



Original: English

No.: ICC-01/04-02/06 OA

Date: 2 December 2013

**THE APPEALS CHAMBER**

**Before:** Judge Sang-Hyun Song  
Judge Erkki Kourula  
Judge Anita Ušacka  
Judge Akua Kuenyehia  
Judge Sanji Mmasenono Monageng

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

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

**Public Redacted**

**Prosecution's response to the Defence appeal against the "Decision on the  
Defence's Application for Interim Release"**

**Source: Office of the Prosecutor**

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

**The Office of the Prosecutor**

Fatou Bensouda  
James Stewart  
Fabricio Guariglia

**Counsel for the Defence**

Marc Desalliers

**Legal Representatives of Victims**

**Legal Representatives of 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

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## Introduction

1. Mr Bosco Ntaganda (“Appellant”) is appealing the “Decision on the Defence’s Application for Interim Release” (“Decision”).<sup>1</sup>
2. The Appeal should be dismissed. The Single Judge did not err in law by relying on UN expert reports, press articles, views expressed in blogs and the statement of an anonymous witnesses in support of the factual findings that led to her conclusion that the continued detention of the Appellant remains necessary (“First Ground of Appeal”). Nor did the Single Judge commit any error of fact. In particular she did not fail to take into account relevant facts, or make manifestly unreasonable factual conclusions (“Second Ground of Appeal”).

## Procedural Background

3. On 22 August 2006, Pre-Trial Chamber I issued a warrant of arrest against the Appellant.<sup>2</sup> This was followed by a second warrant of arrest issued by Pre-Trial Chamber II (“Pre-Trial Chamber”) on 13 July 2012.<sup>3</sup>
4. Upon his surrender, the Appellant was transferred to the Court where he appeared for the first time on 25 March 2013.<sup>4</sup> On the same date, the Registry filed a report on the voluntary surrender and the transfer of the Appellant to the Court (“25 March 2013 Report”).<sup>5</sup>
5. On 20 August 2013, the Appellant filed a request for interim release into the Kingdom of the Netherlands (“Application”).<sup>6</sup> The Prosecution responded on 6 September 2013 (“Prosecution Response”)<sup>7</sup> and the Appellant replied on 20

---

<sup>1</sup> ICC-01/04-02/06-147.

<sup>2</sup> ICC-01/04-02/06-2-Anx-tENG.

<sup>3</sup> ICC-01/04-02/06-36-Red.

<sup>4</sup> ICC-01/04-02/06-T-2-ENG ET.

<sup>5</sup> ICC-01/04-02/06-44-Conf-Exp.

<sup>6</sup> ICC-01/04-02/06-87-Red-tENG.

<sup>7</sup> ICC-01/04-02/06-103-Conf.

September 2013 (“Reply”).<sup>8</sup> The Registry filed a report on 3 October 2013 (“Registry Report”).<sup>9</sup>

6. On 18 November 2013, the Single Judge of the Pre-Trial Chamber (“Single Judge”) issued the Decision, finding that the continued detention of the Appellant appears to be necessary on the grounds of Articles 58(1)(b)(i) and (ii). As a result, she rejected the Application.
7. On 25 November 2013, the Appellant filed a notice of appeal against the Decision<sup>10</sup> and on 26 November 2013, the Appellant filed his document in support of the appeal against the Decision (“Appeal”).<sup>11</sup> The Appeal includes an annex, through which the Appellant identifies 23 specific findings of the Single Judge that are challenged in the Appeal (“Annex”).<sup>12</sup>
8. Pursuant to Regulation 23bis, the Prosecution submits this document Confidential – Ex Parte (Registry, Prosecution and Defence only) because it responds to the Appeal that is subject to the same classification. The Prosecution will simultaneously file a public redacted version of this document.

### **Submissions**

#### **A) First Ground of Appeal: The Single Judge did not err in law by relying on certain categories of information**

9. The Appellant argues that the Single Judge erroneously relied on certain categories of information that have no probative value and that merely consist of anonymous hearsay evidence and “purely speculative opinions”.<sup>13</sup> The Appellant specifically challenges the Single Judge’s reliance on UN expert reports, press articles, views expressed in blogs and the statement of an anonymous witness.

---

<sup>8</sup> ICC-01/04-02/06-111-Conf.

<sup>9</sup> ICC-01/04-02/06-120-Conf.

<sup>10</sup> ICC-01/04-02/06-147.

<sup>11</sup> ICC-01/04-02/06-158-Conf-Exp; ICC-01/04-02/06-158-Red (public redacted version).

<sup>12</sup> ICC-01/04-02/06-158-AnxA.

<sup>13</sup> Appeal, paras.11, 17; see also paras.19-27 and ICC-01/04-02/06-158-AnxA.

10. The Prosecution submits that the Single Judge did not commit such an error.

Contrary to the Appellant's contention, the Single Judge (a) correctly applied the standard of proof under Article 58(1)(b); (b) she also correctly considered all the evidence before her and determined its probative value by looking at the totality of the evidence; and (c) the evidence presented by the Prosecution does not merely consist of anonymous hearsay evidence or purely speculative opinions.

*(a) The Single Judge correctly applied the standard of proof under Article 58(1)(b)*

11. The Appellant submits that for decisions on deprivation of the liberty of persons the highest standards have to be applied, and that certain categories of evidence, such as newspaper articles, blogs or anonymous sources, do not meet this high standard.<sup>14</sup>

12. In her Decision, the Single Judge dealt with this argument by recalling the applicable standard of proof under Article 58(1)(b). In particular, she found that "a review under article 60(2) together with article 58(1)(b) of the Statute speaks of a standard of 'appearance' that a continued detention is necessary. In the words of the Appeals Chamber, the question 'revolves around the possibility, not the inevitability, of a future occurrence'".<sup>15</sup>

13. Moreover, the reference by the Appellant to a decision in the *Gbagbo* case where Pre-Trial Chamber I found that "reliance upon [anonymous hearsay] evidence should [...] be avoided wherever possible",<sup>16</sup> is misplaced. That finding was made in the context of the confirmation of charges where a higher standard applies,<sup>17</sup> and is therefore not conclusive with respect to the question under appeal in this case.<sup>18</sup>

---

<sup>14</sup> Appeal, paras.13-14.

<sup>15</sup> Decision, para.47.

<sup>16</sup> Appeal, para.15, referring to ICC-02/11-01/11-432, para.28.

<sup>17</sup> Decision, para.47.

<sup>18</sup> The Prosecution also notes that this finding of Pre-Trial Chamber I is currently under appeal (see ICC-02/11-01/11-474, paras.70-74).

14. The Single Judge also correctly applied this standard to the facts of the case. She ruled that there is a “possibility of [the Appellant] absconding”<sup>19</sup> and that there is a “possibility of him influencing, threatening or intimidating witnesses or victims and/or their family members”.<sup>20</sup> Indeed, the evidentiary standard under Article 58(1)(b) only applies to these ultimate conclusions and not to individual pieces of evidence or to every single factual assessment.<sup>21</sup> In particular, it does not apply to specific findings challenged by the Appellant, such as the Single Judge’s assessment that the Appellant was pressed to surrender by the circumstances resulting from the split of the M23<sup>22</sup> and by declarations of the Congolese Government calling for his arrest.<sup>23</sup> As a result, even if, *arguendo*, individual items of evidence taken in isolation did not meet the threshold under Article 58(1)(d), this would still not demonstrate an error in the Decision.

*(b) The Single Judge correctly considered all the evidence before her*

15. The Single Judge, when addressing the Appellant’s argument that certain types of evidence should be excluded relied on a decision of Pre-Trial Chamber I in the *Gbagbo* case which states as follows: “[T]here does not exist in the applicable law any impediment to the use of such material, or any requirement that it be corroborated. Rather, the Single Judge must analyse all the material placed before it, in order to determine what weight must be given to it for the purpose of the determination as to whether continued detention ‘appears necessary’”.<sup>24</sup> Based on this finding, the Single Judge concluded that, on the “information as a whole”,<sup>25</sup>

<sup>19</sup> Decision, para.51.

<sup>20</sup> Decision, para.59.

<sup>21</sup> ICC-01/04-01/06-2842, para.92; ICC-01/04-02/12-3, para.35. Most Pre-Trial Chambers in their respective confirmation of charges decisions have also applied the same process. They reviewed the evidence as a whole and applied the ‘substantial grounds to believe’ test only to facts that are essential to establish the chapeau elements of the crimes as well as to the existence of the elements, but not to individual items of evidence or to findings in relation to subsidiary facts. See ICC-01/09-02/11-382-Red, paras.115-229; ICC-01/09-01/11-373, paras.167-221; ICC-01/04-01/06-803-tEN, paras.167-237; ICC-01/05-01/08-424, paras.90-126; The confirmation of charges decision in the *Katanga et al.*, case constitutes an exception, as the Pre-Trial Chamber in that case applied the evidentiary threshold under Article 61(7) also to factual findings that do not appear to be essential to establish the chapeau elements of the crimes (see ICC-01/04-01/07-717, paras.239-241, 403-417).

<sup>22</sup> Decision, para.44.

<sup>23</sup> Decision, para.45.

<sup>24</sup> Decision, para.48, referring to ICC-02/11-01/11-180-Red, para.54.

<sup>25</sup> Decision, para.46.

and looking at all the relevant factors together,<sup>26</sup> the continued detention of the Appellant appears necessary.<sup>27</sup>

16. The Appellant notes that the Appeals Chamber has not yet ruled on this matter.<sup>28</sup>

However, this does not detract from the correctness of the approach laid out in the above referenced findings. The flexible approach to evidence adopted by the drafters of the Rome Statute in Article 69(4) means that all types of evidence are potentially admissible<sup>29</sup> and can be given due weight in the decision-making process.<sup>30</sup> To attribute, as a general rule, little or no evidentiary value to certain types of evidence, such as anonymous hearsay evidence, press articles, views expressed in blogs or UN expert reports, violates the principle of free assessment of evidence under Rule 63(2). This principle means that a Chamber is not bound by any rules or guidelines that prescribe what weight to give to certain types of evidence or what conditions must apply for a fact to be established.<sup>31</sup> Whether a piece of evidence meets the criteria for admissibility, as well as the weight to be given to certain pieces of evidence cannot be determined in the abstract or by reference to certain categories of evidence. It will depend on the circumstances that surround each piece of evidence that must be assessed in the context of the record as a whole.<sup>32</sup> Indeed, the probative value of a mass of evidence may be

<sup>26</sup> Decision, paras.50, 59.

<sup>27</sup> Decision, paras.51, 59.

<sup>28</sup> Appeal, para.18.

<sup>29</sup> The only exceptions are constituted by Article 69(7) and Rule 71.

<sup>30</sup> Piragoff, "Evidence", in Lee, R.S. (Editor), "The International Criminal Court - Elements of Crimes and Rules of Procedure" (Transnational Publishers, Ardsley, New York, 2001) ("Piragoff"), pp.349, 351.

<sup>31</sup> Supreme Court of Germany, BGH VRS 33, 431; BGH NJW 1982, 2882; Jean Pradel, "Droit Pénal Comparé" Editions Dalloz (2008), *La règle de la liberté de la preuve*, p.265; Piragoff, p.352.

<sup>32</sup> ICC-01/04-01/06-803-tEN, para.39; ICC-01/04-01/07-717, para.66; *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Decision, 7 July 2006, para.174 *Prosecutor v. Halilovic*, IT-01-48-A, Decision, 16 October 2007, para.125; *Prosecutor v. Musema*, ICTR-96-13-A, Appeals Decision, 16 November 2001, para.134 (emphasis added); *Prosecutor v. Duško Tadić*, Case No.IT-94-1-A-R77, Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin, para.92. Also, see *Attorney General of Hong Kong v. Wong Muk Ping* [1987] 2 All ER 488, PC; *Charles Villeneuve Kyoto Securities Limited v Joel Gaillard G Holdings Limited*, Privy Council Appeal No 0025 of 2009, from the Court of Appeal of the Commonwealth of the Bahamas, Decision Delivered by Lord Walker on 9th February 2011 paras.65-67; Court Of Criminal Appeal 165/07, *The People v. James Cronin*, [2008] Iecca 94, 23 June 2008, pp.3-5; see further the Opinion of Lord Steyn in *Smith New Court Securities v. Scrimgeour Vickers* [1996] UKHL 3; [1997] AC 254; [1996] 4 All ER 769; [1996] 3 WLR 1051 (21st November, 1996).

cumulative, making it pointless to consider the degree of probability of each item of evidence separately.<sup>33</sup>

17. The Appellant rightly states that he cannot fully investigate and test the reliability of evidence that is based on anonymous sources.<sup>34</sup> However, this does not mean that such evidence must be excluded for the purposes of the Single Judge's decision under Articles 58(1)(b) and 60(2). On the contrary, the Court's basic legal documents allow for the use of such evidence at the pre-trial stage. Pursuant to Rule 81(4), the Prosecution may request that a Chamber authorize the delay of the disclosure of a witness' identity and any identifying information until "prior to the commencement of the trial". This provision implies that anonymous evidence may be used even at the confirmation of charges stage where a higher standard of proof applies. As a result, there is no reason why it should be excluded for the purposes of meeting the lower threshold under Article 58(1)(b).

*(c) The Single Judge's findings are supported by reliable evidence*

18. Contrary to the contention of the Appellant, the evidence presented by the Prosecution and relied upon by the Single Judge in her Decision does not merely consist of anonymous hearsay evidence and "purely speculative opinions".<sup>35</sup>

19. The Appellant specifically objects to four categories of evidence relied upon in the Decision, namely expert reports, articles from blogs, press articles and the evidence of Witness P-0046.<sup>36</sup> In the Annex to the Appeal, the Appellant examines 23 individual findings from the Decision and argues<sup>37</sup> that they fall into these categories of evidence.

20. The Prosecution notes that Regulation 36(2)(b) prohibits the practice of including argumentative material and submissions into annexes, and for this reason alone

---

<sup>33</sup> High Court of Australia, *Shepherd v. R* (1990), 97 ALR 161 at 164-166; see also *Chamberlain v. R (No 2)* (1984), 153 CLR 521 at 626; Supreme Court of Canada, *R v. Morin*, [1988] 2 SCR 345 at 346-347, 354-362; see also *R v. JMH*, [2011] 3 SCR 197, at para.31; *R v. MacKenzie*, [1993] 1 SCR 212.

<sup>34</sup> Appeal, para.16.

<sup>35</sup> Appeal, paras.11, 17; see also paras.19-27 and ICC-01/04-02/06-158-AnxA.

<sup>36</sup> Appeal, paras.19-26.

<sup>37</sup> The last column of the Annex is argumentative, in the sense that the Appellant refers to his own qualification of each individual piece of evidence.

the Annex and the arguments included therein should be dismissed.<sup>38</sup> In any event, from the 23 findings referred to in the Annex, 19 are supported by one or more UN expert reports, making these the main source of the Decision. In addition, there is only one instance where a single non-UN source is used without corroboration.<sup>39</sup> As shown below, the Single Judge did not err by relying on the four categories of evidence referred to above.

#### *UN expert reports*

21. In support of the specific findings challenged by the Appellant,<sup>40</sup> the Single Judge principally relied on three UN expert reports, namely the 2013 Midterm report of the Group of Experts on the Democratic Republic of the Congo (“2013 Midterm Report”),<sup>41</sup> the 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 (“UNJHRO Report”), and the Final report of the Group of Experts on the Democratic Republic of the Congo prepared in pursuance of paragraph 5 of Security Council resolution 1952 (2010) (“2011 Group of Experts Report”).<sup>42</sup>

22. The Prosecution submits that all three UN reports were developed with high evidential standards by international experts. They do not constitute mere anonymous hearsay evidence and, on the contrary, are highly reliable sources of information. The 2013 Midterm Report itself comments on its evidentiary procedures, noting that:

“The Group used the evidentiary standards recommended in the report of the Informal Working Group of the Security Council on General Issues of Sanctions (S/2006/997), relying on authentic documents and, as much as possible, on first-hand, on-site observations by the experts themselves. The

<sup>38</sup> ICC-01/04-01/06-2543 OA18, para. 14.

<sup>39</sup> Decision, footnote 93. The Appellant alleges that the same applies to Decision, footnote 129 (see Annex). However, the relevant portions of the decisions referenced in footnote 129 rely on a wide variety of sources. In a number of instances, the Single Judge makes reference to submissions contained in the Registry Report (ICC-01/04-02/06-120-Conf) or the Prosecution Response (ICC-01/04-02/06-103-Conf) in support of her findings. It is important to note that these submissions themselves contain various references and sources to substantiate their assertions (see for instance Decision, footnotes 94-95, 123, 127).

<sup>40</sup> See Annex.

<sup>41</sup> UN Doc. S/2013/433.

<sup>42</sup> UN Doc. S/2011/738, 2 December 2011.

Group corroborated information by using at least three independent and reliable sources. The Group notably used eyewitness testimonies from former and current combatants of armed groups and members of local communities where incidents occurred. In addition, the Group obtained telephone records, bank statements, money transfer records, photographs, videos and other material evidence to corroborate its findings.”<sup>43</sup>

23. Similarly, the methodology of the UNJHRO Report included work undertaken by in-country Human Rights Officers (“HROs”), who carried out “numerous in-situ visits, in-depth interviews with victims and eyewitnesses”, although “only limited and short conversations with the local population during the patrols, to minimize risk to those willing to give testimony.”<sup>44</sup> The HROs also “communicated with their network in the area in order to cross-check information.”<sup>45</sup>

24. The methodology of the Group of Experts in their 2011 Report was equally thorough. The Report noted that:

“The Group is committed to ensuring the accuracy of its findings, and to adhering to the evidentiary standards recommended by the Informal Working Group of the Security Council on General Issues of Sanctions [...] by relying on verified, authentic documents and, wherever possible, first-hand, on-site observations by the experts themselves, including photographs. When this was not possible, the Group corroborated information using at least three sources assessed to be independent of one another, credible and reliable, placing a higher value on statements by principal actors and first-hand witnesses to events.”<sup>46</sup>

#### *Blogs and press articles*

25. In her Decision, the Single Judge relied, among others, on a blog written by Mr Jason Stearns, as well as a number of press articles.<sup>47</sup> As noted above, with one

<sup>43</sup> 2013 Midterm Report, para.8 (emphasis added).

<sup>44</sup> UNJHRO Report, para.14.

<sup>45</sup> UNJHRO Report, para.15.

<sup>46</sup> 2011 Group of Experts Report, para.5 (emphasis added).

<sup>47</sup> These were either cited directly by the Decision, or they were relied upon by the Prosecution’s Reply which was in turn cited by the Single Judge.

exception,<sup>48</sup> these sources were never cited in isolation; rather, they were used to corroborate other evidence.

26. The Appellant submits that Stearns' blog is purely speculative and merely an expression of his opinion.<sup>49</sup> However, it fails to point out that Stearns is a "political analyst and scientist focusing on conflict and Africa's Great Lakes region" and the director of the Rift Valley Institute's Usalama Project, a "research project on armed groups in the eastern Congo". He has also headed the UN group of Experts on the Congo and has been involved with NGOs, the MONUC peacekeeping mission and the International Crisis Group.<sup>50</sup>

27. The Prosecution submits that, when read in the context of his qualifications, Stearns' blog takes on the quality of expert academic opinion rather than unjustified speculation. It is entirely proper that the Single Judge considered his view, particularly for the purposes of her determination at this stage in proceedings against the Appellant.

28. In terms of the press articles cited, the Appellant levels similar complaints against the Decision. It claims that they are mere speculation and sometimes contain divergent opinions.<sup>51</sup> It should be noted that press articles are never cited in isolation by the Single Judge. Furthermore, they are from reliable sources such as the BBC or CNN, and they often justify their observations by quoting analysts such as Stearns.

#### *Evidence of Witness P-0046*

29. The Appellant claims that the statement of Witness P-0046 relied upon in the Decision is inadmissible because it is based on anonymous hearsay.<sup>52</sup> The Single Judge dismissed these concerns due to a lack of explanation by the Appellant and noted that "even if the Prosecutor [had] not relied on the two witness statements challenged by the Defence in its Response, the information provided in [the UN

---

<sup>48</sup> Decision, footnote 93.

<sup>49</sup> Appeal, paras.22-23.

<sup>50</sup> See Stearns' profile, accessible at <http://www.blogger.com/profile/11454449854081540397>.

<sup>51</sup> Appeal, para.24.

<sup>52</sup> Appeal, para.25.

expert reports] is still sufficient for the purpose of a determination under article 58(1)(b) of the Statute.”<sup>53</sup> Therefore, the reference by the Single Judge to the statement of Witness P-0046 was not determinative for her finding. Even if, *arguendo*, the Single Judge erred by referring to Witness P-0046, this did not have a material impact on the Decision.

### **B) Second Ground of Appeal: The Single Judge did not commit an error of fact**

30. The Appellant submits as the Second Ground that the Single Judge, in finding that the detention of the Appellant was necessary, “*a commis plusieurs erreurs de fait manifestes de nature à invalider la décision*”.<sup>54</sup> In support of his argument, the Appellant primarily refers to the submission he made under his First Ground of Appeal.<sup>55</sup> However, the Appellant does not provide any explanation as to how the assessment of the evidence under the First Ground amounts to an error of fact that vitiates the Decision under the second ground. The only references of the Appellant made in this context are those in the Annex to the Appeal – which merely lists the alleged unreliability of individual pieces of evidence without further explanation.

31. As settled by the Appeals Chamber, an appellant cannot simply claim that an impugned decision violated the fairness of the proceedings or a particular right without specifying and substantiating such a claim.<sup>56</sup> This would force the Appeals Chamber to review the correctness of the entire Decision in the absence of allegations of any specific factual error.<sup>57</sup> Such type of review is not available in appellate proceedings at this Court.<sup>58</sup> In any event, in its response to the Appellant’s First Ground of Appeal the Prosecution has submitted that the Single

---

<sup>53</sup> Decision, para.49.

<sup>54</sup> Appeal, paras.29-45.

<sup>55</sup> Appeal, para.29.

<sup>56</sup> ICC-01/05-01/08-2151-Red OA10, para.41.

<sup>57</sup> *Ibid.*

<sup>58</sup> ICC-01/05-01/08-631-Red, para.62; ICC-01/05-01/08-1626-Red OA7, para.44; ICC-01/04-01/10-283 OA, para.15.

Judge adopted the correct approach to the assessment of evidence and that she made no error, legal or factual.

32. The Appellant also challenges other factual findings in the Decision relating to Article 58(1)(b).<sup>59</sup> However, the Appellant does not demonstrate any appealable error of fact. In fact, he fails to establish that the Single Judge “could not have reasonably reached the conclusions it did on the available evidence.”<sup>60</sup> Neither does the Appellant explain how the alleged errors materially affect the Decision.<sup>61</sup> The Prosecution addresses the Appellant’s arguments individually below.

*(a) The Single Judge did not fail to take into account relevant facts when analysing the circumstances surrounding the surrender of the Appellant*

33. [REDACTED].<sup>62</sup> [REDACTED]<sup>63</sup> [REDACTED]<sup>64</sup> [REDACTED].<sup>65</sup> [REDACTED].<sup>66</sup>

34. Even if it were found that the Single Judge failed to [REDACTED], this would not materially affect the Decision. Firstly, the Single Judge extensively considered the circumstances of the Appellant’s surrender, and his submissions regarding the same.<sup>67</sup> Secondly, the Single Judge did not find the Appellant’s voluntary surrender to be a *determinative* factor: she held that “[t]he fact that Mr. Ntaganda decided to voluntarily surrender to the Court does not mean *per se* that he might not abscond, if the possibility arises.”<sup>68</sup> This approach is consistent with the practice in the *ad hoc* tribunals where voluntary surrender after a long period of time is given little weight.<sup>69</sup>

<sup>59</sup> Appeal, paras.30-45.

<sup>60</sup> ICC-01/04-01/10-283 OA, para.31.

<sup>61</sup> The Appeals Chamber has required that for a successful appeal, the error raised by an appellant must have materially affected the impugned decision. ICC-01/04-01/07-1497 OA8, para.37; ICC-02/05-03/09-295 OA2, para.20.

<sup>62</sup> Appeal, para.35.

<sup>63</sup> Decision, para.5.

<sup>64</sup> Decision, para.22.

<sup>65</sup> Decision, para.22.

<sup>66</sup> Decision, para.42.

<sup>67</sup> Decision, paras.40-46.

<sup>68</sup> Decision, para.41.

<sup>69</sup> *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-

35. The Appellant also claims that the Single Judge did not take into consideration the fact that he never concealed his place of residence and that his location was well known to MONUC/MONUSCO and the DRC authorities.<sup>70</sup> The Appellant does not explain why this is a relevant consideration. The Prosecution submits that it is not. The Appellant could not have failed to realize in the past five years that a public warrant existed for his arrest. However, during those years, he did not surrender, which is a clear indicator of non-cooperation with the Court. [REDACTED].

36. The Appellant further claims that the Single Judge did not take into consideration the fact that the first warrant of arrest was sealed until 2008.<sup>71</sup> The Prosecution submits that this too is not a relevant consideration. Regardless of the fact that the first warrant of arrest was only unsealed<sup>72</sup> in 2008, during the five years between 2008 and 2013 it was public knowledge that a warrant existed for the Appellant's arrest. During this five year period, he did not surrender to the Court. This is a clear indication of an intention to abscond, which is not affected by the fact that the first warrant was under seal between 22 August 2006<sup>73</sup> and 28 April 2008.

37. Moreover, the Single Judge did not base her Decision on the Appellant's behaviour during the period between 22 August 2006 and 28 April 2008. She based her Decision on his behaviour over the course of several years until his surrender in 2013.<sup>74</sup> Hence, even if the Single Judge is found to have erroneously disregarded the fact that the first warrant of arrest was under seal until 2008, this would not have a material impact on the Decision.

38. The Appellant lists an additional set of disparate factors that the Single Judge should have considered, including the Appellant's participation in the peace

---

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.

<sup>70</sup> Appeal, para.35.

<sup>71</sup> Appeal, para.35.

<sup>72</sup> ICC-01/04-02/06-18.

<sup>73</sup> ICC-01/04-02/06-1-US.

<sup>74</sup> Decision, para.41.

process in the DRC and joining of the FARDC from the beginning of 2009, the DRC's alleged decision to suspend the execution of the arrest warrant issued by the Court, [REDACTED], and his alleged participation in peacekeeping operations together with the MONUC/MONUSCO.<sup>75</sup>

39. The Single Judge did take note of the Appellant's arguments made in this context;<sup>76</sup> however, she was not required to address in detail every argument made by the Appellant.<sup>77</sup> In any case, the above arguments are not relevant considerations for the purposes of assessing the voluntariness of surrender. The Appellant does not explain *why* these would be "*éléments essentiels*"<sup>78</sup> in the Single Judge's "*évaluation des circonstances entourant la reddition volontaire*".<sup>79</sup> The Appellant's participation in peace processes, his service as a member of FARDC, and his participation in peacekeeping operations – to the extent these claims are accurate – do not indicate that his surrender was voluntary. Indeed, during all these events, there was a public warrant for the Appellant's arrest, but he took no steps to surrender. None of events above would have prevented the Appellant from surrendering to the Court. [REDACTED].

*(b) The Single Judge correctly took into account the gravity of the crimes and duration of the sentence*

40. The Appellant claims that the Single Judge's findings regarding the relevance of the gravity of the crimes and the possible duration of the sentence are "*manifestement mal fondée en l'espèce*".<sup>80</sup> He argues that at the time of his voluntary surrender in March 2013, he already knew of the sentence imposed on Mr. Thomas Lubanga,<sup>81</sup> that he still wanted to appear voluntarily before the Court [REDACTED],<sup>82</sup> [REDACTED].<sup>83</sup> The Appellant argues that a distinction must be

<sup>75</sup> Appeal, para.35.

<sup>76</sup> Decision, paras.20-22.

<sup>77</sup> ICC-01/04-01/06-774 OA6, para.30. ("Such reasoning will not necessarily require reciting each and every factor that was before the respective Chamber to be individually set out").

<sup>78</sup> Appeal, para.35.

<sup>79</sup> Appeal, para.35.

<sup>80</sup> Appeal, para.38.

<sup>81</sup> Appeal, para.39.

<sup>82</sup> Appeal, para.40.

<sup>83</sup> Appeal, para.41.

made between situations where a suspect is arrested and when a suspect “*se rend volontairement à la Cour en ayant pleinement connaissance de ces éléments.*”<sup>84</sup>

41. The Prosecution submits that the Appellant merely disagrees with the Single Judge’s reasonable assessment of the facts. The Single Judge took into consideration the Appellant’s submissions. She stated that her “conclusions stand despite the Defence’s argument that the gravity of the crimes and the potential length of the sentence are inapplicable factors in this case, given that Mr. Ntaganda has surrendered voluntarily. [...] in view of the material provided and reviewed by the Single Judge concerning the circumstances surrounding Mr. Ntaganda’s surrender, little weight, if any, can be given to this factor.”<sup>85</sup>

42. The fact that the Appellant disagrees with the Single Judge’s conclusion does not establish an error of fact. The Appeals Chamber has held that when reviewing a claim that a Chamber has “misappreciated facts in a decision on interim release”,<sup>86</sup> it will “defer or accord a margin of appreciation both to the inferences that Chamber drew from the available evidence and to the weight it accorded to the different factors militating for or against detention.”<sup>87</sup> In this context, the question is not whether the Single Judge could also have reached other conclusions. The question is whether no Chamber could have reasonably reached the conclusions that the Single Judge reached on the available evidence.<sup>88</sup>

*(c) The Single Judge correctly took into account evidence regarding the Appellant’s ability to travel and propensity to abscond*

43. The Appellant alleges that the Single Judge erroneously relied on “*un seul élément, [...] qui démontrerait à son avis que l’Appellant traversait les frontières sans problème malgré l’existence d’une interdiction de voyager*”<sup>89</sup> and that “[s]ur la base de cet exemple,

---

<sup>84</sup> Appeal, para.42.

<sup>85</sup> Decision, para.52.

<sup>86</sup> ICC-01/04-01/10-283 OA, paras.1, 17. See further ICC-01/04-01/06-2582 OA18, para.56; ICC-01/05-01/08-1626-Red OA7, para.45; ICC-01/05-01/08-2151-Red OA10, para.16.

<sup>87</sup> *Ibid.*

<sup>88</sup> ICC-01/04-01/10-283 OA, para.31.

<sup>89</sup> Appeal, para.43.

*la Chambre préliminaire conclut que l'Appellant pourrait facilement se cacher dans la zone Schengen une fois libéré.”*<sup>90</sup>

44. Firstly, the Single Judge’s citation of an example of the Appellant’s travel across a national border is not erroneous since it has a bearing on the issue being analysed, namely the possibility that the Appellant will abscond if released. Secondly, the Appellant’s claim that it is merely an example confirming “*plutôt que l'Appellant s'est assuré d'obtenir toutes les autorisations nécessaires avant de traverser la frontière*”<sup>91</sup> ignores the fact that a travel ban applying to the Appellant existed at that time.
45. Thirdly, the Appellant’s claim that the Single Judge came to a conclusion *solely* on the basis of the above example is incorrect. The Single Judge also considered other factors, such as the absence of border controls within the Schengen area.<sup>92</sup> Hence, even if, *arguendo*, the above example was an irrelevant consideration, it would not materially affect the Decision.
46. Here too, the Single Judge examined the evidence on the record and the positions taken by the parties regarding the Appellant’s ability to travel and propensity to abscond and came to a different conclusion than that of the Appellant. At best, the Appellant’s arguments offer “alternative conclusions which could have been drawn” by the Single Judge.<sup>93</sup> This, however, is insufficient to establish an error of fact in the Single Judge’s Decision.

---

<sup>90</sup> Appeal, para.43.

<sup>91</sup> Appeal, para.45.

<sup>92</sup> Decision, para.53.

<sup>93</sup> ICC-01/04-01/10-283 OA, para.31.

### Conclusion

47. For the reasons set out above, the Prosecution submits that the Appeals Chamber should dismiss the Appeal.



---

Fatou Bensouda, Prosecutor

Dated this 2<sup>nd</sup> day of December 2013

At The Hague, The Netherlands