

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 13 January 2014

**PRE-TRIAL CHAMBER II**

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

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

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

**Public**

**Decision on the Defence Request for Leave to Appeal**

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

**The Office of the Prosecutor**  
 Fatou Bensouda, Prosecutor  
 James Stewart, Deputy Prosecutor

**Counsel for the Defence**  
 Marc Desalliers

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
 Participation/Reparation**

**The Office of Public Counsel for  
 Victims**

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

**States Representatives**

**Other  
 Appeals Chamber**

## **REGISTRY**

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**Registrar**  
 Herman von Hebel

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
 Section**

**Other  
 Section**

**Judge Ekaterina Trendafilova**, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court”, or “ICC”),<sup>1</sup> hereby renders this decision on the “Requête de la Défense de M. Bosco Ntaganda sollicitant l’autorisation d’interjeter appel de la ‘Decision on the Protocol on the Handling of Confidential Information and Contact with Witnesses of Opposing Party’ rendue le 17 décembre 2013” (the “Application”).<sup>2</sup>

## **I. PROCEDURAL HISTORY**

1. On 9 December 2013, the Prosecutor submitted the “Prosecution’s request to adopt a Protocol on the handling of confidential information and on contact with witnesses of the opposing party”<sup>3</sup> to which a draft protocol, which had been discussed with the Defence since 24 June 2013,<sup>4</sup> was attached.
2. On 12 December 2013, the Defence responded, stating its opposition to two draft articles contained in the draft protocol.<sup>5</sup>
3. On 17 December 2013, the Single Judge issued the “Decision on the Protocol on the Handling of Confidential Information and Contact with Witnesses of the Opposing Party” (the “17 December 2013 Decision”).<sup>6</sup>
4. On 23 December 2013, the Defence submitted the Application in which it sought leave to appeal the 17 December 2013 Decision on the three following issues:
  - (a) Whether the inclusion by the Single Judge of paragraphs 21 and 26 of the Protocol infringes the suspect’s fundamental rights guaranteed by articles 61 and 67 and contravenes the provisions of article 68(1) of the Statute.
  - (b) Whether the inclusion of paragraph 21 in the Protocol adversely affects the confidentiality of the Defence investigations.
  - (c) Whether the Single Judge manifestly erred in fact by failing to give sufficient consideration to the regime established by the Court’s instruments and the other provisions of the Protocol in matters of witness and victim protection.<sup>7</sup>

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

<sup>2</sup> ICC-01/04-02/06-191.

<sup>3</sup> ICC-01/04-02/06-167-Conf with confidential annex.

<sup>4</sup> ICC-01/04-02/06-167-Red, para. 2.

<sup>5</sup> ICC-01/04-02/06-174.

<sup>6</sup> Pre-Trial Chamber II, ICC-01/04-02/06-185.

5. On 27 December 2013, the Prosecutor submitted the “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)” (the “Response”)<sup>8</sup> in which she requested that the Single Judge reject the Application.

## II. APPLICABLE LAW

6. The Single Judge notes articles 21(1)(a), (2),(3) and 82(1)(d) of the Rome Statute (the “Statute”), rule 155 of the Rules of Procedure and Evidence ( the “Rules”) and regulation 65 of the Regulations of the Court.

## III. THE SINGLE JUDGE’S DETERMINATION

7. Article 82(1)(d) of the Statute reads, in relevant part:

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

[...]

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

8. In this regard, the Single Judge recalls the first decision on interlocutory appeals dated 19 August 2005, in which this Chamber, albeit with different composition, held that when examining an application for leave to appeal under article 82(1)(d) of the Statute, it must be guided by three main principles: a) the restrictive nature of the remedy provided in this provision; b) the need for the applicant to satisfy the Chamber as to the fulfilment of the requirements embodied in this provision; and c) the irrelevance of addressing arguments concerning the merits of the appeal.<sup>9</sup> The

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<sup>7</sup> ICC-01/04-02/06-191, para. 6, pp. 14-15.

<sup>8</sup> ICC-01/04-02/06-194.

<sup>9</sup> Pre-Trial Chamber II, “Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58”, 19 August 2005, ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 15; “Decision on the Prosecution’s Application for Leave to Appeal the Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06”, 19 December 2007, ICC-02/04-112, para. 16; see also Trial Chamber I,

Single Judge also recalls the Appeals Chamber's judgment of 13 July 2006, which considers that the object of the remedy provided in article 82(1)(d) of the Statute, is to "pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial".<sup>10</sup> The Single Judge shall therefore assess the Defence's Application in light of these principles.

9. Having laid down the main principles underlying interlocutory appeals, the Single Judge turns to the requirements regulating the granting or rejection of an application for leave to appeal.

10. The Single Judge recalls that for leave to be granted, the following specific requirements must be met:

a) the decision must involve an "issue" that would significantly affect (i) *both* the "fair" and "expeditious" conduct of the proceedings; *or* (ii) the outcome of the trial; *and*

b) in the view of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber is warranted as it may materially advance the proceedings.<sup>11</sup>

11. According to established jurisprudence, an "issue" is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. An "issue" is constituted by a subject, the resolution of which is essential for the determination of matters arising in the judicial

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"Decision on two requests for leave to appeal the 'Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application'", 4 August 2011, ICC-01/04-01/06-2779, para. 10.

<sup>10</sup> Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, para. 19.

<sup>11</sup> See also, for example, Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, paras 9-19; Pre-Trial Chamber II, "Decision on the Prosecutor's Request for Leave to Appeal the Decision Rejecting the Amendment of the Charges (ICC-01/09-01/11-859)", 6 September 2013, ICC-01/09-01/11-912, para. 16 with further references in footnote 22.

cause under examination.<sup>12</sup> Most importantly, the “issue” identified by the appellant must emanate from the relevant decision itself and cannot represent a hypothetical concern or abstract legal question.<sup>13</sup>

12. “Fairness” in the context of article 82(1)(d) of the Statute “is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it (articles 64(2) and 67(1)) and article 21(3)”.<sup>14</sup> “Expeditiousness”, an “attribute of a fair trial”,<sup>15</sup> is closely linked to the concept of proceedings “within a reasonable time”, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned.<sup>16</sup>

13. According to the jurisprudence of the Appeals Chamber, the “outcome of the trial” is affected “where the possibility of error in an interlocutory or intermediate decision may have a bearing thereupon”.<sup>17</sup> In deciding a request under article 82(1)(d) of the Statute, the Pre-Trial Chamber “must ponder the possible implications

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<sup>12</sup> Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 9.

<sup>13</sup> Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Leave to Appeal the ‘Decision Pursuant to Articles 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo’”, 18 September 2009, ICC-01/05-01/08-532, para. 17; Pre-Trial Chamber I, “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges”, 31 July 2013, ICC-02/11-01/11-464, para. 8.

<sup>14</sup> Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 11.

<sup>15</sup> Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 11.

<sup>16</sup> Pre-Trial Chamber III, “Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure”, 25 August 2008, ICC-01/05-01/08-75, para. 18.

<sup>17</sup> Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 13.

of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.<sup>18</sup>

14. A determination that the issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial does not automatically qualify it as a subject of appeal. Pursuant to article 82(1)(d) of the Statute, the issue must be such “for which, in the opinion of the Pre-Trial [...] Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”. To materially “advance” the proceedings has been identified by the Appeals Chamber as to “move forward” “by ensuring that the proceedings follow the right course”.<sup>19</sup> Whether this is the case, involves an assessment by the relevant Chamber as to whether the authoritative decision by the Appeals Chamber will rid “the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial”.<sup>20</sup>

15. Concerning the requirements set out in paragraph 10 (a) and (b) above, the Single Judge recalls that they are cumulative. Failure in demonstrating that one of the requirements in (a) or (b) is fulfilled makes it unnecessary for the Single Judge to address the remaining requirements under article 82(1)(d) of the Statute.

#### *First Issue*

16. As stated earlier in paragraph 4 of the present decision, the Defence wishes to appeal the following issue: “Whether the inclusion by the Single Judge of paragraphs 21 and 26 of the Protocol infringes the suspect’s fundamental rights

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<sup>18</sup> Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 13.

<sup>19</sup> Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 15.

<sup>20</sup> Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 14.

guaranteed by articles 61 and 67 and contravenes the provisions of article 68(1) of the Statute”.

17. In the Application, the Defence argues in several pages that paragraph 21 of the draft protocol concerning the handling of confidential information and contact of witnesses as amended by the Single Judge in the 17 December 2013 Decision together with paragraph 26 of said protocol as retained in the same decision interferes with the suspect’s fundamental rights guaranteed by articles 61 and 67 of the Statute.<sup>21</sup> In substantiating its claim, the Defence states that proceedings before the Court “must include due procedural safeguards to protect the interests of the [suspect] so as to comply, as far as possible”, with the principle of equality of arms.<sup>22</sup>

18. According to the Defence, the suspect is entitled to object to the charges against him, challenge the evidence presented and present evidence pursuant to article 61(6) of the Statute.<sup>23</sup> Thus, to give full effect to these rights, the Defence claims that it “must be afforded the possibility to investigate all the evidence” presented against the suspect,<sup>24</sup> and without being “compel[led] to disclose prior any field mission, the purpose and modalities of its investigations” or limited in its investigations concerning charges of sexual violence.<sup>25</sup> In the view of the Defence, the inclusion of paragraph 21 in particular imposes “unreasonable restrictions [...] on investigations into witnesses admitted to the ICC [Protection Programme] or any other programme established by the [Victims and Witnesses Unit]” (the “VWU”).<sup>26</sup>

19. The Single Judge wishes to point out that although she is not supposed to respond to the merits of the Defence’s arguments in ruling on the Application, a significant part of her assessment as to the fulfilment of the requirements of article 82(1)(d) necessitates engaging, to a certain extent, with the arguments of the party lodging the request. This is to determine whether there exists an “appealable issue”

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<sup>21</sup> ICC-01/04-02/06-191, paras 6-25.

<sup>22</sup> ICC-01/04-02/06-191, para. 10.

<sup>23</sup> ICC-01/04-02/06-191, para. 7.

<sup>24</sup> ICC-01/04-02/06-191, para. 8.

<sup>25</sup> ICC-01/04-02/06-191, para. 11.

<sup>26</sup> ICC-01/04-02/06-191, paras 12-13.



arising from the 17 December 2013 Decision, which also meets the requirements specified in paragraphs (a) and (b) referred to above.<sup>27</sup>

20. In this regard, the Single Judge considers that nothing in the 17 December 2013 Decision prevents the suspect from objecting to the charges against him, challenge the evidence presented by the Prosecutor, or present evidence. Rather, the Defence has been given all opportunities throughout the proceedings leading to the confirmation hearing to exercise the suspect's fundamental rights enshrined in article 67 of the Statute. Further, with the start of the confirmation hearing on 10 February 2014, the suspect is entitled to rebut all the Prosecutor's allegations during the hearing and in its written submissions thereafter.

21. In particular, the Defence does not show in its Application how, by being called upon to liaise with the VWU prior to a mission in which disclosure of a witness identity may take place, the suspect is prevented from objecting to the charges or the evidence presented against him. Nor does the Defence explain why such involvement of the VWU in providing advice based on the specific information presented to it, as its mandate dictates, infringes on the Defence's right to have adequate time and facilities in the preparation of the defence. It is apparent that the Defence considers that the mere involvement of the VWU in the manner explained in the 17 December 2013 Decision is sufficient in itself to deprive the suspect of his rights to have adequate time and facilities in the preparation of his *entire* defence for the *entire* charges brought against him. This cannot be the case and even if it is so, the Defence has not put forward any argument in support of this claim.

22. Be that as it may, the Single Judge observes that the Defence is actually re-litigating the same points raised in its observations submitted to the Chamber on 12

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<sup>27</sup> Pre-Trial Chamber II, "Decision on the Defences' Applications for Leave to Appeal the Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 9 March 2012, ICC-01/09-01/11-399, para. 14; "Decision on the Prosecutor's Application for Leave to Appeal the 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo'", 18 September 2009, ICC-01/05-01/08-532, paras 14-16.

December 2013 and reflected in paragraph 8 of the 17 December 2013 Decision.<sup>28</sup> In paragraph 8 of said decision, the Single Judge recalled the Defence's objection as to the inclusion of paragraph 21 of the draft protocol as initially presented by the Prosecutor. In said paragraph, the Single Judge stated the "Defence [...] submit[ed] that the advice to be given by the VWU on the modality of disclosure of the identity of a protected witness would paralyze the investigation of the Defence [...] and would ultimately result in considerable delays in the Defence investigation".<sup>29</sup>

23. Having considered the Defence's objection and weighed it against other competing interests, the Single Judge finally concluded that:

[I]n deciding the issue at stake, a balance shall be achieved between two competing interests. On the one hand, the Single Judge must be attentive to the right of the suspect to prepare his defence for the purpose of the confirmation of charges hearing, as provided for in articles 61(6) and 67(1) of the Statute. On 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) of the Statute. [...] the Single Judge is of the view that the two competing interests referred to above may still be accommodated by relying on the expertise provided by the VWU, in a preventative way as requested by the Prosecutor, albeit with different modalities from those currently proposed in paragraph 21 of the Draft Protocol. Accordingly, the Single Judge considers it appropriate that the Defence liaise with representatives of the VWU prior to each mission to be undertaken in the field [...].<sup>30</sup>

24. Thus, it is clear that in ruling on the matters disputed between the Prosecutor and the Defence, the Single Judge took note of the Defence's concerns and opted for a balanced approach, which aimed at reconciling the competing interests at stake. It follows that in the present Application, the Defence is actually disputing the legal interpretation or the previous findings of the Single Judge in the 17 December 2013 Decision.

25. Indeed, in paragraphs 15-18 of the Application, the Defence explicitly disagrees with the solutions provided by the Single Judge in the 17 December 2013 Decision when it states that the impugned decision "does not draw any actual conclusion from the specific difficulties and requirements of field investigations and the

<sup>28</sup> Pre-Trial Chamber II, ICC-01/04-02/06-185, para. 8.

<sup>29</sup> Pre-Trial Chamber II, ICC-01/04-02/06-185, para. 8.

<sup>30</sup> Pre-Trial Chamber II, ICC-01/04-02/06-185, paras 9, 11-12.

Defence's limited resources, and that the VWU 'expertise' would not prevent the harm resulting from the inclusion of paragraph 21 in the Protocol".<sup>31</sup> The Defence also argues that by including paragraph 21 as amended in the 17 December 2013 Decision, the Single Judge "fails to take account of the fact that, in the course of investigations, a great deal of information is discovered only after the members of the Defence team have started working in the field".<sup>32</sup> Mindful of the above, the Single Judge is of the view that this sort of "disagreement", or "conflict of opinion", does not constitute an "appealable issue" within the meaning of article 82(1)(d) of the Statute.

26. Nevertheless, nothing in the 17 December 2013 Decision suggest that the Single Judge has not considered these possibilities. Rather, in said decision, she set out the *principle* approach envisaged when dealing with the issue of disclosure of identity of witnesses within the ICC Protection Programme or protected by VWU. Such approach calls for the involvement of VWU as a neutral and specialised unit responsible for the protection of victims and witnesses, prior to a mission, but does not rule out the possibility for such a role *in the course* of such mission. The fact that the Defence misunderstood or misrepresented the essence of the 17 December 2013 Decision makes it clear that the first issue claimed by the Defence also does not arise from the 17 December 2013 Decision, and accordingly, it does not constitute an appealable issue within the meaning of article 82(1)(d) of the Statute.

27. The same holds true with respect to the Defence's objection as to retaining paragraph 26 of the draft protocol (which is the second aspect of the first issue alleged by the Defence) as decided by the Single Judge in paragraph 16 of the 17 December 2013 Decision. The Single Judge has considered the concerns raised by the Defence in terms of the impact of the non-disclosure of facts to family members of these witnesses on the Defence's investigations. She has made her assessment in view of, *inter alia*, the vulnerable situation of one of the witnesses who was a victim

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<sup>31</sup> ICC-01/04-02/06-191, para. 15.

<sup>32</sup> ICC-01/04-02/06-191, paras 16-17.

of sexual violence, and the availability of alternative options to test the credibility of witnesses.<sup>33</sup> Yet, in the Application, the Defence once again does not show more than a mere disagreement regarding the Single Judge's findings that the investigating party must exercise "real caution" and cannot reveal information to the family members.<sup>34</sup> As the Prosecutor has rightly submitted in her Response, "[r]ather than identifying an appealable issue, the Defence merely rehearses its previously submitted arguments"<sup>35</sup> to the Chamber on 12 December 2013,<sup>36</sup> which were already considered in the 17 December 2013 Decision.<sup>37</sup>

28. In light of the foregoing, the Single Judge considers that the first issue identified by the Defence does not amount to an "appealable issue" within the meaning of article 82(1)(d) of the Statute. It follows that there is no need to delve into the remaining requirements of article 82(1)(d) of the Statute.

### *Second Issue*

29. As mentioned in paragraph 4 of the present decision, the Defence wishes to appeal the following issue: "Whether the inclusion of paragraph 21 in the Protocol adversely affects the confidentiality of the Defence investigations".

30. In the Application, the Defence argues that the inclusion of paragraph 21 of the draft protocol as amended by the Single Judge in the 17 December 2013 Decision "may violate the confidentiality of the Defence's work".<sup>38</sup> In advancing its claim, the Defence submits that by requiring it to communicate to the VWU, prior to its mission, the information included in paragraph 21 of the draft protocol, "the impugned Decision imposes [...] the obligation to reveal in advance the content of its investigations and, as a result, reveal a significant part of its strategy".<sup>39</sup> According to

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<sup>33</sup> Pre-Trial Chamber II, ICC-01/04-02/06-185, paras 19-21.

<sup>34</sup> ICC-01/04-02/06-191, paras 19-24.

<sup>35</sup> ICC-01/04-02/06-194, para. 9.

<sup>36</sup> ICC-01/04-02/06-174.

<sup>37</sup> Pre-Trial Chamber II, ICC-01/04-02/06-185.

<sup>38</sup> ICC-01/04-02/06-191, para. 26.

<sup>39</sup> ICC-01/04-02/06-191, para. 27.

the Defence, such requirement to disclose information prior to the mission would lead to a “breakdown in the mutual trust and seriously hamper the persons’ willingness to collaborate with the Defence” given that the Defence would not be in a position to obtain their consent prior to the disclosure of their identity to one of the organs of the Court.<sup>40</sup> Thus, the relevant part of paragraph 21 constitutes “a significant breach of the confidentiality of the Defence’s investigative work”, the Defence adds.<sup>41</sup>

31. The Single Judge cannot agree with the Defence that these arguments constitute an appealable issue within the meaning of article 82(1)(d) of the Statute. In particular, the Defence considers the requirement to liaise with VWU prior to any mission and communicating “the details of the place, time and, to the extent possible, the types of organisations, institutions and, if available, the persons that the party intends to contact” as imposing an obligation to reveal “the content of its investigations” and “a significant part of its strategy”.

32. In this respect, one cannot adhere to the Defence’s arguments that revealing this sort of information, which is confined to the disclosure of the identity of protected witnesses, as revealing “the content of its investigations” or “a significant part of its strategy”. The content of an investigation and a given Defence strategy certainly go way beyond the issue of disclosure of the identity of protected witnesses. Nor can the Single Judge endorse the Defence’s other argument that imposing an obligation to inform VWU constitutes a breach of the confidentiality of the Defence’s investigation.

33. As stated above in relation to the first issue, the Defence is again disputing the arguments already ruled upon in the 17 December 2013 Decision. In this decision the Single Judge responded to these arguments by stating that “communicating to the VWU the details of [the Defence’s] upcoming mission(s) and investigative activities does not amount to any interference or prejudice to the confidentiality of the Defence

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<sup>40</sup> ICC-01/04-02/06-191, para. 28.

<sup>41</sup> ICC-01/04-02/06-191, para. 29.

investigation, in so far as the VWU ‘shall act impartially when cooperating with all parties’”.<sup>42</sup> Thus, by re-introducing the exact arguments in the present Application, the Single Judge cannot but consider that the Defence is in disagreement with the 17 December 2013 Decision. As the Prosecutor correctly put it, the “mere fact that the Defence is not satisfied with the Single Judge’s dismissal of its submissions does not establish an appealable issue”.<sup>43</sup> It follows that the Defence fails to show that the second issue constitutes an appealable issue under article 82(1)(d) of the Statute. Therefore, there is no need to proceed in examining the remaining requirements of this provision.

### *Third Issue*

34. As stated in paragraph 4 of the present decision, the Defence wishes to appeal the following issue: “Whether the Single Judge manifestly erred in fact by failing to give sufficient consideration to the regime established by the Court’s instruments and the other provisions of the Protocol in matters of witness and victims protection”.

35. In the Application, the Defence reiterates that the inclusion of paragraph 21 of the draft protocol as amended by the Single Judge in the 17 December 2013 Decision and retaining paragraph 26 of said protocol in the same decision “would seriously prejudice the suspect’s rights [and] not in return offer any meaningful additional protection to the witnesses concerned”.<sup>44</sup>

36. In supporting its submission, the Defence argues that the “strict principles it must follow in the course of its investigations suffice to ensure the confidentiality of information and protect witnesses and victims”.<sup>45</sup> Referring to different instruments, the Defence further argues that members of its team must comply with the relevant provisions from the Statute and the Rules related thereto, the “Code of Professional

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<sup>42</sup> Pre-Trial Chamber II, ICC-01/04-02/06-185, para. 14.

<sup>43</sup> ICC-01/04-02/06-194, para. 13.

<sup>44</sup> ICC-01/04-02/06-191, para. 34.

<sup>45</sup> ICC-01/04-02/06-191, para. 30.

Conduct for Counsel and the Code of Conduct for Investigators”.<sup>46</sup> The Defence also asserts that the lead counsel and the two legal assistants are bound by the “Code of ethics of advocates of the Quebec Bar”.<sup>47</sup> According to the Defence, the members of its team will also adhere to several paragraphs referred to in the draft protocol, which aim at mitigating “any risk should disclosure of a witness’s identity be necessary in relation to investigations”.<sup>48</sup> In the Defence’s opinion, these provisions applicable to its team members “are more than sufficient to protect the confidentiality of information and ensure the safety of the witnesses”.<sup>49</sup>

37. The Single Judge is well aware of these provisions and that the Defence is bound by certain legal provisions which dictate the parties certain limitations concerning witness protection. However, as stated previously in the 17 December 2013 Decision, the Single Judge’s finding was prompted by the desire to reconcile the competing interests at stake without compromising any of these interests.

38. In this regard, the Single Judge wishes to point out that, surprisingly, the three issues presented by the Defence, including the one *sub judice*, do not reveal more than a persistent pattern of disagreement with the manner in which the Single Judge addressed the very same questions in the 17 December 2013 Decision. As such, instead of focusing its efforts in developing an “appealable issue” arising from the decision, within the meaning of the Appeals Chamber’s definition, the Defence used around eleven pages to argue against the assessment, legal reasoning and solutions provided by the Single Judge in resolving the matters raised in the 17 December 2013 Decision. To this end, and for the sake of judicial economy, the Single Judge does not deem it necessary to examine the remaining requirements of article 82(1)(d) of the Statute.

39. In conclusion, the Single Judge observes that the Defence’s Application as a whole could be considered as a request for reconsideration of the 17 December 2013

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<sup>46</sup> ICC-01/04-02/06-191, para. 30.

<sup>47</sup> ICC-01/04-02/06-191, para. 30.

<sup>48</sup> ICC-01/04-02/06-191, paras 31-32.

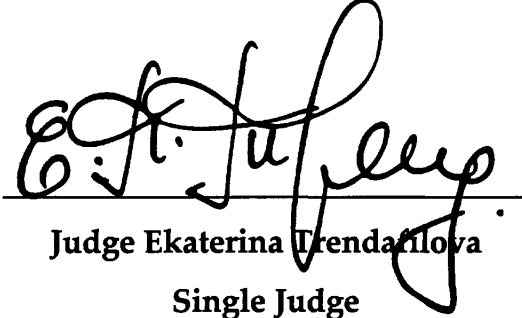
<sup>49</sup> ICC-01/04-02/06-191, para. 33.

Decision. In this context, the Single Judge wishes to highlight that the Pre-Trial Chambers have constantly stated that the Court's statutory documents do not accommodate such requests.<sup>50</sup>

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

**rejects the Application.**

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



Judge Ekaterina Trendafilova  
Single Judge

Dated this Monday, 13 January 2014

At The Hague, The Netherlands

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<sup>50</sup> Pre-Trial Chamber II, "Decision on the 'Defence Request for Leave to Appeal the Urgent Decision on the Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence (ICC-01/09-01/11-260)'" , 29 August 2011, ICC-01/09-01/11-301, para. 18; "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 May 2011, ICC-01/09-01/11-101, para. 42; "Decision on the 'Prosecution's Application for Extension of Time Limit for Disclosure'", 10 May 2011, ICC-01/09-01/11-82, para. 11; Pre-Trial Chamber I, "Decision on the Prosecution Motion for Reconsideration and, in the alternative, Leave to Appeal", 23 June 2006, ICC-01/04-01/06-166, paras 10-12.