

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 12 March 2014

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

**Prosecution's Observations on the Review of the Pre-Trial Detention of
Bosco Ntaganda**

Source: Office of the Prosecutor

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

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Introduction

1. Pursuant to the Chamber's instruction, the Prosecution submits its observations on the periodic review of the pre-trial detention of Bosco Ntaganda under rule 118(2) of the Rules of Procedure and Evidence ("Rules").
2. The Prosecution submits that conditions persist warranting Bosco Ntaganda's continued detention under article 58(1)(b) of the Statute, a decision recently confirmed by the Appeals Chamber. There are no changed circumstances that require modification of this Chamber's decision ordering his continued detention, pursuant to article 60(3). In fact, circumstances are now such that Bosco Ntaganda's detention is further justified under article 58(1)(b)(i) and (ii).
3. Given that Bosco Ntaganda now faces additional charges than those contained in the warrants of arrest, there is an even more pressing need to detain him in order to secure his appearance in Court as provided for under article 58(1)(b)(i). Further, the need for the protection of witnesses assumes greater importance as the identities of most of the witnesses relied upon at the confirmation hearing are now known to Bosco Ntaganda, along with the evidence they provide and the precise links between the evidence and the charges. For this reason, the Prosecution submits there is also heightened justification for his detention under article 58(1)(b)(ii).
4. The Prosecution further submits that Bosco Ntaganda has not been detained for an unreasonable period, nor has there been inexcusable delay by the Prosecution in the conduct of its case, such that the Chamber need consider his release under article 60(4).

Procedural history

5. On 22 August 2006, Pre-Trial Chamber I issued a sealed warrant of arrest for Bosco Ntaganda.¹ This warrant of arrest was made public on 28 April 2008.² On 13 July 2012, Pre-Trial Chamber II issued the second arrest warrant.³
6. On 20 March 2013, Bosco Ntaganda met a representative of the Court at the United States Embassy in Kigali, Rwanda, and confirmed his surrender to the Court.⁴ He was transferred to the Court on 22 March 2013.⁵
7. On 20 August 2013, Bosco Ntaganda requested his interim release for the duration of the proceedings.⁶ The Prosecution opposed this request on 6 September 2013.⁷ The Defence filed a reply on 20 September 2013.⁸
8. On 6 September 2013, the Single Judge rendered the Decision, rejecting Bosco Ntaganda's application for interim release and deciding he would remain in detention (the "Decision").⁹ The Single Judge further decided that the 120 days period for review set out in rule 118(2) of the Rules would begin on the day of notification of the Decision.¹⁰
9. On 3 March 2014, by email, the Single Judge requested that the parties and participants submit observations on the release or continued detention of Bosco Ntaganda by 10 March 2014. On 6 March 2014, the Single Judge granted the Prosecution's request to extend this time limit for these observations until 11 March 2014.

¹ ICC-01/04-02/06-2.

² ICC-01/04-02/06-18.

³ ICC-01/04-02/06-36-Red.

⁴ ICC-01/04-02/06-44-Conf-Exp, para. 1.

⁵ *Ibid.*, paras. 3-4.

⁶ ICC-01/04-02/06-87-Red.

⁷ ICC-01/04-02/06-103-Red.

⁸ ICC-01/04-02/06-111-Conf.

⁹ ICC-01/04-02/06-147.

¹⁰ *Ibid.*

10. Due to a technical error the Prosecution inadvertently provided its observations to the wrong email distribution list of Court Services on 11 March 2014 (Court Management – Court Sessions). Accordingly, these observations were not filed on 11 March 2014 by 16:00. Noting this error, the Prosecution sought and was granted authorisation by the Single Judge to file its observations on 12 March 2014.¹¹
11. On 5 March 2014, the Appeals Chamber confirmed the Decision rejecting the Defence’s request for Bosco Ntaganda’s interim release.¹² The Appeals Chamber held that the Pre-Trial Chamber had “carefully examined the circumstances of Mr. Ntaganda’s voluntary surrender including its timeliness and the manner in which it took place”¹³ and that there was no error in the findings of the Pre-Trial Chamber with respect to the circumstances surrounding his surrender, the gravity of the charges against him and the potential sentence, as well as the risk of him absconding.¹⁴

Prosecution’s Observations

12. The Appeals Chamber has confirmed that when the conditions under article 58(1) continue to be met, article 60(2) of the Statute requires that the person must continue to be detained.¹⁵ Pursuant to article 58(1), a warrant of arrest shall be issued and detention ensue (i) to ensure a person’s appearance at trial; (ii) to prevent the obstruction or endangerment of the investigation or court proceedings; or (iii) to prevent continued criminal conduct by the same person.

¹¹ The Prosecution was provided notification of this authorisation by email from the Senior Legal Advisor to Pre-Trial Division on 12 March 2014 at 10:42.

¹² ICC-01/04-02/06-271-Red (OA).

¹³ *Ibid.*, para. 62.

¹⁴ *Ibid.*, para. 71.

¹⁵ ICC-01/04-01/06-824 (OA 7), para. 134.

13. Article 60 (3) of the Statute requires the Pre-Trial Chamber to review periodically (at least within 120 days) any previous ruling on the release or detention of a person in order to ascertain whether the circumstances bearing on the subject have changed, and if so, whether they warrant the termination of detention.¹⁶
14. A Chamber carrying out a periodic review of a ruling on detention under article 60(3) of the Statute must satisfy itself that the conditions under article 58(1), as required by article 60(2), continue to be met.¹⁷ In conducting this review, the Chamber must revert to the ruling on detention to determine whether there has been a change in the circumstances underpinning this ruling, and whether there are any new circumstances that have a bearing on the conditions under article 58(1) of the Statute.¹⁸
15. Changed circumstances have been found to exist where there is a “change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary.”¹⁹ Where no changed circumstances are found to exist, “the Chamber is not required to further review the ruling on release or detention.”²⁰
16. Finally, the Appeals Chamber has held that the Prosecutor does not have to re-establish circumstances that have already been established.²¹ For each periodic review of detention, the Prosecution must make submissions as to whether there has been any change in the circumstances that previously justified detention, bringing to the attention of the Chamber any other relevant information of which

¹⁶ ICC-01/05-01/08-1019 (OA 4), para 47, citing ICC-01/04-01/07-572 (OA 4), para. 14.

¹⁷ *Ibid.*, para. 52, citing ICC-01/05-01/08-631 (OA 2), para. 60.

¹⁸ *Ibid.*, para. 52.

¹⁹ *Ibid.*, para. 51 and ICC-02/11-01/11-548-Red (OA 4), para. 40, both citing ICC-01/05-01/08-631 (OA 2), para. 60.

²⁰ ICC-02/11-01/11-548-Red (OA 4), para. 40 citing ICC-01/05-01/08-2151 (OA 10), para. 1.

²¹ ICC-01/05-01/08-1019 (OA 4), para. 51.

she is aware that relates to the question of detention or release.²² The Chamber must also consider any other information which has a bearing on the subject.²³

17. There have not been any changes in the facts underlying the Decision or any new facts that would necessitate a modification of the Decision.
18. The Single Judge found there was an “inevitable risk that Mr Ntaganda, if released, would not appear at the confirmation of charges hearing and by implication at trial if the charges (all or any) are confirmed.”²⁴ The Single Judge also concluded that if released, “the risk would increase that he might succeed in exerting pressure on [witnesses] to change their testimony, either directly or indirectly, through his loyalist or his family members.”²⁵ Both of these conclusions were recently confirmed by the majority of the Appeals Chamber.²⁶
19. The Prosecution is not aware of any new factor indicating that the risk that Bosco Ntaganda will abscond has changed. On the contrary, all recent developments in the case confirm the need for continued detention: first, the charges against Bosco Ntaganda have increased in number since the Decision, thereby potentially increasing the risk he will abscond if released; further, the need to protect witnesses from intimidation or interference is equally, if not more pressing, following the detailed rehearsal of their evidence against Bosco Ntaganda at the confirmation hearing. There is similarly nothing to suggest that his continuing influence over his supporters in the DRC has now abated. In fact, the Prosecution asserts that the circumstances are now such that there is even *greater* justification for Bosco Ntaganda’s detention.

²² *Ibid.*, paras. 2 and 51.

²³ *Ibid.*, para. 52.

²⁴ ICC-01/04-02/06-147, para. 54.

²⁵ *Ibid.*, para. 59.

²⁶ ICC-01/04-02/06-271-Red, paras. 50 and 71.

a) *To ensure appearance in Court (article 58(1)(b)(i))*

20. In the Decision, the Single Judge found that:

...the charges or counts Mr Ntaganda is facing are numerous and of such gravity that they might result in an overall lengthy sentence. These two factors considered together may make it likely that Mr Ntaganda will abscond, should the opportunity arise.²⁷

21. At the time of this finding, Bosco Ntaganda was alleged to be criminally responsible under article 25(3)(a) for seven counts of war crimes and three counts of crimes against humanity. On 10 January 2014, the Prosecution filed its document containing the charges in which Bosco Ntaganda is charged with 13 counts of war crimes and five counts of crimes against humanity under articles 7 and 8, and 25(3)(a), (b) and (d), 25(3)(f) and 28(a).

22. Accordingly, the Prosecution asserts that the likelihood that Bosco Ntaganda will abscond should the opportunity arise is now greater given that he is facing more numerous and grave charges, which could result in a lengthier sentence. As such, there is a more pressing need for his detention in order to ensure his appearance in Court.

b) *To ensure the investigation and court proceedings are not endangered or obstructed (article 58(1)(b)(ii))*

23. The Prosecution relied upon the evidence of 47 witnesses at the confirmation hearing. Bosco Ntaganda currently knows the identity of all but nine of these individuals. Moreover, at the confirmation hearing the Prosecution rehearsed in detail the evidence of these witnesses, and explained how their evidence related to the charges against Bosco Ntaganda.

²⁷ ICC-01/04-02/06-147, para. 50

24. In light of the seriousness of the charges against him, his continuing influence over his supporters in the DRC and his history of violence, all conclusions confirmed by the Appeals Chamber,²⁸ the risk of Bosco Ntaganda exerting pressure on witnesses to change their testimony, either directly or indirectly, through loyalists or family members if released is heightened.

c) The length of detention is not unreasonable nor has there been inexcusable delay (article 60(4))

25. Bosco Ntaganda's detention is not unreasonable in the context of article 60(4). The Appeals Chamber in *Lubanga* held that "the unreasonableness of any period of detention prior to trial cannot be determined in the abstract, but has to be determined on the basis of the circumstances of each case."²⁹

26. Having regard to the facts and circumstances of this case, the pre-trial detention of Bosco Ntaganda, which commenced on 22 March 2013 with his arrival at the Court, has not been unreasonable.

27. There has been no inexcusable delay in the pre-trial process. In granting the Prosecution request to postpone the confirmation hearing from 23 September 2013 to 14 February 2014, the Single Judge fully considered her obligation to ensure that judicial proceedings were conducted in a fair and expeditious matter taking into consideration the competing interests at stake.³⁰ The confirmation hearing was completed within the allotted time, and the filing of closing submissions of the Prosecution and the Legal Representatives of Victims has now occurred.

²⁸ ICC-01/04-02/06-271-Red, para. 43.

²⁹ ICC-01/04-01-06-824, para. 122.

³⁰ ICC-01/04-02/06-73, paras. 13 and 18.

28. As such, the Prosecution submits that the statutory grounds for granting release under article 60(4) of the Statute has not been met. Accordingly, Bosco Ntaganda's detention must be maintained.

Relief

29. For the reasons set out above, the Prosecution requests that the Chamber maintain the continued detention of Bosco Ntaganda as the conditions warranting his detention continue to be met. These conditions have not changed since his application for interim release was rejected. Moreover, following the confirmation of charges hearing, his continued detention is further justified pursuant to article 58(1)(b)(i) and (ii).



Fatou Bensouda,
Prosecutor

Dated this 12th day of March 2014
At The Hague, The Netherlands