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Date: **27 September 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

Prosecution's Response to the "Requête de la Défense aux fins de mise en liberté provisoire de M. Bosco Ntaganda" (ICC-01/04-02/06-87-Conf-Exp)

Source: **Office of the Prosecutor**

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Introduction

1. Bosco Ntaganda seeks interim release for the duration of the proceedings, claiming that his continued detention is not necessary.[1] He argues that the justifications for issuing the warrants of arrest against him were never, or are no longer, valid and gives a personal assurance that he will appear for the proceedings against him.

2. The Prosecution opposes this request in its entirety. Not only is it presented as an attack on past decisions of the Court to issue warrants of arrest, which is inappropriate in an Article 60(2) application, but the legal and factual justifications for this request are flawed. There are reasonable grounds to believe that Mr. Ntaganda will not appear unless he continues to be detained. Arrest warrants against Mr. Ntaganda were issued both in the DRC in 2005 and by the ICC in 2006 and 2012. There were international calls for his arrest, including an Interpol Red Notice issued in 2008. Mr. Ntaganda evaded arrest until March 2013 when he had no realistic choice but to surrender to the judicial authorities. He has shown that he can successfully avoid arrest over a prolonged period of time; in these circumstances, an eventual surrender is of little weight when assessing whether continued detention is necessary.

3. Nor are his arguments well-founded that he cannot travel and is indigent. Mr. Ntaganda allegedly owns property and businesses generating a substantial income and he has been linked to gold exploitation, giving him the means to travel. Moreover, with the open borders of the European Union ("EU"), Mr. Ntaganda can freely move throughout the EU Schengen area despite the UN and EU travel bans imposed on him.

[1] ICC-01/04-02/06-87-Conf-Exp, para.1.

4. Further, Mr. Ntaganda is accused of serious crimes that, if proven, may incur a substantial prison sentence. While getting safely out of the DRC and Rwanda may have been a motivation for his surrender, the possibility of a lengthy prison sentence is motivation to avoid the proceedings once the opportunity arises.

5. Lastly, and importantly, Mr. Ntaganda now knows the identity of a critical mass of witnesses who have cooperated with the Prosecution to provide evidence against him. He will continue to receive disclosure of the identity of additional witnesses by 1 November 2013. While the possibility for him to influence witnesses exists from the detention centre even in a monitored environment, there is unlimited possibility for him to do so if he is released. He would then have unrestricted access to persons, telephone, email and internet. It is critical to note that Mr. Ntaganda is known as "The Terminator". Witnesses, NGOs and the UN have alleged that he has killed persons perceived to be traitors. Allegations of this nature must weigh very heavily in favour of continued detention in this case.

Confidentiality

6. This present filing is classified as "Confidential" as it responds to a filing in which the Prosecution, Defence and Registry (Detention Section) are notified.[2] The Prosecution will file a public redacted version.

Procedural history

7. On 22 August 2006 Pre-Trial Chamber I issued the first arrest warrant under seal against Mr. Ntaganda.[3] On 28 April 2008, Pre-Trial Chamber I issued a public

[2] Although Mr Ntaganda's request was classified "Confidential – *ex parte*", it was in fact an *inter partes* filing for which a "Confidential" classification sufficed.
[3] ICC-01/04-02/06-2.

warrant of arrest against Mr. Ntaganda.[4] On 13 July 2012, Pre-Trial Chamber II issued a second public arrest warrant against Mr. Ntaganda.[5]

8. On 20 March 2013, Mr. Ntaganda met a representative of the Court at the United States Embassy in Kigali, Rwanda and confirmed his surrender to the Court.[6] He was transferred to the Court on 22 March 2013.[7] On 20 August 2013, Mr. Ntaganda submitted a request for provisional release ("Request").[8] On 26 August 2013, the Single Judge requested observations from the Prosecution and the Kingdom of the Netherlands on the Request.[9]

Prosecution's Submissions

9. Under Article 60(2), a person shall continue to be detained if the Pre-Trial Chamber "is satisfied that the conditions set forth in article 58, paragraph 1, are met". In reaching a decision under Article 60(2) the Pre-Trial Chamber must decide "in light of the material placed before it".[10]

10. Whilst the Pre-Trial Chamber's power is "not conditioned by its previous decision to direct the issuance of a warrant of arrest",[11] the factors underpinning the decision on a warrant of arrest may be the same as those for the decision under article 60 (2) of the Statute. In particular, "in a decision under article 60 (2) of the Statute, a Pre-Trial Chamber may refer to the decision on the warrant of arrest, without this affecting the *de novo* character of the Pre-Trial Chamber's

[4] ICC-01/04-02/06-18.
[5] ICC-01/04-02/06-36-RED-tFRA.
[6] [REDACTED].
[7] [REDACTED].
[8] ICC-01/04-02/06-87-Conf-Exp.
[9] ICC-01/04-02/06-92.
[10] ICC-01/04-01/07-572 (OA 4), para. 12, cited in ICC-02/11-01/11-278-Red (OA), para. 23.
[11] ICC-01/04-01/07-572 (OA 4), para. 10, cited in ICC-02/11-01/11-278-Red, paras 23, 27.

decision".[12] Moreover, the Appeals Chamber has confirmed that when assessing the need for continued detention a *prima facie* test of necessity is applied [13]

11. The Prosecution's submissions, set out below, accord with the three limbs of Article 58(1)(b) that "define[…] the legal framework within which justification of his detention may be examined".[14] They are argued in the alternative.[15]

I. <u>Article 58(1)(b)(i) - continued detention is necessary to ensure appearance at trial</u>

a. Mr. Ntaganda is likely to abscond if released from detention

12. Mr. Ntaganda's claim that his "*reddition volontaire*" before the Court expresses a "*volonté de collaborer … [in]contestée*"[16] is misleading. The Prosecution submits that his surrender to the US Embassy in Kigali was motivated by self-preservation. The UN Midterm Report of the Group of Experts on the Democratic Republic of the Congo ("Group of Experts' Midterm Report") suggests that Mr. Ntaganda surrendered because of imminent threat to his life:

> As his troops ran low on ammunition, Ntaganda fled into Rwanda. According to three loyalists, former M23 officers and soldiers who fought alongside him, Ntaganda feared that the Rwandan army soldiers deployed along the border would kill him. Makenga's deputy, Col. Innocent Kaina, a sanctioned individual, also told the Group that he had planned to kill Ntaganda. Two officers loyal to Makenga also reported that the latter had ordered his troops to kill Ntaganda.[17]

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[12] ICC-02/11-01/11-278-Red (OA), para. 27.
[13] ICC-01/04-01/07-572, OA4, para.21: *"[w]hat may justify arrest (and in this context, continued detention) under article 58(1)(b) of the Statute is that it must 'appear' to be necessary. The question revolves around the possibility, not the inevitability, of a future occurrence.[…]"*; para.24: "*The possibility of …absconding remains visible. No material was placed before the Pre-Trial Chamber revealing such a possibility as imaginary*."
[14] ICC-01/04-01/07-572 (OA 4), para. 12.
[15] ICC-01/04-01/06-824, para. 139, cited in ICC-01/04-01/07-572, para.20.
[16] ICC-01/04-02/06-87-Conf-Exp, paras 41, 42. *See also* paras 9, 39, 43-45.
[17] Midterm Report, 19 July 2013, S/2013/433, para. 26. *See also* http://www.bbc.co.uk/news/world-africa-21844332, BBC Africa 'Will Bosco Ntaganda's surrender bring peace to DR Congo?', 19 March 2013, citing Jason Stearns: "*His appearance at the US embassy suggests the Rwandan government forced him to hand himself in […] or he was so afraid of what would happen if they arrested him [or Makenga got a hold of him] that he made a run for the embassy". See also* J. Stearns, 18 March 2013, http://congosiasa.blogspot.co.uk/2013/03/amid-good-news-doubts.html: "*Why did Bosco surrender? His time was up. On February 24, an internal battle had broken out among the M23, pitting Bosco's wing against*

13. Even a purported "voluntary" surrender does not mean automatic adherence to, and respect for, Court processes. The overtly uncooperative nature of Mr. Ntaganda's history with the Court is indicative of his likely future cooperation with it. Five years elapsed between the unsealing of the Prosecution's first arrest warrant against Mr. Ntaganda on 29 April 2008[18] and his surrender to the US Embassy in Kigali on 18 March 2013. On several occasions during this "lengthy period of time",[19] the Registry and the Chamber noted that "*Bosco Ntaganda, malgré . . . un premier mandat d'arrêt délivré à son encontre par la Cour, est toujours en fuite*" and requested the DRC to help with his arrest.[20] Mr. Ntaganda: (a) refused to participate in the peace process in December 2004 and to be integrated into the *Forces Armées de la République Démocratique du Congo* ("FARDC");[21] (b) helped to create the *Mouvement Révolutionnaire Congolais* ("MRC") in early 2005 and evaded arrest by the Congolese authorities following the issuance of a Congolese arrest warrant in April 2005, and in May 2005 attacked FARDC forces in Bunia;[22] (c) from 2007 to 2009 led the '*Congrès national pour la défense du peuple*' ("CNDP") as Chief of Staff commanding forces that reportedly committed massacres in North Kivu;[23] and (d) [REDACTED].[24] Contrary to the Defence's assertions, five years of

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that of Sultani Makenga. While Bosco led a large group of soldiers – at least 500 were reported to have crossed the border on 14 March – he was short on ammunition. After weeks of fighting, he decided to run. […]The final straw, however, appears to have been the looming possibility of a peace deal, or at least Bosco's perception that one might take place. With an international arrest warrant looming over his head, and declarations by the Congolese government concerning his arrest, he knew that he would have no chance of re-integrating the Congolese army."; A. Halligan, BBC, 'DR-Congo, Bosco Ntaganda appears before ICC', 26 March 2013: *"some analysts have suggested his surrender was his last resort and only chance of staying alive after splits within the M23 rebels"*.

[18] ICC-01/04-02/06-18.

[19] ICC-01/04-02/06-73, para. 20.

[20] ICC-01/04-02/06-38-Corr, p. 3; *see also* ICC-01/04-02/06-31-Conf; *Letter dated 21 March 2005 from the Permanent Representative of the Democratic Republic of the Congo to the United Nations addressed to the President of the Security Council,* DRC-OTP-0154-0531, at 0531 ("[Mr.] TANGANDA [sic], the leader of the military wing of UPC, remains at liberty and continues to cause trouble in Ituri").

[21] ICC-01/04-02/06-60-Conf-Red, para.201.

[22] ICC-01/04-02/06-60-Conf-Red, para.201.

[23] *See e.g.* Consolidated Investigation Report of the UN Joint Human Rights Office (UNJHRO) into grave human rights abuses committed in Kiwanja, North Kivu, in November 2008, 7 September 2009;

Mr. Ntaganda evading justice[25] cannot be erased by his surrender six months ago.[26] The Chamber cannot be certain that, now that Mr. Ntaganda is in Europe without imminent threat to his life, he will not abscond.

14. As this is the first time the issue of a surrender will be considered in the context of an Article 60(2) decision,[27] the Prosecution draws the Chamber's attention to ICTY jurisprudence, which, contrary to the Defence's submission,[28] indicates that Chambers have critically assessed whether a surrender is truly voluntary, and even where it is, afford it little weight where the individual only surrendered after a long period of time.[29]

15. First, Chambers have held that the circumstances of a voluntary surrender, including the manner and timeliness,[30] and motive,[31] are important to determining the weight to be given to this factor. The Appeals Chamber in *Mrkšić* upheld the Trial Chamber decision "[h]aving noted that nothing had prevented

available at http://www.ohchr.org/Documents/Countries/Kiwanja_Report_September2009.pdf; see also http://www.hrw.org/news/2009/02/02/dr-congo-arrest-bosco-ntaganda.

24 [REDACTED].

25 ICC-01/04-02/06-73, para. 35.

26 *See* ICC-01/04-02/06-87-Conf-Exp, para. 67.

27 The Appeals Chamber in *Lubanga* did once reject a hypothetical argument that the suspect *would have* voluntarily surrendered to the Court had he had an opportunity to do so: ICC-01/04-01/06-824, 13 February 2007, para.138.

28 ICC-01/04-02/06-87-Conf-Exp, para. 45, fn. 44. The Prosecution notes that in the *Prosecutor v. Milan Martić*, "Decision on Second Motion for Provisional Release", 12 September 2005, IT-95-11-T, provisional release was denied on the basis that the accused evaded arrest for a prolonged period.

29 *See, e.g., Prosecutor v. Zoran Kupreškić et al.*, "Decision on motion for provisional release filed by Zoran Kupreskic, Mirjan Kupreskic, Drago Josipovic and Dragan Papic (joined by Marinko Katava)", 15 December 1997, IT-95-16-T; *Prosecutor v. Vinko Pandurević & Milorad Trbić*, "Decision on Vinko Pandurevic's application for provisional release", 18 July 2005, IT-05-86-PT, paras. 12, 16 and 18; *Prosecutor v. Dragoljub Kunarac & Radomir Kovač*, "Decision on request for provisional release of Dragoljub Kunarac", 11 November 1999, IT-96-23-T; *Prosecutor v. Milan Martić*, Decision on Motion for Provisional Release", 10 October 2002, IT-95-11-T; *Prosecutor v. Martić*, "Decision on Second Motion for Provisional Release", 12 September 2005, IT-95-11-T; *Prosecutor v. Mile Mrkšić*, "Decision on Provisional Release", 24 July 2002, IT-95-13/1-PT; *Prosecutor v. Mile Mrkšić*, "Decision on Appeal against refusal to grant provisional release", 8 October 2002, IT-95-13/1-AR65.

30 *Prosecutor v. Vinko Pandurević & Milorad Trbić*, 18 July 2005, IT-05-86-PT, para. 18: "*the demonstrated prior ability of the Accused to successfully avoid compliance with his legal obligations for substantial periods of time, until the moment of his choosing, makes his strong incentive to flee all the more potent.*"

31 *Prosecutor v. Milan Martić*, 10 October 2002, IT-95-11-PT, p.6.

the accused from voluntarily surrendering to the International Tribunal for over six years from the public disclosure of his indictment, doubted whether the accused could be treated as having in fact, voluntarily surrendered".[32] In *Martic*, which the Defence relies upon,[33] the Trial Chamber twice rejected the accused's requests for provisional release as it was not satisfied that his surrender was fully voluntary. It noted that the accused only surrendered after several years when it was impossible for him to successfully hide any longer,[34] circumstances which, the Prosecution submits, are similar to those in the present case.

16. Moreover, in *Martic*, the Trial Chamber noted there were several factors substantially weighing against the assumption that the accused did not pose any flight risk, including the fact he had shown "his capability of evading arrest for a prolonged period of time".[35]

17. In decisions where provisional release was granted and voluntary surrender was one of the factors considered, the decision is not based on this factor alone.[36] In the *Prlić* case, which the Defence relies upon in the Request,[37] there was a delay of

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[32] *Prosecutor v. Milan Lukić and Sredoje Lukić*, "Decision on Defence Appeal against Trial Chamber's Decision on Sredoje Lukić's Motion ror provisional release", 16 April 2007, IT-98-32/1-AR65.1, para. 17, referring to *Prosecutor v. Mile Mrkšić*, "Decision on Provisional Release**",** 24 July 2002, IT-95-13/1-PT, para.43, which was upheld on Appeal. *Prosecutor v. Mile Mrkšić*, "Decision on Appeal against refusal to grant provisional release", 8 October 2002, IT-95-13/1-AR65, paras.4, 8, 15-16. *See also Prosecutor v Pandurevic and Trbic*, Case No. IT-05-86-PT, Trial Chamber, "Decision on Vinko Pandurevic's Application for Provisional Release", 18 July 2005, para.16: The accused was a fugitive for more than 3 years and only had unsubstantiated and generalized reasons for failing to voluntarily surrender - very little weight was attributed to this factor.

[33] ICC-01/04-02/06-92-Conf-Exp, para.45.

[34] *See Prosecutor v Milan Martic,* Case No. IT-95-11-PT, 10 October 2002, pp.3- 4. *See also Prosecutor v Milan Martic,* Case No. IT-05-11-PT, 12 September 2005, pp.8 and 12; *Prosecutor v Pandurevic and Trbic,* Case No. IT-05-86-PT, 18 July 2005, para.18: whether a surrender is voluntary is a matter of fact.

[35] *See Prosecutor v Milan Martic,* Case No. IT-95-11-PT, pp.3-4. *See also Prosecutor v Milan Martic,* Case No.IT-95-11-PT, Trial Chamber, 12 September 2005, para.33.

[36] *See, e.g., Prosecutor v. Simić et al.*, "Decision on Simo Zaric's application for provisional release", 4 April 2000, IT-95-9-PT; *Prosecutor v. Prlić et al.*, "Order on provisional release of Jadranko Prlić", 30 July 2004, IT-04-74-PT; *Prosecutor v. Simić et al.*, "Decision on motions for re-consideration, clarification, request for release and applications for leave to appeal", IT-04-74-AR65.1, IT-04-74-AR65.2, IT-04-74-AR65.3, paras.26-28.

[37] ICC-01/04-02/06-87-Conf-Exp, para. 45, fn. 44.

only *five days* between the notification of the arrest warrant to the suspect and his voluntary surrender. The Chamber emphasized that the accused never attempted to go into hiding despite receiving indications that he was a suspect.[38] This contrasts to this case where Mr. Ntaganda was at large for nearly 7 years.[39]

18. Finally, the Appeals Chamber has previously accepted that "the gravity of the charges and the resulting expectation of a lengthy prison sentence are relevant factors for decisions on interim release",[40] and that "[e]vading justice in fear of the consequences that may befall the person becomes a distinct possibility; a possibility rising in proportion to the consequences that conviction may entail".[41] In this case, Mr. Ntaganda is charged with seven counts of war crimes and three counts of crimes against humanity.[42] These are serious crimes, warranting a lengthy sentence if convicted, which constitutes further incentive for Mr. Ntaganda to abscond. This risk does not disappear merely because Mr. Ntaganda surrendered to the Court,[43] particularly in light of the circumstances of his surrender and what the Prosecution believes to be the true motive.

b. Mr. Ntaganda has the means to abscond if released from detention

19. Appeals Chamber jurisprudence confirms that "[w]hat may justify arrest (and, in this context, continued detention) under article 58 (1) (b) of the Statute is that it must 'appear' to be necessary. The question revolves around the possibility, not the inevitability, of a future occurrence".[44] Thus, it is sufficient for the Chamber to

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[38] *Prosecutor v. Prlić et al.*, "Order on provisional release of Jadranko Prlić", 30 July 2004, IT-04-74-PT, paras.3 and 30.
[39] ICC-01/04-02/06-73, para.20.
[40] ICC-02/11-01/11-278-Red (OA), para. 54, citing *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-283 (OA), para.21.
[41] ICC-01/04-01/07-572 (OA 4), para.21.
[42] *See* ICC-01/04-02/06-2, ICC-01/04-02/06-36-Red.
[43] *See* ICC-01/04-02/06-87-Conf-Exp, para.45.
[44] ICC-01/04-01/07-572 (OA 4), para. 21, cited in ICC-02/11-01/11-278-Red (OA), para.56.

establish that it is *possible* that a suspect has the necessary assets to abscond, if that risk is established on the basis of concrete evidence.[45]

20. The Group of Experts' Report states in this respect:

> M23 engaged in extensive looting while in Goma in November 2012. M23 cadres and several politicians informed the Group that Ntaganda and the former president of M23, Jean-Marie Runiga Lugerero, had appointed loyal M23 members to positions in the Congolese customs offices at the border between Goma and Gisenyi, Rwanda, where they embezzled cash and other goods (see annex 2). […]. In a report by the Government of the Democratic Republic of the Congo, the value of goods stolen by M23 from government offices was estimated at more than $3 million (see annex 7).[46]

21. Mr. Ntaganda is also suspected to have been involved in the trade and looting of gold in 2002 and 2003, and as recently as in 2011.[47] In February 2011, media reports detail that eight persons were arrested in North Kivu in connection with the illegal purchase of gold from rebel groups, and that millions of dollars in cash and a Gulfstream Jet were seized. Persons working for Mr. Ntaganda allegedly carried parcels of gold nuggets from his personal mines in Ituri to the plane in exchange for money totaling 6.8 million USD.[48] During this same period, Mr. Ntaganda was thought to be making "about $15,000 per week" taxing minerals illegally smuggled over the border crossing between North Kivu and Rwanda.[49] He is also thought to own "a flour factory, a hotel, a bar and a cattle ranch outside

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[45] ICC-02/11-01/11-278-Red (OA), para.56.
[46] Group of Experts' MidtermReport, p.6 and paras.46-47.
[47] ICC-01/04-01/06-T-190-CONF-ENG-CT, DRC-OTP-2054-1447 (ENG; DRC-OTP-2054-1781 (FR)), pp.7-9, 17, 26-28; DRC-OTP-0126-0422, paras.130-134. See [REDACTED], DRC-OTP-0155-0145, at 0146: "Bosco [...] is said to be involved in the mining activities in Mongbwalu in northern Ituri".
[48] Lisa Clifford, "Bosco Ntaganda: the Terminator's golden business", *Radio Netherlands Worldwide*, 2 March 2011, http://www.rnw.nl/international-justice/article/bosco-ntaganda-terminator%E2%80%99s-golden-business; Fidel Bafilemba, "Eastern Congo's 'Terminator' Caught with Counterfeit Cash in Minerals Smuggling Scheme", *Enough Project*, 14 February 2011, http://www.enoughproject.org/blogs/eastern-congo-terminator-caught-counterfeit-cash-minerals-smuggling-scheme; "Still smuggling", *The Economist*, 10 February 2011, http://www.economist.com/node/18119207; "Four Americans Among Eight Arrested in Congo Gold-Smuggling Ring", *Fox News*, 8 February 2011, http://www.foxnews.com/world/2011/02/08/americans-arrested-gold-smuggling-congo/.
[49] "Final report of the Group of Experts on the Democratic Republic of the Congo", 2 December 2011, S/2011/738, DRC-OTP-2045-0800, p.124.

Goma",[50] a petrol station near Goma airport,[51] and control mining sites.[52] The Group of Experts has found that Mr. Ntaganda collaborated with East African regional networks of dealers to sell both real and counterfeit gold to international buyers.[53] To store this money, Mr. Ntaganda reportedly had "several bank accounts in Rwanda under the name of his wife, Akiki Irene".[54]

22. According to the Group of Experts' Midterm Report, in 2012, Mr. Ntaganda was reportedly earning "at least $50,700 per month" from cattle he owned,[55] and that access to funds of the M23 was available to Mr. Ntaganda even in February 2013.[56]

23. This information reveals that Mr. Ntaganda has access to funds. With no evidence to the contrary, the *possibility* of Mr. Ntaganda using these funds would be enough to reject any application, "[e]ven if there was no evidence that funds had been or definitely would be used for such purposes".[57]

24. As for the Registry's acceptance of Mr. Ntaganda's claim of indigence, it noted that this was only an "*examen préliminaire*" and a "*décision provisoire*" made "*dans l'attente des suites de l'enquête sur son indigence*".[58] The evaluation was made without an investigation, on short notice, to ensure the proper administration of

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[50] Penny Dale, "Profile: Bosco Ntaganda the Congolese 'Terminator'", *BBC News*, 18 March 2013, http://www.bbc.co.uk/news/world-africa-17689131.
[51] Final Report of the Group of Experts on the Democratic Republic of Congo, DRC-OTP-2045-0800, 2 December 2011, S/2011/738, para.601.
[52] "Final report of the Group of Experts on the Democratic Republic of the Congo", DRC-OTP-2045-0800, 2 December 2011, S/2011/738, p.149-151.
[53] "Final report of the Group of Experts on the Democratic Republic of the Congo". DRC-OTP-2045-0800, 2 December 2011, S/2011/738, paras.606-627.
[54] "Final report of the Group of Experts on the Democratic Republic of the Congo", DRC-OTP-2045-0800, 2 December 2011, S/2011/738, p. 151.
[55] "Interim report of the Group of Experts on the Democratic Republic of the Congo", S/2012/348, 21 June 2012, p.54, annex 3.
[56] Midterm Group of Experts' Report, para.18.
[57] ICC-01/04-01/10-283 (OA), para.25.
[58] ICC-01/04-02/06-48-Anx, p.2-3.

justice. In the absence of a more in-depth investigation,[59] these preliminary findings cannot be afforded great probative value. The Appeals Chamber confirmed in the *Gbagbo* case that a Registrar's provisional decision to grant legal aid does not constitute "conclusive finding as to . . . indigence".[60]

25. Finally, the Defence notes that Mr. Ntaganda is "*interdi[t] de voyager*" by the UN, and "*ne dispose d'aucun passeport*".[61] Even without a passport, and despite the UN travel ban, Mr. Ntaganda can still travel within the Schengen area of the European Union,[62] allowing him to "move from one country to another each time he suspects that he is at risk of being apprehended" and thus "mak[ing] it easier for him to flee".[63] An "analysis of all relevant factors taken together"[64] shows that Mr. Ntaganda is likely to abscond, and has the means to do so.

II. <u>Article 58(1)(b)(ii) - continued detention is necessary to ensure he does not obstruct or endanger the investigation or the Court proceedings</u>

26. If released, Mr. Ntaganda has the motive and means to obstruct or endanger the investigation or the Court proceedings.

(a) Mr. Ntaganda's influence and contacts in the region

27. Although Mr. Ntaganda may now be geographically distant from where the alleged crimes were committed, he continues to have influence in the region. Despite the dissolution of Mr. Ntaganda's faction of the M23 he maintains close

[59] *See* ICC-01/04-02/06-48-Anx, p.3 ("QUE la présente décision sera réexaminée une fois que l'enquête sur les avoirs du Demandeur aura été complétée en application des dispositions de la norme 85.2 du Règlement de la Cour").
[60] ICC-02/11-01/11-278-Red (OA), para.57.
[61] ICC-01/04-02/06-87-Conf-Exp, para.47.
[62] Comprising 26 countries: European Commission, "Schengen Area", http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/. Schengen Agreement of 1985 on Schengen cooperation, as incorporated into the EU legal framework by the 1997 Treaty of Amsterdam: *http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration*.
[63] ICC-01/04-01/10-163, para.57.
[64] ICC-01/05-01/08-323, (OA), para.55.

ties to many of his former soldiers in the DRC, including Col. Baudoin Ngaruye, Col. Innocent Zimurinda, Lt Col. Eric Badege, Col. Jomba Gakumba, Bishop John Rucyahana, Gafishi Semikore and Theo Bitwayiki.[65] The Group of Experts reported in 2011 that a number of former FPLC reintegrated into a special battalion in Masisi under a commander loyal to Mr. Ntaganda. There were also reports of integration of former FPLC into FARDC battalions loyal to Mr. Ntaganda.[66] Former CNDP were also integrated in the FARDC in 2010. It was reported in 2011 that every FARDC mission in North and South Kivu required Mr. Ntaganda's endorsement,[67] and that he also controlled police forces in North Kivu under command of former CNDP officers.[68]

28. As late as February 2013, Mr. Ntaganda had the ability to mobilise large numbers of men to do his bidding:

> [Mr.] Ntaganda maintained regular contacts with a former member of the Congrès national pour la défense du people, Col. François Mudahunga , the commander of the 812th regiment of the Congolese army, based in Kitchanga. In collaboration with Mudahunga, Ntaganda sent some 50 men to prepare for his eventual escape to Masisi and to collect ammunition from the weapons caches that he maintained there.[69]

29. Mr. Ntaganda escaped to Rwanda in March 2013 with the help of "an escort" and "his family",[70] who were willing to support Mr. Ntaganda despite his imminent surrender. It is implausible to suggest that the reserve of control and influence over troops and supporters in the DRC that Mr. Ntaganda built up over a decade of fighting[71] will subside quickly.

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[65] Group of Experts Midterm Report, paras.14, 16, 17.
[66] Final Report of the Group of Experts on the Democratic Republic of Congo, DRC-OTP-2045-0800, 2 December 2011, S/2011/738, paras.239-240.
[67] Final Report of the Group of Experts on the Democratic Republic of Congo, DRC-OTP-2045-0800, 2 December 2011, S/2011/738, paras.13, 297-311.
[68] Final Report of the Group of Experts on the Democratic Republic of Congo, DRC-OTP-2045-0800, 2 December 2011, S/2011/738, paras.307-308.
[69] Group of Experts' Report, para.20.
[70] Group of Experts' Report, para.27.
[71] *See* "DR Congo: UN experts outline sources of funding for armed rebels", *UN News Service*, 30 December 2011, DRC-OTP-0236-0005, at 0005 ("General Ntaganda . . . was able to take control of the

(b) Mr. Ntaganda's ability to contact persons in the region

30. While his incarceration provides certain limits to his capacity to act against witnesses, Mr. Ntaganda retains the ability to communicate from the ICC detention centre. If Mr. Ntaganda is released there are obviously no means of curtailing his communications and ability to act against witnesses.[72]

(c) Mr. Natganda's knowledge of witnesses' identities

31. By 2 September 2013, the Prosecution disclosed the identity of a number of witnesses upon which it intends to rely. Given the seriousness of the charges against him, Mr. Ntaganda has a strong motivation to intimidate, bribe and/or threaten witnesses, victims, or members of their families either directly or indirectly through his supporters in the DRC. The Appeals Chamber in the *Gbagbo* case confirmed that the disclosure of evidence to a suspect "amplified" the risk to the investigation and the proceedings in case of release, noting that "[d]isclosure enhances the detainee's knowledge of the Prosecutor's investigation. Therefore under article 58 (1) (b) (ii) of the Statute it may be a relevant factor".[73]

(d) Mr. Ntaganda's history of violence

32. Mr. Ntaganda is referred to by many sources as the "Terminator";[74] he is considered violent and has executed persons.[75] He was allegedly involved in the assassinations of individuals perceived to be "enemies" of the UPC-FPLC.[76]

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process and position officers loyal to him throughout North and South Kivu"); *Decision of the Council of the European Union enforcing UN Security Council resolution 1533 (2004)*, 30 November 2005, DRC-OTP-0155-0158, at 0163: "[Mr. Ntaganda] [e]xerce une influence sur la politique suivie par cette organisation et continue d'assurer le commandement et le contrôle des forces de l'UPC/L".

[72] See ICC-01/04-01/06-586-t-EN, p.6 where PTCI denied a request for provisional release based in part on the risk posed by unmonitored communications.

[73] ICC-02/11-01/11-278-Red, para.65.

[74] *See*, *e.g.*, Michelle Nichols, and Louis Charbonneau, "Exclusive: Fearing death, Congo's 'Terminator' fled with help of family", *Reuters*, 28 June 2013, http://www.reuters.com/article/2013/06/28/us-congo-democratic-un-ntaganda-idUSBRE95R10F20130628; Penny Dale, "Profile: Bosco Ntaganda the

33. As previously stated in the first warrant of arrest application, after alleged written death threats were made against peacekeepers belonging to *La Mission de l'Organisation des Nations unies en République démocratique du Congo* ("MONUC"), Mr. Ntaganda was said to be responsible for the early 2004 attack on MONUC troops outside Bunia, resulting in the death of one peacekeeper.[77] The Group of Experts also reported that Mr. Ntaganda organised the assassination of a senior FPLC figure in February 2011,[78] and was allegedly behind two assassination attempts of other high-ranking FARDC senior officers.[79]

III. Article 58(1)(b)(iii) - continued detention is necessary to prevent the commission of crimes

34. Mr. Ntaganda's alleged past behavior demonstrates that, not only is he liable to commit crimes within the jurisdiction of the Court, but that if he is released he may be liable to commit crimes in violation of Article 70.

Congolese 'Terminate'", *BBC News*, 18 March 2013, http://www.bbc.co.uk/news/world-africa-17689131; DRC-OTP-0155-0158, at 0163: "Connu sous le nom de 'Terminator'".

[75] *See*, Witness P0046, DRC-OTP-2054-6846, p.22: "One of the executions was carried out by someone close to Mr. Lubanga, Commander Bosco, who was well known for using combat methods or recruitment methods that were particularly -- particularly -- I apologise. I'm looking for the right word. He was well known for violent methods"; Statement of P-0016, DRC-OTP-0126-0422, at 0468: "NTAGANDA a tué KASONGO, CÉSAR, PAPY NDONGALA et Jean-Marie, le cousin de DILANGU pendant qu'il était ivre. Il a tué PAPY lui-même, et César il a tué avec trois coups de balles dans le ventre. Ils étaient tous des militaires. Il a tué KASONGO juste devant l'Hôtel Ituri, mais j'ignore la raison."; [REDACTED], DRC-OTP-0208-0284, at 0290 : "Bosco l'a alors froidement abattu d'une bale dans la tête."

[76] P-0016, DRC-OTP-0126-0422, paras.210, 227.

[77] *See* DRC-OTP-01/04-02/06-60-Conf, para.203. *See also* [REDACTED], 2 December 2003, DRC-OTP-0004-0446, at 0046: "the delegation produced a […] letter supposedly written by Commander Bosco, instructing UPC G4 to perpetrate the assassination of certain persons mentioned by names, including some UPC members, some MONUC civilian staff as well as the Director of MONUC office in Ituri"; *see also* Thierry Vircoulon, "After MONUC, Should MONUSCO "Continue to Support Congolese Military Campigns", *International Crisis Group*, 19 July 2010, DRC-OTP-0236-0007, at 0009 "Ntaganda is [..] accused of the murder of humanitarian and MONUC personnel and of involvement in the massacre of 150 villagers in Kiwanja in November 2008".

[78] Final Report of the Group of Experts on the Democratic Republic of Congo, DRC-OTP-2045-0800, 2 December 2011, S/2011/738, para.238.

[79] Final Report of the Group of Experts on the Democratic Republic of Congo, DRC-OTP-2045-0800, 2 December 2011, S/2011/738, paras.303-304.

35. Mr. Ntaganda's actions in the last decade indicate the extent to which he has felt himself able to act with total impunity. As indicated above, in 2004, Mr. Ntaganda refused to be integrated in the FARDC and to join the peace process. Instead, in 2005 he helped create a new militia group, the MRC, which attacked FARDC forces in May 2005, and, following written death threats against UN MONUC peacekeepers. Mr. Ntaganda was CNDP Chief of Staff from early 2007 to early 2009, when CNDP forces under his command were widely reported to have committed a number of crimes including killings of at least 40 civilians on 16 January 2008 at Kalongo and up to 150 people at Kiwanja in North Kivu, on 5 to 6 November 2008. After the integration of CNDP and Mr. Ntaganda into the FARDC, there were reports of their involvement in sexual crimes and pillaging in the Kivus.[80] In April 2012, Mr. Ntaganda "led a mutiny [from the Congolese army] and became one of the main leaders of a new Rwanda-backed rebel group, the M23. M23 fighters have been responsible for widespread war crimes, including summary executions, rapes, and forced recruitment of children".[81] The issuance of the two arrest warrants seems to have done nothing to halt atrocities allegedly committed by him or by his subordinates.

36. In short, Mr. Ntaganda, although being charged with crimes relating to a concise time period, has been implicated in atrocities spanning "over 10 years",[82] and there is no reason to suggest he would stop now if given the opportunity.

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[80] http://www.hrw.org/news/2009/02/02/dr-congo-arrest-bosco-ntaganda and the Joint OHCHR/MONUC Human Rights Office in the DRC Consolidated Report on Investigations Conducted by the United Nations Joint Human Rights Office (UNJHRO) into Grave Human Rights Abuses Committed in Kiwanja, North Kivu In November 2008 : http://monusco.unmissions.org/LinkClick.aspx?fileticket=ALdPEPIXX0g%3D&tabid=10770&mid=13783&language=en-US

[81] Human Rights Watch, "Bosco Ntaganda", http://www.hrw.org/topic/international-justice/bosco-ntaganda. *See also* ICC-01/04-02/06-35-Conf-Anx2, para.11.

[82] Human Rights Watch, "Bosco Ntaganda", http://www.hrw.org/topic/international-justice/bosco-ntaganda.

37. The Prosecution need not determine exactly what crimes Mr. Ntaganda may commit. The Appeals Chamber has held that, '[t]he reason for detention under article 58 (1) (b) (iii) of the Statute is the risk that further crimes may be committed – therefore the issue is *future* crimes, which by their nature cannot be specified in detail".[83] The Appeals Chamber has confirmed that the Chamber may take into account the nature of the crimes with which he has been already charged.[84]

IV. <u>The guarantees are insufficient to mitigate the risks under Article 58(1)(b)</u>

38. Mr. Ntaganda's desire to be released to assist in the preparation of his defence[85] should not be persuasive, because the proffered guarantee to respect the Court's process[86] is insufficient to mitigate the risks arising under Article 58(1)(b). Similarly, the Prosecution does not believe that any Rule 119 conditions proposed by The Netherlands would be enough to "mitigate[e] or negat[e] the risks".[87]

39. First, Mr. Ntaganda's personal guarantee cannot be determinative in assessing conditional release. Mr. Ntaganda has shown he is unwilling or unable to adhere to his agreements: on 4 April 2012 he deserted from the FARDC, breaking the 23 March 2009 Peace Agreement between the DRC government and the CNDP.[88] He also violated the arms embargo placed on him by the UN Arms Embargo Group implementing Security Council Resolution 1533 (2004).[89]

40. In addition, "personal guarantees" are not decisive at this Court; in the *Bemba* case the Defence advanced a list of personal guarantees, which the Pre-Trial Chamber "consider[ed]", but ultimately did not use in its determination on

[83] ICC-02/11-01/11-278-Red (OA), para.70 (original emphasis).
[84] ICC-02/11-01/11-278-Red (OA), para.70.
[85] ICC-01/04-02/06-87-Conf-Exp, para.63.
[86] ICC-01/04-02/06-87-Conf-Exp, para.67.
[87] ICC-01/05-01/08-631-Red, para.105.
[88] *See* http://www.iccwomen.org/publications/Peace_Agreement_between_the_Government_and_the_CNDP.pdf.
[89] DRC-OTP-0148-0285, at 0286.

interim detention.[90] Mr. Ntaganda's reference to Trial Chamber II taking into account the personal guarantee of Mr. Ngudjolo[91] is misleading as this was accepted *after* Mr. Ngudjolo's acquittal.

41. Second, Mr. Ntaganda has the ability to commit crimes and influence the Prosecution's ongoing investigation, particularly given his network of, and control over, supporters. As the Appeals Chamber has confirmed, "it is not an unreasonable prediction that phone calls or e-mails may be used to continue to contribute to the commission of crimes".[92]

V. <u>The Decision on the Application under Article 58 was reasoned adequately</u>

42. In the Request,[93] Mr. Ntaganda inappropriately challenges the Chamber's factual findings that "the arrest of Mr. Ntaganda still appears necessary . . . pursuant pursuant to article 58(l)(b)(i)-(iii)", contained within its second arrest warrant decision.[94] He alleges that the Prosecution, in its second arrest warrant application,[95] "*n'a pas . . . mis à jour les éléments présents au soutien de son allégation à l'effet que la détention de M. Ntaganda soit justifiée*",[96] implying that the Chamber made a finding based on inaccurate or incomplete information. This claim is unfounded in both fact and law and is irrelevant to the present application. Under Article 60 (2) a Chamber is called to make a fresh determination on the necessity of detention; this does not turn that assessment into a review of a Chamber's prior determination under Article 58.

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[90] ICC-01/05-01/08-475, para. 82; s*ee also* ICC-01/05-01/08-631-Red (OA 2), para.10; ICC-01/05-01/08-321, para.37; ICC-01/05-01/08-403, para.50; and ICC-02/11-01/11-180-Red, para.55.
[91] ICC-01/04-02/06-87-Conf-Exp, footnote 46.
[92] ICC-01/04-01/10-283 (OA), para.60.
[93] ICC-01/04-02/06-87-Conf-Exp, paras.34-38, 60-62.
[94] ICC-01/04-02/06-36-Red, para.80.
[95] ICC-01/04-02/06-61-Conf-Red.
[96] ICC-01/04-02/06-87-Conf-Exp, paras.34.

43. In fact, the Prosecution *did* supply the Chamber with updated factual information, in particular at paragraphs 14 to 23 of the second arrest warrant application. Further, the Chamber's detailed, reasoned, decision[97] took into account evidence that had changed since 2006.[98] Mr. Ntaganda's claims amount simply to a disagreement with the Chamber's anterior factual findings. An application pursuant to Article 60(2) is not the forum in which to bring up these grievances.

Relief

44. For the foregoing reasons, the Prosecution respectfully requests the Chamber to dismiss the Request and maintain Mr. Ntaganda's detention.

Fatou Bensouda,
Prosecutor

Dated this 27th day of September 2013
At The Hague, The Netherlands

[97] *See* ICC-01/04-02/06-36-Red, paras.77-81.
[98] ICC-01/04-02/06-36-Red, para.80.