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Date: **27 December 2013**

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

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

Public

**Prosecution's Response to Mr Bosco Ntaganda's application for leave to appeal
decision ICC-01/04-02/06-185 (ICC-01/04-02/06-191)**

Source: The Office of the Prosecutor

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Introduction

1. On 23 December 2013, Mr Bosco Ntaganda sought leave to appeal the Single Judge's decision on the Protocol on the handling of confidential information and contact with witnesses of the opposing party ("Application").¹
2. The Defence's Application should be rejected. The Defence merely repeats arguments, which it had already submitted prior to the decision and which were considered by the Single Judge in issuing her decision. As such, the issues raised in the Application constitute mere disagreements with the Single Judge's findings and the Application fails to identify any issues within the meaning of Article 82(1)(d) of the Statute. In addition, the three purported issues do not meet the requirements for granting leave to appeal.

Procedural History

3. On 17 December 2013, and after receiving submissions from the Prosecution and the Defence,² the Single Judge of Pre-Trial Chamber II issued the "Decision on the Protocol on the Handling of Confidential Information and Contact with Witnesses of the Opposing Party" ("the Decision").³
4. On 23 December 2013, the Defence for Mr Bosco Ntaganda sought leave to appeal the Decision.⁴

¹ ICC-01/04-02/06-191.

² ICC-01/04-02/06-167-Red (Prosecution) and ICC-01/04-02/06-174 (Defence).

³ ICC-01/04-02/06-185.

⁴ Application.

Submissions

The three purported issues do not arise from the Decision

5. The Defence identifies three issues: first, the Defence argues that the inclusion by the Single Judge of paragraphs 21 and 26 of the draft Protocol infringes the fundamental rights of the suspect guaranteed in Articles 61, 67 and 68(1) ("First Issue"); second, the Defence submits that the inclusion of paragraph 21 in the Protocol infringes the confidential character of the Defence's work ("Second Issue"); and third, the Defence contends that the Single Judge erred by not properly considering the regime established in the texts of the Court and the remaining provisions on victims and witness protection ("Third Issue").

6. As developed below, none of the issues constitute appealable issues arising from the Decision. Rather, they are mere disagreements with the Single Judge's ruling.⁵ According to the jurisprudence of the Appeals Chamber, a "conflict of opinion does not define an appealable subject."⁶ As such, the Application should be dismissed on this ground alone.

First Issue

7. The Defence submits that the Protocol infringes the fundamental rights of the suspect under Articles 61, 67 and 68(1) because, on the one hand, it obliges the Defence to reveal, before any field mission, the object and modalities of its investigations; and on the other, it significantly limits the Defence's investigations with respect to the charges on sexual violence.⁷

⁵ ICC-01/11-01/11-490, para.31.

⁶ ICC-01/04-168, para. 9.

⁷ Application, para.11.

8. The First Issue constitutes a mere disagreement with the Single Judge's balancing exercise of the different interests at stake. As the Defence concedes, the Single Judge noted that a balance should be achieved between competing interests:⁸ "[o]n the one hand, [...] the right of the suspect to prepare his defence for the purpose of the confirmation of charge hearing, as provided for in Articles 61(6) and 67(1) of the Statute [and o]n the other hand, the Single Judge has an obligation to protect the safety, physical and psychological well-being, dignity and privacy of witnesses, as stipulated in article 68(1)."⁹
9. The Defence disagrees with the Single Judge's determination of how these competing interests can be accommodated.¹⁰ Rather than identifying an appealable issue, the Defence merely rehearses its previously submitted arguments regarding the difficulties of its investigations in the field, their unpredictability and spontaneity and the Defence's limited resources,¹¹ as well as the purported need to reveal to family members (and persons in contact with family members) the sexual violence suffered by witnesses to adequately assess their credibility.¹²
10. However, the Single Judge considered all these specific factors and sought to address the impact that the protection of witnesses pursuant to Article 68(1) may have on the suspect's rights set out in Articles 61(6) and 67(1). In particular, the Single Judge noted the Defence allegations with respect to its limited resources¹³ and considered the difficulties that the Defence may encounter in its field investigations in Ituri.¹⁴ She then concluded that VWU's

⁸ Application, para.14; Decision, paras.9, 11.

⁹ Decision, para.9.

¹⁰ Decision, para.11.

¹¹ Application, paras.15-18. See ICC-01/04-02/06-174, paras.17, 19, 23-24.

¹² Application, para.22. See ICC-01/04-02/06-174, para.29.

¹³ Decision, para.8.

¹⁴ Decision, paras. 8, 11.

expert advice prior to any mission would adequately accommodate the competing interests.¹⁵

11. Further, the Single Judge also considered the impact that non-disclosure of the fact that witnesses had suffered sexual abuse to family members (or to persons in contact with family members) may have on the Defence's investigations.¹⁶ She concluded that the Defence's rights pursuant to Articles 61(6) and 67(1) would not be unduly prejudiced in light of the circumstances of this case, namely: given the anonymity of three witnesses who were victims of sexual violence; the particularly vulnerable situation of the one witness who was a victim of sexual violence, but who consented to disclose her identity to the Defence; and considering that the Defence had other avenues to enquire on the credibility of those witnesses.¹⁷

Second Issue

12. The Defence argues that paragraph 21 of the Protocol that provides for the need to communicate certain information to VWU regarding the Defence's upcoming missions and investigative activities, infringes the Defence's confidentiality obligations. In particular, the Defence submits that the persons with whom it intends to meet have not consented to communicating their names to an organ of the Court.¹⁸
13. This purported issue constitutes, once again, a mere disagreement with the Single Judge's conclusion. The Defence already submitted this same argument,¹⁹ and the Single Judge considered - and dismissed - it in the Decision. The Single Judge found that "communicating to the VWU the

¹⁵ Decision, paras. 12-13.

¹⁶ Decision, paras. 18-21.

¹⁷ Decision, paras. 19-21.

¹⁸ Application, paras. 28-29.

¹⁹ ICC-01/04-02/06-174, paras. 8-25.

details of its upcoming mission(s) and investigative activities does not amount to any interference or prejudice to the confidentiality of the Defence investigation, in so far as the VWU “shall act impartially when cooperating with all parties,” pursuant to rule 18(b) of the Rules, in full respect of the neutral role of the Registry.”²⁰ The mere fact that the Defence is not satisfied with the Single Judge’s dismissal of its submissions does not establish an appealable issue.

Third Issue

14. In its Third Issue, the Defence argues that the concerns the Single Judge seeks to address with paragraphs 21 and 26 of the Protocol are already covered by other provisions of the Protocol and the Statute. The Defence already submitted this argument to the Single Judge,²¹ which she took into consideration in issuing her decision.²² Hence, the Third Issue yet again constitutes a mere disagreement with the Single Judge’s view that paragraphs 21 and 26 are necessary to satisfactorily discharge her obligation to protect the rights and interests of witnesses.²³

The issues do not meet the criteria for leave to appeal under Article 82(1)(d)

15. Even if the Chamber considers that the Defence has identified issues arising from the Decision, they do not meet the requirements for leave to appeal.

The issues do not affect the fairness and expeditiousness of the proceedings

16. The Defence argues that the Decision significantly affects the fairness of the proceedings because it infringes the fundamental rights of the suspect, in

²⁰ Decision, para.14.

²¹ ICC-01/04-02/06-174, para.32.

²² Decision, para.18.

²³ Decision, para.9.

particular, Articles 61(6), 67(1)(b) and 68(1),²⁴ and significantly restricts the Defence's capacity to investigate the charges.²⁵

17. The Prosecution concedes that the Decision may impact on the manner in which the Defence conducts its investigation; however, this does not mean that the suspect's rights under Articles 61 and 67 are – or will be – infringed, nor that the Decision necessarily and significantly affects – or will affect – the fairness of the proceedings. First, the Single Judge was mindful of the potential impact that the Decision may have on the rights of the suspect,²⁶ and sought to avoid any undue prejudice to these rights or impact on the fairness of the proceedings. In particular, the Single Judge noted the distinct and specific circumstances surrounding the situation in Ituri and concluded that the expertise provided by VWU may satisfactorily accommodate the different competing interests, including the rights of the suspect.²⁷ Similarly, the Single Judge noted that disclosing the sexual violence suffered by the victims to family members, or to persons in contact with such family members, is not the only way for the Defence to assess the credibility of the witnesses.²⁸

18. Second, the Defence submissions, both on the purported infringement of the suspect's rights and the negative impact of the Decision in the manner in which it conducts its investigations, are speculative and unsupported. The Defence does not substantiate how, specifically, the Decision would infringe or cause undue prejudice to the rights of the suspect. As numerous Chambers have held, the Defence cannot speculate in the abstract that the Decision

²⁴ Application, para.36.

²⁵ Application, para.37.

²⁶ Decision, para.9.

²⁷ Decision, para.11, paras.13-14.

²⁸ Decision, para.20.

causes prejudice to the rights of the suspect to establish that the fairness of the proceedings is affected.²⁹ A purely general complaint is not sufficient.³⁰

19. The Defence further submits that the Decision would significantly impact the expeditious conduct of the proceedings, because of the limited resources and time at the Defence's disposal.³¹ In particular, the Defence argues that there are only 14 days between the filing of the Prosecution's document containing the charges ("DCC") on 10 January 2014, and its filing of the evidence that it intends to rely for the purposes of the confirmation hearing. According to the Defence, this time is insufficient to meet with VWU to discuss the conditions and nature of its investigations. Further, if in the course of a mission, the Defence learns of unforeseen information regarding protected witnesses, it will need to interrupt its field activities to liaise with VWU prior to conducting those enquiries.³²

20. However, the Defence submissions are misplaced and do not show that the expeditiousness of the proceedings would be significantly affected. First, the Prosecution has already disclosed all the evidence that it intends to rely on for the purposes of the confirmation of charges. Thus, the Defence is already in a position to plan and carry out its investigations.

21. Second, the Decision takes into account the practical realities of the Defence's investigations. The Decision requires the Defence to communicate to VWU, "*prior* to each mission to be undertaken in the field," and to communicate "to the extent possible" the name of the organizations, institutions and "if available" the persons that the Defence intends to contact in the course of its

²⁹ See ICC-01/04-168 OA3, para.10; ICC-02/04-01/05-316, p.6; ICC-01/09-02/11-211 paras. 33, 39; ICC-01/09-02/11-88, para.25, paras.23-27; ICC-01/04-01/06-2109, para.22; ICC-01/05-01/08-680, para. 36; ICC-01/09-02/11-275, paras. 28-29; ICC-01/09-01/11-301, para.30.

³⁰ ICC-01/04-01/06-2463, para.31.

³¹ Application, para.38.

³² Application, para.39.

mission and to whom it intends to disclose the identity of the protected witnesses.³³ The Prosecution notes that if in the course of a mission, the Defence comes into possession of unknown information that requires additional or further enquiries, the Defence may not be required to interrupt its mission; rather, the Defence may discuss with the VWU and arrange for suitable mechanisms to deal with unexpected situations in advance of its missions. Further, the Single Judge clarified that VWU's intervention is not considered an authorization; VWU will provide its expert advice and assistance.³⁴

The issues do not significantly affect the outcome of the trial and an immediate resolution by the Appeals Chamber will not materially advance the proceedings

22. The Defence argues that the outcome of the proceedings would be significantly affected, because the Decision will not permit the Defence to investigate certain aspects of its case and, as a result, the Defence will not be able to be fully prepared for the confirmation of charges hearing on 10 February 2014.³⁵ Further, according to the Defence, the Appeals Chamber's intervention is necessary, because the issues have a direct effect on the Defence's capacity to investigate and the disputed paragraphs have not been adopted in other cases.³⁶

23. Any impact of the purported issues on the confirmation of charges is speculative and unsupported. As noted above, the Defence's submissions are made in the abstract but do not identify any specific circumstances in which the outcome of the proceedings would be affected. Moreover, the Decision is not dispositive of the Defence's remedies before the Pre-Trial Chamber. Firstly, if any specific instances of prejudice arise in the course of the Defence

³³ Decision, para.12.

³⁴ Decision, para.13.

³⁵ Application, paras.40-42.

³⁶ Application, paras.43-44.

investigation, the Defence may still approach the Single Judge to tailor a remedy to address that specific complaint. Additionally, the Defence may still raise any purported prejudice in the course of its investigations, if and when it arises, as part of its final oral and written submissions at the confirmation of charges. Finally, the Defence also has the opportunity to seek leave to appeal the confirmation decision, if it considers that the purported limitations on its investigations had any specific detrimental impact on the forthcoming Pre-Trial Chamber's decision. Thus, the intervention of the Appeal Chamber to resolve this issue is unnecessary at this juncture.

24. Finally, the fact that certain provisions of the Protocol were not adopted in other cases does not necessarily require the intervention of the Appeals Chamber. The absence in other protocols of provisions adopted in this case may simply mean that the matter was not litigated before. Moreover, as the Defence indicated³⁷ and the Single Judge noted,³⁸ this case has particular features which are not present in other cases and therefore require the adoption of specific measures. Indeed, the circumstances surrounding each case are different and the purpose of adopting a case-specific protocol is precisely to address the particularities of each case.

³⁷ ICC-01/04-02/06-174, para.17.

³⁸ Decision, para.11.

Conclusion

25. For the above reasons, the Prosecution requests that the Chamber reject the Defence Application.



Fatou Bensouda, Prosecutor

Dated this 27th Day of December 2013

At The Hague, The Netherlands