

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 8 July 2014

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Cuno Tarfusser
Judge Christine Van den Wyngaert

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:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Mr Marc Desalliers
Ms Caroline Buteau
Ms Andrea Valdivia

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

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

Mr Herman von Hebel

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section Other**

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.
2. The Prosecution submits that the conditions warranting Bosco Ntaganda's continued detention under article 58(1) of the Rome Statute (the "Statute") persist. There are no changed circumstances that require modification of this Chamber's previous decisions ordering his detention.¹ Rather, in light of the Chamber's recent decision confirming the charges against Bosco Ntaganda (the "Article 61(7) Decision"),² circumstances are now such that there is even greater necessity for his continued detention.
3. On 9 June 2014, Bosco Ntaganda was committed to trial for the 18 charges confirmed in the Article 61(7) Decision. As such, there remains a pressing need for his detention in order to secure his appearance in Court as provided for under article 58(1)(b)(i). Further, the need to protect victims and witnesses remains of great importance as the identity of most of the witnesses relied upon at the confirmation hearing, who may be relied upon at trial, are known to Bosco Ntaganda along with the evidence they provide and the precise links between their evidence and the charges. Accordingly, 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).

¹ ICC-01/04-02/06-147 (confirmed by the Appeals Chamber, ICC-01/04-02/06-271-Red (OA)) and ICC-01/04-02/06-284.

² ICC-01/04-02/06-309 (as specified in paras. 12, 31, 36, 74 and 97). On 7 July 2014, the Pre-Trial Chamber denied the Defence's application to appeal the Article 61(7) Decision (ICC-01/04-02/06-322).

Procedural history

5. On 22 August 2006, Pre-Trial Chamber I issued a sealed warrant of arrest for Bosco Ntaganda.³ This warrant of arrest was made public on 28 April 2008.⁴ On 13 July 2012, Pre-Trial Chamber II issued the second arrest warrant.⁵
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.⁶ He was transferred to the Court on 22 March 2013.⁷
7. On 18 November 2013, the Single Judge rejected Bosco Ntaganda's application for interim release, deciding that he would remain in detention.⁸ A majority of the Appeals Chamber confirmed this decision on 5 March 2014, finding that there was no error in the findings of the Pre-Trial Chamber with respect to the circumstances surrounding Bosco Ntaganda's surrender, the gravity of the charges against him and his potential sentence, and the risk of him absconding.⁹
8. This Chamber released the "Second Decision on Bosco Ntaganda's Interim Release" on 17 March 2014 (the "Second Decision"), in which the Single Judge decided that Bosco Ntaganda's continued detention was necessary.¹⁰
9. On 6 July 2014, by email, the Single Judge requested that the parties and participants submit observations on the release or continued detention of Bosco Ntaganda by 8 July 2014.

³ ICC-01/04-02/06-2.

⁴ ICC-01/04-02/06-18.

⁵ ICC-01/04-02/06-36-Red.

⁶ ICC-01/04-02/06-44-Conf-Exp, at para. 1.

⁷ *Ibid.*, at paras. 3-4.

⁸ ICC-01/04-02/06-147.

⁹ ICC-01/04-02/06-271-Red (OA), at paras. 71 and 72.

¹⁰ ICC-01/04-02/06-284.

10. On 7 July 2014, the Single Judge denied the Defence's request for leave to appeal the Article 61(7) decision.¹¹

Prosecution's Observations

11. Bosco Ntaganda's continued detention is necessary. Since the Second Decision, the only change in circumstances has been the release of the Article 61(7) Decision by the Pre-Trial Chamber on 9 June 2014.¹² In this decision, the Chamber unanimously confirmed that there is sufficient evidence to establish substantial grounds to believe that Bosco Ntaganda committed all 18 crimes charged. The Pre-Trial Chamber has denied the Defence's application for leave to appeal.¹³ Accordingly, there is now an even stronger basis to assert that the conditions necessitating Bosco Ntaganda's detention under article 58(1) exist.

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.¹⁴ The conditions set out in article 58(1)(b) include: (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. As confirmed by the Appeals Chamber, these three conditions are "in the alternative," such that the fulfillment of any one of them is sufficient to warrant detention.¹⁵

13. Article 60(3) of the Statute requires the Pre-Trial Chamber to periodically review its previous ruling on the release or detention of a person in order to ascertain whether there has been a change in the circumstances underpinning this ruling,

¹¹ ICC-01/04-02/06-322.

¹² ICC-01/04-02/06-309 (as specified in paras. 12, 31, 36, 74 and 97).

¹³ ICC-01/04-02/06-322.

¹⁴ ICC-01/04-01/06-824 (OA 7), at para. 134.

¹⁵ *Ibid.*, at para. 139.

and if so, whether this change has a bearing on the conditions under article 58(1) such that the termination of their detention is warranted.¹⁶

14. 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.”¹⁷ Where no changed circumstances are found to exist, “the Chamber is not required to further review the ruling on release or detention.”¹⁸
15. The Appeals Chamber has also held that the Prosecutor does not have to re-establish circumstances that have already been established.¹⁹ 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 it is aware that relates to the question of detention or release.²⁰ The Chamber must also consider any other information which has a bearing on the subject.²¹
16. As set out above, there have not been any changes in the facts underlying the Chamber’s decision to detain Bosco Ntaganda, or any new facts that would necessitate a modification of the Second Decision. Indeed, the recent Article 61(7) Decision confirming the charges against him, and the denial of leave to appeal that decision, militate strongly in favour of continued detention to secure appearance at trial and to ensure that there are no obstructions to the Prosecution’s investigation and prosecution of the case at trial.

¹⁶ ICC-01/05-01/08-1019 (OA 4), at paras. 47-52 (citing ICC-01/04-01/07-572 (OA 4), at para. 14) and ICC-01/05-01/08-1626-Red, at para. 71.

¹⁷ ICC-01/05-01/08-1019 (OA 4), at para. 51 and ICC-02/11-01/11-548-Red (OA 4), at para. 40 (both citing ICC-01/05-01/08-631 (OA 2), at para. 60).

¹⁸ ICC-02/11-01/11-548-Red (OA 4), at para. 40 (citing ICC-01/05-01/08-2151 (OA 10), at para. 1).

¹⁹ ICC-01/05-01/08-1019 (OA 4), at para. 51.

²⁰ *Ibid.*, at paras. 2 and 51.

²¹ *Ibid.*, at para. 52.

17. In fact, due to the persistent instability in the eastern DRC, including the serious violations of international humanitarian law by the M23 forces, the UN Security Council created a specialised ‘intervention brigade’ within the MONUSCO mandate in late March 2013, which was recently extended until March 2015.²²

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

18. The Prosecution is not aware of any new factors indicating that the risk that Bosco Ntaganda will abscond has diminished. On the contrary, all recent developments in the case confirm the need for his continued detention.

19. As stated above, the one change in circumstances is that all 18 charges against Bosco Ntaganda have been confirmed by this Chamber, and leave to appeal has been denied.²³ The Prosecution asserts that the likelihood that Bosco Ntaganda will abscond should the opportunity arise is now greater given that he is facing trial on numerous and grave charges. If convicted, he will likely receive a lengthy sentence. On this basis, and building upon the reasoning in the previous decisions requiring his detention, there is an increased risk that he will abscond if released and an even more pressing need for his detention in order to ensure his appearance in Court.²⁴

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

20. The need to protect witnesses from intimidation or interference is equally, if not more pressing, given the detailed rehearsal of their evidence against Bosco

²² Resolution 2098, adopted on 28 March 2013, initially created the “Intervention brigade” which was aimed at neutralising the armed groups for a period of one year ([http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2098\(2013\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2098(2013))). This mandate was then extended by Resolution 2147 until 31 March 2015 (adopted on 28 March 2014) ([http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2147\(2014\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2147(2014))).

²³ ICC-01/04-02/06-309 (as specified in paras. 12, 31, 36, 74 and 97) and ICC-01/04-02/06-322.

²⁴ ICC-01/04-02/06-284, at paras. 32-35.

Ntaganda at the confirmation hearing and explanation of how this evidence relates to the charges against him. Moreover, the Article 61(7) Decision provides a detailed analysis of the Chamber's reasoning and the particular evidence it relied upon in reaching its conclusions. The Accused currently knows the identity of 38 of the 47 of the witnesses relied upon at the confirmation hearing, who may also be relied upon by the Prosecution at trial.

21. In light of the seriousness of the charges confirmed against him, his continuing influence over his supporters in the DRC and his history of violence, all conclusions confirmed by the Appeals Chamber and relied upon by this Chamber in the Second Decision,²⁵ 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 now heightened.

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

22. 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."²⁶

23. With respect to the circumstances of this case, the pre-trial detention of Bosco Ntaganda commenced on 22 March 2013 with his arrival at the Court. It has not been unreasonable nor has there been any inexcusable delay in the pre-trial process. Following the confirmation hearing in February and the submission of closing arguments by the parties and participants, the Article 61(7) Decision was rendered within the timeframe established by the statutory framework of the Court.

²⁵ ICC-01/04-02/06-271-Red, at para. 43 and ICC-01/04-02/06-284, at para. 38.

²⁶ ICC-01/04-01-06-824, at para. 122.

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

Relief

25. 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 and his continued detention found to be necessary.



Fatou Bensouda,
Prosecutor

Dated this 8th day of July 2014
At The Hague, The Netherlands