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No. ICC-01/04-02/06 OA
Date: 5 March 2014

THE APPEALS CHAMBER

Before: **Judge Anita Ušacka, Presiding Judge**
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Erkki Kourula
Judge Christine Van den Wyngaert

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. BOSCO NTAGANDA

Public redacted version

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"

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

Counsel for Mr Bosco Ntaganda
Mr Marc Desalliers
Ms Caroline Buteau

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Bosco Ntaganda against the decision of Pre-Trial Chamber II entitled "Decision on the Defence's Application for Interim Release" of 18 November 2013 (ICC-01/04-02/06-147),

After deliberation,

By majority, Judge Anita Ušacka and Judge Christine Van den Wyngaert dissenting,

Delivers the following

JUDGMENT

The "Decision on the Defence's Application for Interim Release" is confirmed. The appeal is dismissed.

REASONS

I. PROCEDURAL BACKGROUND

A. Proceedings before the Pre-Trial Chamber

1. On 22 August 2006, Pre-Trial Chamber I issued the "Decision on the Prosecution Application for a Warrant of Arrest"[1] (hereinafter: "Decision of 22 August 2006"), together with a warrant of arrest for Mr Ntaganda[2] (hereinafter: "First Warrant of Arrest"). The First Warrant of Arrest was unsealed on 28 April 2008.[3]

2. On 15 March 2012, the Presidency reassigned the situation in the Democratic Republic of the Congo (hereinafter: "the DRC"), from which the present case arises, to Pre-Trial Chamber II (hereinafter: "Pre-Trial Chamber").[4]

[1] ICC-01/04-02/06-1-US-Exp-tEN. A redacted version was filed on 6 March 2007 and the decision was made public on 29 September 2010 and registered on 1 October 2010, ICC-01/04-02/06-1-Red.
[2] ICC-01/04-02/06-2-tENG.
[3] "Decision to unseal the warrant of arrest against Bosco Ntaganda", ICC-01/04-02/06-18.
[4] "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 Pre-Trial Chamber rendered the "Decision on the Prosecutor's Application under Article 58",[5] issuing a second warrant of arrest for Mr Ntaganda (hereinafter: "Second Warrant of Arrest").

4. On 25 March 2013, the Registrar filed the "Report of the Registry on the voluntarily [*sic*] surrender of Bosco Ntaganda and his transfer to the Court"[6] (hereinafter: "Registrar's Report of 25 March 2013").

5. On 20 August 2013, Mr Ntaganda filed the "Defence application for the interim release of Mr Bosco Ntaganda"[7] (hereinafter: "Application for Interim Release").

6. On 6 September 2013, the Prosecutor filed her response to the Application for Interim Release[8] (hereinafter: "Prosecutor's Response").

7. On 19 September 2013, the Pre-Trial Chamber 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", requesting an explanation or information from the Registrar as to the circumstances or the reasons surrounding Mr Ntaganda's decision to voluntarily surrender to the Court and granting Mr Ntaganda's request for leave to reply to the Prosecutor's Response.[9]

8. On 20 September 2013, Mr Ntaganda filed his reply to the Prosecutor's Response.[10]

9. On 3 October 2013, the Registrar filed a report providing further information on the surrender of Mr Ntaganda[11] (hereinafter: "Registrar's Report of 3 October 2013").

10. On 18 November 2013, the Pre-Trial Chamber, its functions being exercised by the Single Judge, issued the "Decision on the Defence's Application for Interim

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[5] ICC-01/04-02/06-36-Conf-Exp; public redacted version: ICC-01/04-02/06-36-Red.
[6] ICC-01/04-02/06-44-Conf-Exp.
[7] ICC-01/04-02/06-87-Conf-Exp-tENG; French public redacted version: ICC-01/04-02/06-87-Red.
[8] "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)", ICC-01/04-02/06-103-Conf; public redacted version: ICC-01/04-02/06-103-Red.
[9] ICC-01/04-02/06-109-Conf.
[10] "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", ICC-01/04-02/06-111-Conf-tENG.
[11] "Registry report following the decision of the Single Judge of 19 September 2013 (ICC-01/04-02/06-109-Conf)", dated 3 October 2013 and registered on 4 October 2013, ICC-01/04-02/06-120-Conf: public redacted version: ICC-01/04-02/06-120-Red.

Release"[12] (hereinafter: "Impugned Decision") rejecting the Application for Interim Release.[13]

B. Proceedings before the Appeals Chamber

11. On 25 November 2013, Mr Ntaganda filed the "Acte d'appel de la Défense de M. Bosco Ntaganda à l'encontre de la '*Decision on the Defence's Application for Interim Release*' rendue par la Chambre préliminaire II le 18 novembre 2013".[14]

12. On 26 November 2013, Mr Ntaganda filed the "Document in support of the Defence for Mr Ntaganda's appeal against *Decision on the Defence's Application for Interim Release* rendered on 18 November 2013"[15] (hereinafter: "Document in Support of the Appeal").

13. On 2 December 2013, the Prosecutor filed her response to the Document in Support of the Appeal[16] (hereinafter: "Response to the Document in Support of the Appeal").

II. PRELIMINARY ISSUE

14. In her Response to the Document in Support of the Appeal, the Prosecutor argues that the annex to the Document in Support of the Appeal submitted by Mr Ntaganda should be dismissed as it contains argumentative material and submissions in violation of regulation 36 (2) (b) of the Regulations of the Court.[17]

15. Regulation 36 (2) (b) of the Regulations of the Court stipulates that "[a]n appendix shall not contain submissions". The annex to the Document in Support of the Appeal contains a table which illustrates Mr Ntaganda's arguments under the first ground of appeal by linking the specific factual findings of the Pre-Trial Chamber with the type of evidence relied upon to support those findings and Mr Ntaganda's

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[12] ICC-01/04-02/06-147.
[13] Impugned Decision, p. 27.
[14] ICC-01/04-02/06-155.
[15] ICC-01/04-02/06-158-Conf-Exp-tENG; French public redacted version: ICC-01/04-02/06-158-Red, and Annex.
[16] "Prosecution's response to the Defence appeal against the 'Decision on the Defence's Application for Interim Release'", ICC-01/04-02/06-161-Conf-Exp; public redacted version: ICC-01/04-02/06-161-Red.
[17] Response to the Document in Support of the Appeal, para. 20.

objection to that evidence.[18] Thus the annex to the Document in Support of the Appeal contains a more detailed and specific presentation of Mr Ntaganda's arguments under the first ground of appeal.

16. The Appeals Chamber notes that the original French version of the Document in Support of the Appeal is 17 pages long, while the annex comprises three pages. Therefore, Mr Ntaganda's submissions as a whole remain within the page limit of 20 pages established by regulation 37 (1) of the Regulations of the Court. Furthermore, the annex does not contain any additional arguments, but merely a table which explains in more detail Mr Ntaganda's arguments under the first ground of appeal. In light of these circumstances and on an exceptional basis, the Appeals Chamber accepts the submissions contained in the annex to the Document in Support of the Appeal. However, Mr Ntaganda is reminded of the necessity and importance of complying with the requirements for the format of documents filed with the Court as set out in the Regulations of the Court. Furthermore, he is reminded that failure to comply with these requirements may result in the document in question being dismissed *in limine*.

III. MERITS

A. First ground of appeal

1. Submissions

(a) Mr Ntaganda's submissions

17. Mr Ntaganda's first ground of appeal is that the Pre-Trial Chamber committed:

> a manifest error of law in considering that the less burdensome onus of proof for detention justifies reliance in the main on information from anonymous sources (anonymous hearsay), purely speculative opinions, or documents with no legal probative value, such as articles from newspapers and a blog and reports based on anonymous sources [...].[19]

18. Mr Ntaganda submits that the "appearance of necessity of detention must be grounded on concrete evidence" and that "blogs, press articles or evidence founded on

[18] Annex A to the Document in Support of the Appeal, ICC-01/04-02/06-158-AnxA.
[19] Document in Support of the Appeal, para. 17. *See also* Document in Support of the Appeal, para. 11.

anonymous sources fall short of that standard".[20] He underlines that "the suspect must have the opportunity to investigate and test the reliability of the source of Prosecution evidence" and cites in support of his argument the recent decision of Pre-Trial Chamber I to adjourn the confirmation of charges hearing in the case of the *Prosecutor v. Laurent Gbagbo*.[21] Mr Ntaganda argues that this alleged error of law invalidates the Pre-Trial Chamber's findings on article 58 (1) (b) of the Statute as "each of the factual findings relies principally on documents of no legal probative value, opinions of a purely speculative nature or information from anonymous sources".[22]

19. Specifically, Mr Ntaganda highlights that the Pre-Trial Chamber relied on two articles from a blog in order to support the finding that he had surrendered following the split within M23 and pressure from Rwanda.[23] In Mr Ntaganda's submission, these articles represent "nothing more than the blogger's individual opinion and under no circumstances [constitute] a source of the slightest reliability", being highly "conjectural and unsubstantiated by any concrete evidence".[24]

20. Mr Ntaganda further takes issue with the Pre-Trial Chamber's reliance on press articles in order to support its finding that his surrender to the Court was due to pressure from Rwanda or fear of being killed.[25] Mr Ntaganda stresses that the articles in question "propound only pure speculation or often divergent opinions on the circumstances of [his] surrender" (footnotes omitted).[26]

21. Mr Ntaganda asserts that the only witness statement relied upon by the Pre-Trial Chamber is that of witness P-0046, referenced for the purposes of supporting its

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[20] Document in Support of the Appeal, para. 14, referring to Appeals Chamber, *Prosecutor v. Laurent Gbagbo*, "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"'" (hereinafter : "*Gbagbo OA Judgment*"), 26 October 2012, ICC-02/11-01/11-278-Red (OA), para. 56; and Dissenting Opinion of Judge Anita Ušacka, ICC-02/11-01/11-278-Red (OA), para. 13.
[21] Document in Support of the Appeal, paras 15-16, referring to "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute", 3 June 2013, ICC-02/11-01/11-432, paras 28-29.
[22] Document in Support of the Appeal, para. 11. *See also* Document in Support of the Appeal, para. 28.
[23] Document in Support of the Appeal, para. 21.
[24] Document in Support of the Appeal, paras 21-23.
[25] Document in Support of the Appeal, para. 24.
[26] Document in Support of the Appeal, para. 24.

finding that Mr Ntaganda has a "documented history of violence".[27] Mr Ntaganda challenges the Pre-Trial Chamber's recourse to anonymous hearsay in this witness statement, stressing that witness "P-0046 has no first-hand or direct knowledge of the facts alleged" but relies on an "account by two individuals whose identities were not revealed".[28]

22. Finally, Mr Ntaganda highlights the Pre-Trial Chamber's references to two Reports of the group of experts on the Democratic Republic of the Congo and submits that "almost all sources in the reports are anonymous and therefore unverifiable".[29]

(b) Prosecutor's submissions

23. The Prosecutor submits that the Pre-Trial Chamber "correctly applied the standard of proof under [a]rticle 58(1)(b)" of the Statute.[30] She argues that Mr Ntaganda's reference to the decision of Pre-Trial Chamber I in the case of the *Prosecutor v. Laurent Gbagbo* is misplaced as it was made in the "context of the confirmation of charges where a higher standard applies, and is therefore not conclusive with respect to the question under appeal in this case" (footnotes omitted).[31] The Prosecutor also contends that the evidentiary standard under article 58 (1) (b) of the Statute "only applies to [...] ultimate conclusions and not to individual pieces of evidence or to every single factual assessment".[32] Therefore, the Prosecutor submits that even if "individual items of evidence taken in isolation did not meet the threshold under [a]rticle 58(1)(d) [*sic*], this would still not demonstrate an error in the [Impugned] Decision".[33]

24. The Prosecutor further submits that the Pre-Trial Chamber "correctly considered all the evidence before [it] and determined its probative value by looking at the totality of the evidence".[34] She argues that the attribution, "as a general rule, [of] little or no evidentiary value to certain types of evidence, such as anonymous hearsay evidence, press articles, views expressed in blogs or UN expert reports, violates the

[27] Document in Support of the Appeal, para. 25, referring to Impugned Decision, para. 59.
[28] Document in Support of the Appeal, para. 25.
[29] Document in Support of the Appeal, paras 26-27.
[30] Response to the Document in Support of the Appeal, para. 10.
[31] Response to the Document in Support of the Appeal, para. 13.
[32] Response to the Document in Support of the Appeal, para. 14.
[33] Response to the Document in Support of the Appeal, para. 14.
[34] Response to the Document in Support of the Appeal, para. 10.

principle of free assessment of evidence under [r]ule 63(2)".[35] The Prosecutor maintains that:

> [w]hether a piece of evidence meets the criteria for admissibility, as well as the weight to be given to certain pieces of evidence cannot be determined in the abstract or by reference to certain categories of evidence. It will depend on the circumstances that surround each piece of evidence that must be assessed in the context of the record as a whole [footnote omitted].[36]

With regard to evidence emanating from anonymous sources, the Prosecutor points out that the Court's legal documents "allow for the use of such evidence at the pre-trial stage" and argues that there is "no reason [that] it should be excluded for the purposes of meeting the lower threshold under [a]rticle 58(1)(b)".[37]

25. Finally, the Prosecutor contends that the evidence she presented "does not merely consist of anonymous hearsay evidence or purely speculative opinions".[38]

26. In this regard, the Prosecutor claims that 19 of the 23 findings referred to by Mr Ntaganda are supported by one or more United Nations (hereinafter: "UN") expert reports and that "there is only one instance where a single non-UN source is used without corroboration".[39] The Prosecutor indicates that the main sources relied upon for the purposes of the Impugned Decision are three UN expert reports: the 2013 *Midterm report of the Group of Experts on the Democratic Republic of the Congo*[40] (hereinafter: "2013 Group of Experts Midterm Report"), the *Consolidated Report on Investigations Conducted by the United Nations Joint Human Rights Office (UNJHRO) into Grave Human Rights Abuses Committed in Kiwanja, North Kivu, in November 2008*[41] and the 2011 *Final report of the Group of Experts on the Democratic Republic of the Congo*[42] (hereinafter: "2011 Group of Experts Final Report").[43] The Prosecutor submits that all three reports were "developed with high

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[35] Response to the Document in Support of the Appeal, para. 16.
[36] Response to the Document in Support of the Appeal, para. 16.
[37] Response to the Document in Support of the Appeal, para. 17.
[38] Response to the Document in Support of the Appeal, paras 10, 18.
[39] Response to the Document in Support of the Appeal, para. 20.
[40] *Midterm report of the Group of Experts on the Democratic Republic of the Congo*, 19 July 2013, UN Doc. S/2013/433.
[41] Joint OHCHR/MONUC Human Rights Office in the DRC, *Consolidated Report on Investigation Conducted by the United Nations Joint Human Rights Office (UNJHRO) into Grave Human Rights Abuses Committed in Kiwanja, North Kivu, in November 2008*, 7 September 2009.
[42] *Final report of the Group of Experts on the Democratic Republic of the Congo*, 2 December 2011, UN Doc. S/2011/738.
[43] Response to the Document in Support of the Appeal, para. 21.

evidential standards by international experts" and "are highly reliable sources of information".[44]

27. With regard to the blog articles referenced in the Impugned Decision, the Prosecutor highlights that the author thereof is a "'political analyst and scientist focusing on conflict and Africa's Great Lakes region' and the director of the Rift Valley Institute's Usalama Project, a 'research project on armed groups in the eastern Congo'", has headed the "UN group of Experts on the Congo and has been involved with [non-governmental organisations], the MONUC peacekeeping mission and the International Crisis Group".[45] According to the Prosecutor, viewed in this light, the blog "takes on the quality of expert academic opinion rather than unjustified speculation".[46]

28. As regards the press articles referenced in the Impugned Decision, the Prosecutor indicates that they are "never cited in isolation" and are "from reliable sources such as the BBC or CNN, and they often justify their observations by quoting analysts [...]".[47] Concerning the statement of witness P-0046, the Prosecutor submits that, even if the Pre-Trial Chamber had erred in using this evidence to support its findings, the reference was not necessary to the determination made under article 58 (1) (b) of the Statute, which was, in the view of the Pre-Trial Chamber, otherwise sufficiently supported by UN expert reports.[48]

2. Standard of Review

29. In considering appeals in relation to decisions granting or denying interim release, the Appeals Chamber has previously held that it "will not review the findings of the Pre-Trial Chamber *de novo*, instead it will intervene in the findings of the Pre-Trial Chamber only where clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision".[49]

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[44] Response to the Document in Support of the Appeal, para. 22. *See also* Response to the Document in Support of the Appeal, paras 23-24.
[45] Response to the Document in Support of the Appeal, para. 26.
[46] Response to the Document in Support of the Appeal, para. 27.
[47] Response to the Document in Support of the Appeal, para. 28.
[48] Response to the Document in Support of the Appeal, para. 29.
[49] *Prosecutor v. Jean-Pierre Bemba Gombo*, "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,

30. Mr Ntaganda contends that the Pre-Trial Chamber "committed a manifest error of law in considering that the less burdensome onus of proof for detention justifies reliance in the main on anonymous sources (anonymous hearsay), purely speculative opinions, or documents with no legal probative value, such as articles from newspapers and a blog and reports based on anonymous sources".[50] Mr Ntaganda uses this argument to challenge particular findings of the Pre-Trial Chamber.[51] Thus, rather than alleging that the type of evidence relied upon may never form the basis of a finding by a Pre-Trial Chamber in the context of an interim release decision, Mr Ntaganda appears to argue under the first ground of appeal that the evidence relied on by the Pre-Trial Chamber in relation to specific findings of fact falls short of the applicable standard. Accordingly, Mr Ntaganda's arguments are more appropriately characterised as alleging an error of fact rather than an error of law and will be treated as such.

31. The Appeals Chamber has explained its approach to factual errors in respect of decisions on interim release as follows:

> The Appeals Chamber has held that a Pre-Trial or Trial Chamber commits such an error if it misappreciates facts, disregards relevant facts or takes into account facts extraneous to the *sub judice* issues. In this regard, the Appeals Chamber has underlined that the appraisal of evidence lies, in the first place, with the relevant Chamber. In determining whether the Trial Chamber has misappreciated facts in a decision on interim release, the Appeals Chamber will "defer or accord a margin of appreciation both to the inferences [the Trial Chamber] drew from the available evidence and to the weight it accorded to the different factors militating for or against detention". Therefore, the Appeals Chamber "will interfere only in the case of a clear error, namely where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it".[52] [Footnotes omitted.]

ICC-01/05-01/08-631-Red (OA 2), para. 62, cited in *Prosecutor v. Callixte Mbarushimana*. "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the "Defence Request for Interim Release"'", 14 July 2011, ICC-01/04-01/10-283 (OA) (hereinafter: "*Mbarushimana OA Judgment*"), para. 15.

[50] Document in Support of the Appeal, para. 17.

[51] *See* Document in Support of the Appeal, paras 19-27; Annex A to the Document in Support of the Appeal.

[52] *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled 'Decision on the defence's 28 December 2011 "Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo"'", 5 March 2012, ICC-01/05-01/08-2151-Conf (OA 10); public redacted version: ICC-01/05-01/08-2151-Red (OA 10), para. 16. *See also Gbagbo OA Judgment*, para. 51.

In the *Mbarushimana OA Judgment*, the Appeals Chamber noted that the appellant's mere disagreement with the conclusions that the Pre-Trial Chamber drew from the available facts or the weight it accorded to particular factors is not enough to establish a clear error.[53]

32. It is also recalled that "an appellant is obliged not only to set out an alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision".[54] Failure to do so may lead to the Appeals Chamber dismissing arguments *in limine,* without full consideration of their merits.

3. Determination by the Appeals Chamber

(a) Introduction

33. Article 69 (4) of the Statute provides as follows:

> The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

34. Rule 63 (1) and (2) of the Rules of Procedure and Evidence provides that:

> 1. The rules of evidence set forth in this chapter, together with article 69, shall apply in proceedings before all Chambers.
>
> 2. A Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69.

35. The Appeals Chamber has previously held in the context of an appeal of a decision under article 60 (2) of the Statute that:

> What may justify arrest (and, in this context, continued detention) under article 58 (1) (b) of the Statute is that it must "appear" to be necessary. The question revolves around the possibility, not the inevitability, of a future occurrence.[55]

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[53] *Mbarushimana OA Judgment*, paras 21, 31.

[54] *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges'", 19 October 2010, ICC-01/05-01/08-962 (OA 3), para. 102, citing *Prosecutor v. Joseph Kony et al.*, "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", 16 September 2009, ICC-02/04-01/05-408 (OA 3), para. 48.

[55] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* "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

36. In addressing the question of what evidence may be used to establish that the continued detention of a person appears necessary, the Appeals Chamber has previously dismissed arguments that the Pre-Trial Chamber erred in relying on a report of a non-governmental organisation, finding that "[a]ppraisal of the evidence relevant to continued detention lies, in the first place, with the Pre-Trial Chamber".[56] In the context of an appeal of a decision under article 60 (3) of the Statute, the Appeals Chamber has also found that the Pre-Trial Chamber did not err "in holding that it could rely upon the Final Report [of the Group of Experts on Côte d'Ivoire pursuant to paragraph 16 of Security Council resolution 2045 (2012)] to provide 'sufficiently detailed information'".[57]

(b) Group of experts reports

37. In the Impugned Decision, the Pre-Trial Chamber relied primarily on the 2013 Group of Experts Midterm Report and the 2011 Group of Experts Final Report to support its findings regarding the circumstances of Mr Ntaganda's voluntary surrender, his movements between Rwanda and the DRC, his financial means and his continuing influence over his supporters in the DRC. Therefore, the Appeals Chamber will first examine whether the Pre-Trial Chamber committed a clear error in relying on the 2013 Group of Experts Midterm Report and the 2011 Group of Experts Final Report to support its findings.

38. The Appeals Chamber notes that the group of experts on the DRC was established pursuant to Security Council resolution 1533 (2004) "to gather and analyse all relevant information on flows of arms and related material, and networks operating in violation of the arms embargo concerning the [DRC]".[58] It was also instructed to assist, "[w]ithin its capabilities and without prejudice to the execution of the other tasks in its mandate", in the designation of leaders of armed groups as well

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Appellant for Interim Release", 9 June 2008, ICC-01/04-01/07-572 (OA 4) (hereinafter: "*Ngudjolo OA 4 Judgment*"), para. 21.

[56] *Ngudjolo OA 4 Judgment*, paras 23-25.

[57] *Prosecutor v. Laurent Gbagbo*, "Judgment on the appeal of Mr Laurent Gbagbo against the decision of Pre-Trial Chamber I of 11 July 2013 entitled 'Third decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute'", 29 October 2013, ICC-02/11-01/11-548-Conf (OA 4); public redacted version: ICC-02/11-01/11-548-Red, para. 70.

[58] 2011 Group of Experts Final Report, para. 1; 2013 Group of Experts Midterm Report, para. 6; United Nations, Security Council, *Resolution 1807*, 31 March 2008, S/RES/1807 (2008) (hereinafter: "Security Council Resolution 1807"), para. 18.

as individuals committing serious violations of international law in the DRC.[59] In execution of its mandate, the group of experts collected detailed information on the movements and activities of Mr Ntaganda.[60]

39. The Appeals Chamber also notes that the methodology employed by the group of experts was quite rigorous. The group indicated that it adhered to the evidentiary standards recommended in the report of the Informal Working Group of the Security Council on General Issues of Sanctions (S/2006/997)[61] (hereinafter: "Report of the Informal Working Group on General Issues of Sanctions"). In pursuance of these standards, the 2013 Group of Experts Midterm Report indicated that the following methodology was employed:

> The Group [...] [relied] on authentic documents and, and as much as possible, on first-hand, on-site observations by the experts themselves. The Group corroborated information by using at least three independent and reliable sources. The Group notably used eyewitness testimonies from former and current combatants of armed groups and members of local communities where incidents occurred. In addition, the Group obtained telephone records, bank statements, money transfer records, photographs, videos and other material evidence to corroborate its findings.[62]

40. It is also of relevance to note that, with respect to the general character and reliability of the reports of the group of experts, the Report of the Informal Working Group on General Issues of Sanctions stresses that "[a]ny perception of less than rigorous standards in the conduct of any aspect of their work can call into question the

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[59] Security Council Resolution 1807, paras 13, 18. Paragraph 18 (g) expressed the mandate of the Group of Experts in the following terms: "Within its capabilities and without prejudice to the execution of the other tasks in its mandate, to assist the Committee in the designation of the individuals referred to in subparagraphs (b) to (e) of paragraph 13 above". The individuals referred to in subparagraphs (b) to (e) of paragraph 13 were "[p]olitical and military leaders of foreign armed groups operating in the Democratic Republic of the Congo who impede the disarmament and the voluntary repatriation or resettlement of combatants belonging to those groups; (c) [p]olitical and military leaders of Congolese militias receiving support from outside the Democratic Republic of the Congo, who impede the participation of their combatants in disarmament, demobilization and reintegration processes; (d) [p]olitical and military leaders operating in the Democratic Republic of the Congo and recruiting or using children in armed conflicts in violation of applicable international law; (e) [i]ndividuals operating in the Democratic Republic of the Congo and committing serious violations of international law involving the targeting of children or women in situations of armed conflict, including killing and maiming, sexual violence, abduction and forced displacement".

[60] 2013 Group of Experts Midterm Report, paras 9-30, 46-47, 120, 129-130; 2011 Group of Experts Final Report, paras 238-242, 297-300, 597-627.

[61] *Report of the Informal Working Group of the Security Council on General Issues of Sanctions*, 22 December 2006, S/2006/997, para. 9.

[62] 2013 Group of Experts Midterm Report, para. 8. *See also* 2011 Group of Experts Final Report, para. 5.

integrity of their entire reports".[63] This report also recommends that clear guidelines be established for expert groups to consult "in order to ensure that, while these groups maintain their independence, their enquiries and findings meet appropriately high standards (including reliability of sources; validity of information; identifying names; and right of reply to individuals, entities and States)".[64] Furthermore, the Report of the Informal Working Group on General Issues of Sanctions stresses that sanctions monitoring mechanisms are:

> organs with different and distinct mandates, of independent, expert and non-judiciary character, with no subpoena powers, whose primary role is to provide sanctions-related information to the relevant committees. However, given that the findings of the monitoring mechanism (either their reports or documents or testimonies of their individual members), may be used by judicial authorities, their methodological standards may affect the credibility of the Organisation.[65]

41. In addition, the Appeals Chamber observes that the events described in the reports were contemporaneous with the production of the reports and that quite a high level of detail is provided with respect to the information relied upon by the Pre-Trial Chamber.

42. The Appeals Chamber notes that the identities of the sources relied upon were known to the group of experts, who "corroborated information by using three independent and reliable sources",[66] notwithstanding the fact that these sources were anonymous. Moreover, the 2011 Group of Experts Final Report indicates that "in situations in which the identification of sources would expose them or others to unacceptable safety risks, it has withheld identifying information and placed the relevant evidence in United Nations archives".[67] In this context, the Appeals Chamber notes that similar protective measures may be authorised with respect to witness statements prior to the commencement of the trial, under rule 81 (4) of the Rules of Procedure and Evidence, when such measures are justified to protect the safety of the witness or their family members. The guiding principle in the use of this type of anonymous evidence is that it should be "in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".[68] In the

[63] Report of the Informal Working Group on General Issues of Sanctions, para. 9.
[64] Report of the Informal Working Group on General Issues of Sanctions, para. 9 (a).
[65] Report of the Informal Working Group on General Issues of Sanctions, para. 19.
[66] 2013 Group of Experts Midterm Report, para. 8; 2011 Group of Experts Final Report, para. 5.
[67] 2011 Group of Experts Final Report, para. 5.
[68] Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution

present case, the Appeals Chamber is of the view that the excerpts relied upon for the purposes of the Impugned Decision were sufficiently detailed to enable Mr Ntaganda to investigate and consequently challenge the relevant information and that he was not prejudiced by the anonymity of the sources of the information relied upon.[69]

43. In view of the above considerations, the Appeals Chamber cannot discern any clear error in the Pre-Trial Chamber's reliance on the 2013 Group of Experts Midterm Report and the 2011 Group of Experts Final Report to support its findings with respect to the circumstances of Mr Ntaganda's voluntary surrender, his movements between Rwanda and the DRC, his financial means and his continuing influence over his supporters in the DRC.

(c) Press and blog articles

44. Mr Ntaganda also challenges the Pre-Trial Chamber's reliance on press and blog articles to support its findings regarding the circumstances of his surrender.[70]

45. The Appeals Chamber notes that the Impugned Decision does make reference to information contained in press and blog articles when examining the circumstances of Mr Ntaganda's surrender. However, the Pre-Trial Chamber referenced press and blog articles only for the purposes of indicating that "[t]he core of the above information finds support in other sources" and "[t]he latter possibility finds support in a number of non-anonymous sources" and in order to support its finding that "according to other material, Mr Ntaganda's surrender was likely to have been influenced by [...] pressure imposed on him by the Rwandan Government to surrender" (footnote omitted).[71]

46. The Appeals Chamber considers that it is unnecessary to consider Mr Ntaganda's arguments as to the Pre-Trial Chamber's reliance on press and blog articles. In assessing the circumstances surrounding Mr Ntaganda's surrender,

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Requests and Amended Requests for Redactions under Rule 81'", 14 December 2006, ICC-01/04-01/06-773, (OA 5), para. 2. *See also* "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'", 14 December 2006, ICC-01/04-01/06-774 (OA 6), para. 46.

[69] *See*, e.g., 2013 Group of Experts Midterm Report, paras 10-11, 13, 21, 26-27, 129-130 pp. 5-6, 13; 2011 Group of Experts Final Report, paras 601-607, pp. 70, 82-83, 85, 123-124, 149-151.

[70] Document in Support of the Appeal, paras 21-24.

[71] Impugned Decision, para. 45.

the Pre-Trial Chamber considered a number of other factors, such as the split in the M23 at the end of February 2013, that Mr Ntaganda's faction had run low in ammunition, prompting him to flee towards the Rwandan border and that Mr Ntaganda feared that he would be killed, in addition to the fact that he "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".[72] The evidentiary basis for these findings was the 2013 Group of Experts Midterm Report. The Appeals Chamber considers that the conclusion of the Pre-Trial Chamber that its findings reduce the weight to be given to Mr Ntaganda's claim that he voluntarily surrendered was adequately supported by reference to this latter set of circumstances. Therefore, the error alleged by Mr Ntaganda, even if established, would not have materially affected the Impugned Decision.

47. Accordingly, the Appeals Chamber cannot discern any clear error in the Pre-Trial Chamber's conclusion that reduced weight must be given to Mr Ntaganda's claim that he voluntarily surrendered.

(d) Anonymous hearsay of witness P-0046

48. Finally, Mr Ntaganda argues that the Pre-Trial Chamber erred in relying on anonymous hearsay in the statement of Witness P-0046 to establish that he has a history of violence.[73]

49. The Appeals Chamber notes that the Pre-Trial Chamber's conclusion as to Mr Ntaganda's history of violence is adequately supported by reference to the 2013 Group of Experts Midterm Report, the 2011 Group of Experts Final Report, the Decision of 22 August 2006 and the Second Warrant of Arrest where the Pre-Trial Chamber found reasonable grounds to believe that Mr Ntaganda had committed war crimes and crimes against humanity.[74] Therefore, the Appeals Chamber cannot discern any clear error in the Pre-Trial Chamber's conclusion that Mr Ntaganda has a history of violence.

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[72] Impugned Decision, paras 41-44.
[73] Document in Support of the Appeal, para. 25.
[74] Impugned Decision, para. 59, referring to Decision of 22 August 2006, paras 48-64; Second Warrant of Arrest, paras 63-66, 70, 72, 74-76, 80.

(e) Conclusion

50. In light of the foregoing reasons, the Appeals Chamber finds that Mr Ntaganda has failed to establish a clear error in the findings of the Pre-Trial Chamber; consequently the first ground of appeal is dismissed.

B. Second ground of appeal

1. Submissions

(a) Mr Ntaganda's submissions

51. The second ground of appeal raised by Mr Ntaganda is that the Pre-Trial Chamber "committed manifest errors in fact in assessing material submitted by both the parties and the Registry".[75] Mr Ntaganda indicates that his main submission focuses on the evidence on which the Pre-Trial Chamber relied in order to find that his detention was necessary, but he also presents further arguments with respect to the factual findings of the Pre-Trial Chamber.[76]

52. First, Mr Ntaganda argues that, in assessing the circumstances of his voluntary surrender, the Pre-Trial Chamber failed to take into account the following essential factors: (i) [redacted] that he had cooperated fully at all stages of the transfer procedure and expressed his willingness to appear in Court on numerous occasions during the process; (ii) that he had never sought to conceal his place of residence and that his whereabouts were known to the Prosecutor, the authorities of the DRC and MONUC/MONUSCO; (iii) that the First Warrant of Arrest was under seal until 28 April 2008, "which precludes his being at large since 2006"; and (iv) that the Government of the DRC confirmed that he participated in the peace process in the DRC and was integrated into the regular armed forces, and that it had officially decided to suspend execution of the warrant of arrest issued by the Court.[77] Mr Ntaganda argues that these "important factors ought to have been taken into account by the Chamber in assessing the circumstances of [his] voluntary surrender" and that this error invalidates the Pre-Trial Chamber's findings on article 58 (1) (b) (i) of the

[75] Document in Support of the Appeal, para. 33.
[76] Document in Support of the Appeal, paras 29-31.
[77] Document in Support of the Appeal, paras 34-35.

Statute, as voluntary surrender is a "significant factor in determining whether [a] suspect will appear at trial if granted interim release".[78]

53. Second, Mr Ntaganda contends that the Pre-Trial Chamber's conclusion that the gravity of the charges and possible lengthy sentence show that there is a risk that he will abscond if released is manifestly unfounded.[79] He argues that he had knowledge of the gravity of the charges and possible sentence if convicted at the time of his surrender.[80] Mr Ntaganda submits that, although the Court has previously held "that the gravity of the charges and the possible sentence are factors to consider in determining the risk of a suspect's absconscion, a distinction must be made between an arrested suspect and a suspect who voluntarily surrenders to the court, fully aware of the above factors" (footnote omitted).[81]

54. Third, Mr Ntaganda argues that the "Pre-Trial Chamber's finding that [he] habitually crossed borders and that he would do the same if released in the Schengen area is clearly unreasonable".[82] Mr Ntaganda submits that the report relied on by the Pre-Trial Chamber in order to substantiate its finding shows that he "twice crossed the border separating [...] neighbouring towns [...] to attend funerals" and that he sought all necessary authorisations prior to crossing the border.[83]

55. According to Mr Ntaganda, these errors "invalidate the Pre-Trial Chamber's findings that the article 58(1)(b) criteria are met".[84] He "requests the Appeals Chamber to quash the Pre-Trial Chamber's findings with respect to article 58(1)(b) [of the Statute]"[85] and reverse the Impugned Decision.[86]

(b) Prosecutor's submissions

56. The Prosecutor asserts that Mr Ntaganda supports the second ground of appeal primarily by reference to the arguments that he made under the first ground of appeal, without explaining how the Pre-Trial Chamber's assessment of the evidence would amount to an error of fact that would vitiate the Impugned Decision under the second

[78] Document in Support of the Appeal, para. 36.
[79] Document in Support of the Appeal, paras 37-38.
[80] Document in Support of the Appeal, paras 39-41.
[81] Document in Support of the Appeal, para. 42.
[82] Document in Support of the Appeal, para. 45.
[83] Document in Support of the Appeal, para. 44.
[84] Document in Support of the Appeal, para. 46.
[85] Document in Support of the Appeal, para. 47.
[86] Document in Support of the Appeal, p. 16.

ground of appeal.[87] She indicates that an appellant "cannot simply claim that an impugned decision violated the fairness of the proceedings or a particular right without specifying and substantiating such a claim".[88]

57. The Prosecutor submits that the remaining arguments under the second ground of appeal do not demonstrate any appealable error of fact and that Mr Ntaganda has failed to establish that the Pre-Trial Chamber "could not have reasonably reached the conclusions it did on the available evidence" or "how the alleged errors materially affect the [Impugned] Decision" (footnotes omitted).[89]

58. The Prosecutor argues that, contrary to Mr Ntaganda's assertion, the Pre-Trial Chamber did take note of Mr Ntaganda's submissions as to his cooperation [redacted] when analysing the circumstances of his surrender to the Court.[90] The Prosecutor further contends that, even if this point had not been considered, the Impugned Decision would not have been materially affected; firstly because the Pre-Trial Chamber "extensively considered the circumstances of [Mr Ntaganda's] surrender [...]" and secondly because the Pre-Trial Chamber did not consider his voluntary surrender to be a determinative factor in deciding whether he might abscond if the possibility arises.[91] The Prosecutor submits that the fact that the First Warrant of Arrest was under seal until 2008 is also not a relevant consideration as Mr Ntaganda had failed to surrender to the Court in the five year period between 2008 and 2013 and the Impugned Decision based itself on Mr Ntaganda's behaviour over the course of several years until his surrender.[92] Lastly, the Prosecutor submits that Mr Ntaganda's arguments regarding his participation in the peace process, service in the army of the DRC, participation in peacekeeping operations and the alleged decision of the authorities to suspend the execution of the arrest warrant issued by the Court, the fact that his location was known to the authorities and that he did not conceal his place of residence are all irrelevant "considerations for the purposes of assessing the voluntariness of surrender".[93]

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[87] Response to the Document in Support of the Appeal, para. 30.
[88] Response to the Document in Support of the Appeal, para. 31.
[89] Response to the Document in Support of the Appeal, para. 32.
[90] Response to the Document in Support of the Appeal, para. 33.
[91] Response to the Document in Support of the Appeal, para. 34.
[92] Response to the Document in Support of the Appeal, paras 36-37.
[93] Response to the Document in Support of the Appeal, paras 35, 38-39.

59. The Prosecutor submits that the Pre-Trial Chamber took into account Mr Ntaganda's submissions in relation to the gravity of the alleged crimes and the duration of the possible sentence.[94] She contends that Mr Ntaganda's arguments on appeal merely represent a disagreement with the conclusions of the Pre-Trial Chamber, which is not sufficient to establish an error of fact.[95]

60. The Prosecutor finally submits that the Pre-Trial Chamber's reference to the occasions when Mr Ntaganda had crossed international borders in contravention of a travel ban was not erroneous as this has a bearing on the possibility of him absconding if released.[96] According to the Prosecutor, Mr Ntaganda's arguments offer "alternative conclusions which could have been drawn [...]", but this does not suffice to establish an error of fact in the Impugned Decision.[97] The Prosecutor also emphasises that the Pre-Trial Chamber did not come to its conclusions regarding Mr Ntaganda's ability to travel and propensity to abscond on the basis of this factor alone; therefore, even if the Pre-Trial Chamber had erred by taking into account an irrelevant factor, the Impugned Decision would not be materially affected.[98]

2. Determination by the Appeals Chamber

61. Mr Ntaganda's arguments under his second ground of appeal relate to alleged factual errors challenging the Pre-Trial Chamber's specific findings under articles 58 (1) (b) and 60 (2) of the Statute that the continued detention of Mr Ntaganda appeared necessary. The Appeals Chamber has assessed Mr Ntaganda's arguments against the standard of review for factual errors as set out in paragraphs 31-32 above.

(a) Alleged failure to take into account relevant factors in assessing the circumstances of Mr Ntaganda's voluntary surrender

62. The Appeals Chamber notes that the Pre-Trial Chamber carefully examined "the circumstances of Mr. Ntaganda's voluntary surrender including its timeliness and the manner in which it took place" (footnote omitted).[99] Mr Ntaganda submits that, in assessing the circumstances of the voluntary surrender, the Pre-Trial Chamber failed

[94] Response to the Document in Support of the Appeal, paras 40-41.
[95] Response to the Document in Support of the Appeal, paras 41-42.
[96] Response to the Document in Support of the Appeal, paras 43-44.
[97] Response to the Document in Support of the Appeal, para. 46.
[98] Response to the Document in Support of the Appeal, para. 45.
[99] Impugned Decision, para. 42; *See also* Impugned Decision, paras 40-46.

to take into account essential factors, namely that (i) [redacted] he cooperated at all stages of the transfer procedure and expressed his willingness to appear in Court; (ii) he did not conceal his place of residence, and that his whereabouts were known to the Prosecutor, MONUC/MONUSCO and the authorities of the DRC; (iii) the First Warrant of Arrest issued in 2006 was only unsealed in 2008 precluding his being at large since 2006; and (iv) he participated in the peace process in the DRC, was integrated in the regular armed forces and the authorities of the DRC had decided to suspend the execution of the warrant of arrest issued by the Court.[100]

63. It is noted that Mr Ntaganda does not explain how any of these factors would be relevant to the Pre-Trial Chamber's consideration of the circumstances surrounding his surrender. At most Mr Ntaganda identifies a disagreement between himself and the Pre-Trial Chamber as to what factors should have been taken into account for the purpose of analysing the circumstances surrounding his voluntary surrender. As such, Mr Ntaganda has not identified a clear error in the Pre-Trial Chamber's findings. Accordingly, his argument is rejected.

(b) Alleged manifestly unfounded conclusions with respect to the gravity of the charges and possible sentence

64. The Pre-Trial Chamber found that "the charges or counts Mr. Ntaganda is facing are numerous and of such gravity that they might result in an overall lengthy sentence. These two factors if considered together may make it likely that Mr. Ntaganda will abscond, should the opportunity arise" (footnote omitted).[101] The Pre-Trial Chamber indicated that these 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".[102] The Pre-Trial Chamber then reiterated its conclusion that "in view of the material provided and reviewed by the [Pre-Trial Chamber] concerning the circumstances surrounding Mr. Ntaganda's surrender, little weight, if any, can be given to this factor".[103]

[100] Document in Support of the Appeal, para. 35.
[101] Impugned Decision, para. 50.
[102] Impugned Decision, para. 52.
[103] Impugned Decision, para. 52.

65. Mr Ntaganda argues that the Pre-Trial Chamber's conclusion that the gravity of the charges and the possibly lengthy sentence show the risk that he will abscond if released is manifestly unfounded in the instant case.[104] He does not dispute that the gravity of the charges and the resulting expectation of a lengthy prison sentence are relevant factors to be considered in the determination of the risk of absconding for decisions on interim release.[105] Rather, he repeats that a distinction should be drawn between a suspect who surrendered on a voluntary basis in full awareness of the gravity of the charges and the potentially lengthy sentence that he is facing and a suspect who did not surrender voluntarily.[106]

66. The Appeals Chamber has already rejected Mr Ntaganda's arguments on appeal relevant to the Pre-Trial Chamber's consideration of the circumstances surrounding his surrender.[107] Apart from disagreeing with the conclusions of the Pre-Trial Chamber regarding his voluntary surrender, Mr Ntaganda does not present any additional arguments that would serve to demonstrate a clear error in the Pre-Trial Chamber's findings with regard to the gravity of the charges and potentially lengthy sentence that he is facing.[108] Accordingly, his argument is rejected.

(c) Alleged manifestly ill-founded assessment of certain factual considerations

67. Lastly, Mr Ntaganda contends that it was clearly unreasonable for the Pre-Trial Chamber to find that he "habitually crossed borders and that he would do the same if released in the Schengen area [...]".[109] According to Mr Ntaganda, the Pre-Trial Chamber failed to consider that on both occasions when he crossed the border between the DRC and Rwanda, he had obtained the necessary authorisation from military and immigration authorities.[110]

68. In the view of the Appeals Chamber, Mr Ntaganda misconstrues the Pre-Trial Chamber's findings in this regard. The Pre-Trial Chamber found that it "cannot [...] adhere to the Defence's assertion that the risk of absconding is diminished, because he

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[104] Document in Support of the Appeal, paras 37-38.
[105] Document in Support of the Appeal, para. 42.
[106] Document in Support of the Appeal, para. 42. *See also* Application for Interim Release, para. 45; Impugned Decision, para. 22.
[107] *Supra,* paras 62-63. *See also* paras 43, 47.
[108] *See*, e.g., *Gbagbo OA Judgment*, para. 52, referring to *Mbarushimana OA Judgment*, paras 21, 31.
[109] Document in Support of the Appeal, para. 45.
[110] Document in Support of the Appeal, para. 44.

is subject to the 'sanctions regime laid down by United Nations Security Council resolution 1596 [...], which imposes a travel ban and an asset freeze' [and] 'does not hold a passport or other travel document'".[111] In support of its conclusion, the Pre-Trial Chamber noted that Mr Ntaganda had "managed to move around undisturbed since 2006 until the date of his surrender on March 2013, despite the existence of a travel ban".[112]

69. Although the Pre-Trial Chamber cited only two examples of Mr Ntaganda's cross border movements during this time, without reference to the fact that on both occasions he had apparently sought all necessary authorisations prior to travelling,[113] the essential point remains that Mr Ntaganda moved freely despite the existence of a travel ban against him at the relevant time.[114] The question of whether his travel had been authorised by the relevant State authorities is therefore irrelevant to this analysis.

70. Consequently, the conclusion of the Pre-Trial Chamber that Mr Ntaganda had previously been able to move across borders despite the existence of a travel ban against him and that "he will probably still be able to move within the Schengen area if released, given the absence of borders" is not affected by the argument raised by Mr Ntaganda.[115] As Mr Ntaganda has failed to establish a clear error in the Pre-Trial Chamber's findings, his argument is dismissed.

(d) Conclusion

71. For the above reasons, the Appeals Chamber finds that Mr Ntaganda has failed to establish a clear error in the findings of the Pre-Trial Chamber with respect to the circumstances surrounding his surrender, the gravity of the charges against him and the potential sentence, as well as the risk of him absconding. Consequently, the second ground of appeal is dismissed.

IV. APPROPRIATE RELIEF

72. Pursuant to Rule 158 (1) of the Rules of Procedure and Evidence, the Appeals Chamber may confirm, reverse or amend a decision appealed under article 82 (1) (b)

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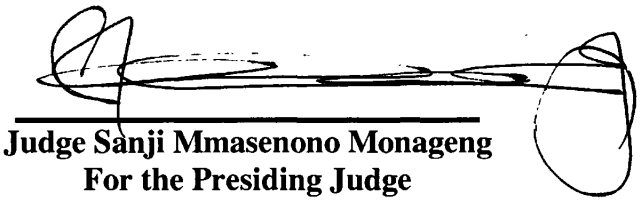
[111] Impugned Decision, para. 53.
[112] Impugned Decision, para. 53.
[113] *See* 2011 Group of Experts Final Report, para. 597.
[114] *See* 2011 Group of Experts Final Report, para. 598.
[115] Impugned Decision, para. 53.

of the Statute. In the present case the Appeals Chamber has rejected all grounds of appeal that Mr Ntaganda has raised; it is therefore appropriate to confirm the Impugned Decision and to dismiss the appeal.

Judge Anita Ušacka and Judge Christine Van den Wyngaert append dissenting opinions to this judgment.

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



Judge Sanji Mmasenono Monageng
For the Presiding Judge

Dated this 5th day of March 2014

At The Hague, The Netherlands

Dissenting Opinion of Judge Anita Ušacka

1. I regret that I am unable to join the majority of the Appeals Chamber in confirming the "Decision on the Defence's Application for Interim Release"[1] (hereinafter: "Impugned Decision"). My divergence from the majority relates to the first ground of appeal raised by Mr Bosco Ntaganda (hereinafter: "Mr Ntaganda") in the document in support of the appeal filed on 26 November 2013[2] (hereinafter: "Document in Support of the Appeal"). For the reasons set out hereunder, I would have found that Pre-Trial Chamber II (hereinafter: "Pre-Trial Chamber") committed an error of fact in exclusively relying on anonymous hearsay evidence contained in two United Nations group of experts reports and press and blog articles in order to support most of the factual findings relevant to its conclusion that the continued detention of Mr Ntaganda appears necessary. On this basis, I would have reversed the Impugned Decision and remanded it to the Pre-Trial Chamber for a new decision. I would not have addressed the second ground of appeal.

Introduction

2. Mr Ntaganda challenges the Pre-Trial Chamber's decision on his first request for interim release under article 60 (2) of the Statute.[3] Article 60 (2) of the Statute provides:

> 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. In line with article 21 (3) of the Statute, the Appeals Chamber has previously held that "[t]he provisions of the Statute relevant to detention, like every other provision of it, must be interpreted and applied in accordance with 'internationally

[1] ICC-01/04-02/06-147.
[2] "Document in support of the Defence for Mr Ntaganda's appeal against *Decision on the Defence's Application for Interim Release* rendered on 18 November 2013", ICC-01/04-02/06-158-Conf-Exp-tENG with a public redacted version in French ICC-01/04-02/06-158-Red.
[3] Although Mr Ntaganda contends under the first ground of appeal that the Pre-Trial Chamber's error in relying on anonymous hearsay, purely speculative opinions, or documents with no legal probative value constituted an error of law. *See* Document in Support of the Appeal, para. 17. I agree with the conclusion of the majority that his arguments are more appropriately characterised as errors of fact and should be assessed against the more deferential standard of review for factual errors.

recognized human rights'".[4] The significance of a decision granting or denying the release of a detained person, who is in a particularly vulnerable situation, and its impact on the human rights of a person is demonstrated by the fact that it may be directly appealed under article 82 (1) of the Statute.

4. The principle that everyone shall be presumed innocent until proved guilty before the Court is enshrined in article 66 (1) of the Statute.[5] The Appeals Chamber has previously stated, in the context of an appeal of a decision reviewing a ruling on detention under article 60 (3) of the Statute, that "[t]his procedural safeguard must also be seen in the context of the detained person's right to be presumed innocent".[6] In addition to the right to be presumed innocent until proved guilty, the human right to personal liberty, the right to not be detained for an unreasonable period of time and the right to challenge the lawfulness of detention are of particular importance in the context of a decision granting or denying the release of a person being prosecuted.[7] In line with this human rights framework, the jurisprudence of the Pre-Trial Chambers has been that "when dealing with the right to liberty, one should bear in mind the fundamental principle that deprivation of liberty should be an exception and not the

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[4] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment In the appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I of the Appellant for Interim Release", 9 June 2008, ICC-01/04-01/07-572 (OA 4), para. 15.

[5] According to the jurisprudence of the European Court of Human Rights, the presumption of innocence "requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused". *See* ECtHR, Court (Plenary), *Barberà, Messegué and Jabardo v. Spain*, "Judgment", 6 December 1988, application number 10590/83, para. 77; Grand Chamber, *Allen v. the United Kingdom*, "Judgment", 12 July 2013, application no. 25424/09, para. 93. The United Nations Human Rights Committee has indicated that "[t]he presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. It is a duty for all public authorities to refrain from prejudging the outcome of a trial [...]". *See* United Nations Human Rights Committee, *General comment no. 32*, 23 August 2007, CCPR/C/GC/32, para. 30.

[6] *Prosecutor v. Jean-Pierre Bemba Gombo*, "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 (OA 4), para. 49.

[7] *Universal Declaration of Human Rights*, 10 December 1948, General Assembly, Resolution 217 A (III), U.N. Doc A/810, articles 9-11; *International Covenant on Civil and Political Rights*, 16 December 1966, 999 United Nations Treaty Series 14668, articles 9, 14; *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, as amended by Protocols Nos. 11 and 14, , 213 United Nations Treaty Series 2889, articles 5, 6; *American Convention on Human Rights, "Pact of San José, Costa Rica"*, 22 November 1969, 1144 United Nations Treaty Series 17955, articles 7, 8; *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 United Nations Treaty Series 26363, articles 6, 7.

rule" (footnotes omitted).[8] These principles must be at the forefront of any consideration of an application under article 60 (2) of the Statute.

5. The Appeals Chamber has previously stated that:

> Article 60 (2) of the Statute aims to provide the detainee with an early opportunity to contest his or her arrest and sequential detention. This he may do by reference to article 58 of the Statute, which defines the legal framework within which justification of his detention may be examined. Thereupon, the Chamber must address anew the issue of detention in light of the material placed before it.[9]

6. Thus, a decision under article 60 (2) of the Statute is a decision *de novo*, in the course of which the Pre-Trial Chamber must determine whether the conditions of article 58 (1) of the Statute are met, hearing the submissions of the defence for the first time. Accordingly, the Pre-Trial Chamber is bound to assess the application for interim release in light of the circumstances prevailing at the time of the application, rather than at the time of the issuance of the warrant of arrest.[10] In the context of the present case, it is worth noting that the first warrant for Mr Ntaganda's arrest was issued by Pre-Trial Chamber I, composed of Judges Claude Jorda, Akua Kuenyehia and Sylvia Steiner, on 22 August 2006,[11] and was unsealed on 28 April 2008.[12] Fatou Bensouda was sworn in on 15 June 2012, replacing Luis Moreno Ocampo as

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[8] Pre-Trial Chamber I, *Prosecutor v. Callixte Mbarushimana*, "Decision on the 'Defence Request for Interim Release'", 19 May 2011, ICC-01/04-01/10-163, para. 33. *See also* Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga", 18 March 2008, ICC-01/04-01/07-330, pp. 6-7; Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the Conditions of the Pre-Trial Detention of Germain Katanga", 21 April 2008, ICC-01/04-01/07-426, p. 6; Pre-Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo* "Decision on Application for Interim Release", 16 December 2008, ICC-01/05-01/08-321, para. 31; Pre-Trial Chamber II, *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on Application for Interim Release", 14 April 2009, ICC-01/05-01/08-403, para. 36; Pre-Trial Chamber II, *Prosecutor v. Jean-Pierre Bemba Gombo,* "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", 14 August 2009, ICC-01/05-01/08-475, para. 77.

[9] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "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 (OA 4), para. 12.

[10] Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, "Separate Opinion of Judge Georghios M. Pikis", 13 February 2007, ICC-01/04-01/06-824 (OA 7), para. 10.

[11] "Decision on the Prosecution Application for a Warrant of Arrest", dated 22 August 2006 and registered on 24 August 2006, ICC-01/04-02/06-1-US-Exp-tEN. A redacted version was filed on 6 March 2007 and the decision was made public on 29 September 2010, *see* public redacted version in French ICC-01/04-02/06-1-Red. *See also* "Warrant of Arrest", 22 August 2006, ICC-01/04-02/06-2-tENG. A redacted corrigendum of the redacted version was filed on 7 March 2007, *see* "Warrant of Arrest - Corrigendum", ICC-01/04-02/06-2-Corr-tENG-Red.

[12] "Decision to Unseal the Warrant of Arrest against Bosco Ntaganda", ICC-01/04-02/06-18.

Prosecutor. A second warrant for Mr Ntaganda's arrest was issued by Pre-Trial Chamber II,[13] composed of Judges Ekaterina Trendafilova, Hans-Peter Kaul and Cuno Tarfusser, on 13 July 2012.[14] Mr Ntaganda's initial appearance before the Court took place on 26 March 2013.[15]

7. The circumstances relating to Mr Ntaganda that led the Pre-Trial Chambers to conclude that his arrest appeared necessary have also radically altered since the issuance of the two warrants of arrest against him. Mr Ntaganda argues that, despite the fact that between the issuance of the first and second warrant of arrest he held the rank of General in the *Forces Armées de la République Démocratique du Congo*, took part in the peace process in the Democratic Republic of the Congo and participated in joint peacekeeping operations with MONUC/MONUSCO, the Prosecutor "did not update the material substantiating [her] contention that Mr Ntaganda's detention was warranted [...]".[16] Regarding current circumstances, Mr Ntaganda argues that the fact that he surrendered voluntarily to the Court on 20 March 2013 demonstrates that he does not harbour the intention to evade justice.[17] On this basis, Mr Ntaganda requests conditional release in the territory of the Netherlands subject to any conditions that the Pre-Trial Chamber considers necessary in accordance with rule 119 of the Rules of Procedure and Evidence.[18] It is significant that Mr Ntaganda is now present on the territory of the Kingdom of the Netherlands rather than the Democratic Republic of the Congo,[19] having apparently voluntarily surrendered.[20] The Impugned Decision represents the first time a Chamber of the Court has considered the impact of a suspect's voluntary surrender to the Court on the appearance of necessity of his continued detention.

Analysis of the Legal Framework

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[13] The situation in the Democratic Republic of the Congo, and with it the case against Mr Ntaganda, was reassigned to Pre-Trial Chamber II on 15 March 2012. *See* The 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.
[14] "Decision on the Prosecutor's Application under Article 58", ICC-01/04-02/06-36-Conf-Exp..
[15] Transcript of 26 March 2013, ICC-01/04-02/06-T-2-ENG (ET WT).
[16] Pre-Trial Chamber II, "Defence application for the interim release of Mr Bosco Ntaganda", 20 August 2013, ICC-01/04-02/06-87-Conf-Exp-tEng (hereinafter: "Interim Release Application") with a public redacted version in French ICC-01/04-02/06-87-Red, paras 33-40.
[17] Interim Release Application, paras 41-46.
[18] Interim Release Application, paras 63-67.
[19] *See* G. Sluiter et al. (eds), *International Criminal Procedure Principles and Rules* (Oxford University Press, 2013), p. 332.
[20] Impugned Decision, para. 40.

8. Although the appeal relates to the question of interim release, Mr Ntaganda's arguments under the first ground of appeal primarily relate to the law of evidence and the question of the kind of evidence on which a Pre-Trial Chamber may reasonably rely for factual findings underpinning a holding that continued detention appears necessary.

9. The most salient provisions of the legal framework regarding evidence are article 69 (4) of the Statute and rules 63 and 64 of the Rules of Procedure and Evidence. Article 69 (4) of the Statute provides that:

> The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

Rule 63 of the Rules of Procedure and Evidence provides that:

> 1. The rules of evidence set forth in this chapter, together with article 69, shall apply in proceedings before all Chambers.
> 2. A Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69.
> [...]
> 4. Without prejudice to article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.

Rule 64 (2) of the Rules of Procedure and Evidence provides that "[a] Chamber shall give reasons for any rulings it makes on evidentiary matters".

10. These provisions must be read in light of the established principles of human rights. The jurisprudence of human rights bodies shows that the requirement of a fair trial necessitates that courts indicate with sufficient clarity the grounds on which they base their decisions.[21] A reasoned decision contributes to the acceptance of the decision by the parties and to preserving the rights of the defence. Moreover, the reasoning provided by the first instance Chamber forms the basis for an appeal by the person affected and allows the appellate body to review the decision.

[21] Appeals Chamber, *Prosecutor v. Laurent Koudou Gbago*, "Dissenting Opinion of Judge Anita Ušacka", 26 October 2012, ICC-02/11-01/11-278-Red (OA), paras 8-14. *See* G. Sluiter et al. (eds), *International Criminal Procedure Principles and Rules* (Oxford University Press, 2013), p. 1144.

11. Notwithstanding rule 64 (2) of the Rules of Procedure and Evidence, in response to Mr Ntaganda's challenge to the type of evidence ultimately relied upon for the purposes of the Impugned Decision, the Pre-Trial Chamber simply found that "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".[22] The Pre-Trial Chamber did not, however, provide any indication as to why it found the evidence presented by the Prosecutor to be reliable and to have probative value that would not be outweighed by its prejudicial effect. The Pre-Trial Chamber also did not provide an assessment of the weight accorded to each type of evidence in reaching its conclusions. In this regard, it is also notable that the Pre-Trial Chamber did not refer to the relevant provisions of the Statute and the Rules of Procedure and Evidence regarding the assessment of evidence. This lack of reasoning on the part of the Pre-Trial Chamber has rendered the assessment of the first ground of appeal problematic.

12. It is, moreover, regrettable that the majority of the Appeals Chamber did not deem it necessary to set out their analysis of this legal framework and its application to determinations under articles 58 (1) (b) and 60 (2) of the Statute. It may be noted that article 69 (4) of the Statute, although placed in Part VI of the Statute under the heading "The Trial", does not refer to the Trial Chamber but indicates more generally that the "Court may rule on the relevance or admissibility of any evidence [...]". This appears to be taken up in rule 63 (1) of the Rules of Procedure and Evidence, which clarifies that "[t]he rules of evidence set forth in this chapter, together with article 69, shall apply in proceedings before all Chambers".[23] These provisions demonstrate that the criteria applicable to the assessment of evidence apply beyond the context of the trial itself. At the same time, it is important to note that the principles applicable to the

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[22] Impugned Decision, para. 47.

[23] Donald K. Piragoff suggests that the question of the application of article 69 (4) of the Statute was "resolved in the context of the Rules by creating one chapter on rules relating to various stages of the proceedings (Chapter 4) and a separate chapter for those rules applicable exclusively to the trial procedure (Chapter 6). Since those rules that relate directly to article 69 were included in Chapter 4, it is likely that article 69 is intended to apply beyond the context of the trial itself", *see* D. K. Piragoff, "Article 69 Evidence", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (C.H. Beck-Hart-Nomos, 2nd ed, 2008), p. 1301, at p. 1327. Other academic commentators have raised this question but left it unanswered. *See* G. Sluiter et al. (eds) *International Criminal Procedure Principles and Rules* (Oxford University Press, 2013), p. 1020.

assessment of the evidence are distinct from and should not be confused with the standard of proof, which differs at each stage of the proceedings.[24]

13. An analysis of the applicable legal framework shows that the flexible provisions of the Statute and the Rules of Procedure and Evidence allow judges broad discretion in their assessment of evidence. It is clear that any evidence may, in fact, be relied upon, with only two exceptions explicitly set out, relating to evidence obtained by means of a violation of the Statute or internationally recognised human rights and evidence of the prior or subsequent sexual conduct of a victim or witness.[25] Nevertheless, article 69 (4) of the Statute and the relevant provisions of the Rules of Procedure and Evidence highlight the importance of the Pre-Trial Chamber examining the relevance, probative value and prejudicial effect of specific items of evidence. It has been suggested that although article 69 of the Statute "does not refer directly to the requirement of reliability [...] [a]ny assessment of relevance and probative value must involve some consideration of the reliability of the evidence – it must be *prima facie* credible".[26] The ability of the opposing party to investigate and test the reliability of the source of an item of evidence is an important consideration in assessing its potential prejudicial effect. In our case, the question remains as to whether the appearance of necessity of detention under articles 58 (1) (b) and 60 (2) of the Statute may be satisfied by reliance exclusively on anonymous hearsay evidence.

14. Before turning to an assessment of the type of evidence challenged in the context of the present appeal, it is useful for present purposes to have regard also to the jurisprudence of the ad hoc tribunals. It may be observed that, in common with the Court, the ad hoc tribunals apply a flexible framework for the evaluation of evidence, representing "a crucial civil law element in a predominantly adversarial system".[27]

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[24] *See* articles 58 (1), 61 (7) ,66 (3) of the Statute.
[25] Article 69 (7) of the Statute provides that "[e]vidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings". Rule 71 of the Rules of Procedure and Evidence provides that "subject to article 69, paragraph 4, a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness".
[26] H. Brady, "The System of Evidence in the Statute of the International Criminal Court", in F. Lattanzi and W. A. Schabas, (eds) *Essays on the Rome Statute of the International Criminal Court* Vol., 1 (Editirice il Sirente, 1999), p. 279, at p. 290.
[27] A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009), p. 314.

However, despite the apparent flexibility of the legal framework, a jurisprudential evolution has taken place at the ad hoc tribunals, which demonstrates an increasingly cautious approach to the use of certain types of documentary evidence.[28]

15. There are good reasons for a cautious approach towards the use of reports of states, international organisations or non-governmental organisations, whose "mandates and objectives are usually quite different from those of international staff appointed with a specific mandate to carry out independent investigations and prosecutions".[29] Problems relating to reliance on such reports have been highlighted in the following terms:

> [T]he process of the investigations by the OTP [at the International Criminal Tribunal for the former Yugoslavia] started with the review and analysis of reports from the U.N. Commission of Experts, governments, and NGOs. By and large those reports fell into two categories. They were designed to either present an overall picture of the conflict or to address certain characteristics of the conflict, depending on the character or interest of the particular organization or group preparing the report. All of them, however, were prepared from the perspective of establishing a historical record of what occurred either to answer to or influence the actions of some group of decision makers, as opposed to the more exacting process of establishing a legally sufficient case for prosecution.[30]

16. At the ICC, Pre-Trial and Trial Chambers generally attach low probative value to anonymous hearsay evidence and adopt a cautious approach to the use of such evidence for the purposes of establishing the truth of its contents.[31] In general, such evidence is relied upon to corroborate other evidence. The recent "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute" in the case of the *Prosecutor v. Laurent Gbagbo* indicates the

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[28] A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009), p. 314; G. Sluiter et al. (eds), *International Criminal Procedure Principles and Rules* (Oxford University Press, 2013), p. 1054-1060.
[29] L. Reydams et al. (eds), *International Prosecutors* (Oxford University Press, 2012), p. 581.
[30] M. J. Keegan, "Preparation of Cases for the ICTY",,7 *Transnational Law and Contemporary Problems* (1999), p. 119, at p. 124.
[31] Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo* "Decision on the confirmation of charges", 29 January 2007, ICC-01/04-01/06-803-tEN, paras 99-106; Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the confirmation of charges", 30 September 2008, ICC-01/04-01/07-717, paras 119-120, 131-141, 221-223; Pre-Trial Chamber II, *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 15 June 2009, ICC-01/05-01/08-424, paras 47-52.

emergence of a more stringent approach to the use of anonymous hearsay documentary evidence for the purposes of the confirmation of charges.[32]

17. In the case of the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II indicated that "there is no finite list of possible criteria that are to be applied in determining reliability" but listed key factors that will normally be considered, including the source of the evidence, the nature and characteristics of the item of evidence, the contemporaneousness of the evidence with the events to which it pertains, the purpose for which the document was created, and the question of whether the information and the way in which it was gathered can be independently verified or tested.[33] Trial Chamber II concluded that:

> Although there is no prohibition on hearsay before the Court, the Chamber is conscious of the inherent risks in this type of evidence. It may therefore take such risks into consideration when attributing the appropriate probative value to items of evidence consisting mainly or exclusively of hearsay.[34]

18. Trial Chamber II considered UN reports *prima facie* reliable (as reports from independent, direct observers of the facts being reported), but cautioned that if the author's identity and the sources of the information provided are not revealed with sufficient detail, the Chamber would be unable to assess the reliability of the contents and would not admit them into evidence.[35] Moreover, Trial Chamber II found that, "where such reports are based, for the most part, on hearsay information, especially if that information is twice or further removed from its source, the reliability of their content is seriously impugned".[36]

19. Trial Chamber II has also expressed reservations about the probative value of media reports, finding that they "often contain opinion evidence about events said to have occurred and rarely provide detailed information about their sources".[37] Trial Chamber II declined to admit press releases into evidence as the Prosecutor had "failed to inform the Chamber either of the background and qualifications of the

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[32] Pre-Trial Chamber I, "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute", 3 June 2013, ICC-02/11-01/11-432, paras 28-30.
[33] "Decision on the Prosecutor's Bar Table Motions", 17 December 2010, ICC-01/04-01/07-2635 (hereinafter: "*Katanga* and *Ngudjolo* Decision of 17 December 2010"), para. 27.
[34] *Katanga* and *Ngudjolo* Decision of 17 December 2010, para. 27.
[35] *Katanga* and *Ngudjolo* Decision of 17 December 2010, para. 29.
[36] *Katanga* and *Ngudjolo* Decision of 17 December 2010, para. 29.
[37] *Katanga* and *Ngudjolo* Decision of 17 December 2010, para. 31.

journalists or of their sources, in order to satisfy the Chamber as to their objectivity and professionalism".[38]

20. Finally, in the context of decisions on interim release under article 60 (2) of the Statute, none of the five decisions that have previously been issued by Pre-Trial Chambers were based exclusively on anonymous hearsay evidence.[39] It can be concluded that a more rigorous approach to the assessment of evidence is developing in the context of article 60 (2) of the Statute.

Specific analysis of the evidence relied on in the Impugned Decision

21. The findings in the Impugned Decision were heavily based on the 2013 Midterm report of the Group of Experts on the Democratic Republic of the Congo[40] (hereinafter: "2013 Group of Experts Midterm Report") and the Final report of the

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[38] *Katanga* and *Ngudjolo* Decision of 17 December 2010, para. 31. In considering the probative value of hearsay evidence, the indicia of reliability as set out by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the "*Prosecutor v. Zlatko Aleksovski* may also be noted. The ICTY Appeals Chamber stated in this relation: Since such evidence is admitted to prove the truth of its contents, a Trial Chamber must be satisfied that it is reliable for that purpose, in the sense of being voluntary, truthful and trustworthy, as appropriate; and for this purpose may consider both the content of the hearsay statement and the circumstances under which the evidence arose; or, as Judge Stephen described it, the probative value of a hearsay statement will depend upon the context and character of the evidence in question. The absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is "first-hand" or more removed, are also relevant to the probative value of the evidence". *See Prosecutor v. Zlatko Aleksovski*. "Decision on Prosecutor's Appeal on Admissibility of Evidence", 16 February 1999, IT-95-14/1 (hereinafter: "*Aleksovski* Decision"), para. 15. *See also* Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the admissibility of four documents" 13 June 2008, ICC-01/04-01/06-1398-Conf, para. 28 with a public redacted version ICC-01/04-01/06-1399, referring to the *Aleksovski* Decision, para. 15 . This jurisprudence was followed up by a direction from the ICTY Appeals Chamber that various indicia of reliability should be considered before hearsay evidence is admitted, including whether the statement was (i) given under oath, (ii) subject to cross-examination, (iii) first-hand or removed, (iv) made through many layers of translation, (v) made contemporaneously to the events, or (vi) given under formal circumstances, such as before a judge. The evidence in question was witness testimony. Nevertheless, the same indicia could also – potentially with some modification – be applied to other circumstances. *See* M. Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events* (Martinus Nijhoff Publishers, 2013), p. 371, referring to *Prosecutor v. Dario Mario Kordić and Mario Čerkez*, "Decision on Appeal Regarding Statement of a Deceased Witness", 21 July 2000, IT 95-14/2, paras 7-8, 23.

[39] *See* Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the Application for Interim Release of Mathieu Ngudjolo Chui", 27 March 2008, ICC-01/04-01/07-345; Pre-Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on application for interim release", 20 August 2008, ICC-01/05-01/08-73; Pre-Trial Chamber I, *Prosecutor v. Callixte Mbarushimana*, "Decision on the 'Defence Request for Interim Release'", 19 May 2011, ICC-01/04-01/10-163; Pre-Trial Chamber I, *Prosecutor v. Laurent Gbagbo*, "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.

[40] Midterm report of the Group of Experts on the DRC submitted in accordance with paragraph 5 of Security Council resolution 2078 (2012), 19 July 2013, UN Doc. S/2013/433.

Group of Experts on the Democratic Republic of the Congo[41] (hereinafter: "2011 Group of Experts Final Report").[42] I am of the view that, in the circumstances of the present case, it was unreasonable for the Pre-Trial Chamber to base its findings on the 2011 Group of Experts Final Report and the 2013 Group of Experts Midterm Report. In this regard, I find it highly problematic that the reports do not clearly identify the sources that they rely upon for the relevant information. As a result, the ability of Mr Ntaganda to challenge the evidence relied upon and to present new evidence was compromised. The ability of a suspect to properly defend himself is of crucial importance in the context of a decision under article 60 (2) of the Statute as this decision identifies the circumstances that ground the appearance of necessity of detention. It is in light of the decision under article 60 (2) of the Statute and the circumstances identified as relevant therein that future reviews of the suspect's detention under article 60 (3) will be carried out.

22. It may also be noted that the reports in question present information on flows of arms and related material and on networks operating in violation of the arms embargo in the Democratic Republic of the Congo, in order to identify individuals and entities on whom sanctions should be imposed and to monitor sanctioned individuals and entities. It must be underlined that the standards applicable to information gathering for such purposes are very different to those applicable in criminal trials and decisions to deprive an individual of their liberty. Although the methodology set out in the reports appears to have been quite rigorous, there is no guarantee that this methodology was applied in practice at all times. It is notable in this regard that, although the group of experts indicate on a number of occasions that they received information from Mr Ntaganda, he denies having made a statement to the group of experts.[43]

23. In this regard it is, in my view, of significance that the group of experts was composed of six experts in the fields of arms, customs and aviation (or logistics), regional issues, armed groups, natural resources and finance.[44] This composition

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[41] Final report of the Group of Experts on the DRC submitted in accordance with paragraph 5 of Security Council resolution 1952 (2010)", 2 December 2011, UN Doc. S/2011/738.
[42] *See* "Prosecution's response to the Defence appeal against the 'Decision on the Defence's Application for Interim Release'", 2 December 2013, ICC-01/04-02/06-Conf-Exp (OA), para. 21.
[43] Document in Support of the Appeal, footnote 38.
[44] *See* 2013 Group of Experts Midterm Report, paras 1, 2; 2011 Group of Experts Final Report, para. 3.

reflected the mandate of the group of experts set out above. An investigation for the purpose of a criminal trial requires specific expertise, which, the group of experts lacked. It must be borne in mind that the process of investigating in the international context is a complex exercise, often rendered even more difficult by problems in translation and understanding stemming from linguistic and cultural differences.[45] This background means that it is of vital importance for the Prosecutor to carry out her own independent investigation to verify the facts rather than relying on reports of external organisations.

24. The Pre-Trial Chamber relied on information in blog articles and press releases to corroborate its findings as to the circumstances of Mr Ntaganda's surrender.[46] Furthermore, the Pre-Trial Chamber relied exclusively on blog articles and press releases to support its determination that "Mr Ntaganda's decision [to surrender] was likely to have also been influenced by [...] pressure imposed on him by the Rwandan Government to surrender", which forms an important part of its overall conclusion that "[t]he evidence or material available before the [Pre-Trial Chamber] 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" (footnotes omitted).[47] The extent of the Pre-Trial Chamber's reliance on press releases and blog articles to support this finding is not clear from the Impugned Decision, which indicates that the "possibility finds support in a number of non-anonymous sources provided in the Second Registry's Report".[48] For the purposes of clarity, the report in question noted that since primary sources were lacking, the Registrar could only use secondary sources, such as media coverage and NGO articles, to provide information regarding the reasons behind the surrender of Mr Ntaganda.[49] The same report stated that "no source can confirm with certainty the underlying circumstances of the surrender of Mr. Ntaganda".[50] This was illustrated by reference to an article from Human Rights Watch and an article from CNN, both stating that the reasons behind

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[45] *See* L. Reydams et al. (eds), *International Prosecutors* (Oxford University Press, 2012), pp. 582-583.
[46] Impugned Decision, para. 45.
[47] Impugned Decision, paras 43, 45.
[48] Impugned Decision, para. 45.
[49] Pre-Trial Chamber II, "Registry report following the decision of the Single Judge of 19 September 2013 (ICC-01/04-02/06-109-Conf)", 3 October 2013, ICC-01/04-02/06-120-Conf (hereinafter: "Registrar's Report of 3 October 2013"), para. 8.
[50] Registrar's Report of 3 October 2013, para. 9.

Mr Ntaganda's surrender were unclear.[51] The Registrar added that, in his view, other sources cited in the media provided "speculative reasons" for Mr Ntaganda's surrender and provided in an annex a list of such press articles.[52]

25. A careful review of the excerpts from the blog and news articles relied on by the Pre-Trial Chamber show that none of these materials identify the sources of the information presented with regard to the circumstances of Mr Ntaganda's surrender.[53]

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[51] Registrar's Report of 3 October 2013, para. 10, referring to Human Rights Watch, "DR Congo: Congolese Warlord Should Face Justice", 18 March 2013, accessed at http://www.hrw.org/news/2013/03/18/send-bosco-ntaganda-icc (hereinafter: "Human Rights Watch article"); CNN, "Why Bosco Ntaganda trial is just first step towards justice for DRC", 28 March 2013, accessed at http://www.edition.cnn.com/2013/03/28/opinion/amnesty-bosco-ntaganda/index.html (hereinafter: "CNN article").

[52] Registrar's Report of 3 October 2013, para. 11, referring to Al Jazeera, "The surrender of Bosco Ntaganda", 20 March 2013, accessed at http://blogs.aljazeera.com/blog/africa/surrender-bosco-ntaganda (hereinafter: "Al Jazeera blog"); LeMonde.fr, "Pourquoi le général congolais Bosco Ntaganda se livre à la justice", 20 March 2013, accessed at http://www.lemonde.fr/afrique/article/2013/03/20/pourquoi-le-general-congolais-bosco-ntaganda-se-livre-a-la-justice_1850854_3212.html# (hereinafter: "Le Monde article"). *See also* ICC-01/04-02/06-120-Conf-Anx1 (hereinafter: "Annex 1 of Registrar's Report of 3 October 2013").

[53] *See* Congo Siasa, "Amid good news, doubts" 18 March 2013, accessed at http://congosiasa.blogspot.nl/2013/03/amid-good-news-doubts.html (hereinafter : "Congo Siasa blog"), which states in the relevant part: "[T]he Rwandan government probably either forced him to hand himself over or he was so afraid of what would happen if they arrested him (or Makenga got a hold on him) that he made a run for the embassy"; The Human Rights Watch article states in the relevant part: "It is unclear why Ntaganda suddenly turned himself in to the US embassy and asked to be transferred to the ICC. A recent outbreak of hostilities between two factions of the M23 rebel group, headed by Ntaganda and other commanders, resulted in the faction opposed to Ntaganda apparently gaining the upper hand". The CNN article reads in the relevant part: "[I]n a surprising move, the Congolese Army general and ex-rebel leader turned himself in at the U.S. embassy in Rwanda after spending the past few months in hiding in North Kivu in the Democratic Republic of Congo (DRC)" and that "his decision to turn himself in on March 18, and the exact reasons behind his 'self-referral', remain unclear". The Al Jazeera blog states in the relevant part: "There are also unanswered questions, like why would the former general hand himself over. 'The Rwandan government probably either forced him to hand himself over', says Jason Stearns from the Rift Valley Institute. 'Or he was so afraid of what would happen if they arrested him, (or [Sultani] Makenga got a hold of him) he made a run for the embassy". It should be noted that the latter information replicates the reason provided in the Congo Siasa blog excerpt. The Al Jazeera blog adds that "[t]he surrender of Ntaganda, probably has less to do with justice, and more about the bloody battles we have seen in recent weeks for control of M23 rebel group based in eastern Dr Congo". The Le Monde article reads in the relevant part: "Les raisons pour lesquelles Bosco Ntaganda s'est soudain rendu à l'ambassade des Etats-Unis et a demandé à être déféré devant la CPI ne sont pas claires. Sa reddition pourrait avoir un lien avec les récents affrontements armés, dans l'est de la RDC, entre les factions du M23. La situation de Bosco Ntanga [*sic*] pourrait aussi être le résultat de la perte du soutien de la part des autorités rwandaises. Kigali a récemment été accusé par des experts de l'ONU, malgré ses dénégations, de soutenir le M23" and that "Kinshasa a affirmé dimanche 17 mars que Bosco Ntaganda a franchi la frontière entre l'est de la RDC et le Rwanda, dans la foulée de centaines de combattants de la faction mise en déroute qu'il est accusé de diriger. Selon Tony Gambino, ancien président du programme américain Usaid au Congo '*la meilleure supposition est que ses solutions se sont réduites à [choisir entre] La Haye ou se faire tuer*'".
See also Annex 1 of Registrar's Report of 3 October 2013, referring to Afrik.com, "RDC : le chef du M23, Bosco Ntaganda, se rend à la CPI", 19 March 2013, accessed at http://www.afrik.com/rdc-le-chef-du-m23-bosco-ntaganda-se-rend-a-la-cpi, which states in the relevant part: "Pour le moment, aucune information crédible ne permet de déterminer les raisons exactes de sa reddition. Mais l'on évoque la vulnérabilité du chef rebelle au sein du mouvement M23. Les récents tiraillements au sein de

In the absence of such information, it is impossible to establish to what extent they corroborate or merely repeat the relevant information in the United Nations group of experts reports (the 2011 Group of Experts Final Report and 2013 Group of Experts Midterm Report). Furthermore, they do not provide detailed information regarding the alleged pressure imposed by Rwanda; nor do they provide any indication of how their authors arrived at the conclusion that Rwanda had in fact applied pressure to Mr Ntaganda to surrender. Given that the nature of the information cited in these sources is rather speculative and in the absence of any evidence confirming such an allegation,

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la rébellion ne lui permettent plus d'assurer son hégémonie. Lâché par le Rwanda qui est accusé de soutenir la rébellion du M23, Bosco Ntaganda aurait préféré se livrer à la justice pour échapper à la mort"; RFI,, "RDC: les raisons de la reddition surprise de Bosco Ntaganda", 19 March 2013, accessed at http://www.rfi.fr/afrique/20130319-rdc-raisons-reddition-surprise-bosco-ntaganda, indicating that "[i]l y a d'abord la version officielle. Selon le département d'Etat américain, cet ancien chef rebelle tutsi [...] se serait rendu librement à l'ambassade des Etats-Unis à Kigali [...]. Une autre version est avancée par plusieurs autres sources. Bosco Ntaganda était acculé. Il avait tenté [...] de rejoindre le Masisi en passant par le parc des Virunga. Mais il avait été arrêté dans sa progression par les milices hutues [*sic*] du FDLR (Forces démocratiques de libération du Rwanda). Il a donc dû faire demi-tour et avait participé aux combats contre la faction du M23 de son rival, Sultani Makenga. Faute de munitions et de logistique suffisante, le général Bosco Ntaganda a fini par traverser la frontière rwandaise [...]. [C]ette reddition a été sans doute préparée par Kigali et Washington dans les heures qui ont suivi son entrée en territoire rwandais"; Le Nouvel Observateur, "Les Etats-Unis s'interrogent sur le sort à réserver à Ntaganda", 19 March 2013, accessed at http://tempsreel.nouvelobs.com/monde/20130319.REU9991/les-etats-unis-s-interrogent-sur-le-sort-a-reserver-a-ntaganda.html, which reads in the relevant part: "Recherché dans le cadre d'un mandat d'arrêt international, Bosco Ntaganda craint certainement d'être livré aux autorités congolaises dans le cadre d'un éventuel accord de paix, a écrit Jason Stearns, de l'Institut de la Vallée du Rift [...]"; Le Figaro, "RD Congo : la reddition de « Terminator »", 20 March 2013, accessed at http://www.lefigaro.fr/international/2013/03/19/01003-20130319ARTFIG00658-rd-congo-la-reddition-de-terminator.php, which reads in the relevant part: "Lâché par ses frères d'armes et par le Rwanda, Bosco Ntaganda s'est livré lundi à l'ambassade américaine de Kigali. [...] Abandonné par son propre camp, le chef de guerre ne semble plus bénéficier du soutien que lui prodigue habituellement le Rwanda. [...]Laura Seay, une experte sur le Congo à l'université de Morehouse au [*sic*] États-Unis. Sa décision de se rendre suggère qu'il a perdu le soutien de ses puissants alliés au sein du gouvernement et de l'armée rwandaise."; Digital Congo, "La reddition de Bosco Ntaganda pourrait avoir été planifié par Kigali", 20 March 2013, accessed at http://www.digitalcongo.net/article/90545, states in relevant part: "Autant que le confirment plusieurs sources, après avoir traversé la frontière, Ntaganda a été pris en charge par le gouvernement rwandais. Les faits sur le terrain attestent superbement cette thèse. Nombre d'observateurs soutiennent que la reddition de Ntaganda à l'ambassade a 'été planifiée par Kigali"; The Guardian, "Notorious warlord gives himself up to international criminal court", 19 March 2013, accessed at http://www.theguardian.com/world/2013/mar/19/africa-congo, which provides in the relevant part: "His request to be transferred to the Hague surprised many. However, he has made many powerful enemies in Kigali and Kinshasa; for him international justice was probably preferable to the consequences of handing himself over to Congolese or Rwandan authorities, or staying on the run. He had nowhere else to go. 'He must have been so afraid for his life that a long sentence in the Hague looked like his best option', said Jason Stearns, a political analyst who specialises in Congo. 'He must have been pretty scared'. [...] Stearns said: 'This surrender marks his fall from favour with the Rwandan government. He had become a liability because of his notoriety. He's a reliable general but he's also a thug. The Rwandans realised that it was better to let M23 implode and see who came out of it'"; allAfrica.com, "Rwanda: U.S. State Department Daily Press Briefing: General Bosco Ntaganda", 18 March 2013, accessed at http://allafrica.com/stories/201303191193.html, which reads in the relevant part: "QUESTION: [...] can you explain in any manner how this process came about, or was it just a complete surprise to you that he showed up at the Embassy today? MS. NULAND: I don't think that we had any advance notice that he would plan to walk in".

I would have found that the Pre-Trial Chamber was unreasonable in according weight to these documents for the purposes of reaching its determination that Mr Ntaganda's surrender was likely to have been influenced by pressure imposed by Rwanda and in using these documents to corroborate the information in the two United Nations group of experts reports.

26. Therefore, on the basis of the reasoning set out above, I would have found that the Pre-Trial Chamber committed an error of fact in basing the majority of the factual findings relevant to its conclusion that the continued detention of Mr Ntaganda appears necessary, based exclusively on speculation and anonymous hearsay contained in press releases, blog articles and two United Nations group of experts reports. I would not have proceeded to an assessment of the second ground of appeal as the challenged findings of the Pre-Trial Chamber are affected by the error found under the first ground of appeal, either because they are based on the same type of evidence or because they are dependent on factual findings affected by this error. Accordingly, I would have reversed the Impugned Decision and remanded it to the Pre-Trial Chamber.

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

Judge Anita Ušacka

Dated this 5 day of March 2014

At The Hague, The Netherlands

Dissenting Opinion of Judge Christine Van den Wyngaert

1. Like Judge Ušacka, I am also regretfully unable to join the Majority of the Appeals Chamber in confirming the "Decision on the Defence's Application for Interim Release" (hereinafter: "Impugned Decision").[1] I am also of the opinion that the Pre-Trial Chamber II (hereinafter: "Pre-Trial Chamber") erred in its sole reliance on anonymous hearsay evidence contained in press releases, blog articles and two UN group of expert reports. Such evidence must be treated with utmost caution in the context of a criminal trial and without considerably more, independently verified, information cannot, in my view, be safely relied upon to justify the continued detention of Mr Bosco Ntaganda. I offer only a few additional observations that are not intended to detract from my agreement with all aspects of Judge Ušacka's Dissenting Opinion.

2. The International Criminal Court (hereinafter: "ICC") and *ad hoc* tribunals have traditionally employed a flexible approach to the admissibility of evidence, ostensibly a civil law influence within a broadly adversarial system. Rather than systematically rejecting the admissibility of any particular category of evidence, judges have been afforded broad discretion to balance probative value with prejudicial effect. However, the fact that certain types of evidence, such as anonymous hearsay, are not automatically excluded from the proceedings does not mean that they are therefore safe to rely on. Whether they are or not can only be determined on a case-by-case basis, which, in the case of anonymous hearsay is a difficult task, considering the sources of the information are unknown.

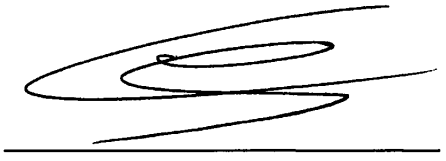
3. As Judge Ušacka observes, a jurisprudential evolution has taken place at the ad hoc tribunals, reflecting an increasingly cautious approach to the use of certain

[1] ICC-01/04-02/06-147.

types of documentary evidence.[2] At the ICC too, Pre-Trial and Trial Chambers are more and more relegating anonymous hearsay evidence to something which can, at best, potentially corroborate other evidence, rather than as stand-alone source of information that possesses significant probative value *per se*.[3] There is no reason why this approach should not also apply in the context of decisions under article 60(2) of the Statute.

4. What I think warrants emphasis, however, is that this more cautious approach to anonymous hearsay evidence is not something that derives from the whim of a number of judges. Instead, it brings us closer to the standard that always should have been applied when assessing such evidence. Indeed, I am not aware of any other system of criminal justice, be it national or international, where anonymous hearsay is given any serious probative value, if it is considered/admitted at all. I can think of no good reason why this Court should take a different approach, let alone what could justify basing judicial decisions pertaining to the freedom of individuals on evidence that is inherently fragile and against which the suspect has no meaningful opportunity to defend him or herself. This last point is as essential in the context of an article 60(2) decision as it is for any other judicial finding of this Court.

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



Judge Christine Van den Wyngaert

Dated this 5th day of March 2014

At The Hague, The Netherlands

[2] See Dissenting Opinion of Judge Anita Ušacka, para. 14.

[3] See Dissenting Opinion of Judge Anita Ušacka, paras 16-20.