

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 17 March 2014

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR V. BOSCO NTAGANDA***

Public

Second Decision on Bosco Ntaganda's Interim Release

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Defence

Marc Desalliers

Legal Representatives of the Victims

Sarah Pellet
Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel, Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court”),¹ issues this decision on Bosco Ntaganda’s (“Mr. Ntaganda”) interim release.

The present decision is classified as public although it refers to the existence of documents and, as the case may be, to a limited extent to their content, which have been submitted and are currently treated as confidential and/or confidential *ex parte*. The Single Judge considers that the references to the said documents in the present decision are required by the principle of judicial reasoning as well as fairness of proceedings *vis-à-vis* the Defence. Moreover, those references are not inconsistent with the nature of the documents referred to and have been kept to a minimum.

I. PROCEDURAL HISTORY

1. On 22 August 2006, Pre-Trial Chamber I, to which this case had originally been assigned, issued the “Decision on the Prosecution Application for a Warrant of Arrest” (the “22 August 2006 Decision”),² along with a corresponding warrant of arrest for Mr. Ntaganda.³

2. On 15 March 2012, the Presidency re-assigned the situation in the Democratic Republic of the Congo (the “DRC”) to this Chamber.⁴

¹ Pre-Trial Chamber II, “Decision Designating a Single Judge”, 21 March 2013, ICC-01/04-02/06-40, p. 4.

² Pre-Trial Chamber I, ICC-01/04-02/06-1-US-Exp-tEN; a redacted version was filed in the record of the case on 6 March 2007 and the decision was made public on 1 October 2010, ICC-01/04-02/06-1-Red-tENG.

³ Pre-Trial Chamber I, “Warrant of Arrest”, 22 August 2006, ICC-01/04-02/06-2-Anx-tENG; a corrigendum was filed into the record of the case on 7 March 2007, see ICC-01/04-02/06-2-Corr-tENG-Red.

⁴ 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.

3. On 13 July 2012, the Chamber issued the “Decision on the Prosecutor’s Application under Article 58”,⁵ with which a second warrant of arrest was issued against Mr. Ntaganda (the “13 July 2012 Decision”).

4. On 22 March 2013, the Single Judge issued the “Decision on Setting the Date for the Initial Appearance and Related Issues”,⁶ in which she, *inter alia*, noted Mr. Ntaganda’s voluntary surrender to the Court⁷ and decided to convene a hearing for his initial appearance.⁸

5. On 25 March 2013, the Chamber received the “Report of the Registry on the voluntarily surrender of Bosco Ntaganda and his transfer to the Court”.⁹

6. On 26 March 2013, Mr. Ntaganda’s initial appearance took place before the Chamber.¹⁰

7. On 20 August 2013, the Defence filed the “Requête de la Défense aux fins de mise en liberté provisoire de M. Bosco Ntaganda” (the “Application”),¹¹ in which it requested the interim release of Mr. Ntaganda to the Kingdom of the Netherlands and, where necessary, the application of those conditions which the Chamber considered necessary in accordance with rule 119 of the Rules of Procedure and Evidence (the “Rules”).¹²

8. On 26 August 2013, the Single Judge issued the “Decision Requesting Observations on the Defence’s Application for Interim Release”,¹³ in which she, *inter alia*, ordered the Registry to transmit the redacted version of the Application to the

⁵ Pre-Trial Chamber II, ICC-01/04-02/06-36-Conf-Exp; and public redacted version, ICC-01/04-02/06-36-Red.

⁶ Pre-Trial Chamber II, ICC-01/04-02/06-41.

⁷ Pre-Trial Chamber II, ICC-01/04-02/06-41, p. 4.

⁸ Pre-Trial Chamber II, ICC-01/04-02/06-41, p. 5.

⁹ ICC-01/04-02/06-44-Conf-Exp.

¹⁰ Pre-Trial Chamber II, Transcript of Hearing, 26 March 2013, ICC-01/04-02/06-T-2-ENG ET.

¹¹ ICC-01/04-02/06-87-Red-tENG.

¹² ICC-01/04-02/06-87-Red-tENG, p. 16.

¹³ Pre-Trial Chamber II, ICC-01/04-02/06-92.

Kingdom of the Netherlands and invited the latter to submit its observations in accordance with the operative part of the decision no later than Friday, 13 September 2013.¹⁴

9. On 4 September 2013, the Single Judge issued the “*Décision concernant la requête urgente présentée par la Défense de Monsieur Bosco Ntaganda le 3 Septembre 2013 (ICC-01/04-02/06-99-Conf-Exp)*”,¹⁵ in which she, *inter alia*, ordered the Registry to transmit the confidential version of the Application to the Kingdom of the Netherlands and invited the latter to submit its observations in accordance with the operative part of the decision no later than Friday, 20 September 2013.¹⁶

10. On 19 September 2013, the Single Judge issued the “*Decision on the Circumstances Surrounding Bosco Ntaganda’s Voluntary Surrender to the Court and on the Defence’s Request for Leave to Reply*” (the “19 September 2013 Decision”), in which she, *inter alia*, ordered the Registrar to file a report with the Chamber concerning the circumstances underlying the voluntary surrender of Mr. Ntaganda, no later than 3 October 2013.¹⁷ The Single Judge also requested the Prosecutor and the Defence, should they desire, to submit their observations on said report no later than 10 and 17 October 2013 respectively.¹⁸

11. On 20 September 2013, the Registrar transmitted to the Chamber the observations submitted by the Kingdom of the Netherlands on the Application.¹⁹

12. On 3 October 2013, the Chamber received the “*Registry report following the decision of the 19 September 2013 (ICC-01/04-02/06-109-Conf)*”.²⁰

¹⁴ Pre-Trial Chamber II, ICC-01/04-02/06-92, p. 5.

¹⁵ Pre-Trial Chamber II, ICC-01/04-02/06-100-Conf.

¹⁶ Pre-Trial Chamber II, ICC-01/04-02/06-100-Conf, p. 5.

¹⁷ Pre-Trial Chamber II, ICC-01/04-02/06-109-Conf, p. 6.

¹⁸ Pre-Trial Chamber II, ICC-01/04-02/06-109-Conf, p. 7.

¹⁹ Registry, “*Transmission to Pre-Trial Chamber II of the observations submitted by the Kingdom of the Netherlands on the request for interim release presented by Bosco Ntaganda*”, ICC-01/04-02/06-113-Conf and its 4 confidential annexes.

13. On 18 November 2013, the Single Judge issued the “Decision on the Defence’s Application for Interim Release” (the “18 November 2013 Decision”).²¹

14. On 3 March 2014, by way of email, the Single Judge requested the Prosecutor, the Defence and the Legal Representatives of Victims to submit their observations on the release or continued detention of Mr. Ntaganda no later than Monday, 10 March 2014.

15. On 5 March 2014, the Appeals Chamber issued the “Judgment on the appeal of Mr Bosco Ntaganda against the decision of Pre-Trial Chamber II of 18 November 2013 entitled ‘Decision on the Defence’s Application for Interim Release’”, in which it confirmed the impugned decision, by majority (the “5 March 2014 Judgment”).²²

16. On 6 March 2014, by way of email, the Prosecutor requested an extension of time to file her observations on the release or continued detention of Mr. Ntaganda by Tuesday, 11 March 2014.

17. On the same date, by way of email, the Single Judge granted the Prosecutor’s request and extended the time limit for the submission of observations by the parties and participants until Tuesday, 11 March 2014 at 1600hrs.

18. On 11 March 2014, the Chamber received the observations of the Defence²³ and the Legal Representatives of Victims,²⁴ and due to a technical error, the Prosecutor was authorized by way of email, on behalf of the Single Judge, to file her observations on 12 March 2014.²⁵

²⁰ ICC-01/04-02/06-120-Conf.

²¹ Pre-Trial Chamber II, ICC-01/04-02/06-147.

²² Appeals Chamber, ICC-01/04-02/06-271-Conf.

²³ “Observations de la Défense de M. Bosco Ntaganda conformément à l’Article 60-3 du Statut”, ICC-01/04-02/06-280.

²⁴ “Observations conjointes des représentants légaux communs relatives au réexamen périodique de la détention de M. Bosco Ntaganda”, ICC-01/04-02/06-279.

²⁵ ICC-01/04-02/06-282.

II. APPLICABLE LAW

19. The Single Judge notes articles 21(1)(a), (2) and (3), 58(1), 60(2), (3) and 67(1) of the Rome Statute (the "Statute"), and rule 118(2) of the Rules.

20. In particular, the Single Judge recalls article 58(1) of the Statute which stipulates:

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

(b) The arrest of the person appears necessary:

(i) To ensure the person's appearance at trial;

(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or [...]

21. Further, article 60(2) and (3) of the Statute states:

2. 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. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

III. DETERMINATION BY THE SINGLE JUDGE

22. The Single Judge notes that according to article 60(3) of the Statute and rule 118(2) of the Rules, the Chamber is under an obligation to review its previous ruling undertaken pursuant to article 60(2) of the Statute on the release or detention of Mr. Ntaganda "at least every 120 days", and "may modify its ruling as to detention,

release or conditions of release, if it is satisfied that changed circumstances so require". The reference to the phrase "at least every 120 days" makes it evident that the Single Judge is obliged to conduct such review prior to the expiry of this period.

23. The last time the Single Judge ruled on the "release or detention" of Mr. Ntaganda on the basis of article 60(2) of the Statute was on 18 November 2013 when it was decided that the suspect should continue to be detained, and that the 120 days period for review shall start running as of the date of notification of the 18 November 2013 Decision.²⁶ Accordingly, the next deadline for the review required pursuant to article 60(3) of the Statute is 18 March 2014.

24. At the outset the Single Judge wishes to recall the fundamental principle reflected in the jurisprudence of this Court,²⁷ that when dealing with the right to interim release, one must bear in mind that deprivation of liberty is the exception and not the rule. This interpretation is consistent with internationally recognised human rights, as dictated by article 21(3) of the Statute, and finds support in the jurisprudence of the European Court of Human Rights (the "ECtHR").²⁸

25. The Single Judge also notes that unlike a ruling under article 60(2) of the Statute, which calls for a *de novo* assessment of the requirements of article 58(1) of the Statute

²⁶ Pre-Trial Chamber II, ICC-01/04-02/06-147, p. 27.

²⁷ Pre-Trial Chamber III, "Decision on Application for Interim Release", 16 December 2008, ICC-01/05-01/08-321, para. 31; Pre-Trial Chamber II, "Decision on Application for Interim Release", 14 April 2009, ICC-01/05-01/08-403, para. 36; Pre-Trial Chamber I, "Decision on the Conditions of the Pre-Trial Detention of Germain Katanga", ICC-01/04-01/07-426, p. 6; "Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga", ICC-01/04-01/07-330, pp. 6-7.

²⁸ ECtHR, *Shamayev and others v. Georgia and Russia*, no. 36378/02, Judgment of 12 April 2005, para. 396; *Kurt v. Turkey*, no. 24276/94, Judgment of 25 May 1998, para. 122. See also in the context of the *ad hoc* tribunals, Special Court for Sierra Leone, *Prosecutor v. Sesay, Kallon and Gbao*, Case No. (SCSL-04-15-PT), "Decision on the Motion by Morrise Kallon for Bail", 23 February 2004, para. 25; ICTY, *Prosecutor v. Darko Mrdja*, "Decision on Darko Mrdja' Request for Provisional Release", Case No. (IT-02-59-PT), 15 April 2002, para. 29; *Prosecutor v. Hadžihasanović et al.*, Case No. (IT-01-47-PT), "Decision Granting Provisional Release to Enver Hadžihasanović", 19 December 2001, para. 7.

(i.e., “to inquire anew into the existence of facts justifying detention”),²⁹ conducting an article 60(3) review depends on the criterion of “changed circumstances”. As the Appeals Chamber has clarified in several recent judgments, changed circumstances “imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary”.³⁰ This necessitates that the Chamber “revert[s] to the ruling on detention to determine whether there has been a change in the circumstances that have a bearing on the conditions under article 58(1) of the Statute”.³¹ It follows that revisiting the conditions on the basis of which it was decided in the 18 November 2013 Decision that Mr. Ntaganda continues to be detained is essential. In principle, the scope of such review in reaching a decision under article 60(3) of the Statute “is potentially much more limited than that carried out in reaching a decision under article 60 (2) of the Statute”.³²

26. Turning to the said conditions, article 58(1)(a) of the Statute generally requires an assessment of whether there are reasonable grounds to believe that the person committed a crime that falls within the jurisdiction of the Court. In the context of the present review, it is essential to assess whether there has been a change in circumstances which could have an impact on this condition.

²⁹ Appeals Chamber, “Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled ‘Decision on the *Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo*’”, 26 October 2012, ICC-02/11-01/11-278-Red, para. 23.

³⁰ Appeals Chamber, “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s ‘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’”, 2 December 2009, ICC-01/05-01/08-631-Red, para. 60; Appeals Chamber, “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 2 September 2011 entitled ‘Decision on the *Demande de mise en liberté de M. Jena-Pierre Bemba Gombo afin d’accomplir ses devoirs civiques en République Démocratique du Congo*’”, ICC-01/05-01/08-1722, para. 30.

³¹ Appeals Chamber, “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled ‘Decision on Applications for Provisional Release’”, 19 August 2011, ICC-01/05-01/08-1626-Red, para. 71.

³² Appeals Chamber, “Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled ‘Decision on the *Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo*’”, 26 October 2012, ICC-02/11-01/11-278-Red, para. 24.

27. In the 18 November 2013 Decision, the Single Judge referred to the findings of the 22 August 2006 Decision and the 13 July 2012 Decision. In these decisions collectively, it was determined that there are reasonable grounds to believe that Mr. Ntaganda is criminally responsible, pursuant to article 25(3)(a) of the Statute for seven counts of war crimes and three counts of crimes against humanity during the time-frame and locations specified therein.³³ Moreover, in the 18 November 2013 Decision, the Single Judge acknowledged that the Defence of Mr. Ntaganda:

[Did] not challenge the validity of the relevant Chambers' findings under article 58(1)(a) of the Statute. Nor [did] the Defence present any argument or evidence which [required] the Chamber to look anew into the requirement of [this provision]. Instead, the Defence "reserve[d] the right to submit, where necessary, a further application to impugn the foundation of the warrants of arrest in accordance with the provisions of article 58(1)(a)."³⁴

In the context of the present review, it is clear that the Defence has neither challenged these earlier findings nor submitted any further applications "to impugn the foundation of the warrants of arrest". Instead, in its most recent observations of 11 March 2014, the Defence stated that it does not intend to comment on the release or detention of Mr. Ntaganda at this stage, unless it finds it necessary to respond to the observations submitted by the Prosecutor and the Legal Representatives of Victims.³⁵ In view of the parties' and participants' submissions, as well as the available information before the Chamber, the Single Judge considers that there has been no change in the circumstances since the issuance of the 18 November 2013 Decision that merits reaching a different conclusion. Accordingly, the requirement of article 58(1)(a) of the Statute continues to be met.

28. Turning to the conditions set forth in article 58(1)(b) of the Statute, it should be stressed that, in principle, continued detention cannot be ordered, unless it appears

³³ Pre-Trial Chamber II, ICC-01/04-02/06-147, para. 38; Pre-Trial Chamber I, ICC-01/04-02/06-1-Red-tENG, paras 21, 34, 48-60; Pre-Trial Chamber II, ICC-01/04-02/06-36-Red, pp. 27, 36, 66, 68-76.

³⁴ Pre-Trial Chamber II, ICC-01/04-02/06-147, para. 38.

³⁵ ICC-01/04-02/06-280, paras 13-14.

necessary: (i) to ensure Mr. Ntaganda's appearance at trial; (ii) to ensure that he does not obstruct or endanger the investigation or the court proceedings, or (iii) where applicable, to prevent him from continuing with the commission of the crimes referred to in the 22 August 2006 Decision, the 13 July 2012 Decision, or a related crime. As to the latter, the crime must fall within the jurisdiction of the Court and arise from the same circumstances. The Appeals Chamber has confirmed that these three conditions are "in the alternative", and thus, the fulfilment of one of them is sufficient to negate the need to address the remaining conditions.³⁶

29. In the context of the present review, the Single Judge is called upon to determine whether there is a change "in some or all of the facts underlying" the 18 November 2013 Decision or whether there exists "a new fact" which prompts the Single Judge to modify her previous ruling.

Mr. Ntaganda's Appearance at Trial (article 58(1)(b)(i) of the Statute)

30. In this respect, the Single Judge recalls that in the 18 November 2013 Decision, she responded to a number of arguments put forward by the Defence including those related to his voluntary surrender and decided that if Mr. Ntaganda were to be released he might abscond, if the possibility arises.³⁷ In particular, the Single Judge found that Mr. Ntaganda managed to escape for several years since the issuance of the first warrant of arrest in August 2006 until he decided to seek refuge in Kigali on 18 March 2013.³⁸ Despite the issuance of two warrants of arrest against him on 22 August 2006 and 13 July 2012, he managed to evade justice for such a lengthy period of time, in total disregard to the serious accusations brought against him.³⁹ At present, the Single Judge does not see a reason to arrive at a different conclusion

³⁶ Appeals Chamber, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'", 13 February 2007, ICC-01/04-01/06-824, para. 139.

³⁷ Pre-Trial Chamber II, ICC-01/04-02/06-147, paras 40-46.

³⁸ Pre-Trial Chamber II, ICC-01/04-02/06-147, para. 41.

³⁹ Pre-Trial Chamber II, ICC-01/04-02/06-147, para. 41.

with respect to these facts, which reveal a possibility that Mr. Ntaganda absconds if released.

31. Furthermore, relying on evidence and material available before the Chamber including a United Nations report as well as some media articles,⁴⁰ the Single Judge concluded that Mr. Ntaganda's voluntary surrender was not driven by good will but rather due to some external factors which influenced his decision to surrender to the United States Embassy in Kigali on 18 March 2013. In particular, the Single Judge found that Mr. Ntaganda's surrender was prompted by either the declaration of the Congolese Government to arrest him, or due to pressure exerted on him by the Rwandan Government to surrender or most likely his fear to be killed, especially after the split of the "[*Mouvement du 23 mars*] by the end of February 2013" and the "outbreak of fighting between Mr. Ntaganda's faction and his deputy's faction, headed by Mr. Makenga", which led to the defeat of his troops.⁴¹ There is no evidence before the Chamber that these facts have changed. Also the weight to be given to his decision to voluntarily surrender remains affected by the timeliness and manner in which the surrender took place⁴² as stated in the 18 November 2013 Decision and summarized above. Thus, it cannot be concluded that there is any change of circumstances with respect to this factor which warrants revisiting the Single Judge's previous ruling.

⁴⁰ "Midterm report of the Group of Experts on the Democratic Republic of the Congo", UN Doc. S/2013/433; "The Bosco surrender: more questions than answers", Congo Siasa, 22 March 2013, available at, congosiasa.blog.co.uk/search?updated-max=2013-03-29T; also "DR Congo: Bosco Ntaganda appears before ICC", BBC News, 26 March 2013, available at, www.bbc.co.uk/news/world-africa-21933569. ⁹² ICC-01/04-02/06-103-Red, p. 7, fn. 17; "Amid good new^s, doubts", Congo Siasa, 18 March 2013, available at, congosiasa.blog.co.uk/search?updated-max=2013-03-29T.

⁴¹ Pre-Trial Chamber II, ICC-01/04-02/06-147, paras 43-45.

⁴² See ICTY, *Prosecutor v. Vinko Pandurevic et al.*, "Decision on Vinko Pandurevic's Application for Provisional Release", 18 July 2005, Case No: (IT-05-86-PT), para. 18; *Prosecutor v. Drago Nikolic et al.*, "Decision on Drago Nikolic's Request for Provisional Release", Case No: (IT-05-88-PT), 9 November 2005, paras 19-20.

32. Moreover, the charges Mr. Ntaganda is facing as presented in the document containing the charges are numerous (18 counts and several modes of liability, including direct perpetration)⁴³ and of such gravity⁴⁴ that, if they are confirmed, would lead to his committal to trial. His trial, in turn, might result in an overall lengthy sentence if convicted. In its judgment of 13 February 2007, the Appeals Chamber stated that “[i]f a person is charged with grave crimes, the person might face a lengthy prison sentence, which may make the person more likely to abscond”.⁴⁵ The same logic was endorsed in the Appeals Chamber judgment of 9 June 2008 whereby it was acknowledged that the “gravity” of the crimes as well as the potential length of the sentence are distinct factors which enhance the probability of the person absconding.⁴⁶

33. Further, part of the charges facing Mr. Ntaganda in relation to the recruitment and use of child soldiers led to the conviction of Thomas Lubanga⁴⁷ (his alleged co-perpetrator) by Trial Chamber I for a lengthy sentence of 14 years.⁴⁸ Although convicting an accused person and imposing a sentence with respect to one or more crimes within the jurisdiction of the Court depends on the specific circumstances underlying each particular case, Mr. Ntaganda’s mere awareness of the sentence imposed in a quite similar case such as that of Thomas Lubanga increases the possibility of him absconding. Also the fact that the date of issuance of the decision

⁴³ ICC-01/04-02/06-203; ICC-01/04-02/06-203-AnxA.

⁴⁴ See for example, Trial Chamber I, “Decision on Sentence pursuant to Article 76 of the Statute”, 10 July 2012, ICC-01/04-01/06-2901, para. 37 (considering that the “crimes of conscription and enlisting children under the age of fifteen and using them to participate actively in hostilities are undoubtedly very serious crimes that affect the international community as a whole”).

⁴⁵ Appeals Chamber, “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’”, 13 February 2007, ICC-01/04-01/06-824, para. 136.

⁴⁶ Appeals Chamber, “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, paras 21, 24.

⁴⁷ Trial Chamber I, “Judgment pursuant to Article 74 of the Statute”, 14 March 2012, ICC-01/04-01/06-2842.

⁴⁸ Trial Chamber I, “Decision on Sentence pursuant to Article 76 of the Statute”, 10 July 2012, ICC-01/04-01/06-2901.

on whether or not to confirm the charges against him is approaching makes it more likely that he absconds if the situation arises.

34. The Single Judge relied on some of these factors including the gravity of the charges and potential length of the sentence in the 18 November 2013 Decision, and the Appeals Chamber in its judgment of 16 December 2008 confirmed that “repeating findings already made in [a previous decision on detention] and concluding that these findings were ‘still valid’ [...] did not detract from the correctness and adequacy of the [Pre-Trial Chamber’s] finding”.⁴⁹

35. More recently, in the 5 March 2014 Judgment, the Appeals Chamber found no “clear error in the [...] Chamber’s finding with regard to the gravity of the charges and potentially lengthy sentence that [Mr. Ntaganda] is facing”.⁵⁰ Even more, the Single Judge’s finding on the gravity of the charges and length of sentence in the 18 November 2013 Decision was prompted by a far more limited number of charges and modes of liability when compared to those set out in the document containing the charges filed by the Prosecutor subsequent to the issuance of said decision.⁵¹ Accordingly, the Single Judge considers that all of these factors remain valid and relevant for the purpose of the present review.

36. Based on the foregoing, the Single Judge cannot reach a finding other than that there would be an inevitable risk that Mr. Ntaganda, if released, would not appear at trial if all or part of the charges were confirmed. This is more compelling in view of the Single Judge’s previous finding that Mr. Ntaganda has the financial means to abscond if released.⁵² Having assessed these factors collectively, the Single Judge

⁴⁹ Appeals Chamber, “Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled ‘Decision on application for interim release’”, 16 December 2008, ICC-01/05-01/08-323, para. 53.

⁵⁰ Appeals Chamber, “Judgment on the appeal of Mr Bosco Ntaganda against the decision of Pre-Trial Chamber II of 18 November 2013 entitled ‘Decision on the Defence’s Application for Interim Release’”, 5 March 2014, ICC-01/04-02/06-271-Conf, para. 66.

⁵¹ ICC-01/04-02/06-203-AnxA.

⁵² Pre-Trial Chamber II, ICC-01/04-02/06-147, paras 54-55.

considers that the requirement of article 58(1)(b)(i) of the Statute remains satisfied and the continued detention of Mr. Ntaganda remains necessary to ensure his appearance at trial, if charges are confirmed.

Obstructing or endangering the investigation or the Court Proceedings (article 58(1)(b)(ii) of the Statute)

37. Turning to the requirement of article 58(1)(b)(ii) of the Statute, the Single Judge considers that on the basis of the available information, it is evident that Mr. Ntaganda remains influential in the DRC due to the contacts he managed to retain with a considerable number of his former soldiers including those from the *Forces Patriotiques pour la Libération du Congo* and the *Congrès National pour la Défense du Peuple* who used to be part of the *Mouvement du 23 mars*. This fact has been developed in more details in the 18 November 2013 Decision on the basis of United Nations reports,⁵³ and the Appeals Chamber has recently accepted, by majority, the level of details provided by the Chamber to prove this fact as well as the reliability of the source.⁵⁴

38. This finding when assessed together with the fact that the identity of thirty eight witnesses has so far been disclosed to Mr. Ntaganda,⁵⁵ his documented history of violence,⁵⁶ which is also revealed in a number of reports⁵⁷ and the seriousness of the

⁵³ Pre-Trial Chamber II, ICC-01/04-02/06-147, para. 58.

⁵⁴ Appeals Chamber, "Judgment on the appeal of Mr Bosco Ntaganda against the decision of Pre-Trial Chamber II of 18 November 2013 entitled 'Decision on the Defence's Application for Interim Release'", 5 March 2014, ICC-01/04-02/06-271-Conf, paras 40-43.

⁵⁵ Pre-Trial Chamber II, "First Decision on the Prosecutor's Requests for Redactions and Other Related Requests", 1 October 2013, ICC-01/04-02/06-117-Conf-Red, para. 36; "Second Decision on the Prosecutor's Requests for Redactions", 15 November 2013, ICC-01/04-02/06-145-Conf-Red, para. 24; "Third Decision on the Prosecutor's Requests for Redactions", 5 December 2013, ICC-01/04-02/06-165-Conf-Red, para. 27 (wherein these decisions anonymity has been granted for 9 witnesses bringing the total number of Prosecutor's witnesses known to the Defence to 38); ICC-01/04-02/06-282, para. 23.

⁵⁶ Pre-Trial Chamber I, ICC-01/04-02/06-1-Red-tENG, paras 48-64; Pre-Trial Chamber II, ICC-01/04-02/06-36-Red, paras 63-66, 70, 72, 74, 75, 76, 80; DRC-OTP-2054-6846, at 6867.

⁵⁷ See for example, "Consolidated Report on Investigations Conducted by the United Nations Joint Human Rights Office (UNJHRO) into Grave Human Rights Abuses Committed in Kiwanja, North

charges he is facing and the potential lengthy sentence that he might face if the charges against him are confirmed,⁵⁸ one cannot rule out the possibility of him influencing, threatening or intimidating witnesses and victims and/or their family members. This conclusion is strengthened by the fact that he has also the financial means to carry out these acts.⁵⁹ Accordingly, if Mr. Ntaganda were to be released, the risk would increase that he might succeed in exerting pressure on those witnesses to change their testimony, either directly or indirectly, through his loyalist or his family members. These factors were relevant for the Single Judge's consideration in her previous decision, and in the context of the present review, there is no available information to the contrary, which prompt her to rule otherwise.

39. In light of these considerations, the Single Judge finds that the requirement of article 58(1)(b)(ii) of the Statute is fulfilled insofar as the continued detention of Mr. Ntaganda remains necessary to ensure that he does not obstruct or endanger the investigation or the Court's proceedings.

40. Finally, since the requirements of article 58(1)(b) of the Statute are in the alternative and the Single Judge has not considered sub-paragraph 1(b)(iii) in the 18 November 2013 Decision, she finds no reason to address it in the present decision.

Kivu, in November 2008", 7 September 2009, in particular paras 24 and 26; also 2011 Group of Experts Report, pp. 82-83, 85, 123-124, 149-150; Midterm Report, paras 129-130.

⁵⁸ See paras 30-31 above.

⁵⁹ Pre-Trial Chamber II, ICC-01/04-02/06-147, paras 54-55.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) **decides** that Bosco Ntaganda shall continue to be detained; and
- b) **decides** that the 120 days period for review set out in rule 118(2) of the Rules shall start running as of the date of notification of this decision.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Monday, 17 March 2014

At The Hague, The Netherlands