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Date: **20 August 2013**

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public redacted version

Defence application for the interim release of Mr Bosco Ntaganda

Source: Defence team for Mr Bosco Ntaganda

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

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REGISTRY

Registrar

Mr Herman von Hebel

Detention Section

Mr Harry Tjonk

SUBJECT-MATTER OF THE APPLICATION

1. Pursuant to article 60(2), the Defence seeks the interim release of Mr Bosco Ntaganda for the duration of the present proceedings. The Defence submits that the conditions set forth in article 58(1)(b) are not met and hence Mr Ntaganda's detention finds no justification.
2. The Defence is still not in receipt of all of the material and submissions advanced by the Prosecution in support of its two applications for the issuance of warrants of arrest,¹ and as such reserves 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).²

PROCEDURAL BACKGROUND

- Mr Ntaganda's voluntary surrender

3. On 12 January 2006, the Prosecution submitted a first sealed application for a warrant for Mr Bosco Ntaganda's arrest ("First Application").³
4. On 25 and 27 January 2006, the Prosecution submitted the further information and materials⁴ directed by Pre-Trial Chamber I on 20 January 2006.⁵
5. On 22 August 2006, Pre-Trial Chamber I issued a first sealed warrant for Mr Ntaganda's arrest.⁶
6. On 28 April 2008, Pre-Trial Chamber I decided to unseal and make public the warrant of arrest issued by the Court in August 2006.⁷

¹ See for example annexes 10.1, 11.1, 13.1, 14.1, 15.1, 16.1, 17.1, 18.1, 19.1, 20.1, 26.2 in support of the Second Application and annex 8 (v) in support of the First Application.

² ICC-01/05-01/08-403, para. 33; ICC-01/05/01/08-323, para. 1.

³ ICC-01/04-02/06-60-Conf-Red.

⁴ ICC-01/04-02/06-79-Conf-AnxA-Red and ICC-01/04-02/06-79-Conf-AnxB-Red.

⁵ ICC-01/04-102-Red.

⁶ ICC-01/04-02/06-2-tENG.

⁷ ICC-01/04-02/06-18.

7. On 14 May 2012, the Prosecution submitted a second application for a warrant of arrest ("Second Application").⁸
8. On 13 July 2012, Pre-Trial Chamber II issued a second warrant for Mr Ntaganda's arrest.⁹
9. On 18 March 2013, Mr Ntaganda presented himself at the United States Embassy in Kigali, Rwanda, for the purposes of his voluntary surrender to the Court.
10. On 20 March 2013, Mr Ntaganda met with a representative of the Court at the United States Embassy in Kigali and confirmed his desire to be transferred to The Hague to appear before a judge.¹⁰
11. On 22 March 2013, Mr Ntaganda was transferred to the seat of the Court in The Hague. Thenceforth, Mr Ntaganda has remained in custody at the Court's detention centre in The Hague.
12. By decision of 12 April 2013, the Registrar declared Mr Bosco Ntaganda provisionally indigent pursuant to regulation 85(1) of the Regulations of the Court.¹¹
13. On 18 April 2013, Mr Desalliers was appointed Lead Counsel for Mr Ntaganda.¹²

⁸ ICC-01/04-02/06-61-Conf-Red.

⁹ ICC-01/04-02/06-36-RED.

¹⁰ [REDACTED].

¹¹ ICC-01/04-02/06-48-Anx.

¹² ICC-01/04-02/06-52-AnxII. Mr Desalliers' appointment was registered in the record of the case on 25 April 2013 (ICC-01/04-02/06-52).

- Disclosure to the Defence of the “further information and materials” submitted by the Prosecution on 25 and 27 January 2006

14. In May 2013, the Defence requested the Prosecution to disclose two documents filed as confidential, *ex parte* on 25 and 27 January 2006, wherein it transmitted to the Chamber the “further information and materials” in sustenance of the First Application.¹³
15. On 21 June 2013, the Prosecution sought the redaction of certain information from the two documents, so as to disclose a confidential redacted version to the Defence.¹⁴
16. On 4 July 2013, the Defence took objection to part of the Prosecution’s request.¹⁵
17. On 16 July 2013, the Single Judge of Pre-Trial Chamber II allowed certain redactions requested by the Prosecution on 21 June 2013¹⁶ and ordered that a confidential redacted version be furnished to the Defence.¹⁷
18. Having received the “further information and materials” on 25 and 27 January 2006, the Defence noticed that a public version of the two documents had been registered in the Lubanga case on 25 April 2006 and that the documents were publicly available on the Court’s website. In *Lubanga*, the public version of the documents had been filed in Annexes C and D of filing ICC-01/04-01/06-39, entitled “Submission of Redacted documents”.
19. The Prosecution could not have been unaware that a significant part of the information whose redaction it had sought had been made public in another case. The Chamber and the Defence, however, were unapprised of this fact, which delayed the filing of the present application, since the Defence had

¹³ ICC-01/04-02/06-74-Conf-AnxA-Red and ICC-01/04-02/06-74-Conf-AnxB-Red.

¹⁴ ICC-01/04-02/06-74-Conf.

¹⁵ ICC-01/04-02/06-76.

¹⁶ ICC-01/04-02/06-74-Conf.

¹⁷ ICC-01/04-02/06-78-Conf-Red.

perforce to acquaint itself with the information disclosed by the Prosecution in support of the First Application.

APPLICATION FOR THE INTERIM RELEASE OF MR NTAGANDA

20. Settled case-law is clear: “deprivation of liberty should be an exception and not the rule”.¹⁸
21. The Appeals Chamber of the Court affirmed that in contrast to the periodic review envisaged by article 60(3), a suspect’s initial application for interim release founded on article 60(2) requires appraisal *ab initio* of the material supporting the application for issuance of a warrant for said suspect’s arrest.¹⁹ In this regard, the Bench opined: “The power of the Pre-Trial Chamber is not conditioned by its previous decision to direct the issuance of a warrant of arrest. The Pre-Trial Chamber must inquire anew into the existence of facts justifying detention.”²⁰
22. Accordingly, at this stage in the proceedings, it rests with the Prosecution to establish the necessity for detention²¹ and the Defence must be afforded the opportunity to respond to the Prosecution arguments.
23. Further still, it must be recalled that a decision to confine or release a person in pursuance of both articles 60(2) and 58(1) does not entail exercise of discretion.²² In adjudication of an application for release, the Chamber must determine whether continued detention under article 58(1)(b) “appear[s]” necessary.”²³

¹⁸ See, for example, ICC-01/04-01/10-163, para. 33; ICC-01/05-01/08-321, para. 31; ICC-01/05-01/08-403, para. 36, footnote 50.

¹⁹ ICC-01/04-01/07-572, paras. 10-12; See also Judge Pikis’s dissent, ICC-01/05-01/08-323, para. 23.

²⁰ ICC-01/04-01/07-572, para. 10.

²¹ Article 58(1); See also ICC-01/04-01/07-330, p. 7; ICC-01/04-01/07-602, p. 4; Judge Pikis’s dissent, ICC-01/05-01/08-323, para. 24.

²² See, for example, ICC-01/04-01/06-824, para. 134; ICC-01/04-01/10-163, para. 37.

²³ ICC-01/04-01/07-572, para. 21.

24. Lastly, the Appeals Chamber affirmed that the provisions of the Statute relevant to detention, like every other provision of it, must be interpreted and applied in accordance with “internationally recognised human rights”.²⁴
25. The Defence presents the submissions hereunder to the Chamber on the foundation of such principles.

1. THE WARRANT OF ARREST DATED 22 AUGUST 2006

26. In its First Application of 12 January 2006 for the issuance of a warrant of arrest, the Prosecution contended that the three conditions laid down in article 58(1)(b) are met to justify the arrest and detention of Mr Ntaganda.²⁵
27. In its decision on the Prosecution’s First Application, the Pre-Trial Chamber found: “[TRANSLATION] in spite of the criminal proceedings instituted against him in the DRC, Bosco Ntaganda [is] still at large and currently [fighting] the FARDC in Ituri District, having refused to endorse the regional peace process”.²⁶ It further noted that given that Mr Ntaganda “[TRANSLATION] ranks among the principal MRC military commanders at war with the FARDC in Ituri District, [he] could be in a position to obstruct or endanger the investigation, *inter alia* by threatening potential witnesses”.²⁷
28. The Defence submits that the Prosecution arguments advanced in 2006 in support of its First Application are unfounded and that the current situation, fundamentally different from that described by the Prosecution on 22 August 2006, does not warrant Mr Ntaganda’s continued pre-trial detention.
29. In any event, in the instant case, the interests protected by the provisions of article 58(1)(b) may be safeguarded by an alternative to deprivation of liberty.

²⁴ICC-01/04-01/07-572, para. 15 (article 21(3) of the Statute); ICC-01/05-01/08-323, para. 28.

²⁵ ICC-01/04-02/06-60-Conf-Red, paras. 200-203.

²⁶ ICC-01/04-02/06-1-Red, para. 64.

²⁷ ICC-01/04-02/06-1-Red, para. 65.

(i) The Prosecution has not established that the arrest is necessary to guarantee Mr Ntaganda's appearance

- The Prosecution arguments

30. The Prosecution argues that Mr Ntaganda will not appear before the Court voluntarily unless compelled. In sustenance of that claim, the Prosecution alleges that: (1) Mr Ntaganda declined the offer made by the Congolese government of integration into the FARDC and participation in the peace process in December 2004; (2) he was a member of the MRC from early 2005 and evaded location and arrest by the Congolese authorities, subsequent to a warrant for his immediate appearance [*mandat d'amener*] dated 25 February 2005 and a warrant for his arrest dated April 2005; and (3) in May 2005, he attacked the FARDC forces in Bunia.
31. All such allegations are bereft of evidentiary support. In fact, the Prosecution leads no evidence to substantiate the claims, as the absence of any reference in paragraphs 201 *et seq.* and paragraph 32 of the First Application attests; no information or further material on the matter is furnished in the Prosecution submissions concerning its further information and materials of 25 and 27 January 2006.²⁸
32. Furthermore, even were they to be established – which the Defence vigorously contests – such events antecedent to 2006 are immaterial to a determination on the current necessity of Mr Ntaganda's detention. Trial Chamber II so ruled in *Ngudjolo*: events which had occurred several years earlier were insufficient to establish the necessity for detention.²⁹
33. As regards the three factors propounded by the Prosecution in 2006, the Defence points out that the Prosecution is now itself alleging that:

²⁸ ICC-01/04-02/06-74-Conf-AnxA-Red and ICC-01/04-02/06-74-Conf-AnxB-Red.

²⁹ Oral decision of Trial Chamber II, ICC-01/04-02/12-T-3-FRA, p. 4, line 24 to p. 5, line 5.

(1) Mr Ntaganda was no longer acting as MRC commander in Ituri District³⁰ and (2) sequential to issuance of the first warrant of arrest, Mr Ntaganda joined the FARDC and took part in the peace process in the DRC.³¹

34. In spite of the changed circumstances, known to the Prosecution at the time of filing its Second Application in 2012, it did not update the material substantiating its contention that Mr Ntaganda's detention was warranted despite the opportunity to do so. The Prosecution merely adverted to the application filed in 2006 at paragraph 143 of its Second Application.
35. Apprised that these factors were no longer material, the Prosecution was duty-bound to impart to the Chamber any information which it considered necessary to justify the issuance of a warrant of arrest.³² Instead, the Prosecution stated on 15 May 2012 that "the circumstances that led the Pre-Trial Chamber to issue a warrant of arrest on 22 August 2006 still subsist."³³
36. However, the considerable changes to Mr Ntaganda's situation since 22 August 2006 cannot be disregarded.
37. Indeed, [REDACTED],³⁴ [REDACTED].³⁵
38. The Prosecution notes in this connection that Mr Ntaganda held the rank of General in the DRC national army (FARDC) as of early 2009 and in such capacity took part in joint peacekeeping operations with MONUC/MONUSCO.³⁶

³⁰ The Prosecution submitted the information to the Chamber on 9 May 2008: ICC-01/04-02/06-19, p. 3/4.

³¹ ICC-01/04-02/06-61-Conf-Red, paras. 21-22.

³² *Supra*, footnote 21.

³³ ICC-01/04-02/06-61-Conf-Red, para. 143.

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ ICC-01/04-02/06-61-Conf-Red, paras. 21-22; [REDACTED].

39. On 6 July 2012 the President of the DRC ordered that Mr Ntaganda be dismissed from the DRC Armed Forces.³⁷ Mr Ntaganda surrendered eight months thereafter, once he had planned his voluntary surrender to ensure that it took place in conditions guaranteeing its effectiveness and security. Mr Ntaganda never sought to evade justice and surrendered when he was in a position to do so.
40. The Prosecution confirmed to the Chamber that it had been informed of Mr Ntaganda's place of residence,³⁸ which, in any case, he had never sought to conceal.

- The guarantee of Mr Ntaganda's appearance

41. Mr Ntaganda's willingness to cooperate cannot be disputed at this stage of the proceedings: he surrendered voluntarily to the Court and on numerous occasions stated his desire to appear before a judge.³⁹
42. [REDACTED].⁴⁰ [REDACTED].⁴¹
43. [REDACTED].⁴²
44. Manifestly, had Mr Ntaganda harboured the intention to evade justice, he would not have surrendered voluntarily to the Court.
45. It bears recalling that the Pre-Trial Chamber's holding in *Bemba* – "[t]he risk of absconding increases after arrest, especially when the applicant learns about the charges he is facing and the possible sentence that may result if found guilty"⁴³ – is inapplicable in this cause, since Mr Ntaganda surrendered voluntarily to the Court. Moreover, ICTY jurisprudence has on several

³⁷ Order no. 13 dismissing certain army officers, signed by President Joseph Kabila on 6 July 2012.

³⁸ ICC-01/04-T-8-Red-FRA, p. 15, lines 18-20; ICC-01/04-02/06-74-Conf-AnxA-Red, para. 16; ICC-01/04-02/06-61-Conf-Red, paras. 20-23.

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ ICC-01/05-01/08-403, para. 47.

occasions acknowledged that such an argument made *in abstracto* cannot be raised against an accused.⁴⁴ In any event, Trial Chamber II has stated that the gravity of the alleged crimes *simpliciter* cannot sanction denial of release.⁴⁵

46. Mr Ntaganda has, moreover, undertaken to appear in the proceedings instituted against him before the International Criminal Court.⁴⁶
47. It must be noticed that Mr Ntaganda is considered indigent by the Court;⁴⁷ hence he does not possess the financial resources to enable him to abscond justice. What is more, he is subject to the sanctions regime laid down by United Nations Security Council resolution 1596 of 18 April 2005, which imposes a travel ban and an asset freeze.⁴⁸ Lastly, Mr Ntaganda does not hold a passport or other travel document.

(ii) The Prosecution has not established that the arrest is necessary to guarantee that Mr Ntaganda will not obstruct the investigation or the Court proceedings

48. In 2006, the Prosecution asserted that Mr Ntaganda was in a position to harm witnesses and victims, particularly those living in the Ituri region.⁴⁹
49. The Prosecution's claims set forth at paragraph 202 of the First Application are general and unsubstantiated. Since the burden is cast on the Prosecution to establish the necessity of detention, such claims, which are wholly unsupported, cannot succeed here, particularly since they pertain to years antecedent to 2006.

⁴⁴ *The Prosecutor v. Milan Martić, Decision on Second Motion for Provisional Release*, 12 September 2005, para. 29; *The Prosecutor v. Jadranko Prlić et al., Order on Provisional release of Jadranko Prlić*, 30 July 2004, para. 29.

⁴⁵ ICC-01/04-01/07-965-tENG, para. 8.

⁴⁶ ICC-01/04-02/12-T-3-FRA, p. 5, lines 6-8. Mr Ngudjolo's statement to this effect was accepted by Trial Chamber II.

⁴⁷ Registrar's 12 April 2013 decision, ICC-01/04-02/06-48-Anx.

⁴⁸ S/RES/1596 (2005).

⁴⁹ ICC-01/04-02/06-60-Conf-Red, para. 202.

50. In its 6 March 2007 decision, the Pre-Trial Chamber found that Mr Ntaganda “[TRANSLATION] could be in a position to obstruct or endanger the investigation, *inter alia* by threatening potential witnesses”.⁵⁰
51. However, the Defence argues that none of the material relied upon by the Chamber in the decision on the first warrant for Mr Ntaganda’s arrest lend support to that finding:⁵¹
- The allegations set out at paragraph 201 of the Prosecution’s application are not justified by any reference.
 - Paragraph 16 of the “Further Information and Materials” brought by the Prosecution concerns its now redundant allegation that [REDACTED].
 - Lastly, the fear expressed by the Prosecution at the 2 February 2006 hearing⁵² that Mr Ntaganda might discover that he was the subject of an arrest warrant is clearly of no relevance at this stage in the proceedings.
52. When filing its Second Application in 2012, the Prosecution did not update the information cited in support of its claim that Mr Ntaganda’s detention was justified. No new material was put forward on that occasion; the Prosecution merely referred to the initial warrant of arrest.
53. Also noteworthy is that on 9 May 2008, in justification of the unsealing of the first warrant of arrest, the Prosecution stated that it and the Victims and Witnesses Unit had taken measures to protect witnesses concerned by said warrant.⁵³ The Pre-Trial Chamber accepted the Prosecution argument, stating:

⁵⁰ ICC-01/04-02/06-1-Red, para. 65.

⁵¹ ICC-01/04-02/06-1-Red, para. 65. The Defence notes that it only has a redacted version of the decision of paragraph 65 of this decision.

⁵² ICC-01/04-T-8-Red-FR, p. 15, lines 14-25 and p. 16, lines 1-7.

⁵³ ICC-01/04-02/06-19, p. 4.

“the unsealing of the warrant of arrest for Bosco Ntaganda will not endanger the witnesses of the DRC cases”.⁵⁴

54. In light of the foregoing, Mr Ntaganda’s pre-trial detention cannot be justified under article 58(1)(b)(ii).
55. Lastly, were the Chamber to order his interim release, Mr Ntaganda undertakes not to obstruct or endanger the investigations or the Court proceedings.

(iii) The Prosecution has not established that the arrest is necessary to guarantee that Mr Ntaganda will not continue with the execution of the crime charged

56. The Prosecution contends: “It can reasonably be anticipated that absent arrest, Bosco NTAGANDA, connected to the same historical context, will continue with the commission of crimes of the nature described in this application and other crimes falling within the jurisdiction of the Court.”⁵⁵ In support, the Prosecution alleges that Mr Bosco Ntaganda issued written death threats to United Nations peacekeepers, that he was responsible for an attack on MONUC in early 2004, and that at the time of filing the Prosecution application he belonged to the leadership of the MRC, whose objective was to destabilise eastern DRC.
57. Firstly, the Prosecution fails to advance any material to sustain such allegations,⁵⁶ which the Defence vigorously rebuts. The Prosecution submissions of 25 and 27 January 2006⁵⁷ are silent in this regard.
58. In any event, the Prosecution does not rehearse the allegation in its application for the issuance of a second warrant of arrest of May 2012⁵⁸.

⁵⁴ ICC-01/04-02/06-18, p. 5.

⁵⁵ ICC-01/04-02/06-60-Conf-Red, para. 203.

⁵⁶ ICC-01/04-02/06-60-Conf-Red, para. 203.

⁵⁷ ICC-01/04-02/06-74-Conf-AnxA-Red and ICC-01/04-02/06-74-Conf-AnxB-Red.

59. Further still, since Mr Ntaganda seeks release in host State territory,⁵⁹ the argument concerning his potential, continued commission of a crime within the jurisdiction of the Court is manifestly unfounded.

2. THE 13 JULY 2012 WARRANT OF ARREST

60. In its Second Application, the Prosecution merely claims that the circumstances which prompted Pre-Trial Chamber I to deliver on 22 August 2006 a warrant for Mr Ntaganda's arrest persist. On this basis, the Prosecution, offering no new information in support, submits that article 58(1)(b)(i) and 58(1)(b)(ii) criteria are met, *viz.*, that Mr Ntaganda's arrest is necessary to guarantee his appearance at trial and to guarantee that he will not obstruct the investigations.⁶⁰
61. As previously shown, the Prosecution's 20 May 2012 application propounds nothing to sustain the necessity of Mr Ntaganda's arrest within the meaning of article 58(1)(b).
62. A mere reference to the Chamber's findings and the arguments raised six years earlier cannot, as shown above, satisfy the requisite threshold to warrant pre-trial detention, particularly given the new developments purported by the Prosecution itself.⁶¹

3. SITE AND CONDITIONS OF INTERIM RELEASE

63. Mr Ntaganda wishes to be released in the territory of the Netherlands, the host State of the International Criminal Court. Desirous of making an active contribution to the preparation of his defence, Mr Ntaganda would thus be able to communicate readily with his defence team and attend court hearings concerning the case.

⁵⁸ ICC-01/04-02/06-61-Conf-Red, para. 143.

⁵⁹ *Infra*, paras. 63 to 65.

⁶⁰ ICC-01/04-02/06-61-Conf-Red, para. 143.

⁶¹ *Supra*, para. 26 *et seq.*

64. The Defence further submits that Mr Ntaganda's appearance can be guaranteed by the imposition of one or more of the conditions itemised in rule 119 which are available on the territory of the Netherlands. Thus, the Court will have the guarantees of that State, which to date has shown the utmost cooperation with the Court.⁶²

65. Lastly, Mr Ntaganda undertakes to comply fully with any conditions the Chamber attaches to his release.

4. CONCLUSION

66. In light of the foregoing, the Defence requests the interim release of Mr Ntaganda on the territory of the Netherlands.

67. Mr Ntaganda formally undertakes:

- To appear before the Court for the confirmation hearing and any other hearing which the Court orders;
- Not to obstruct or endanger the investigations or court proceedings;
- Not to leave Dutch territory for the duration of the proceedings; and
- To comply with any other conditions which the Pre-Trial Chamber considers necessary in accordance with rule 119.

⁶² For this, see the Appeals Chamber decision in *Čermak and Markač*, which held that the general level of cooperation of the authority with the International Tribunal is somewhat relevant to a determination as to whether the accused must be arrested; *The Prosecutor v. Čermak and Markač, Decision on Interlocutory Appeal against Trial Chamber's Decision Denying Provisional Release*, AC, 2 December 2004, para. 32.

Confidential, *ex parte* classification of the present application

68. The Defence files the present application as confidential, *ex parte* so as not to reveal information protected by the Court. The Defence shall, on even date, file a public redacted version.

FOR THESE REASONS, MAY IT PLEASE PRE-TRIAL CHAMBER TO:

GRANT this application;

ORDER the immediate interim release of Mr Ntaganda;

And, where necessary,

ORDER the application of those conditions which it considers necessary in accordance with rule 119.

[signed]

Mr Marc Desalliers, Lead Counsel for Mr Ntaganda

Dated this 20 August 2013, at The Hague, The Netherlands