Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/04-02/06**
Date: **18 November 2013**

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

Decision on the Defence's Application for 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

Legal Representatives of the Victims

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

Registrar
Herman von Hebel, Registrar

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")[1] issues this decision on the "Requête de la Défense aux fins de mise en liberté provisoire de M. Bosco Ntaganda"(the "Application").[2]

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 ("PTC 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"),[3] along with a corresponding warrant of arrest for Bosco Ntaganda ("Mr. Ntaganda").[4]

2. On 15 March 2012, the Presidency re-assigned the situation in the Democratic Republic of the Congo (the "DRC") to this Chamber.[5]

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[1] Pre-Trial Chamber II, "Decision Designating a Single Judge", 21 March 2013, ICC-01/04-02/06-40, p. 4.
[2] ICC-01/04-02/06-87-Conf-Exp-tENG; a public redacted version was also filed in the record of the case, ICC-01/04-02/06-87-Red-tENG.
[3] Pre-Trial Chamber I, "Decision on the Prosecution Application for a Warrant of Arrest", 22 August 2006, ICC-01/04-02/06-1-US-Exp-tEN; a redacted version was filed in the record of the case on 6 March 2007 and the decision was made public on 1 October 2010, ICC-01/04-02/06-1-Red-tENG.
[4] Pre-Trial Chamber I, "Warrant of Arrest", 22 August 2006, ICC-01/04-02/06-2-Anx-tENG; a corrigendum was filed into the record of the case on 7 March 2007, see ICC-01/04-02/06-2-Corr-tENG-Red.
[5] 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",[6] 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",[7] in which she, *inter alia*, noted Mr. Ntaganda's voluntary surrender to the Court[8] and decided to convene a hearing for his initial appearance.[9]

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".[10]

6. On 26 March 2013, a hearing on Mr. Ntaganda's initial appearance took place.[11]

7. On 20 August 2013, the Defence filed the Application,[12] in which it requested the immediate 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").[13]

8. On 26 August 2013, the Single Judge issued the "Decision Requesting Observations on the Defence's Application for Interim Release",[14] in which she, *inter alia*, ordered the Registry to transmit the redacted version of the Application to the Kingdom of the

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[6] Pre-Trial Chamber II, "Decision on the Prosecutor's Application under Article 58", 13 July 2012, ICC-01/04-02/06-36-Conf-Exp; and public redacted version, ICC-01/04-02/06-36-Red.
[7] Pre-Trial Chamber II, "Decision on Setting the Date for the Initial Appearance and Related Issues", 22 March 2013, ICC-01/04-02/06-41.
[8] Pre-Trial Chamber II, "Decision on Setting the Date for the Initial Appearance and Related Issues", 22 March 2013, ICC-01/04-02/06-41, p. 4.
[9] Pre-Trial Chamber II, "Decision on Setting the Date for the Initial Appearance and Related Issues", 22 March 2013, ICC-01/04-02/06-41, p. 5.
[10] ICC-01/04-02/06-44-Conf-Exp.
[11] Pre-Trial Chamber II, Transcript of Hearing, 26 March 2013, ICC-01/04-02/06-T-2-ENG ET.
[12] ICC-01/04-02/06-87-Red-tENG.
[13] ICC-01/04-02/06-87-Red-tENG, p. 16.
[14] Pre-Trial Chamber II, ICC-01/04-02/06-92.

Netherlands and invited the latter to submit its observations in accordance with the operative part of the decision no later than Friday, 13 September 2013.

9. On 3 September 2013, the Defence filed the "Requête urgente de la Défense aux fins de reconsideration de la 'Decision Requesting Observations on the Defence's Application for Interim Release', datée du 26 août 2013",[15] in which it mainly requested the transmission of the confidential version of the Application to the Kingdom of the Netherlands for its observations.[16]

10. 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)",[17] in which she, *inter alia*, ordered the Registry to 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.[18]

11. On 6 September 2013, the Chamber received the "Prosecution's Response to the 'Requête de la Défense aux fins de mise en liberté provisoire de M. Bosco Ntaganda'" (the "Prosecutor's Response" or "Response").[19]

12. On 13 September 2013, the Chamber received the "Requête de la Défense aux fins de solliciter l'autorisation de déposer une réplique à la 'Prosecution's Response to the *Requête de la Défense aux fins de mise en liberté provisoire de M. Bosco Ntaganda* (ICC-01/04-02/06-87-Conf-Exp)', déposée le 6 septembre 2013",[20] in which the Defence requested leave to reply to the Prosecutor's Response (the "Defence's Request for Leave to Reply").[21]

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[15] ICC-01/04-02/06-99-Conf-Exp.
[16] ICC-01/04-02/06-99-Conf-Exp, p. 5.
[17] Pre-Trial Chamber II, ICC-01/04-02/06-100-Conf.
[18] Pre-Trial Chamber II, ICC-01/04-02/06-100-Conf, p. 5.
[19] ICC-01/04-02/06-103-Conf.
[20] ICC-01/04-02/06-105-Conf.
[21] ICC-01/04-02/06-105-Conf, p. 5.

13. On 18 September 2013, the Chamber received the "Prosecution's Response to Bosco Ntaganda's Request to File a Reply", in which the Prosecutor opposed the Defence's Request for Leave to Reply.[22]

14. On 19 September 2013, the Single Judge issued the "Decision on the Circumstances Surrounding Bosco Ntaganda's Voluntary Surrender to the Court and on the Defence's Request for Leave to Reply", in which she, *inter alia*, granted the Defence's Request for Leave to Reply.[23] In the same decision, the Single Judge ordered the Registrar to file a report with the Chamber concerning the circumstances underlying the voluntary surrender of Mr. Ntaganda, no later than 3 October 2013.[24] The Single Judge also requested the Prosecutor and the Defence, should they desire so, to submit their observations on said report no later than 10 and 17 October 2013 respectively.[25]

15. On 20 September 2013, the Chamber received the "Defence Reply to the 'Prosecution's Response to the *Requête de la Défense aux fins de mise en liberté provisoire de M. Bosco Ntaganda* (ICC-01/04-02/06-87-Conf-Exp)', dated 6 September 2013" (the "Defence's Reply" or "Reply").[26] An English translation of the Defence's Reply was received and registered in the record of the case on 8 October 2013.[27]

16. On 20 September 2013, the Registrar transmitted to the Chamber the observations submitted by the Kingdom of the Netherlands on the Application.[28]

17. On 3 October 2013, the Chamber received the "Registry report following the decision of the Single Judge of 19 September 2013 (ICC-01/04-02/06-109-Conf)" (the "Second Registry's Report").[29]

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[22] ICC-01/04-02/06-108-Conf.
[23] Pre-Trial Chamber II, ICC-01/04-02/06-109-Conf.
[24] Pre-Trial Chamber II, ICC-01/04-02/06-109-Conf, p. 6.
[25] Pre-Trial Chamber II, ICC-01/04-02/06-109-Conf, p. 7.
[26] ICC-01/04-02/06-111-Conf.
[27] ICC-01/04-02/06-111-Conf-tENG.
[28] 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.
[29] ICC-01/04-02/06-120-Conf.

II. SUBMISSIONS OF THE PARTIES

18. The Single Judge wishes to point out that for the sake of judicial economy, the parties' submissions have been summarised below only to the extent that they relate to the elements considered by the Single Judge for her final determination. Apart from that, the Single Judge notes that throughout its Application, the Defence constantly refers to 6 March 2007 as the date of the issuance of the decision on the first warrant of arrest. In this regard, the Single Judge wishes to clarify that said decision was issued on 22 August 2006, while on 6 March 2007 a redacted version was filed in the record of the case. Therefore, in the present decision the Single Judge shall proceed by referring to the actual date of 22 August 2006.

The Defence's Application

19. In the Application, the Defence submits that continued detention should be an exception to the general rule which weighs in favour of the person's liberty.[30] Referring to the jurisprudence of the Appeals Chamber, the Defence argues that a decision by the relevant Chamber on an initial application for interim release based on articles 58(1) and 60(2) of the Rome Statute (the "Statute") is not discretionary and it requires "appraisal *ab initio* of the material supporting the application for issuance of a warrant for said suspect's arrest".[31] In the words of the Defence, the Chamber "must determine whether continued detention under article 58(1)(b) appear[s] necessary".[32] Thus, the burden of proving the "necessity for detention" lies with the Prosecutor, the Defence adds.[33]

20. In substantiating its Application, the Defence refers to excerpts from the Prosecutor's first application for the issuance of a warrant of arrest against Mr. Ntaganda as well as from the 22 August 2006 Decision.[34] According to the Defence, the

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[30] ICC-01/04-02/06-87-Red-tENG, para. 20.
[31] ICC-01/04-02/06-87-Red-tENG, paras 21, 23.
[32] ICC-01/04-02/06-87-Red-tENG, para. 23.
[33] ICC-01/04-02/06-87-Red-tENG, para. 22.
[34] ICC-01/04-02/06-87-Red-tENG, paras 26-27, 30.

arguments put forward by the Prosecutor in 2006 to support the suspect's arrest and detention on the basis of article 58(1)(b) of the Statute are "unfounded".[35] The current situation, "[is] fundamentally different from that described [...] on 22 August 2006",[36] the date of issuance of the first warrant of arrest, the Defence claims. Referring to the requirements of article 58(1)(b)(i) and (ii) of the Statute, the Defence also challenges the Prosecutor's application in support of a second warrant of arrest as it "propounds nothing to sustain the necessity of Mr Ntaganda's arrest" on the basis of these requirements.[37]

21. In particular, according to the Defence, the Prosecutor's claim that Mr. Ntaganda, *inter alia*, attacked the *Forces Armées de la République Democratique du Congo* ("FARDC") in Bunia in 2005 and evaded arrest by the Congolese authorities on account of a domestic warrant of arrest issued the same year, lacks "evidentiary support".[38] To the contrary and as acknowledged by the Prosecutor elsewhere,[39] Mr. Ntaganda actually joined the FARDC after the issuance of the first arrest warrant and took part in the peace process.[40] Despite the change in circumstances, the Prosecutor when applying for the issuance of a second warrant of arrest failed to "update the material" in support of Mr. Ntaganda's detention, the Defence adds.[41] Instead, the Prosecutor claims that the circumstances "still subsist", despite "the considerable changes to Mr Ntaganda's situation since 22 August 2006", which cannot be disregarded, the Defence states.[42] Referring to the 22 August 2006 Decision, the Defence further alleges that PTC I found that Mr. Ntaganda "could be in a position [...] of threatening witnesses", although the material presented fails to support these findings.[43]

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[35] ICC-01/04-02/06-87-Red-tENG, para. 28.
[36] ICC-01/04-02/06-87-Red-tENG, para. 28.
[37] ICC-01/04-02/06-87-Red-tENG, paras 60-62.
[38] ICC-01/04-02/06-87-Red-tENG, paras 30-31.
[39] The Defence is referring to document ICC-01/04-02/06-61-Conf-Red, paras 21-22.
[40] ICC-01/04-02/06-87-Red-tENG, para. 33.
[41] ICC-01/04-02/06-87-Red-tENG, paras 34 and 52.
[42] ICC-01/04-02/06-87-Red-tENG, paras 35-36.
[43] ICC-01/04-02/06-87-Red-tENG, para. 50.

22. The Defence also submits that Mr. Ntaganda never intended to evade justice and he surrendered voluntarily to the Court after ensuring his security and the effectiveness of such action.[44] Mr. Ntaganda cooperated throughout the entire process of his voluntary surrender and despite being informed of the charges against him, he still demanded to proceed with his surrender, the Defence adds.[45] Referring to the jurisprudence of the Court and the International Criminal Tribunal for the Former Yugoslavia (the "ICTY"), the Defence further argues that the suspect's awareness of the charges against him, and the potential sentence expected if found guilty, should not be relied upon in support of continued detention, given the suspect's voluntary surrender.[46] Moreover, according to the Defence, since Mr. Ntaganda is subject to "a travel ban and an asset freeze" and does not "hold a passport or other travel documents", he is not in a position "to abscond justice".[47] In light of these considerations, the Defence claims that Mr. Ntaganda's "pre-trial detention cannot be justified under article 58(1)(b)(ii) [of the Statute]".[48] Accordingly, the Defence requests that Mr. Ntaganda be released on the territory of the Netherlands, the host State, subject to one or more of the conditions set out in rule 119 of the Rules.[49]

The Prosecutor's Response

23. In her response, the Prosecutor opposes the entirety of the Defence's Application and considers it to be flawed, lacking "legal and factual justifications".[50] Acknowledging that the Pre-Trial Chamber is "not conditioned by its previous decision to direct the issuance of a warrant of arrest", the Prosecutor argues however that the "factors underpinning the decision on a warrant of arrest may be the same as those for the decision under article 60(2) of the Statute".[51]

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[44] ICC-01/04-02/06-87-Red-tENG, paras 39, 44.
[45] ICC-01/04-02/06-87-Red-tENG, para. 41; ICC-01/04-02/06-87-Conf-Exp-tENG, paras 41-43.
[46] ICC-01/04-02/06-87-Red-tENG, para. 45.
[47] ICC-01/04-02/06-87-Red-tENG, para. 47.
[48] ICC-01/04-02/06-87-Red-tENG, para. 54.
[49] ICC-01/04-02/06-87-Red-tENG, paras 63-65.
[50] ICC-01/04-02/06-103-Red, paras 2-5, 9-43.
[51] ICC-01/04-02/06-103-Red, para. 10.

24. Disagreeing with the Defence's core argument concerning Mr. Ntaganda's voluntary surrender, the Prosecutor submits that the suspect's surrender to the United States Embassy in Kigali was prompted by different reasons. These reasons were the fear of being killed or arrested by the Congolese Government.[52] Another possibility could be that he was forced by the Rwandan Government to surrender, the Prosecutor asserts.[53] According to the Prosecutor, the voluntary surrender of the suspect does not mean that he will comply with the Court's proceedings. The circumstances underlying the voluntary surrender are significant in the Chamber's assessment.[54] Relying on Mr. Ntaganda's past behaviour including: the many years of his escape, his involvement in several attacks in the DRC, his refusal to participate in a peace process in 2004 and to be integrated into the FARDC, the creation of the *Mouvement Révolutionnaire Congolais* (the "MRC"), his "overtly uncooperative nature", and his presence "in Europe without imminent threat to his life", show uncertainty that the suspect will not abscond, the Prosecutor argues.[55]

25. The Prosecutor also points out to the nature of the charges the suspect is facing, their gravity, and the length of his sentence if he is to be convicted, as reasons justifying continued detention.[56] Referring to a witness statement, certain reports, and press articles, the Prosecutor alleges that Mr. Ntaganda has been involved in the trade and looting of gold in 2002-2003 and more recently in 2011.[57] According to the Prosecutor, Mr. Ntaganda is not indigent as he owns a "flour factory, a hotel, a bar and a cattle ranch outside Goma".[58] Further, according to a recent report issued in 2012, Mr. Ntaganda was earning a substantial amount of money from the cattle he

[52] ICC-01/04-02/06-103-Red, para. 12; ICC-01/04-02/06-103-Red, para. 12, fn. 17.
[53] ICC-01/04-02/06-103-Red, para. 12, fn. 17.
[54] ICC-01/04-02/06-103-Red, paras 15-17.
[55] ICC-01/04-02/06-103-Red, para. 13.
[56] ICC-01/04-02/06-103-Red, para. 18.
[57] ICC-01/04-02/06-103-Red, paras 21-25.
[58] ICC-01/04-02/06-103-Red, para. 21.

owned and had access to funds of the *Mouvement du 23 mars* (the "M23") in February 2013.[59]

26. The Prosecutor further argues that if released, Mr. Ntaganda is capable of obstructing or endangering the Court's proceedings. According to the Prosecutor, Mr. Ntaganda retains influence in the region, given his "close ties" with his former soldiers who are integrated into the FARDC and remain loyal to him.[60] Moreover, Mr. Ntaganda knows the names of some witnesses through the disclosure process, and given the seriousness of the charges against him, he "has a strong motivation to intimidate, bribe and/or threaten witnesses, victims, or members of their families".[61] In the Prosecutor's opinion, Mr. Ntaganda's history of violence over the years is a factor weighing against his release.[62]

27. Finally the Prosecutor highlights the Defence's challenge to the validity of the prior findings of PTC I and the present Chamber. In so doing, the Prosecutor argues that the findings of both Chambers were supported by the necessary evidence.[63]

The Defence's Reply

28. Throughout its Reply, the Defence challenges the type of evidence provided by the Prosecutor in support of Mr. Ntaganda's continued detention. According to the Defence, the Prosecutor's information is based on "NGO and UN reports [and press articles]" and as such, it is "devoid of any probative value".[64] The material provided is no more than "unverified anonymous hearsay", and in the absence of corroboration, the evidence is unreliable and "insufficient to justify Mr. Ntaganda's deprivation of liberty",[65] the Defence asserts.

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[59] ICC-01/04-02/06-103-Red, para. 22.
[60] ICC-01/04-02/06-103-Red, paras 27-28.
[61] ICC-01/04-02/06-103-Red, para. 31.
[62] ICC-01/04-02/06-103-Red, paras 32-33.
[63] ICC-01/04-02/06-103-Red, paras 42-43.
[64] ICC-01/04-02/06-111-Conf-tENG, paras 9-11.
[65] ICC-01/04-02/06-111-Conf-tENG, paras 13-14.

29. The Defence also challenges the main arguments put forward by the Prosecutor relating to the gravity of the charges and length of potential sentence,[66] the alleged financial situation of the suspect,[67] his asserted contacts and influence in the region,[68] and the information about his history of violence.[69] In addition, the Defence disagrees with the Prosecutor's reliance on two witness statements as one was not disclosed by the time of its submission of the Application, while the other "is exclusively hearsay".[70] Having set out its arguments as summarized above, the Defence reiterates its request for an immediate release, subject to any of the conditions in rule 119 of the Rules, where necessary.[71]

III. APPLICABLE LAW

30. The Single Judge notes articles 21(1)(a), (2) and (3), 58(1), 60(1) and (2), and 67(1) of the Statute, rules 118(1) and (3), 119(1) and (3), and 176 of the Rules, and regulation 51 of the Regulations of the Court.

31. 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; or [...]

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[66] ICC-01/04-02/06-111-Conf-tENG, para. 17.
[67] ICC-01/04-02/06-111-Conf-tENG, paras 19-20.
[68] ICC-01/04-02/06-111-Conf-tENG, paras 22-24.
[69] ICC-01/04-02/06-111-Conf-tENG, paras 25-28.
[70] ICC-01/04-02/06-111-Conf-tENG, para. 27.
[71] ICC-01/04-02/06-111-Conf-tENG, p. 13.

32. Further, article 60(1) and (2) of the Statute states:

> 1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.
>
> 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.

IV. DETERMINATION BY THE SINGLE JUDGE

33. At the outset the Single Judge highlights that, consistent with the jurisprudence of this Court,[72] when dealing with the right to interim release, one must bear in mind the fundamental principle 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").[73]

34. The Single Judge also notes that in ruling on the present Application through the scope of article 60(2) of the Statute, it is imperative that she conducts an assessment as to whether the necessary requirements of article 58(1) of the Statute remain fulfilled. Indeed, the Appeals Chamber has recently stated that "in reaching a decision under article 60(2) of the Statute, the Pre-Trial Chamber has to inquire anew into the

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[72] 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 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.

[73] 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 Morrise Kallon for Bail", 23 Febraury 2004, para. 25; 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.

existence of facts justifying detention".[74] Thus, depending on the Single Judge's finding, the suspect shall either be released or continue to be detained.

35. In this regard, the Single Judge recalls also the judgment of 13 February 2007 in which the Appeals Chamber stated:

> [T]he decision on continued detention or release pursuant to article 60 (2) read with article 58 (1) of the Statute is not of a discretionary nature. Depending upon whether or not the conditions of article 58 (1) of the Statute continue to be met, the detained person shall be continued to be detained or shall be released.[75]

Further, in its judgment of 19 November 2010, the Appeals Chamber clarified that "it is the initial ruling under article 60(2) of the Statute that establishes the grounds justifying continued detention".[76]

36. Turning to article 58(1) of the Statute, the Single Judge recalls that it embodies two limbs: (1) sub-paragraph 1(a) which concerns the suspect's alleged responsibility for the commission of one or more crimes within the jurisdiction of the Court; and (2) sub-paragraph 1(b) which is a test of "appearance" of the "necessity" to arrest the suspect or order his continued detention, if one or more of the grounds specified therein are satisfied.[77] Thus, for the purpose of the present Application, it is essential to assess whether these grounds still exist.

37. Starting with the first limb, article 58(1)(a) of the Statute requires an assessment of whether there are reasonable grounds to believe that Mr. Ntaganda committed a crime

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[74] 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.

[75] 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. 134; see also, "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, para. 11.

[76] Appeals Chamber, "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled 'Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to rule 118(2) of the Rules of Procedure and Evidence'", 19 November 2010, ICC-01/05-01/08-1019, para. 46.

[77] 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, para. 20.

that falls within the jurisdiction of the Court. In this context, the Single Judge recalls the judgment of 26 October 2012, in which the Appeals Chamber made clear that "in a decision under article 60(2) of the Statute, a Pre-Trial Chamber may refer to the decision on the warrant of arrest, without this affecting the *de novo* character of the Pre-Trial Chamber's decision".[78]

38. In the 22 August 2006 Decision as well as in the 13 July 2012 Decision, PTC I and this Chamber respectively determined that there are reasonable grounds to believe that Mr. Ntaganda is 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 in these decisions.[79] The Defence does not challenge the validity of the relevant Chambers' findings under article 58(1)(a) of the Statute. Nor does the Defence present any argument or evidence which requires the Chamber to look anew into the requirement of article 58(1)(a) of the Statute. Instead, the Defence "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)".[80] In light of this and given the findings in the two warrants of arrest, the Single Judge considers that the requirement of article 58(1)(a) of the Statute continues to be satisfied.

39. Turning to the second limb, namely the conditions set forth in article 58(1)(b) of the Statute, the Single Judge considers that continued detention cannot be ordered, unless she is satisfied that 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 22 August 2006 Decision, the 13 July 2012 Decision, or a related crime. As to the latter, the crime must fall within the jurisdiction

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[78] 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. 27.

[79] Pre-Trial Chamber I, ICC-01/04-02/06-1-Red-tENG, paras 21, 34, 48-60; Pre-Trial Chamber II, ICC-01/04-02/06-36-Red, pp. 27, 36, 66, 68-76.

[80] ICC-01/04-02/06-87-Red-tENG, para. 2.

of the Court and arise from the same circumstances. The Appeals Chamber has confirmed that these three conditions are "in the alternative", and thus, the fulfilment of one of them is sufficient to negate the need to address the remaining conditions.[81] However, given that the Defence's Application relies heavily on negating the first two elements, the Single Judge deems it appropriate to address them in turn. It also follows that the Single Judge does not find it necessary to address the criterion of article 58(b)(iii) of the Statute.

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

40. The Defence argues throughout different parts of its Application that Mr. Ntaganda surrendered voluntarily to the Court, and accordingly, it cannot be said that he intends to "evade justice".[82]

41. The Single Judge is not persuaded by the Defence's argument. The 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. It should not be forgotten that Mr. Ntaganda had been at large for many years since the issuance of the first warrant of arrest in August 2006 until he apparently sought refuge in the United States Embassy in Kigali on 18 March 2013. In particular, despite the issuance of the first warrant of arrest on 22 August 2006 followed by another warrant of arrest six years later, Mr. Ntaganda did not choose to face justice, but instead managed to avoid apprehension during this period, in total disregard of the serious accusations brought against him. Even after the issuance of the second warrant of arrest on 13 July 2012, Mr. Ntaganda managed to escape for another eight months before his surrender to the Court. Thus,

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[81] 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.

[82] ICC-01/04-02/06-87-Red-tENG, paras 39, 41, 44; ICC-01/04-02/06-87-Conf-Exp-tENG, paras 39, 41, 42-44.

his prior ability to escape for such a lengthy period of time, until the moment of his choosing, enhances his motivation to flee when the circumstances allow.[83]

42. The fact that Mr. Ntaganda decided to surrender to the Court is not sufficient in and of itself to justify his release. Instead, the Single Judge's determination should take into consideration, *inter alia*, the circumstances of Mr. Ntaganda's voluntary surrender including its timeliness and the manner[84] in which it took place.

43. The evidence or material available before the Single Judge suggests that Mr. Ntaganda's voluntary surrender was prompted by the likelihood of him being killed or by pressure imposed on him by the Rwandan Government.[85]

44. In particular, according to an official report prepared by a group of experts appointed by the United Nations Secretary General to gather and analyse information on "networks operating in violation of the arms embargo concerning the DRC" (the "Midterm Report"),[86] Mr. Ntaganda's surrender was not driven by good will to comply with international justice. Rather he was pressured by the circumstances resulting from the split of the M23 by the end of February 2013. According to the Midterm Report, after the split of the M23 and the outbreak of fighting between Mr. Ntaganda's faction and his deputy's faction, headed by Mr. Makenga, Mr. Ntaganda's troops ran low of ammunition.[87] This prompted the suspect to flee towards the Rwandan border on 15 March 2013 and thereafter to Kigali with the assistance of his

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[83] In *Pandurević*, the ICTY stated that the "demonstrated prior ability of the Accused to successfully avoid compliance with his legal obligations for substantial periods of time, until the moment of his choosing, makes his strong incentive to flee all the more potent". See ICTY, *Prosecutor v. Vinko Pandurević* et al., "Decision on Vinko Pandurevic's Application for Provisional Release", 18 July 2005, Case No: (IT-05-86-PT), para. 18; *Prosecutor v. Drago Nikolic et al*, "Decision on Drago Nikolic's Request for Provisional Release", Case No: (IT-05-88-PT), 9 November 2005, para. 20.

[84] See ICTY, *Prosecutor v. Vinko Pandurević* et al., "Decision on Vinko Pandurevic's Application for Provisional Release", 18 July 2005, Case No: (IT-05-86-PT), para. 18; *Prosecutor v. Drago Nikolic et al*, "Decision on Drago Nikolic's Request for Provisional Release", Case No: (IT-05-88-PT), 9 November 2005, paras 19-20.

[85] ICC-01/04-02/06-103-Red, pp. 6-7.

[86] "Midterm report of the Group of Experts on the Democratic Republic of the Congo", UN Doc. S/2013/433 [hereinafter Midterm Report].

[87] Midterm Report, paras 10-11, 13, 21, 26.

family.[88] Yet, according to three of his loyalists, former M23 officers and soldiers, Mr. Ntaganda "feared that the Rwandan army soldiers deployed along the border would kill him".[89] Moreover, Mr. Makenga's deputy and other soldiers loyal to this faction informed the group of experts that they were ordered to kill Mr. Ntaganda.[90]

45. The core of the above information finds support in other sources reviewed by the Single Judge.[91] According to other material, Mr. Ntaganda's decision was likely to have also been influenced by declarations of the Congolese Government calling for his arrest,[92] or by pressure imposed on him by the Rwandan Government to surrender.[93] The latter possibility finds support in a number of non-anonymous sources provided in the Second Registry's Report.[94] Also, the information provided in the Second Registry's Report reveals that Mr. Ntaganda's surrender was not prompted by the desire to adhere to justice, but rather by the defeat of his troops by the other M23 faction, and the loss of support from the Rwandan Government.[95]

46. Although the evidence available does not provide only one possible reason for Mr. Ntaganda's voluntary surrender, the information as a whole certainly casts serious doubt on the validity of the Defence's claim. Actually, in light of the material presented, it cannot be concluded that Mr. Ntaganda's alleged voluntary surrender provides reason to believe that he did not have the intention to "evade justice" as the Defence asserts. Nor it can be deduced from the reviewed material that Mr. Ntaganda's "willingness to cooperate [with the Court] cannot be disputed", as the Defence further claims. Accordingly, the Single Judge's findings in this regard reduce the weight to be given to this major factor which the Defence heavily relies upon.

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[88] Midterm Report, para. 27.
[89] Midterm Report, para. 26.
[90] Midterm Report, para. 26.
[91] "The Bosco surrender: more questions than answers", Congo Siasa, 22 March 2013, available at, 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.
[92] ICC-01/04-02/06-103-Red, p. 7, fn. 17.
[93] "Amid good news, doubts", Congo Siasa, 18 March 2013, available at, congosiasa.blog.co.uk/search?updated –max=2013-03-29T.
[94] ICC-01/04-02/06-120-Conf, pp. 8-10 and its annex.
[95] ICC-01/04-02/06-120-Conf, pp. 9-10.

47. In this context, the Single Judge does not share the Defence's view set out in its Reply that the Prosecutor cannot rely on reports issued by non-governmental organisations or press articles, because they allegedly constitute "anonymous hearsay".[96] This claim stands to be corrected. The purpose of an assessment under article 60(2) of the Statute differs from that required for the purpose of the confirmation of charges or making a finding on the merits upon trial. An assessment pursuant to article 60(2) of the Statute neither aims at confirming one or more charges nor at making a finding of guilt against an accused person, which require meeting a high evidentiary threshold. To the contrary, 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".[97] Therefore, the evidence presented in relation to the necessity of continued detention for the purpose of article 58(1)(b) of the Statute does not have to be of the same nature and strength as the evidence required to establish reasonable grounds to believe that the person has committed one or more crimes referred to in the Prosecutor's application, in accordance with article 58(1)(a) of the Statute.

48. In this regard, the Single Judge recalls the finding of PTC I in the case of the *Prosecutor v. Laurent Gbagbo*, in which it stated:

> The Single Judge notes at the outset that the Defence opposes the reliance on newspaper articles or other public sources for the purpose of assessing the requirements. The Single Judge, however, considers that there 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".[98]

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[96] ICC-01/04-02/06-111-Conf-tENG, pp. 4-6.

[97] 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, para. 21.

[98] Pre-Trial Chamber I, "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'", 13 July 2012, ICC-02/11-01/11-180-Red, para. 54.

The Single Judge recalls that PTC I's finding was upheld by the Appeals Chamber[99] knowing that PTC I relied heavily in its decision on documentary evidence, including those obtained from publicly available sources.

49. In the same vein, the Single Judge recalls the Defence's challenge to the two witnesses relied upon by the Prosecutor. With respect to one of the two witnesses, the Defence asserts that his/her testimony "is exclusively hearsay", without any further explanation. In the absence of any evidence or clarification in support of its claim, the Defence's argument cannot stand. Even if the Prosecutor has not relied on the two witness statements challenged by the Defence in its Response, the information provided in said reports is still sufficient for the purpose of a determination under article 58(1)(b) of the Statute. As the Appeals Chamber has underlined, the "[a]ppraisal of the evidence [...] lies, in the first place, with the Pre-Trial Chamber [considering the request for interim release]".[100]

50. In addition and apart from the above considerations, the charges or counts Mr. Ntaganda is facing are numerous and of such gravity[101] that they might result in an overall lengthy sentence. These two factors if considered together may make it likely that Mr. Ntaganda will abscond, should the opportunity arise. 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".[102] The same logic was endorsed in its judgment of 9 June 2008 whereby the Appeals Chamber has acknowledged, that the "gravity" of the crimes as

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[99] 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.

[100] "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, para. 25.

[101] 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 conscription 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").

[102] 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.

well as the potential length of the sentence are distinct factors which enhance the probability of the person absconding.[103]

51. In addition, in the application leading to the issuance of the 22 August 2006 Decision, the Prosecutor alleged that Mr. Ntaganda "along with Thomas Lubanga Dyilo and a number of [*Forces Patriotiques pour la Libération du Congo*, ("the FPLC")] officers, are responsible as co-perpetrators within the meaning of [article] 25(3)(a) of the Statute".[104] PTC I, in turn, highlighted their different roles in the commission of the crimes.[105] Since Thomas Lubanga was convicted[106] and sentenced, for quite a lengthy period (14 years)[107] with respect to *part* of the counts which Mr. Ntaganda is facing, the possibility of him absconding and not appearing for the confirmation of charges hearing becomes even more likely. 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 awareness of the sentence imposed in quite a similar case such as that of Thomas Lubanga increases the possibility of him absconding.

52. The Single Judge's above 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.[108] Again, as indicated above, 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.

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[103] 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.

[104] The relevant quote of the Prosecutor's allegation is referred to in PTC I's decision of 22 August 2006, see Pre-Trial Chamber I, ICC-01/04-02/06-1-Red-tENG, para. 48.

[105] Pre-Trial Chamber I, ICC-01/04-02/06-1-Red-tENG, paras 49-58.

[106] Trial Chamber I, "Judgment pursuant to Article 74 of the Statute", 14 March 2012, ICC-01/04-01/06-2842.

[107] Trial Chamber I, "Decision on Sentence pursuant to Article 76 of the Statute", 10 July 2012, ICC-01/04-01/06-2901.

[108] ICC-01/04-02/06-87-Red-tENG, para. 45.

53. The Single Judge cannot also adhere to the Defence's assertion that the risk of absconding is diminished, because he is subject to the "sanctions regime laid down by United Nations Security Council resolution 1596 [...], which imposes a travel ban and an asset freeze".[109] Nor can she accept the Defence's claim that Mr. Ntaganda will not abscond due to the fact that he "does not hold a passport or other travel document".[110] In fact, Mr. Ntaganda managed to move around undisturbed since 2006 until the date of his surrender in March 2013, despite the existence of a travel ban. For example, it is reported that Mr. Ntaganda has crossed from "Goma to the town of Gisenyi, Rwanda, twice in 2011".[111] It is true that Mr. Ntaganda's apparent free movement between DRC and Rwanda could be easily explained in light of the fact that soldiers loyal to him controlled certain border crossings.[112] Although the suspect does not benefit from such support in Europe, he will probably still be able to move within the Schengen area if released, given the absence of borders. The fact that Mr. Ntaganda is used to the practice of crossing borders to different countries makes it likely that he will attempt to repeat the same practice within the Schengen area. Thus, neither of these situations can prevent Mr. Ntaganda from hiding within any country within the Schengen area. Accordingly, if released, it is not unlikely that Mr. Ntaganda will avoid appearing for the confirmation hearing, which is due within few months' time.

54. Furthermore, the fact that Mr. Ntaganda "under[took] to appear in the proceedings instituted against him before the [Court]",[113] is not sufficient *per se* to grant the suspect interim release. This may be only regarded as a factor that needs to be assessed alongside other factors, such as those outlined above, before coming to a decision.[114] In weighing these factors, the Single Judge cannot reach a finding other than that there

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[109] ICC-01/04-02/06-87-Red-tENG, para. 47.
[110] ICC-01/04-02/06-87-Red-tENG, para. 47.
[111] "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, p. 149 [hereinafter 2011 Group of Experts Report].
[112] 2011 Group of Experts Report, para. 485.
[113] ICC-01/04-02/06-87-Red-tENG, para. 46.
[114] This view was also confirmed in *Šainivić* and *Gvero* before the ICTY. See *Prosecutor v. Nikola Šainivić et al.*, "Decision on Provisional Release", Case No. (IT-99-37-AR65), 30 October 2002, paras. 6-7, 9; *Prosecutor v. Milan Gvero et al.*, "Decision Concerning Motion for Provisional Release of Milan Gvero", Case No. (IT-04-80-PT), 19 July 2005, paras 7, 18.

would be 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. This is more the case given that the available information also suggests that Mr. Ntaganda has the financial means to abscond, if the opportunity arises. In particular, the material presented reveals that the M23 headed by, *inter alia*, Mr. Ntaganda, before its split, was involved in extensive lootings in Goma in late November 2012. The estimated value of the goods looted amounted to $3 million.[115] Further, Mr. Ntaganda and Mr. Makenga secured the finance of the M23 by imposing taxes on commercial trucks crossing checkpoints at Kibumba and Kiwanja and the border at Bunagana which amounted to an average of $180000 per month.[116] In addition, according to different sources, Mr. Ntaganda owns a fuel station, a flour factory in the centre of Goma, which is run by his wife, a hotel in the same location, and several bank accounts in Rwanda under the name of his wife.[117] Based on the same report, Mr. Ntaganda was involved with East African regional networks of dealers "selling both real and counterfeit gold to international buyers".[118]

55. Thus, in view of this information, it is difficult to believe that Mr. Ntaganda lacks the necessary financial means (whether directly or indirectly through his family) to escape if released. This conclusion stands, despite the Registry's provisional finding that the suspect is indigent. The Registrar's finding, which is based on the sources available to his office, is provisional and subject to revision. Accordingly, in view of the circumstances of the present case, this provisional finding cannot overweigh the other evidence or material provided to the Single Judge. Having regard to the foregoing factors, the Single Judge considers that the requirement of article 58(1)(b)(i) of the Statute is satisfied and the continued detention of Mr. Ntaganda remains necessary to ensure his appearance at trial.

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[115] Midterm Report, p. 6.
[116] Midterm Report, p. 13.
[117] 2011 Group of Experts Report, pp. 150-151.
[118] 2011 Group of Experts Report, pp. 150-151.

Obstructing or endangering the investigation or the Court Proceedings (article 58(1)(b)(ii) of the Statute)

56. Turning to the requirement of article 58(1)(b)(ii) of the Statute, the Single Judge recalls that in the 22 August 2006 Decision, PTC I relied on information provided by the Prosecutor that "some witnesses in trials held before the *Tribunal de Grande Instance* in Bunia against middle or high ranking UPC [*Union des Patriotes Congolais*]/FPLC members, ha[d] been killed or threatened, and that Bosco Ntaganda, still at large and fighting as one of the top military commanders of the MRC against the FARDC in the Ituri District, may be in a position to obstruct or endanger the investigation by *inter alia* threatening potential witnesses".[119] In justifying the issuance of a second warrant of arrest against Mr. Ntaganda, the present Chamber relied on similar reasons in the 13 July 2012 Decision.[120]

57. The Defence argues that none of the material relied upon by the Chamber in the 22 August 2006 Decision supports the finding that Mr. Ntaganda "could be in a position to obstruct or endanger the investigation, *inter alia,* by threatening potential witnesses".[121] The Single Judge understands the Defence's argument as referring to a particular situation, which relates to the threatening of potential witnesses in the trials that were allegedly underway in Bunia. Although it is true that it cannot be relied on this allegation any longer, given that the Prosecutor has not provided the Chamber with any updates related to these particular witnesses, the Single Judge cannot ignore equally important factors which are proven by the information provided to the Chamber.

58. Based on the available information, it is apparent that Mr. Ntaganda continues to have some influence in the DRC, given that he managed to retain some contacts with a substantial number of his former soldiers who used to be part of the M23.[122] According

[119] ICC-01/04-02/06-1-Red-tENG, para. 65.
[120] ICC-01/04-02/06-36-Red, paras 79-80.
[121] ICC-01/04-02/06-87-Red-tENG, paras 50-51.
[122] Midterm Report, pp. 15-16 and p. 15, fn. 2.

to the information presented, former FPLC and the *Congrés National pour la Défense du Peuple* (the "CNDP") who are loyal to Mr. Ntaganda have been integrated into FARDC special battalions.[123] According to the 2011 Group of Experts Report, Mr. Ntaganda "appointed ex-CNDP commanders to key positions during the reorganization",[124] and every FARDC operation in North and South Kivu was "endorsed" by the suspect.[125] Mr. Ntaganda is also reported to have said that "he and his colleagues had planned every operation carried out" in these parts of Kivu.[126] The Defence also acknowledges Mr. Ntaganda's linkage with the FARDC. Thus, the Single Judge concurs with the Prosecutor that based on this information, it is difficult to conclude that Mr. Ntaganda lost total influence over his supporters in the DRC.[127]

59. This conclusion when put together with the fact that the identity of more than thirty witnesses has so far been disclosed to Mr. Ntaganda,[128] his documented history of violence,[129] which is also revealed in a number of reports[130] and the seriousness of the counts or charges he is facing,[131] one cannot rule out the possibility of him influencing, threatening or intimidating witnesses and victims and/or their family members. This is more the case if one considers such possibility in view of the material provided which demonstrates that he has the financial means to do so. Thus, 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.

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[123] ICC-01/04-02/06-103-Red-tENG, paras 27-28 and accompanying footnotes. Also, 2011 Group of Experts Report, p. 70.
[124] 2011 Group of Experts Report, p. 82.
[125] 2011 Group of Experts Report, p. 82.
[126] 2011 Group of Experts Report, p. 82, in particular para. 298.
[127] ICC-01/04-02/06-103-Red-tENG, paras 27, 29.
[128] 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-Conf-Red, para. 33, p. 33.
[129] 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.
[130] 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 Kivu, in November 2008", 7 Septmber 2009, in particular paras 24 and 26; also 2011 Group of Experts Report, pp. 82-83, 85, 123-124, 149-150; Midterm Report, paras 129-130.
[131] See paras 50 and 51 above.

60. In light of these considerations, 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.

61. Turning to the second part of the Application concerning the possibility of release with conditions, the Defence submits that Mr. Ntaganda "wishes to be released in the territory of the Netherlands".[132] The Defence also asserts that by imposing one or more of the conditions set out in rule 119 of the Rules, which are "available on the territory of the Netherlands", the Court "will have the guarantees of that State" to ensure Mr. Ntaganda's appearance.[133]

62. In this respect, the Single Judge recalls the Appeals Chamber judgment of 19 August 2011, in which it stated that conditional release is possible in two situations:

> (1) where a Chamber, although satisfied that the conditions under article 58 (1) (b) are not met, nevertheless considers it appropriate to release the person subject to conditions; and (2) where risks enumerated in article 58 (1) (b) exist, but the Chamber considers that these can be mitigated by the imposition of certain conditions of release. Therefore, in a situation such as the present, where the Trial Chamber has found that detention is necessary to ensure the person's appearance at trial, the Chamber has the discretion to consider whether the risk of flight can be mitigated by the imposition of conditions and to order conditional release. However, given that a person's personal liberty is at stake if a Chamber is considering conditional release and a State has indicated its general willingness and ability to accept a detained person and enforce conditions, the Chamber must seek observations from that State as to its ability to enforce specific conditions identified by the Chamber.[134]

Accordingly and as interpreted by the Appeals Chamber, even assuming that the Single Judge used her discretion to consider whether the risk of flight can be mitigated by imposing one or more of the conditions in rule 119 of the Rules, conditional release could still not be ordered. It would be imperative to first ensure the willingness of the Netherlands to accept the suspect and enforce the conditions imposed by the Court. As the Appeals Chamber explicitly stated, "for conditional release to be granted, 'a

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[132] ICC-01/04-02/06-87-Red-tENG, para. 63.

[133] ICC-01/04-02/06-87-Red-tENG, para. 64.

[134] 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. 55.

State willing to accept the person concerned as well as enforce related conditions is necessary'".[135] The Netherlands denied Mr. Ntaganda's request to be released on its territory, be it with or without conditions.[136] In these circumstances, the Single Judge cannot but reject this part of the Application.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

a) **rejects** the Application;

b) **decides** that Bosco Ntaganda shall continue to be detained;

c) **decides** 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; and

d) **decides** to reclassify as public document: ICC-01/04-02/06-100-Conf.

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[135] 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. 48; "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, paras 106-107.

[136] 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-Anx4.

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

Judge Ekaterina Trendafilova
Single Judge

Dated this Monday, 18 November 2013

At The Hague, The Netherlands