

Judgment delivery

(Open Session)

ICC-01/04-02/06

1 International Criminal Court

2 Appeals Chamber - Courtroom 1

3 Situation: Democratic Republic of the Congo

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

5 Judge Sanji Mmasenono Monageng

6 Appeals Chamber Hearing for the delivering of a Judgment

7 Wednesday, 5 March 2014

8 (The hearing starts in open session at 4.34 p.m.)

9 THE COURT USHER: All rise.

10 The International Criminal Court is now in session.

11 Please be seated.

12 JUDGE MONAGENG: Good afternoon, officers of the court, and good afternoon,

13 Mr Ntaganda.

14 Would the court officer please call the case.

15 THE COURT OFFICER: Thank you, your Honour. The situation in the

16 Democratic Republic of the Congo, in the case of The Prosecutor against Bosco

17 Ntaganda, ICC-01/04-02/06.

18 JUDGE MONAGENG: Thank you.

19 My name is Judge Sanji Mmasenono Monageng. Judge Anita Ušacka is the

20 Presiding Judge on this appeal arising from the case of the Prosecutor against Bosco

21 Ntaganda. Judge Ušacka has requested me to deliver this judgment on her behalf,

22 as she dissents from the view of the majority of the Appeals Chamber.

23 May I ask the parties to introduce themselves for the record, starting with the

24 Prosecutor?

25 MS BRADY: Good afternoon, your Honour. Helen Brady, senior appeals counsel,

1 appearing on behalf of the Prosecution. Together with me today is appeals counsel

2 Reinhold Gallmetzer. Thank you.

3 JUDGE MONAGENG: Thank you very much.

4 Defence of Mr Ntaganda please?

5 MR DESALLIERS: (Interpretation) For the Defence, your Honour, Maître Andrea

6 Valdivia, Caroline Buteau, Margaux Portier, Mr Maxime Charron-Tousignant and

7 myself, Marc Desalliers.

8 JUDGE MONAGENG: Thank you very much.

9 Today the Appeals Chamber is delivering its judgment on the appeal by Mr

10 Ntaganda against the decision of Pre-Trial Chamber II entitled, and I quote,

11 "Decision on the Defence's Application For Interim Release," end of quote. The

12 decision was rendered on the 18 November 2013 by the Single Judge of Pre-Trial

13 Chamber II responsible for the case of the Prosecutor against Bosco Ntaganda.

14 In today's summary, I will refer to the decision as the impugned decision or the

15 decision of the Pre-Trial Chamber.

16 I shall now summarize the Appeals Chamber's judgment and the reasons for it.

17 This summary is not part of the written judgment, which is the only authoritative

18 account of the Appeals Chamber's rulings and reasons. The written judgment will

19 be made available to the parties at the conclusion of this hearing. Judge Anita

20 Ușacka and Judge Christine Van den Wyngaert dissent. I will also briefly

21 summarise the reasons for their dissenting opinions at the end.

22 I shall start with a brief procedural history. On 20 August 2013, Mr Ntaganda filed

23 his application for interim release. The Prosecutor filed a response, opposing this

24 request on 6 September 2013. On 20 September 2013, Mr Ntaganda filed a reply to

25 the Prosecutor's response.

1 In the impugned decision, the Pre-Trial Chamber rejected Mr Ntaganda's application
2 for interim release.

3 Mr Ntaganda presents two grounds of appeal. The first ground of appeal is that the
4 Pre-Trial Chamber committed a manifest error of law in considering that the less
5 burdensome onus of proof for detention justifies reliance in the main on anonymous
6 hearsay, purely speculative opinions, or documents with no legal probative value,
7 such as articles from newspapers and a blog and reports based on anonymous
8 sources. In response, the Prosecutor submits that the Pre-Trial Chamber correctly
9 applied the standard of proof under Article 58(1)(b) of the Statute.

10 Under the first ground of appeal, Mr Ntaganda alleges that the Pre-Trial Chamber
11 committed an error of law in relying on particular kinds of evidence. And Mr
12 Ntaganda uses this argument to challenge specific findings of the Pre-Trial Chamber
13 on the basis that the evidence relied or relied on falls short of the applicable
14 standards. Accordingly, in the view of the Appeals Chamber, Mr Ntaganda's
15 arguments are more appropriately characterized as alleging an error of fact rather
16 than an error of law.

17 The Appeals Chamber recalls its previous finding that in the context of an appeal of
18 a decision under Article 60(2) of the Statute, and I quote "what may justify continued
19 detention under Article 58(1)(b) of the Statute is that it must appear to be necessary.
20 The question revolves around the possibility, not the inevitability of a future
21 occurrence," end of quote. The Appeals Chamber has assessed the Pre-Trial
22 Chamber's reliance on the evidence challenged by Mr Ntaganda in light of this
23 standard and in accordance with the legal framework for the assessment of evidence
24 established by Article 69(4) of the Statute and Rule 63(1) and (2) of the Rules of
25 Procedure and Evidence.

1 The Appeals Chamber will first consider the Pre-Trial Chamber's reliance on the
2 2013 Midterm Report of the Group of Experts on the Democratic Republic of the
3 Congo, which I will refer to hereafter as the Midterm Report, and the 2011 Final
4 Report of the Group of Experts on the Democratic Republic of the Congo, which I
5 will refer to as the Final Report. These reports were relied upon to support the
6 Pre-Trial Chamber's findings regarding the circumstances of Mr Ntaganda's
7 surrender, his movements between Rwanda and the Democratic Republic of the
8 Congo, his financial means and his continuing influence over his supporters in the
9 Democratic Republic of the Congo.

10 The Appeals Chamber notes that the Group of Experts on the Democratic Republic
11 of the Congo was established in the year 2004 pursuant to the United Nations
12 Security Council resolution 1533, and I quote, "... to gather and analyse all relevant
13 information on flows of arms and related material and networks operating in
14 violation of the arms embargo concerning the Democratic Republic of the Congo,"
15 end of quote. It was also instructed to assist in the designation of leaders of armed
16 groups as well as individuals committing serious violations of international law in
17 the Democratic Republic of the Congo. In execution of this mandate, the group of
18 experts collected detailed information on the movements and activities of Mr
19 Ntaganda.

20 The Appeals Chamber notes that the methodology employed by the group of experts
21 was quite rigorous. The group indicated that it adhered to the evidentiary
22 standards recommended in the 2006 report of the Informal Working Group of the
23 Security Council on General Issues of Sanctions. In pursuance of these standards,
24 the Midterm Report indicated that, and I quote:

25 "The Group relied on authentic documents and, and as much as possible, on

1 firsthand on-site observations by the experts themselves. The Group corroborated
2 information by using at least three independent and reliable sources. The Group
3 notably used eyewitness testimonies from former and current combatants of armed
4 groups and members of local communities where incidents occurred. In addition,
5 the Group obtained telephone records, bank statements, money transfer records,
6 photographs, videos and other material evidence to corroborate its findings," end of
7 quote.

8 It is also of relevance to note that with respect to the general character and reliability
9 of the reports of the group of experts, the 2006 report of the Informal Working Group
10 on General Issues of Sanctions stresses that, and I quote, "... any perception of less
11 than rigorous standards in the conduct of any aspect of their work can call into
12 question the integrity of their entire report," end of quote. This report also
13 recommends that clear guidelines be established for expert groups to consult in
14 order to ensure that, while groups maintain their independence, their enquiries and
15 findings meet appropriately high standards.

16 In addition, the Appeals Chamber observes that the events described in the reports
17 were contemporaneous with the production of the reports and that quite a high level
18 of detail is provided with respect to the information relied upon by the Pre-Trial
19 Chamber.

20 The Appeals Chamber notes that the identities of the sources relied upon were
21 known to the group of experts, who corroborated information by using three
22 independent and reliable sources, notwithstanding the fact that these sources were
23 anonymous. Moreover, the Final Report indicates that in situations in which the
24 identification of sources would expose them or others to unacceptable safety risks, it
25 has withheld identifying information and placed the relevant evidence in United

1 Nations archives. In the present case, the Appeals Chamber is of the view that the
2 excerpts relied upon for the purposes of the impugned decision were sufficiently
3 detailed to enable Mr Ntaganda to investigate and consequently challenge the
4 relevant information and that he was not prejudiced by the anonymity of the sources
5 of the information relied upon.

6 In view of these considerations, the Appeals Chamber cannot discern any clear error
7 in the Pre-Trial Chamber's reliance on the Midterm Report and the Final Report to
8 support its findings.

9 Mr Ntaganda also challenges the Pre-Trial Chamber's reliance on press and blog
10 articles to support its findings regarding the circumstances of his surrender.

11 The Appeals Chamber notes that the Pre-Trial Chamber referenced press and blog
12 articles for the purposes of indicating that other sources support the information in
13 the Midterm Report and in order to support its finding that according to other
14 material, Mr Ntaganda's surrender was likely to have been influenced by pressure
15 imposed on him by the Rwandan government to surrender.

16 The Appeals Chamber finds that it is unnecessary to consider Mr Ntaganda's
17 arguments as to the Pre-Trial Chamber's reliance on press and blog articles. In
18 assessing the circumstances surrounding Mr Ntaganda's surrender, the Pre-Trial
19 Chamber considered a number of other factors, such as the split in the M23 at the
20 end of February 2013, that Mr Ntaganda's faction had run low in ammunition,
21 prompting him to flee towards the Rwandan border and that Mr Ntaganda feared
22 that he would be killed, in addition to the fact that he had been at large for many
23 years since the issuance of the first warrant of arrest in August 2006. The
24 evidentiary basis for these findings was the Midterm Report. The Appeals
25 Chamber considers that the conclusion of the Pre-Trial Chamber, that its findings

1 reduced the weight to be given to Mr Ntaganda's claim that he voluntarily
2 surrendered was adequately supported by reference to this latter set of
3 circumstances. Therefore, the error alleged by Mr Ntaganda, even if established,
4 would not have materially affected the impugned decision.

5 Accordingly, the Appeals Chamber cannot discern any clear error in the Pre-Trial
6 Chamber's conclusion that reduced weight must be given to Mr Ntaganda's claim
7 that he voluntarily surrendered.

8 Finally, Mr Ntaganda argues that the Pre-Trial Chamber erred in relying on
9 anonymous hearsay in the statement of Witness P-0046 to establish that he has a
10 history of violence.

11 The Appeals Chamber notes that the Pre-Trial Chamber's conclusion as to Mr
12 Ntaganda's history of violence is adequately supported by reference to the Midterm
13 Report, the Final Report, and the decisions issuing the warrants of arrest against Mr
14 Ntaganda, wherein the Pre-Trial Chamber found reasonable grounds to believe that
15 Mr Ntaganda had committed war crimes and crimes against humanity. Therefore,
16 the Appeals Chamber cannot discern any clear error in the Pre-Trial Chamber's
17 conclusion that Mr Ntaganda has a history of violence.

18 As the Appeals Chamber has found that Mr Ntaganda failed to establish a clear error
19 in the findings of the Pre-Trial Chamber, the first ground of appeal is dismissed.

20 I shall now turn to the second ground of appeal.

21 Under the second ground of appeal, Mr Ntaganda raises specific arguments in
22 relation to a number of Pre-Trial Chamber's factual findings. The Prosecutor
23 submits that Mr Ntaganda does not demonstrate any appealable error of fact under
24 the second ground of appeal and that he has failed to establish that the Pre-Trial
25 Chamber, and I quote "... could not have reasonably reached the conclusions it did

1 on the available evidence," end of quote, or "... how the alleged errors materially
2 affect the impugned decision," end of quote. Mr Ntaganda's arguments will be
3 addressed in turn.

4 First, Mr Ntaganda argues that in assessing the circumstances of his voluntarily
5 surrender, the Pre-Trial Chamber failed to take into account a number of essential
6 factors, namely that (i) he co-operated at all stages of the transfer procedure and
7 expressed his willingness to appear in court, (ii) he did not conceal his place of
8 residence and that his whereabouts were known, (iii) the first warrant of arrest
9 issued in 2006 was only unsealed in 2008 precluding his being at large since 2006 and
10 (iv) he participated in the peace progress in the Democratic Republic of the Congo
11 and was integrated in the regular armed forces, and the authorities of the
12 Democratic Republic of the Congo had decided to suspend the execution of the
13 warrant of arrest issued by the Court.

14 The Appeals Chamber notes that the Pre-Trial Chamber carefully examined the
15 circumstances of Mr Ntaganda's voluntary surrender, including its timeliness and
16 the manner in which it took place. It is noted that Mr Ntaganda does not explain
17 the relevance of any of the factors he identifies as essential to the Pre-Trial
18 Chamber's consideration of the circumstances surrounding his surrender. At most,
19 Mr Ntaganda identifies a disagreement between himself and the Pre-Trial Chamber
20 as to which factors should have been taken into account for the purposes of
21 analysing the circumstances surrounding his voluntary surrender. As such, Mr
22 Ntaganda has not identified a clear error in the Pre-Trial Chamber's findings.
23 Accordingly, his argument is rejected.

24 Second, Mr Ntaganda contends that the Pre-Trial Chamber's conclusion that the
25 gravity of the charges and possible lengthy sentence show that there is a risk that he

1 will abscond if released is manifestly unfounded. He does not dispute that the
2 gravity of the charges and the resulting expectation of a lengthy prison sentence are
3 relevant factors to be considered in the determination of the risk of absconding for
4 decisions on interim release. Rather, he repeats that a distinction should be drawn
5 between a suspect who surrendered on a voluntary basis in full awareness of the
6 gravity of the charges and the potentially lengthy sentence that he is facing and a
7 suspect who did not surrender voluntarily.

8 The Appeals Chamber has already rejected Mr Ntaganda's arguments on appeal
9 relevant to the Pre-Trial Chamber's consideration of the circumstances surrounding
10 his surrender. Apart from disagreeing with the conclusions of the Pre-Trial
11 Chamber regarding his surrender, Mr Ntaganda does not present any additional
12 arguments that would serve to demonstrate a clear error in the Pre-Trial Chamber's
13 findings with regard to the gravity of the charges and potentially lengthy sentence
14 that he is facing. Accordingly, his argument is rejected.

15 Third, Mr Ntaganda argues that the Pre-Trial Chamber's finding that he habitually
16 crossed borders and that he would do the same if released in the Schengen area is
17 clearly unreasonable. According to Mr Ntaganda, the Pre-Trial Chamber failed to
18 consider that on both occasions when he crossed the border between the Democratic
19 Republic of the Congo and Rwanda, he had obtained the necessary authorisation
20 from military and immigration authorities.

21 In the view of the Appeals Chamber, Mr Ntaganda misconstrues the Pre-Trial
22 Chamber's findings in this regard. The Pre-Trial Chamber found that it cannot
23 adhere to the Defence's assertion that the risk of absconding is diminished because
24 he is subject to the sanctions regime laid down by the United Nations Security
25 Council resolution 1596, which imposes a travel ban and an asset freeze and does not

1 hold a passport or other travel document. In support of its conclusion, the Pre-Trial
2 Chamber noted that Mr Ntaganda had, and I quote "... managed to move around
3 undisturbed since 2006 until the date of his surrender on March 2013, despite the
4 existence of a travel ban," end of quote.

5 Although the Pre-Trial Chamber cited only two examples of Mr Ntaganda's cross
6 border movements during this time, the essential point remains that Mr Ntaganda
7 moved freely despite the existence of a travel ban against him at the relevant time.
8 The question of whether his travel had been authorised by the relevant state
9 authorities is irrelevant to this analysis.

10 Consequently, the conclusion of the Pre-Trial Chamber that Mr Ntaganda had
11 previously been able to move across borders despite the existence of a travel ban,
12 travel ban against him and that, I quote, "He will probably still be able to move
13 within the Schengen area if released, given the absence of borders," end of quote, is
14 not affected by the argument raised by Mr Ntaganda. As Mr Ntaganda has failed to
15 establish a clear error in the Pre-Trial Chamber's findings, his argument is dismissed.
16 For the above reasons, the Appeals Chamber finds that Mr Ntaganda has failed to
17 establish a clear error in the findings of the Pre-Trial Chamber with respect to the
18 circumstances surrounding his surrender, the gravity of the charges against him and
19 the potential sentence, as well as the risk of him absconding. Consequently, the
20 second ground of appeal is dismissed.

21 As the two grounds of appeal have been dismissed, the Appeals Chamber has
22 decided by majority to confirm the impugned decision and to dismiss the appeal.
23 Now, Judge Anita Ušacka and Judge Christine Van den Wyngaert dissent from the
24 Appeals Chamber's decision. They consider that the arguments presented by Mr
25 Ntaganda under the first ground of appeal primarily relate to the law of evidence

1 and the kind of evidence on which a Pre-Trial Chamber may reasonably rely in order
2 to find that the continued detention of a suspect appears necessary. They
3 emphasise that the application of Article 69(4) of the Statute and Rules 63 and 64 of
4 the Rules of Procedure and Evidence relating to evidence apply to all chambers and
5 must inform the Pre-Trial Chamber's assessment of evidence for the purposes of a
6 decision under Article 60(2) of the Statute.

7 With these principles in mind, they would have found that the Pre-Trial Chamber
8 committed an error of fact by relying on the Midterm Report and Final Report in
9 order to support factual findings relevant to its conclusion that the continued
10 detention of Mr Ntaganda appears necessary.

11 In particular, Judge Ušacka and Judge Van den Wyngaert find it problematic that the
12 reports are based on anonymous hearsay evidence, as a result of which in their view
13 the ability of Mr Ntaganda to challenge the evidence and to present new evidence
14 was compromised. Judge Ušacka and Judge Van den Wyngaert also consider that
15 the reports were prepared for a purpose unrelated to criminal proceedings and that
16 they were not intended to provide justification for a decision to deprive an
17 individual of his or her liberty in the context of a criminal trial. Judge Ušacka and
18 Judge Van den Wyngaert also note that the expertise of the group of experts is
19 entirely different to that required to conduct investigations in an international
20 criminal context. The dissenting Judges would underline that it is of vital
21 importance for the Prosecutor to carry out her own independent investigation or to
22 at least independently verify the facts mentioned in United Nations reports.

23 Judge Ušacka and Judge Van den Wyngaert would also have found that the
24 Pre-Trial Chamber committed an error of fact in relying on press articles and blog
25 articles in order to support its factual findings as to the circumstances of Mr

1 Ntaganda's surrender. They note that the information relied on by the Pre-Trial
2 Chamber from the blog and news articles is vague, speculative and based on
3 anonymous hearsay evidence. In the absence of information about the sources of
4 the information provided, the dissenting judges would have found that it is
5 impossible to establish to what extent the articles corroborate or merely repeat the
6 relevant information in the United Nations group of experts report. Accordingly,
7 Judge Ušacka and Judge Van den Wyngaert would have found that the Pre-Trial
8 Chamber was unreasonable in according weight to these documents for the
9 purposes of reaching its determination that Mr Ntaganda's surrender was likely to
10 have been influenced by pressure imposed by Rwanda and in using these
11 documents to corroborate the information in the United Nations group of experts
12 reports.

13 Therefore, Judge Ušacka and Judge Van den Wyngaert would have found that the
14 Pre-Trial Chamber committed an error of fact in basing the majority of the factual
15 findings relevant to its conclusions that the continued detention of Mr Ntaganda
16 appears necessary exclusively on speculation and anonymous hearsay contained in
17 press releases, blog articles, and two United Nations group of experts reports. On
18 this basis, they would have reversed the impugned decision and remanded it to the
19 Pre-Trial Chamber. They would not have considered the second ground of appeal.
20 This concludes my summary of the judgment. Finally, I wish to thank the parties,
21 the interpreters and the court reporters for this afternoon. The session is now
22 closed.

23 THE COURT USHER: All rise.

24 (The hearing ends in open session at 5.10 p.m.)