criminal justice, be it national or international, where anonymous hearsay is given any serious probative value, if it is considered/admitted at all. I can think of no good reason why this Court should take a different approach, let alone what could justify basing judicial decisions pertaining to the freedom of individuals on evidence that is inherently fragile and against which the suspect has no meaningful opportunity to defend him or herself. This last point is as essential in the context of an article 60(2) decision as it is for any other judicial finding of this Court.

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



Judge Christine Van den Wyngaert

Dated this 5th day of March 2014

At The Hague, The Netherlands

[2] See Dissenting Opinion of Judge Anita Ušacka, para. 14.

[3] See Dissenting Opinion of Judge Anita Ušacka, paras 16-20.