Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/04-02/06**
Date: **20 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

Confidential – only available to the Prosecutor, Defence and Registry

Defence Reply to the *"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)"*, dated 6 September 2013

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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PROCEDURAL BACKGROUND

1. On 20 August 2013, the Defence for Mr Bosco Ntaganda filed the "Defence application for the interim release of Mr Bosco Ntaganda" ("the Application").[1]

2. On 26 August 2013, the Single Judge invited the Prosecution and the host State to present their observations on the Application.[2]

3. On 6 September 2013, the Prosecution responded to the Application ("the Response").[3]

4. On 13 September 2013, the Defence sought authorisation to reply to the Response in accordance with regulation 24(5) of the Regulations of the Court.[4]

5. On 18 September 2013, the Prosecution opposed the Defence request for authorisation to reply.[5]

6. On 19 September 2013, at 4.21 p.m., the Defence received notification of the Single Judge's decision authorising the Defence to file a reply within the time limit stipulated by regulation 34(c) of the Regulations of the Court.[6] Pursuant to this regulation, a reply shall be filed within ten days of notification of the Response, which was filed on 6 December 2013.

[1] ICC-01/04-02/06-87-Conf-Exp-tENG and ICC-01/04-02/06-87-Red-tENG.
[2] ICC-01/04-02/06-92.
[3] ICC-01/04-02/06-103-Conf.
[4] ICC-01/04-02/06-105-Conf.
[5] ICC-01/04-02/06-108-Conf.
[6] ICC-01/04-02/06-109-Conf, para.16.

7. However, the 10 day time-limit expired at 4 p.m., on 19 September 2013, that is, before the Defence received the decision of the Single Judge. Accordingly, the Defence sought authorisation from Pre-Trial Chamber II to file the present reply on 20 September 2013.

GENERAL OBSERVATIONS

8. The Appeals Chamber has confirmed that detention must be "considered in the context of the detained person's right to be presumed innocent",[7] a fundamental right guaranteed by article 66(1). Furthermore, the detained person must be given a real opportunity to contest the evidence presented in support of his or her detention.[8]

9. In the instant case, the Prosecution has in effect presented evidence that is devoid of any probative value in support of its Response, in particular press articles and NGO and UN reports.

10. In fact, most of the material upon which the Prosecution has grounded its Response is anonymous hearsay:[9] the Prosecution repeatedly cites three of the Reports of the Group of Experts on the Democratic Republic of the Congo, almost all of which are from anonymous sources.[10] The Prosecution also refers to reports from non-governmental organisations (NGOs) such as Human Rights Watch, International Crisis Group or Enough; various press articles

[7] ICC-01/05-01/08-2151-Red, para.40.
[8] See in respect of a detained person's right to contest his or her detention: ICC-01/05-01/08-323, Dissenting opinion of Judge Georghois M. Pikis, para. 29.
[9] ICC-02/11-01/11-432, para. 28: "[…] in the sense that insufficient information is available about who made the observation being reported or from whom the source (irrespective of whether the source is a witness interviewed by the Prosecutor or a documentary item of evidence) obtained the information."
[10] ICC-01/04-02/06-103-Conf, footnotes 17, 46, 49, 51, 52, 53, 54, 55, 56, 65, 66, 67, 68, 69, 70, 78 and 79.

(BBC, Reuters, Fox News, The Economist and Radio Netherlands); and even blogs,[11] which are essentially unverified anonymous hearsay.

11. In *Gbagbo*,[12] the Pre-Trial Chamber ruled that the Prosecution must, whenever possible, avoid reliance on anonymous hearsay, contained especially in press articles and NGO or UN reports. The Chamber emphasised that the fact the Prosecution heavily relied on NGO reports and press articles cannot "be presented as the fruits of a full and proper investigation by the Prosecutor in accordance with article 54(1)(a) of the Statute."[13] Although these conclusions were made in the context of the confirmation of charges, the Defence submits that the Prosecution's obligation to investigate incriminating and exculpatory circumstances equally in accordance with article 54(1)(a) of the Statute should also apply to material presented in support of an application under article 58(1).

12. Nonetheless, the Prosecution evidently did not undertake any serious investigation to verify the veracity of the information reported in the press articles and reports substantiating the Response, because it did not present any evidence of real probative value to corroborate this information.[14]

13. In the present case, such absence of corroboration precludes attachment of any probative value to the reports and press articles cited by the Prosecution in its Response because it is impossible for Mr Ntaganda to properly defend

[11] ICC-01/04-02/06-103-Conf, footnotes 17, 23, 48, 74, 77, 80, 81, 82 and 88.
[12] ICC-02/11-01/11-432, paras. 28-29 and 36.
[13] ICC-02/11-01/11-432, para. 35.
[14] The only two witness statements cited by the Prosecution concern P-0016 and P-0046 (ICC-01/04-02/06-103-Conf, footnotes 47, 75 and 76). The Defence refers to this issue in its observations: *infra*, para. 27.

himself against allegations from anonymous sources and the Chamber is unable to ascertain the reliability of these sources.

14. Accordingly, the Defence submits that the evidence presented by the Prosecution in support of its Response is insufficient to justify Mr Ntaganda's deprivation of liberty, in the absence of any substantive verification or corroboration by reliable evidence.

DEFENCE REPLY TO THE PROSECUTION ALLEGATIONS

- The alleged absconsion risk

15. The Defence strongly disputes the arguments raised at paragraphs 12 and 13 of the Prosecution Response. The doubts cast by the Prosecution over the voluntariness of Mr Ntaganda's surrender are pure speculation.

16. Furthermore, the Defence notes that at paragraph 13 of the Application, the Prosecution once again makes reference[15] to allegations which are not based on any reliable or credible evidence.

17. Lastly, it should be noted that contrary to the Prosecution's suggestion at paragraph 14 of its Response, the Defence relied on ICTY jurisprudence alone to demonstrate that the gravity of the accusations and the possible sentence cannot be raised *in abstracto* against an accused and do not *simpliciter* entail an increased risk of absconcion.[16]

[15] See ICC-01/04-02/06-87-Red-tENG, para. 26, and ICC-01/04-02/06-60-Conf-Red, para. 201.
[16] ICC-01/04-02/06-87-Red-tENG, para. 45, footnote 44.

- **The allegation that Mr Ntaganda has the financial resources to enable him to evade justice**

18. The Prosecution alleges at paragraphs 19 to 25 of the Response that Mr Ntaganda has substantial financial means to enable him to evade justice if released. The Prosecution particularly alleges that Mr Ntaganda was involved in smuggling gold and minerals and that he owns numerous businesses, and holds bank accounts in Rwanda. Finally, according to the information cited by the Prosecution, Mr Ntaganda earned more than US$ 100 000 a month alone from livestock and taxation on minerals illegally smuggled between North Kivu and Rwanda.[17]

19. The Defence strongly challenges all such allegations set out at paragraphs 19 to 25 of the Response, which have clearly not been verified by the Prosecution.

20. To support the allegation of Mr Ntaganda's involvement in the smuggling and looting of gold in 2002, 2003 and 2011,[18] the Prosecution relies on information which does not support such conclusions:

- The excerpt quoted by the Prosecution of the testimony of Witness P-0016 in *Lubanga* does not contain any allegation of Mr Ntaganda's involvement in any gold smuggling or looting whatsoever. The witness merely alleged that an FPLC military operation, in which Mr Ntaganda took part, was carried out at Mongwalu and that that town was a "gold mining town";[19]

[17] ICC-01/04-02/06-103-Conf, paras. 21-22.
[18] Evidence quoted at ICC-01/04-02/06-103-Conf, footnote 47.
[19] DRC-OTP-2054-1703, p. 17.

- The Prosecution cannot, moreover, rely on a witness statement (P-0016, DRC-OTP-0126-0422) which remains undisclosed to the Defence at the time of writing;[20]

- Finally, document DRC-OTP-0155-0145, dated 11 December 2003 and presented by the Prosecution as a MONUC report does not specify its author or its organisation of origin.[21] The mere statement in this document that "Bosco (…) is said to be involved in the mining activities in Mongbwalu in northern Ituri",[22] in addition to being anonymous hearsay, does not substantiate any involvement by Mr Ntaganda in gold smuggling or looting in 2002, 2003 and 2011;

- Besides, the press articles relied on by the Prosecution at paragraph 21 of the Response are devoid of any probative value. At the ICTY, the Trial Chamber in *Kupreškic* reversed the Registrar's decision on the indigence of an accused wherein newspaper articles had been used to establish that the accused had financial resources. The Trial Chamber emphasised that:

> Media reports may serve as a first step to launch an investigation into the veracity of the reported facts. That newspapers and other kinds of media are very often a highly unreliable source of information is common knowledge. Their reports, unsubstantiated by other material, cannot by themselves be sufficient evidence for a court of law.[23]

The Defence submits that, *a fortiori* such material cannot be considered sufficient to justify an individual's deprivation of liberty.

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[20] See *infra*, para. 27

[21] The metadata provided by the Prosecution merely states that it received the document from the "National Endowment for Democracy".

[22] Emphasis added.

[23] ICTY: *The Prosecutor v. Kupreškic, Decision on the registrar's withdrawal of the assignment of Defence counsel*, 3 September 1999, para. 7.

21. Lastly, at paragraph 25 of the Response, the Prosecution submits that the travel ban on Mr Ntaganda and his lack of a passport do not preclude his travel within the Schengen area. The Defence underscores that rule 119 stipulates that the Chamber may, if it considers it necessary, impose several restrictive conditions on the released person, such as conditions for monitoring the released person's movements, for example electronic tagging or the obligation to periodically report to a competent authority.

- **The allegation that Mr Ntaganda continues to have contacts in the region enabling him to obstruct the investigation or the ongoing proceedings**

22. At paragraphs 27 to 31 of the Response, the Prosecution alleges that Mr Ntaganda has influence and contacts in the region thereby enabling him to "act against witnesses."[24]

23. The Defence vigorously challenges the truth of these allegations.

24. Furthermore, the Prosecution relies on material which, even if considered to be true, does not support such conclusions. For example:

- The Prosecution's references to the Midterm Report do not lead to the conclusion that Mr Ntaganda has maintained close contact with the individuals named at paragraph 27 of the Response;

- Scrutiny of the final 2011 report impels the conclusion that the acronym FPLC mentioned in this report is not linked to the former armed wing of

[24] ICC-01/04-02/06-103-Conf, para. 30

the UPC/RP (integrated into the FARDC in December 2004),[25] but relates to an entirely different group bearing the same acronym, formed by, among others, the Mai Mai and reportedly founded in Kivu in November 2008.[26] Moreover, the Prosecution has not explained how the integration into the national army of the members of this group or of any other group during 2010 and 2011 is of relevance to determining the influence and contacts Mr Ntaganda allegedly has in the region in 2013.

- **Mr Ntaganda's alleged "history of violence"**

25. The Defence strongly disputes the meritoriousness of the allegations set out at paragraphs 32 and 33 of the Response.

26. Contrary to the Prosecution assertions, the fact that some media sources nicknamed Mr Ntaganda the "Terminator" cannot in any case constitute "critical" information[27] and is of no relevance to the determination of whether Mr Ntaganda should or should not be deprived of his liberty.

27. Further still, the Prosecution relies on the testimonies of P-0046 and P-0016 to argue that Mr Ntaganda executed people, in particular individuals perceived as "traitors"[28] or "enemies of the UPC-FPLC".[29] However, it should be pointed out that the testimony of P-0016 referred to by the Prosecution[30] remains

[25] See, in particular, DRC Presidential Decrees Nos. 04/094 and 04/095 of 11 December 2004 (DRC-OTP-0086-0036 and DRC-OTP-0086-0038).
[26] Final Report of the Group of Experts on the Democratic Republic of Congo of 2010, 29 November 2010, S/2010/596, paras. 50 - 59.
[27] ICC-01/04-02/06-103-Conf, paras. 5 and 32.
[28] ICC-01/04-02/06-103-Conf, para. 5.
[29] ICC-01/04-02/06-103-Conf, para. 32.
[30] ICC-01/04-02/06-103-Conf, footnotes 75 and 76.

undisclosed to the Defence at the time of writing, denying it the opportunity to make any observations on this matter. With respect to Witness P-0046's testimony before Trial Chamber I in *Lubanga*, this is exclusively hearsay based on anonymous sources.[31]

28. At footnote 77 of the Response, the Prosecution cites its own submissions to support the allegation that Mr Ntaganda was responsible for attacks on MONUC in early 2004 which resulted in the death of one person.[32] However, in its submissions of 12 January 2006,[33] the Prosecution did not refer to any evidence.

- **The allegation that continued detention is necessary to prevent the commission of crimes.**

29. The Defence challenges the totality of the Prosecution arguments at paragraphs 34 to 41 of the Response.

30. The Prosecution alleges at paragraph 34 of the Response that Mr Ntaganda's past criminal behaviour demonstrates that, not only is he liable to commit crimes within the jurisdiction of the Court, but if released he may commit crimes in violation of article 70. At the ICTY, the Trial Chamber recalled the jurisprudence which established that "[…] the assessment of whether the accused would pose a danger to victims, witnesses or other persons 'cannot be made in abstract', and that 'a concrete danger needs to be identified'".[34] Here, the Prosecution provides no demonstration of the existence of a

[31] See DRC-OTP-2054-6846, pp. 21-22.
[32] Material quoted at ICC-01/04-02/06-103-Conf, footnote 77.
[33] ICC-01/04-02/06-60-Conf-Red, para. 203.
[34] ICTY: *The Prosecutor v. Haradinaj* et al., *Decision on Ramush Haradinaj's motion for provisional Release*, 10 September 2010, para. 29.

concrete danger that Mr Ntaganda would commit an offence against the administration of justice if released.

31. Furthermore, it should be stressed that the "future crimes" mentioned in the decision cited by the Prosecution at paragraph 37 of the Response refer to crimes similar to those of which Mr Gbagbo stands charged.[35]

32. Finally, the Prosecution alleges at paragraph 41 of the Response that the Appeals Chamber confirmed that it is not an unreasonable prediction that telephone calls or e-mails may be used to continue to contribute to the commission of crimes, whilst omitting to mention that the Appeals Chamber stipulated that this conclusion applied in the "specific context of the case".[36] In fact, in said case, Pre-Trial Chamber I held that this risk was assessed in light of the mode of liability attributed to Mr Mbarushimana, which does not require his physical presence at the scene of the crimes, as well as Mr Mbarushimana's information technology experience.[37] The Defence submits that no analogy can be drawn with the present case.

- **The confidentiality of this reply**

33. The Defence files this reply as confidential in light of the fact that the Prosecution Response has been filed as confidential only. However, the Defence is of the view that this reply may be classified as "public" if the Chamber considers it to be appropriate.

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[35] ICC-02/11-01/11-278-Red, para. 70.
[36] ICC-01/04-01/10-283 (OA), para. 60: "In the specific context of this case, it is not an unreasonable prediction that phone calls or e-mails may be used to continue to contribute to the commission of crimes."
[37] ICC-01/04-01/10-163, para. 66.

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

AUTHORISE the filing of this reply;

GRANT the "Defence application for the interim release of Mr Bosco Ntaganda", dated 20 August 2013;

ORDER the immediate interim release of Mr Ntaganda;

And, where necessary,

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

[signed]

Mr Marc Desalliers, Lead Counsel for Mr Ntaganda

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