

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/04-02/06**
Date: **31 October 2014**

TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Geoffrey Henderson

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public

Fourth decision on Mr Ntaganda's interim release

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Ms Nicole Samson

Counsel for Bosco Ntaganda

Mr Stéphane Bourgon

Mr Luc Boutin

Legal Representatives of Victims

Ms Sarah Pellet

Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

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Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Mr Patrick Craig

**Victims Participation and Reparations
Section**

Other

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda* ('Ntaganda case'), having regard to Articles 58(1), 60(3), 61(11) and 64(6)(a) of the Rome Statute ('Statute') and Rules 118 and 119 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Fourth decision on Mr Ntaganda's interim release'.

I. Procedural history

1. On 18 November 2013,¹ 17 March 2014² and 17 July 2014³, Mr Ntaganda had his detention reviewed by Pre-Trial Chamber II ('First Interim Release Decision', 'Second Interim Release Decision', 'Third Interim Release Decision', respectively). On each occasion, Pre-Trial Chamber II's Single Judge decided that Mr Ntaganda shall continue to be detained.
2. On 18 July 2014, the Presidency of the Court constituted Trial Chamber VI and referred to it the *Ntaganda* case.⁴ The record of the proceedings was transmitted to Trial Chamber VI on the same day.
3. On 17 October 2014, following an oral order made by the Chamber,⁵ the parties and participants agreed to make observations on interim release at a hearing on detention convened pursuant to Rule 118(3) of the Rules.
4. On 23 October 2014, this hearing was held ('Hearing on Detention') and the parties and participants made their observations.⁶

¹ Decision on the Defence's application for interim release, 18 November 2013, ICC-01/04-02/06-147, upheld by Appeals Chamber, Judgment on the appeal of Mr Bosco Ntaganda against the decision of Pre-Trial Chamber II of 18 November 2013 entitled "Decision on the Defence's Application for Interim Release", 5 March 2014, ICC-01/04-02/06-271-Red, OA (with dissenting opinions of Judges Ušacka and Van den Wyngaert).

² Second Decision on Bosco Ntaganda's Interim Release, 17 March 2014, ICC-01/04-02/06-284.

³ Third Decision on Bosco Ntaganda's Interim Release, 17 July 2014, ICC-01/04-02/06-335.

⁴ Presidency, Decision constituting Trial Chamber VI and referring to it the case of *The Prosecutor v. Bosco Ntaganda*, 18 July 2014, ICC-01/04-02/06-337.

⁵ Transcript of hearing on 17 October 2014, ICC-01/04-02/06-T-15-ENG-ET, page 16 line 25 to page 18 line 6. At this hearing, Ms Pellet, the Legal Representative for former child soldier victims, was granted permission to have herself represented by her colleague, Mr Suprun, who represents the victims of attacks. See also Power of attorney for representation at the hearing on detention issues to be held on 23 October 2014, 20 October 2014, ICC-01/04-02/06-387 (with annex).

II. Applicable law

5. The Chamber recalls the following applicable law regarding interim release:

- (a) 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(1) ('Article 58(1) Conditions') are met, the person shall continue to be detained.⁷
- (b) The Article 58(1) Conditions require the Pre-Trial Chamber to be satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court⁸ and that the arrest of the person appears necessary: (i) to ensure the person's appearance at trial; (ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.⁹
- (c) The Pre-Trial Chamber must review its ruling on the release or pre-trial detention of a person at least every 120 days.¹⁰ This Chamber may exercise any functions of the Pre-Trial Chamber as regards interim release reviews.¹¹ This Chamber considers it to be in the interests of justice to continue to review Mr Ntaganda's detention until the commencement of the trial.¹²

⁶ See Transcript of hearing on 23 October 2014, ICC-01/04-02/06-T-16-ENG ET.

⁷ Article 60(2) of the Statute.

⁸ Article 58(1)(a) of the Statute.

⁹ Article 58(1)(b) of the Statute.

¹⁰ Article 60(3) of the Statute; Rule 118(2) of the Rules.

¹¹ Articles 61(11) and 64(6)(a) of the Statute.

¹² See Trial Chamber III, *The Prosecutor v Jean-Pierre Bemba Gombo*, Transcript of hearing, 8 December 2009, ICC-01/05-01/08-T-18-Red-ENG, page 24 lines 14-17; See also *The Prosecutor v Laurent Gbagbo*, Trial

- (d) Under Article 60(3) of the Statute, a chamber may modify its previous ruling on detention, release or conditions of release if 'it is satisfied that changed circumstances so require'.¹³ The previous ruling on detention refers to the initial decision made under Article 60(2), as well as any potential subsequent modifications made to that decision under Article 60(3) of the Statute.¹⁴
- (e) Changed circumstances mean a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a chamber that a modification of its prior ruling is necessary.¹⁵ If there are changed circumstances, a chamber will need to consider their impact on the factors that formed the basis for the decision to keep the person in detention. If, however, a chamber finds that there are no changed circumstances, it is not required to further review the ruling on release or detention.¹⁶ When addressing changed circumstances, the Prosecution does not have to re-establish the same underlying facts if these facts continue to apply.¹⁷

Chamber I, Decision on the "Requête urgente aux fins de fixation d'une nouvelle date d'audience portant sur le réexamen des conditions de maintien en détention", 8 October 2014, ICC-02/11-01/11-693, para. 11, in which Trial Chamber I requested submissions in relation to the detention of Mr Gbagbo pursuant to Rule 118(2) and (3) of the Rules.

¹³ See for example, *The Prosecutor v Laurent Gbagbo*, Appeals Chamber, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'", 26 October 2012, ICC-02/11-01/11-278-Red, OA ('*Gbagbo* OA Judgment'), para. 23.

¹⁴ *The Prosecutor v Jean-Pierre Bemba Gombo*, Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence", 19 November 2010, ICC-01/05-01/08-1019, OA 4 ('*Bemba* OA 4 Judgment'), para. 46.

¹⁵ *Bemba* OA 4 Judgment, ICC-01/05-01/08-1019, paras 51-52.

¹⁶ See, for example, *The Prosecutor v Laurent Gbagbo*, Appeals Chamber, 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-Red, OA 4, para. 51; *The Prosecutor v Jean-Pierre Bemba Gombo*, Appeals Chamber, Public redacted version - 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-Red, OA 10, para. 31.

¹⁷ See *Bemba* OA 4 Judgment, ICC-01/05-01/08-1019, OA 4, para. 51.

- (f) In circumstances where a State has offered to accept a detained person and to enforce conditions, it is incumbent upon the chamber to consider conditional release. On the other hand, where no such proposals for conditional release are presented and none are self-evident, the chamber's discretion to consider conditional release is unfettered.¹⁸

III. Previous findings on detention

6. The Chamber will now proceed to review Mr Ntaganda's detention pursuant to Article 60(3) of the Statute. For the purposes of such review, the Chamber incorporates by reference the factual findings and materials relied upon in the Third Interim Release Decision, which reflects the conclusions in the First Interim Release Decision as modified by the Second and Third Interim Release Decisions. The Chamber considers it appropriate to summarise these findings given that it is conducting the review of Mr Ntaganda's detention for the first time.

- a) Circumstances grounding the previous finding that there are reasonable grounds to believe Mr Ntaganda committed a crime within the jurisdiction of the Court (Article 58(1)(a) of the Statute)*

7. In the Third Interim Release Decision, the Single Judge referred to the First Interim Release Decision and the two decisions on Prosecution applications for warrants of arrest in relation to Mr Ntaganda,¹⁹ in which, collectively, it was 'determined that there were reasonable grounds to believe that Mr Ntaganda was criminally responsible, pursuant to [A]rticle 25(3)(a) of the Statute, for seven counts of war crimes and three counts of crimes against

¹⁸ See Rule 119 of the Rules; *Gbagbo* OA Judgment, ICC-02/11-01/11-278-Red, OA, para. 79.

¹⁹ Pre-Trial Chamber I, Decision on the Prosecution Application for a Warrant of Arrest, 22 August 2006, ICC-01/04-02/06-1-Conf-Exp-tENG. A redacted version was filed in the record of the case on 6 March 2007 which was thereafter made public on 1 October 2010 (ICC-01/04-02/06-1-Red-tENG); Pre-Trial Chamber II, Decision on the Prosecutor's Application under Article 58, 13 July 2012, ICC-01/04-02/06-36-Conf-Exp. A public redacted version was filed on the same day (ICC-01/04-02/06-36-Red).

humanity during the time-frame and locations specified therein',²⁰ thus fulfilling the condition of Article 58(1)(a) of the Statute. This finding was not subsequently challenged, nor did Mr Ntaganda submit any further applications 'to impugn the foundation of the warrants of arrest'.²¹ Indeed, the charges against Mr Ntaganda have been confirmed against 'the higher evidentiary standard set out in [A]rticle 61(7) of the Statute', rendering it 'even more the case' that the requirement of Article 58(1)(a) of the Statute was met.²²

b) Circumstances grounding the previous finding that continued detention of Mr Ntaganda appears necessary to ensure his appearance at trial (Article 58(1)(b)(i) of the Statute)

8. In the Third Interim Release Decision, the Single Judge referred to a number of factors contributing to the persisting risks under Article 58(1)(b)(i) of the Statute justifying the ongoing detention of Mr Ntaganda to ensure his appearance at trial. These risks include (i) that Mr Ntaganda had 'managed to evade justice for a lengthy period of time' prior to his voluntary surrender in Kigali on 18 March 2013;²³ (ii) that his surrender was due to 'external factors' rather than goodwill, and 'remains affected by the timeliness and manner in which [it] took place';²⁴ (iii) that Mr Ntaganda is facing numerous charges, 'especially after the Chamber [...] confirmed against him 18 charges of war crimes and crimes against humanity', and that the gravity of the charges and concomitant prospect of a lengthy prison sentence if convicted enhances the probability he may abscond;²⁵ (iv) that Mr Ntaganda's awareness of the sentence imposed against Mr Thomas Lubanga Dyilo, who was convicted for similar charges related to the recruitment and use of child

²⁰ Third Interim Release Decision, ICC-01/04-02/06-335, para. 23.

²¹ Third Interim Release Decision, ICC-01/04-02/06-335, para. 24.

²² Third Interim Release Decision, ICC-01/04-02/06-335, para. 24.

²³ Third Interim Release Decision, ICC-01/04-02/06-335, paras 27-28.

²⁴ Third Interim Release Decision, ICC-01/04-02/06-335, paras 29-31.

²⁵ Third Interim Release Decision, ICC-01/04-02/06-335, para. 32.

soldiers, may also increase his risk of absconding;²⁶ and (v) Mr Ntaganda's financial means to abscond if released.²⁷

9. It was concluded in the Third Interim Release Decision that the risk of Mr Ntaganda absconding became even higher when the majority of the charges brought against him have been confirmed, and that, based on a consideration of all of the aforementioned factors collectively, there could be no other finding than 'that there would be a high risk that Mr Ntaganda would not appear at trial if released'.²⁸ Accordingly, the conditions of Article 58(1)(b)(i) of the Statute were held to be satisfied.

c) Circumstances grounding the previous finding that continued detention of Mr Ntaganda appears necessary to ensure he does not obstruct or endanger the investigation or the court proceedings (Article 58(1)(b)(ii) of the Statute)

10. In the Third Interim Release Decision, the Single Judge referred to a number of factors contributing to the persisting risks under Article 58(1)(b)(ii) of the Statute justifying the ongoing detention of Mr Ntaganda to ensure he does not obstruct or endanger the investigation or the court proceedings. These risks included (i) that Mr Ntaganda maintains some influence in the Democratic Republic of the Congo due to the contacts he managed to retain with a considerable number of his former soldiers, a fact that was developed in more detail in the First Interim Release Decision and found still to be valid;²⁹ which, when considered with (ii) the fact that the identity of 38 witnesses has been disclosed to Mr Ntaganda;³⁰ (iii) that Mr Ntaganda has a 'documented history of violence';³¹ and (iv) the gravity of the charges and

²⁶ Third Interim Release Decision, ICC-01/04-02/06-335, para. 33.

²⁷ Third Interim Release Decision, ICC-01/04-02/06-335, para. 35.

²⁸ Third Interim Release Decision, ICC-01/04-02/06-335, para. 35.

²⁹ Third Interim Release Decision, ICC-01/04-02/06-335, para. 36.

³⁰ Third Interim Release Decision, ICC-01/04-02/06-335, para. 37.

³¹ Third Interim Release Decision, ICC-01/04-02/06-335, para. 37.

concomitant potential lengthy sentence if convicted,³² 'one cannot rule out the possibility of him influencing, threatening or intimidating witnesses and victims and/or their family members',³³ including exerting pressure on witnesses to amend their testimony. It was further held that this was particularly relevant given Mr Ntaganda has financial means to carry out such acts.³⁴

11. The Single Judge concluded in the Third Interim Release Decision that the conditions of Article 58(1)(b)(ii) of the Statute remain fulfilled insofar as the continued detention of Mr Ntaganda remained necessary to ensure that he does not obstruct or endanger the investigation or the Court's proceedings.³⁵

d) Circumstances grounding the previous finding that continued detention of Mr Ntaganda appears necessary to prevent him from continuing with the commission of a crime within the jurisdiction of the Court arising out of the same circumstances (Article 58(1)(b)(iii) of the Statute)

12. In the Third Interim Release Decision, the Single Judge held that, since the requirements of Article 58(1)(b) of the Statute are in the alternative and the Single Judge had not considered sub-paragraph (1)(b)(iii) in the Second Interim Release Decision, it was not necessary to address this limb in the Third Interim Release Decision.³⁶

IV. Submissions

13. At the Hearing on Detention, the Office of the Prosecutor ('Prosecution') submitted that Mr Ntaganda's detention ought to be maintained as 'there are no changed circumstances that would modify the three previous

³² Third Interim Release Decision, ICC-01/04-02/06-335, para. 37.

³³ Third Interim Release Decision, ICC-01/04-02/06-335, para. 37.

³⁴ Third Interim Release Decision, ICC-01/04-02/06-335, para. 37.

³⁵ Third Interim Release Decision, ICC-01/04-02/06-335, para. 38.

³⁶ Third Interim Release Decision, ICC-01/04-02/06-335, para. 39.

decisions of the Single Judge of Pre-Trial Chamber II ordering his detention',³⁷ as required by Article 60(3) of the Statute. The Prosecution submitted further that the only changed circumstances that have transpired since the Third Interim Release Decision 'mitigate in favour of continued detention'.³⁸

14. On behalf of the victims, it was argued that Mr Ntaganda 'must remain in detention because the conditions of Article 58(1) of the Rome Statute still prevail'³⁹ and that there are no changed circumstances that would warrant his release.⁴⁰

15. The Defence team for Mr Ntaganda ('Defence') contested certain submissions put forward by the Prosecution and the Legal Representative of Victims ('LRV'), particularly the fact that they had reverted 'to issues that were addressed previously [in previous decisions on interim release] when this hearing is supposed to address any change in circumstances'.⁴¹ The Defence noted that it had 'no observations to make regarding any change in circumstances further to the last decision rendered by the Single Judge on 17 July of this year'.⁴²

V. Analysis and Conclusion

16. The Chamber notes that, for each of the Article 58(1) Conditions for which Mr Ntaganda is detained, no changed circumstances were identified by the parties and participants at the Hearing on Detention. In addition, the Chamber has not identified any changed circumstances which would justify modifying the ruling on detention as provided for in the Third Interim

³⁷ ICC-01/04-02/06-T-16-ENG ET, page 4, lines 9-10.

³⁸ ICC-01/04-02/06-T-16-ENG ET, page 4, line 12.

³⁹ ICC-01/04-02/06-T-16-ENG ET, page 7, lines 10-11.

⁴⁰ ICC-01/04-02/06-T-16-ENG ET, page 7, lines 15-18.

⁴¹ ICC-01/04-02/06-T-16-ENG ET, page 10, lines 18-20. *See also* ICC-01/04-02/06-T-16-ENG, page 16, lines 12-21.

⁴² ICC-01/04-02/06-T-16-ENG ET, page 10, lines 11-13.

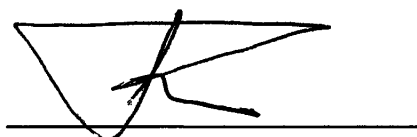
Release Decision. Therefore, the Chamber considers that no changed circumstances have transpired that would now require the release of Mr Ntaganda pursuant to Article 60(3) of the Statute.

17. With respect to conditional release, the Chamber notes that no proposals for conditional release have been presented and considers that no such proposals are self-evident. In these circumstances, the Chamber need not consider conditional release,⁴³ and has not done so in the present decision.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DECIDES that Mr Ntaganda shall continue to be detained.

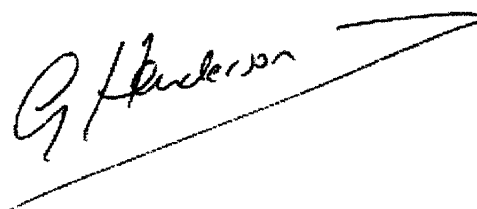
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Geoffrey Henderson

Dated 31 October 2014

At The Hague, The Netherlands

⁴³ *Gbagbo* OA Judgment, ICC-02/11-01/11-278-Red, OA, para. 79.