

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

Date: 17 July 2014

**PRE-TRIAL CHAMBER II**

**Before: Judge Ekaterina Trendafilova, Single Judge**

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

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

**Public**

**Third Decision on Bosco Ntaganda's Interim Release**

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

**The Office of the Prosecutor**

Fatou Bensouda, Prosecutor

James Stewart, Deputy Prosecutor

**Defence**

Marc Desalliers

Caroline Buteau

**Legal Representatives of the Victims**

Sarah Pellet

Dmytro Suprun

**Legal Representatives of the 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**

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**Registrar**

Herman von Hebel

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**Judge Ekaterina Trendafilova**, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court”),<sup>1</sup> issues this decision on the review of Bosco Ntaganda’s (“Mr. Ntaganda”) detention pursuant to article 60(3) of the Rome Statute (the “Statute”).

The present decision is classified as public although it refers to the existence of documents and, as the case may be, to a limited extent to their content, which have been submitted and are currently treated as confidential and/or confidential *ex parte*. The Single Judge considers that the references to the said documents in the present decision are required by the principle of judicial reasoning as well as fairness of proceedings *vis-à-vis* the Defence. Moreover, those references are not inconsistent with the nature of the documents referred to and have been kept to a minimum.

## **I. PROCEDURAL HISTORY**

1. On 22 August 2006, Pre-Trial Chamber I, to which this case had originally been assigned, issued the “Decision on the Prosecution Application for a Warrant of Arrest” (the “22 August 2006 Decision”),<sup>2</sup> along with a corresponding warrant of arrest for Mr. Ntaganda.<sup>3</sup>
2. On 15 March 2012, the Presidency re-assigned the situation in the Democratic Republic of the Congo (the “DRC”) to this Chamber.<sup>4</sup>

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<sup>1</sup> Pre-Trial Chamber II, “Decision Designating a Single Judge”, 21 March 2013, ICC-01/04-02/06-40, p. 4.

<sup>2</sup> Pre-Trial Chamber I, ICC-01/04-02/06-1-Conf-Exp-tEN; a redacted version was filed in the record of the case on 6 March 2007 which was thereafter made public on 1 October 2010, ICC-01/04-02/06-1-Red-tENG.

<sup>3</sup> Pre-Trial Chamber I, “Warrant of Arrest”, 22 August 2006, ICC-01/04-02/06-2-Anx-tENG; a corrigendum was filed in the record of the case on 7 March 2007, ICC-01/04-02/06-2-Corr-tENG-Red.

<sup>4</sup> Presidency, “Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the Congo, Darfur, Sudan and Côte d’Ivoire situations”, 15 March 2012, ICC-01/04-02/06-32.

3. On 13 July 2012, the Chamber issued the “Decision on the Prosecutor’s Application under Article 58”,<sup>5</sup> with which a second warrant of arrest was issued against Mr. Ntaganda (the “13 July 2012 Decision”).

4. On 22 March 2013, the Single Judge issued the “Decision on Setting the Date for the Initial Appearance and Related Issues”,<sup>6</sup> in which she, *inter alia*, noted Mr. Ntaganda’s voluntary surrender to the Court<sup>7</sup> and decided to convene a hearing for his initial appearance.<sup>8</sup>

5. On 25 March 2013, the Chamber received the “Report of the Registry on the voluntarily surrender of Bosco NTAGANDA and his transfer to the Court”.<sup>9</sup>

6. On 26 March 2013, Mr. Ntaganda’s initial appearance took place before the Chamber.<sup>10</sup>

7. On 20 August 2013, the Defence filed the “Requête de la Défense aux fins de mise en liberté provisoire de M. Bosco Ntaganda” (the “Application”),<sup>11</sup> in which it requested the interim release of Mr. Ntaganda to the Kingdom of the Netherlands and, where necessary, the application of those conditions which the Chamber considered necessary in accordance with rule 119 of the Rules of Procedure and Evidence (the “Rules”).<sup>12</sup>

8. On 4 September 2013, the Single Judge issued the “Décision concernant la requête urgente présentée par la Défense de Monsieur Bosco Ntaganda le 3 Septembre 2013 (ICC-01/04-02/06-99-Conf-Exp)”,<sup>13</sup> in which she, *inter alia*, ordered the Registry to

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<sup>5</sup> Pre-Trial Chamber II, ICC-01/04-02/06-36-Conf-Exp; and public redacted version, ICC-01/04-02/06-36-Red.

<sup>6</sup> Pre-Trial Chamber II, ICC-01/04-02/06-41.

<sup>7</sup> Pre-Trial Chamber II, ICC-01/04-02/06-41, p. 4.

<sup>8</sup> Pre-Trial Chamber II, ICC-01/04-02/06-41, p. 5.

<sup>9</sup> ICC-01/04-02/06-44-Conf-Exp.

<sup>10</sup> Pre-Trial Chamber II, Transcript of Hearing, 26 March 2013, ICC-01/04-02/06-T-2-ENG ET.

<sup>11</sup> ICC-01/04-02/06-87-Red.

<sup>12</sup> ICC-01/04-02/06-87-Red, p. 16.

<sup>13</sup> Pre-Trial Chamber II, ICC-01/04-02/06-100.

transmit the confidential version of the Application to the Kingdom of the Netherlands and invited the latter to submit its observations in accordance with the operative part of the decision no later than Friday, 20 September 2013.<sup>14</sup> The Kingdom of the Netherlands submitted its observations which were transmitted to the Chamber on 20 September 2013.<sup>15</sup>

9. On 18 November 2013, the Single Judge issued the “Decision on the Defence’s Application for Interim Release” (the “18 November 2013 Decision”).<sup>16</sup>

10. On 5 March 2014, the Appeals Chamber issued the “Judgment on the appeal of Mr Bosco Ntaganda against the decision of Pre-Trial Chamber II of 18 November 2013 entitled ‘Decision on the Defence’s Application for Interim Release’”, in which it confirmed the impugned decision, by majority (the “5 March 2014 Judgment”).<sup>17</sup>

11. On 17 March 2014, the Single Judge issued the “Second Decision on Bosco Ntaganda’s Interim Release”,<sup>18</sup> which was notified on 18 March 2014 (the “18 March 2014 Decision”). In this decision, the Single Judge decided that “Bosco Ntaganda shall continue to be detained [...] and [...] that the 120 days period for review set out in rule 118(2) of the Rules shall start running as of the date of notification of this decision”.<sup>19</sup>

12. On 9 June 2014, the Chamber issued the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco

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<sup>14</sup> Pre-Trial Chamber II, ICC-01/04-02/06-100, p. 5.

<sup>15</sup> Registry, “Transmission to Pre-Trial Chamber II of the observations submitted by the Kingdom of the Netherlands on the request for interim release presented by Bosco Ntaganda”, ICC-01/04-02/06-113-Conf and its 4 confidential annexes.

<sup>16</sup> Pre-Trial Chamber II, ICC-01/04-02/06-147.

<sup>17</sup> Appeals Chamber, ICC-01/04-02/06-271-Conf; and public redacted version, ICC-01/04-02/06-271-Red.

<sup>18</sup> Pre-Trial Chamber II, ICC-01/04-02/06-284.

<sup>19</sup> Pre-Trial Chamber II, ICC-01/04-02/06-284, p. 17.

Ntaganda” (the “Confirmation of Charges Decision”),<sup>20</sup> in which it confirmed 18 charges against Mr. Ntaganda, to the extent specified in the decision.

13. On 3 July 2014, by way of email, the Single Judge requested the Prosecutor, the Defence and the Legal Representatives of Victims to submit their observations on the release or continued detention of Mr. Ntaganda no later than Tuesday, 8 July 2014.

14. On 8 July 2014, the Chamber received the observations of the Prosecutor,<sup>21</sup> the Defence<sup>22</sup> and the Legal Representatives of Victims.<sup>23</sup> The Defence, in particular, did not express its views on the matter of Mr. Ntaganda’s detention nor did it respond to the Prosecutor’s observations.

## II. APPLICABLE LAW

15. The Single Judge notes articles 21(1)(a), (2) and (3), 58(1), 60(3) and 67(1) of the Statute, and rules 118(2) and 129 of the Rules.

16. In particular, the Single Judge recalls article 58(1) of the Statute which stipulates:

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

(b) The arrest of the person appears necessary:

(i) To ensure the person’s appearance at trial;

(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; [...]

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<sup>20</sup> Pre-Trial Chamber II, ICC-01/04-02/06-309.

<sup>21</sup> “Prosecution’s Observations on the Review of the Pre-Trial Detention of Bosco Ntaganda”, ICC-01/04-02/06-330.

<sup>22</sup> “Observations de la Défense en lien avec le réexamen périodique de la détention provisoire de M. Bosco Ntaganda, conformément à l’Ordonnance du 3 juillet 2014”, ICC-01/04-02/06-329.

<sup>23</sup> “Observations conjointes des représentants légaux communs relatives au réexamen périodique de la détention de M. Bosco Ntaganda”, ICC-01/04-02/06-327.

17. Further, article 60(2) and (3) of the Statute states:

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

### III. DETERMINATION BY THE SINGLE JUDGE

18. The Single Judge notes that according to article 60(3) of the Statute and rule 118(2) of the Rules, the Chamber is under an obligation to review its previous ruling on the release or detention of Mr. Ntaganda “at least every 120 days”, and “may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require”. The reference to the phrase “at least every 120 days” makes it evident that the Single Judge is obliged to conduct such review according to the timeframe specified in this provision.

19. The last time the Single Judge ruled on the “release or detention” of Mr. Ntaganda was on 18 March 2014 when it was decided that the suspect should continue to be detained, and that the 120 days period for review shall start running as of the date of notification of the 18 March 2014 Decision.<sup>24</sup> Therefore, the next deadline for the review required pursuant to article 60(3) of the Statute is 17 July 2014.

20. At the outset, the Single Judge deems it essential to recall the fundamental principle reflected in the jurisprudence of this Court,<sup>25</sup> that when dealing with the

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<sup>24</sup> Pre-Trial Chamber II, ICC-01/04-02/06-147, p. 27.

<sup>25</sup> Pre-Trial Chamber III, “Decision on Application for Interim Release”, 16 December 2008, ICC-01/05-01/08-321, para. 31; Pre-Trial Chamber II, “Decision on Application for Interim Release”, 14 April 2009, ICC-01/05-01/08-403, para. 36; Pre-Trial Chamber I, “Decision on the Conditions of the Pre-Trial

right to interim release, one must bear in mind that deprivation of liberty is the exception and not the rule. This interpretation is consistent with internationally recognised human rights, as dictated by article 21(3) of the Statute, and finds support in the jurisprudence of the European Court of Human Rights (the “ECtHR”).<sup>26</sup>

21. The Single Judge also notes that unlike a ruling under article 60(2) of the Statute, which calls for a *de novo* assessment of the requirements of article 58(1) of the Statute (i.e., “to inquire anew into the existence of facts justifying detention”),<sup>27</sup> conducting an article 60(3) review depends on the criterion of “changed circumstances”. As the Appeals Chamber has clarified in its jurisprudence, changed circumstances “[import] either 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”.<sup>28</sup> This necessitates that the Chamber “revert[s] to the ruling on detention to determine whether there has been a change in the circumstances that

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Detention of Germain Katanga”, ICC-01/04-01/07-426, p. 6; “Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga”, ICC-01/04-01/07-330, pp. 6-7.

<sup>26</sup> ECtHR, *Shamayev and others v. Georgia and Russia*, no. 36378/02, Judgment of 12 April 2005, para. 396; *Kurt v. Turkey*, no. 24276/94, Judgment of 25 May 1998, para. 122. See also in the context of the *ad hoc* tribunals, Special Court for Sierra Leone, *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-PT, “Decision on the Motion by Morris Kallon for Bail”, 23 February 2004, para. 25; International Criminal Tribunal for the Former Yugoslavia (“ICTY”), *Prosecutor v. Darko Mrdja*, “Decision on Darko Mrdja’ Request for Provisional Release”, Case No. IT-02-59-PT, 15 April 2002, para. 29; *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, “Decision Granting Provisional Release to Enver Hadžihasanović”, 19 December 2001, para. 7.

<sup>27</sup> Appeals Chamber, “Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled ‘Decision on the *Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo*’”, 26 October 2012, ICC-02/11-01/11-278-Red, para. 23.

<sup>28</sup> Appeals Chamber, “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’”, 2 December 2009, ICC-01/05-01/08-631-Red, para. 60; Appeals Chamber, “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 2 September 2011 entitled ‘Decision on the *Demande de mise en liberté de M. Jena-Pierre Bemba Gombo afin d’accomplir ses devoirs civiques en République Démocratique du Congo*’”, ICC-01/05-01/08-1722, para. 30.

have a bearing on the conditions under article 58(1) of the Statute”.<sup>29</sup> It follows that revisiting the conditions on the basis of which it was decided in the 18 March 2014 Decision that Mr. Ntaganda continued to be detained is essential. In principle, the scope of such review in reaching a decision under article 60(3) of the Statute “is potentially much more limited than that carried out in reaching a decision under article 60(2) of the Statute”.<sup>30</sup>

22. Turning to the said conditions, article 58(1)(a) of the Statute generally requires an assessment of whether there are reasonable grounds to believe that the person committed a crime that falls within the jurisdiction of the Court. In the context of the present review, it is essential to assess whether there has been a change in circumstances which could have an impact on this condition.

23. In the 18 November 2013 Decision, the Single Judge referred to the findings of the 22 August 2006 Decision and the 13 July 2012 Decision. In these decisions collectively, it was determined that there were reasonable grounds to believe that Mr. Ntaganda was criminally responsible, pursuant to article 25(3)(a) of the Statute, for seven counts of war crimes and three counts of crimes against humanity during the time-frame and locations specified therein.<sup>31</sup> Moreover, in the 18 November 2013 Decision, the Single Judge acknowledged that the Defence of Mr. Ntaganda:

[Did] not challenge the validity of the relevant Chambers’ findings under article 58(1)(a) of the Statute. Nor [did] the Defence present any argument or evidence which [required] the Chamber to look anew into the requirement of [this provision]. Instead, the Defence

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<sup>29</sup> Appeals Chamber, “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled ‘Decision on Applications for Provisional Release’”, 19 August 2011, ICC-01/05-01/08-1626-Red, para. 71.

<sup>30</sup> Appeals Chamber, “Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled ‘Decision on the *Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo*’”, 26 October 2012, ICC-02/11-01/11-278-Red, para. 24.

<sup>31</sup> Pre-Trial Chamber II, “Decision on the Defence’s Application for Interim Release”, 18 November 2013, ICC-01/04-02/06-147, para. 38; Pre-Trial Chamber I, “Decision on the Prosecution Application for a Warrant of Arrest”, 6 March 2007, ICC-01/04-02/06-1-Red-tENG, paras 21, 34, 48-60; Pre-Trial Chamber II, “Decision on the Prosecutor’s Application under Article 58”, 13 July 2012, ICC-01/04-02/06-36-Red, pp. 27, 36, 66, 68-76.

“reserve[d] the right to submit, where necessary, a further application to impugn the foundation of the warrants of arrest in accordance with the provisions of article 58(1)(a).<sup>32</sup>

24. In the context of the present review, as in the 18 March 2014 Decision, the Defence has neither challenged these earlier findings nor submitted any further applications “to impugn the foundation of the warrants of arrest”. Instead, in its most recent observations of 8 July 2014, the Defence stated that it does not intend to comment on the release or detention of Mr. Ntaganda, unless it finds it necessary to respond to the observations submitted by the Prosecutor and the Legal Representatives of Victims.<sup>33</sup> In light of the submissions of the parties and participants, as well as the information available before the Chamber, the Single Judge considers that there has been no change in circumstances since the issuance of the 18 March 2014 Decision, save for the issuance of the Confirmation of Charges Decision. This indeed is a change of circumstance which supports a finding on Mr. Ntaganda’s continued detention. Accordingly, the requirement of article 58(1)(a) of the Statute is met. This is even more the case given that the charges against Mr. Ntaganda have been confirmed against the higher evidentiary standard set out in article 61(7) of the Statute.

25. Turning to the conditions set forth in article 58(1)(b) of the Statute, it should be emphasized that, in principle, continued detention cannot be ordered, unless it appears necessary: (i) to ensure Mr. Ntaganda’s appearance at trial; (ii) to ensure that he does not obstruct or endanger the investigation or the court proceedings, or (iii) where applicable, to prevent him from continuing with the commission of the crimes referred to in the Confirmation of Charges Decision or related crimes. As to the related crimes, they must fall within the jurisdiction of the Court and arise from the same circumstances. The Appeals Chamber has confirmed that these three

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<sup>32</sup> Pre-Trial Chamber II, ICC-01/04-02/06-147, para. 38.

<sup>33</sup> ICC-01/04-02/06-329, paras 9-10.

conditions are “in the alternative”, and thus, the fulfilment of one of them is sufficient to negate the need to address the remaining conditions.<sup>34</sup>

26. In the context of the present review, the Single Judge is called upon to determine whether there is a change “in some or all of the facts underlying” the 18 March 2014 Decision or whether there exists “a new fact” which prompts the Single Judge to modify her previous ruling.

*Mr. Ntaganda’s Appearance at Trial (article 58(1)(b)(i) of the Statute)*

27. The Single Judge recalls that in the 18 November 2013 Decision, she responded to a number of arguments put forward by the Defence, including those related to his voluntary surrender, and decided that if Mr. Ntaganda were to be released he might abscond, should the possibility arise.<sup>35</sup> In particular, the Single Judge found that Mr. Ntaganda managed to escape for several years since the issuance of the first warrant of arrest in August 2006 until he decided to seek refuge in Kigali on 18 March 2013.<sup>36</sup> Despite the issuance of two warrants of arrest against him on 22 August 2006 and 13 July 2012, he managed to evade justice for a lengthy period of time, in total disregard of the serious accusations brought against him.<sup>37</sup>

28. In the 18 March 2014 Decision the Single Judge did not see a reason to deviate from this finding. At present, the Single Judge also does not see a reason that would lead her to a different conclusion with respect to these facts, which reveal a possibility that Mr. Ntaganda absconds if released.

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<sup>34</sup> Appeals Chamber, “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’”, 13 February 2007, ICC-01/04-01/06-824, para. 139.

<sup>35</sup> Pre-Trial Chamber II, ICC-01/04-02/06-147, paras 40-46.

<sup>36</sup> Pre-Trial Chamber II, ICC-01/04-02/06-147, para. 41.

<sup>37</sup> Pre-Trial Chamber II, ICC-01/04-02/06-147, para. 41.

29. Furthermore, relying on evidence and material available before the Chamber, including a United Nations report as well as certain media articles,<sup>38</sup> the Single Judge concluded in both the 18 November 2013 Decision and the 18 March 2014 Decision that Mr. Ntaganda's voluntary surrender was not driven by good will. Rather, his decision to surrender to the United States Embassy in Kigali on 18 March 2013 was due to external factors.

30. More specifically, the Single Judge found that Mr. Ntaganda's surrender was prompted by either the declaration of the Congolese Government to arrest him, or pressure exerted on him by the Rwandan Government to surrender, or most likely, his fear of being killed after the split of the "[*Mouvement du 23 mars*] by the end of February 2013" and the defeat of his troops.<sup>39</sup>

31. Hitherto, there is no evidence before the Chamber that these facts have changed. In addition, the weight to be given to Mr. Ntaganda's decision to voluntarily surrender remains affected by the timeliness and manner in which the surrender took place,<sup>40</sup> as stated in the 18 November 2013 Decision and the 18 March 2014 Decision. Therefore, the Single Judge does not consider that there is any change of circumstances with respect to this factor which warrants revisiting her previous ruling in the present decision.

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<sup>38</sup> "Midterm report of the Group of Experts on the Democratic Republic of the Congo", UN Doc. S/2013/433 ("Midterm report"); "The Bosco surrender: more questions than answers", Congo Siasa, 22 March 2013, available at <[congosiasa.blog.co.uk/search?updated-max=2013-03-29T](http://congosiasa.blog.co.uk/search?updated-max=2013-03-29T)>; also "DR Congo: Bosco Ntaganda appears before ICC", BBC News, 26 March 2013, available at <[www.bbc.co.uk/news/world-africa-21933569](http://www.bbc.co.uk/news/world-africa-21933569)>; "Amid good news, doubts", Congo Siasa, 18 March 2013, available at <[congosiasa.blog.co.uk/search?updated-max=2013-03-29T](http://congosiasa.blog.co.uk/search?updated-max=2013-03-29T)>.

<sup>39</sup> Pre-Trial Chamber II, ICC-01/04-02/06-147, paras 43-45.

<sup>40</sup> See ICTY, *Prosecutor v. Vinko Pandurević et al.*, "Decision on Vinko Pandurević's Application for Provisional Release", 18 July 2005, Case No. IT-05-86-PT, para. 18; *Prosecutor v. Drago Nikolić et al.*, "Decision on Drago Nikolić's Request for Provisional Release", Case No. IT-05-88-PT, 9 November 2005, paras 19-20.

32. Further, Mr. Ntaganda is facing numerous charges, especially after the Chamber has confirmed against him 18 charges of war crimes and crimes against humanity.<sup>41</sup> These charges are of such gravity<sup>42</sup> and might result in an overall lengthy sentence in case of conviction. In its judgment of 13 February 2007, the Appeals Chamber stated that “[i]f a person is charged with grave crimes, the person might face a lengthy prison sentence, which may make the person more likely to abscond”.<sup>43</sup> The same logic was endorsed in the Appeals Chamber judgment of 9 June 2008 whereby it was acknowledged that the “gravity” of the crimes as well as the potential length of the sentence are distinct factors which enhance the probability of the person absconding.<sup>44</sup> As the Prosecutor correctly points out, “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”.<sup>45</sup>

33. Further, part of the charges confirmed against Mr. Ntaganda in relation to the recruitment and use of child soldiers represent charges for which Thomas Lubanga (his alleged co-perpetrator) was convicted<sup>46</sup> by Trial Chamber I to a lengthy sentence of 14 years.<sup>47</sup> Although convicting an accused person and imposing a sentence with respect to one or more crimes within the jurisdiction of the Court depends on the specific circumstances underlying each particular case, Mr. Ntaganda’s mere

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<sup>41</sup> Pre-Trial Chamber II, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda”, 9 June 2014, ICC-01/04-02/06-309.

<sup>42</sup> See for example, Trial Chamber I, “Decision on Sentence pursuant to Article 76 of the Statute”, 10 July 2012, ICC-01/04-01/06-2901, para. 37 (considering that the “crimes of conscripting and enlisting children under the age of fifteen and using them to participate actively in hostilities are undoubtedly very serious crimes that affect the international community as a whole”).

<sup>43</sup> Appeals Chamber, “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’”, 13 February 2007, ICC-01/04-01/06-824, para. 136.

<sup>44</sup> Appeals Chamber, “Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release”, 9 June 2008, ICC-01/04-01/07-572, paras 21, 24.

<sup>45</sup> ICC-01/04-02/06-330, para. 19; also ICC-01/04-02/06-327, para. 17.

<sup>46</sup> Trial Chamber I, “Judgment pursuant to Article 74 of the Statute”, 14 March 2012, ICC-01/04-01/06-2842.

<sup>47</sup> Trial Chamber I, “Decision on Sentence pursuant to Article 76 of the Statute”, 10 July 2012, ICC-01/04-01/06-2901.

awareness of the sentence imposed in quite a similar case such as that of Thomas Lubanga increases the possibility of him absconding.

34. The Single Judge relied before on some of these factors, including the gravity of the charges and the potential length of the sentence, in the 18 November 2013 Decision and the 18 March 2014 Decision. In the present circumstances, the risk of Mr. Ntaganda absconding becomes even higher given that most of the charges brought against him have been confirmed.<sup>48</sup> The Appeals Chamber in its judgment of 16 December 2008 confirmed that “repeating findings already made in [a previous decision on detention] and concluding that these findings were ‘still valid’ [...] did not detract from the correctness and adequacy of the [Pre-Trial Chamber’s] finding”.<sup>49</sup> In addition, in the 5 March 2014 Judgment, the Appeals Chamber found no “clear error in the [...] Chamber’s finding with regard to the gravity of the charges and potentially lengthy sentence that [Mr. Ntaganda] is facing”.<sup>50</sup>

35. Based on the foregoing, the Single Judge cannot reach a finding other than that there would be a high risk that Mr. Ntaganda would not appear at trial if released.<sup>51</sup> This conclusion is more compelling in view of the Single Judge’s previous findings that Mr. Ntaganda has the financial means to abscond if released.<sup>52</sup> Having assessed

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<sup>48</sup> Pre-Trial Chamber II, ICC-01/04-02/06-309.

<sup>49</sup> Appeals Chamber, “Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled ‘Decision on application for interim release’”, 16 December 2008, ICC-01/05-01/08-323, para. 53.

<sup>50</sup> Appeals Chamber, “Judgment on the appeal of Mr. Bosco Ntaganda against the decision of Pre-Trial Chamber II of 18 November 2013 entitled ‘Decision on the Defence’s Application for Interim Release’”, 5 March 2014, ICC-01/04-02/06-271-Conf, para. 66.

<sup>51</sup> As the Appeals Chamber reiterated most recently in the 11 July 2014 judgment, “the gravity of the crimes, and the concomitant sentence that may be imposed upon conviction, are relevant considerations in assessing the risk that a person may not appear at trial”. Appeals Chamber, “Judgment on the appeal of Mr. Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled ‘Decision on the *Demande de mise en liberté provisoire* de Maître Aimé Kilolo Musamba’”, 11 July 2014, ICC-01/05-01/13-558, para. 63.

<sup>52</sup> Pre-Trial Chamber II, “Decision on the Defence’s Application for Interim Release”, 18 November 2013, ICC-01/04-02/06-147, paras 54-55; Pre-Trial Chamber II, “Second Decision on Bosco Ntaganda’s Interim Release”, 18 March 2014, ICC-01/04-02/06-284, para. 36.

these factors collectively, the Single Judge considers that the requirement of article 58(1)(b)(i) of the Statute remains satisfied and the continued detention of Mr. Ntaganda remains necessary to ensure his appearance at trial.

*Obstructing or Endangering the Investigation or the Court Proceedings (article 58(1)(b)(ii) of the Statute)*

36. Turning to the requirement of article 58(1)(b)(ii) of the Statute, the Single Judge considers that on the basis of the available information, it is clear that Mr. Ntaganda remains to have some influence in the DRC due to the contacts he managed to retain with a considerable number of his former soldiers, including those from the *Forces Patriotiques pour la Libération du Congo* and the *Congrès National pour la Défense du Peuple* who used to be part of the *Mouvement du 23 mars*. This fact has been developed in more detail in the 18 November 2013 Decision on the basis of United Nations reports.<sup>53</sup> The Single Judge has also relied on this information in making her assessment in the 18 March 2014 Decision, and for the purpose of the present review there is no information to the contrary. Thus, said information remains valid.

37. When assessing this finding together with the fact that the identity of 38 witnesses has been disclosed to Mr. Ntaganda,<sup>54</sup> his documented history of violence,<sup>55</sup> which is also revealed in a number of reports,<sup>56</sup> and the seriousness of the

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<sup>53</sup> Pre-Trial Chamber II, ICC-01/04-02/06-147, para. 58. The Appeals Chamber has recently accepted, by majority, the level of detail provided by the Chamber to prove this fact as well as the reliability of the source. See, Appeals Chamber, "Judgment on the appeal of Mr Bosco Ntaganda against the decision of Pre-Trial Chamber II of 18 November 2013 entitled 'Decision on the Defence's Application for Interim Release'", 5 March 2014, ICC-01/04-02/06-271-Conf, paras 40-43.

<sup>54</sup> See, Pre-Trial Chamber II, "First Decision on the Prosecutor's Requests for Redactions and Other Related Requests", 1 October 2013, ICC-01/04-02/06-117-Red3, para. 36; "Second Decision on the Prosecutor's Requests for Redactions", 15 November 2013, ICC-01/04-02/06-145-Red2, para. 24; "Third Decision on the Prosecutor's Requests for Redactions", 5 December 2013, ICC-01/04-02/06-165-Red3, para. 27, wherein anonymity was granted for 9 witnesses, bringing the total number of Prosecutor's witnesses known to the Defence to 38; ICC-01/04-02/06-282, para. 23.

<sup>55</sup> Pre-Trial Chamber I, ICC-01/04-02/06-1-Red-tENG, paras 48-64; Pre-Trial Chamber II, ICC-01/04-02/06-36-Red, paras 63-66, 70, 72, 74, 75, 76, 80; DRC-OTP-2054-6846, at 6867.

<sup>56</sup> See for example, "Consolidated Report on Investigations Conducted by the United Nations Joint Human Rights Office (UNJHRO) into Grave Human Rights Abuses Committed in Kiwanja, North

charges he is facing after their confirmation as well as the potential lengthy sentence that he might face if convicted, one cannot rule out the possibility of him influencing, threatening or intimidating witnesses and victims and/or their family members. Moreover, the fact that he has also the financial means necessary strengthens the conclusion that he is capable of carrying out these acts.<sup>57</sup> Accordingly, if Mr. Ntaganda were to be released, the risk would increase that he might succeed in exerting pressure on those witnesses to change their testimony, either directly or indirectly, through his loyalist or his family members. These factors were relevant for the Single Judge's consideration in her previous decision, and in the context of the present review, there is no available information to the contrary prompting her to rule otherwise.

38. In view of the foregoing, the Single Judge finds that the requirement of article 58(1)(b)(ii) of the Statute is fulfilled insofar as the continued detention of Mr. Ntaganda remains necessary to ensure that he does not obstruct or endanger the investigation or the Court's proceedings.

39. Finally, since the requirements of article 58(1)(b) of the Statute are in the alternative and the Single Judge has not considered sub-paragraph 1(b)(iii) in the 18 March 2014 Decision, she finds no reason to address it in the present decision.

#### **IV. FINAL REMARKS**

40. The present decision concludes the proceedings of the present case before this Chamber. Accordingly, the Single Judge effectuates the transmission of the record of the proceedings to the Presidency.

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Kivu, in November 2008", 7 September 2009, in particular paras 24 and 26; also "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)", 2 December 2011, UN Doc. S/2011/738, pp. 82-83, 85, 123-124, 149-150; Midterm Report, paras 129-130.

<sup>57</sup> Pre-Trial Chamber II, "Decision on the Defence's Application for Interim Release", 18 November 2013, ICC-01/04-02/06-147, paras 54-55; "Second Decision on Bosco Ntaganda's Interim Release", 18 March 2014, ICC-01/04-02/06-284, para. 38.

**FOR THESE REASONS, THE SINGLE JUDGE HEREBY**

- a) **decides** that Bosco Ntaganda shall continue to be detained; and
- b) **orders** the Registrar to transmit, in accordance with rule 129 of the Rules, the Confirmation of Charges Decision together with the record of the case against Bosco Ntaganda to the Presidency to constitute a Trial Chamber.

Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova  
Single Judge

Dated this Thursday, 17 July 2014

At The Hague, The Netherlands