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PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
v. THOMAS LUBANGA DYILO**

Public Document

**Decision Establishing General Principles Governing Applications to
Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure
and Evidence**

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I. Preliminary Considerations

1. On 22 March 2006, Pre-Trial Chamber I (“the Chamber”) designated Judge Sylvia Steiner as single judge responsible, under article 57 (2) of the Rome Statute (“the Statute”), for exercising the functions of the Chamber in the case against Thomas Lubanga Dyilo, including those functions provided for in rule 121 (2) (b) of the Rules of Procedure and Evidence (“the Rules”);¹
2. On 24 and 26 April 2006, a hearing with the Prosecution and the Defence (“the Hearing”) addressed the system of disclosure. Items 9 and 10 of the agenda consisted of information provided by the Prosecution concerning future applications under rules 81 (2) and (4) of the Rules.² Subsequently, an *in camera* hearing was held with the Prosecution on 2 May 2006 (“the *In Camera* Hearing”).
3. On 6 April,³ 19 April,⁴ 24 April,⁵ 2 May⁶ and 8 May⁷ the Prosecution and the Defence made a number of filings in relation to the Hearing and the *In Camera* Hearing.
4. On 15 May 2006, Judge Sylvia Steiner acting as single judge issued the Decision on the Final System of Disclosure and the Establishment of a Timetable (“the Decision on the Final System of

¹ ICC-01/04-01/06-51.

² “Decision on the Agenda of the Hearing of 24 April 2006”, issued by Judge Sylvia Steiner acting as single judge on 19 April 2006, p. 10.

³ ICC-01/04-01/06-66 and ICC-01/04-01/06-68.

⁴ ICC-01/04-01/06-81-Conf-Exp.

⁵ ICC-01/04-01/06-83-US-Exp.

⁶ ICC-01/04-01/06-91 and ICC-01/04-01/06-92.

⁷ ICC-01/04-01/06-93-Conf.

Disclosure”)⁸. This decision deals with general rules on disclosure of evidence for the purpose of the confirmation hearing.

5. In light of those proceedings, and given that the Decision on the Final System of Disclosure lays down general rules on disclosure prior to the confirmation hearing, the single judge considers that a need exists to establish certain general principles governing applications to restrict disclosure pursuant to rule 81(2) and (4) of the Rules.
6. In ascertaining such principles, the single judge considers that due regard must be given to the statutory framework provided in articles 54, 57 (3) (c), 61, 67, 68, 72 and 93 of the Statute; rules 15, 76, 77, 81, 87, 88, and 121 of the Rules; regulation 8 of the Regulations of the Court (“the Regulations”); and regulations 14 and 24 of the Regulations of the Registry. This includes paying particular attention to the limited scope of the confirmation hearing, pursuant to article 61 (5), (6) and (7) of the Statute, and to the fact that protection of sensitive evidence, materials, and information must be consistent with the rights of the Defence.
7. Moreover, in interpreting the contours of such a statutory framework, the single judge must take into account:
 - i. the general principle of interpretation set out in article 21 (3) of the Statute, according to which “the application and the interpretation of law pursuant to this article must be consistent with internationally recognized human rights”,
and

⁸ ICC-01/04-01/06-102.

- ii. the general principles of interpretation set out in article 31 (1) of the Vienna Convention on the Law of Treaties, according to which “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”;

II- Scope and Nature of *ex parte* Proceedings pursuant to Rule 81 (2) and (4)

- 8. According to article 61 (1) and 2 (a) of the Statute, Thomas Lubanga Dyilo has the right to be present at the confirmation hearing. This right extends, in principle, to all proceedings from the initial appearance to the confirmation hearing;⁹
- 9. However, a few provisions of the Statute and the Rules expressly provide for *ex parte* proceedings in the absence of the Defence, in

⁹ According to article 6 (1) of the European Convention on Human Rights and Fundamental Freedoms, “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. In interpreting the stages of criminal proceedings to which this article applies, the European Court has held that it applies throughout the entirety of the proceedings (see particularly *Phillips v United Kingdom*, Application No. 41087/98, “Judgment”, 5 September 2001, para. 39).

The single judge also takes note of the “Decision of Trial Chamber I on the Applications of the Prosecutor Dated 24 June and 20 August 1996 in respect of Protection of witnesses”, *The Prosecutor v Tihomir Blaskic*, ICTY Case No. IT-95-14-T, 2 October 1996, on the Prosecution’s application for *ex parte* proceedings concerning the Prosecution’s request to be relieved from the obligation to disclose all or any part of certain witness statements that it was required to disclose to the Defence under Rule 66 (A) of the ICTY Rules of Procedure and Evidence. In deciding the Prosecution’s application, Trial Chamber I rejected the Prosecution’s submission that the right to be present at one’s trial does not include the right to be present at every aspect of the trial. According to Trial Chamber I, the right to be present at one’s trial “includes every one of its stages, commences from the time the indictment is served, and must be respected both during the preliminary proceedings and the trial itself before the appropriate court.”

particular, rule 81 (2) of the Rules makes *ex parte* proceedings mandatory in relation to Prosecution applications to restrict disclosure in order not to prejudice further or ongoing investigations;

10. On the other hand, rule 81 (4) of the Rules establishes that when a request is made to restrict disclosure pursuant to this rule, “the Chamber dealing with the matter shall [...] take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families”.
11. In the view of the single judge, absent any express prohibition, recourse to *ex parte* proceedings in the absence of the Defence is one such measure, particularly in light of the fact that *ex parte* proceedings are expressly provided for matters of national security information under article 72 of the Statute, and protection of victims and witnesses under article 68 of the Statute and rule 88 of the Rules.
12. However, in the view of the single judge, *ex parte* proceedings are the exception and not the general rule as shown by the legal regime concerning the protection of victims and witnesses, according to which:
 - i. any motion or request under rule 87 (2) (a) of the Rules “shall not be submitted *ex parte*”;

- ii. rule 88 (3) of the Rules only provides *a contrario* for the possibility of filing an *ex parte* motion or request under rule 88 of the Rules; and
- iii. rule 88 (2) of the Rules establishes that only if necessary may the competent Chamber hold an *ex parte* hearing of a request under rule 88 of the Rules.

13. Hence, the single judge considers that, insofar as *ex parte* proceedings in the absence of the Defence constitute a restriction on the rights of the Defence, *ex parte* proceedings under rule 81 (4) of the Rules shall only be permitted subject to the Prosecution showing in its application that:

- i. it serves a sufficiently important objective;
- ii. it is necessary in the sense that no lesser measure could suffice to achieve a similar result; and
- iii. the prejudice to the Defence interest in playing a more active role in the proceedings must be proportional to the benefit derived from such a measure.¹⁰

¹⁰The European Court of Human Rights has embraced the requirements of necessity and proportionality. For instance, in *Silver v. the United Kingdom*, Application No. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; and 7136/75, "Judgment", 25 March 1983, the Court elaborated on the standard that the restriction must be "necessary in a democratic society" for one of the purposes provided for in the relevant provision (a standard that can be found *inter alia* in article 8 (2) of the Convention on the right to respect for private and family life and in article 11 (2) on the right to freedom of assembly and association). The Court held at para. 97 that "[...] the phrase 'necessary in a democratic society' means that, to be compatible with the Convention, the interference must, *inter alia*, correspond to a 'pressing social need' and be 'proportionate to the legitimate aim pursued'" and that "those paragraphs of Articles of the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted."

14. The single judge notes that, in the framework of the Statute and the Rules, the notion of *ex parte* proceedings may involve the following two alternative meanings, as expressed in rule 24 (4) of the Regulations of the Registry:
- i. proceedings where the Prosecution, the Defence, or any other participant (or a combination thereof), while aware that such proceedings exist, have no opportunity to voice their arguments, documents, material, and orders; or
 - ii. proceedings where the Prosecution, the Defence, or any other participant (or a combination thereof) are not notified and thus unaware of their existence.

The Human Rights Committee, in relation to restrictions of fundamental rights expressly provided for in the International Covenant on Civil and Political Rights, as it is the case in article 12 (3) in relation to the right to liberty of movement and freedom to choose one's residence, has also stressed that the requirements of necessity and proportionality must be met (General Comment No. 27, Freedom of Movement (Art. 12), CCPR/21/Rev.1/Add.9, 2 November 1999, para. 16).

The ICTY Appeals Chamber, in its "Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence's Counsel", *The Prosecution v. Slobodan Milosevic*, Case No. IT-02-54-AR73.7, 1 November 2004, when analysing the restriction on the defendant's right to represent himself as a result of the Trial Chamber's decision to impose counsel, held at para. 17, on the basis of the case law of a number of national jurisdictions (including 50 *Elloy de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands, and Housing*, 1 A.C. 69 (1998) (United Kingdom Privy Council); *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003) (United States Supreme Court); and *Edmonton Journal v. Alberta*, 1989 CarswellAlta 198 (Canadian Supreme Court)): "[...] When reviewing restrictions on fundamental rights such as this one, many jurisdictions are guided by some variant of a basic proportionality principle: any restriction of a fundamental right must be in service of 'a sufficiently important objective,' and must 'impair the right... no more than is necessary to accomplish the objective.'" Furthermore, in this same decision (para. 17 *in fine*), the Appeals Chamber, referring specifically to paragraph 13 of the Appeals Chamber "Decision on Fatmir Limaj's Request for Provisional Release" (Case No. IT-03-66-AR65, 31 October 2003), underscored with approval that "[...] the ICTY itself has been guided by a 'general principle of proportionality' in assessing defendants' suitability for provisional release, noting that a restriction on the fundamental right to liberty is acceptable only when it is '(1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target.'"

15. The single judge also notes that the meaning of the expression *ex parte*, as mentioned above, is far from new, but has indeed been embraced by legal provisions and case law in jurisdictions in which disclosure forms a key feature of criminal procedure.¹¹ The European Court of Human Rights has considered that this framework is consistent with article 6 (1) of the European Convention on Human Rights and Fundamental Freedoms¹²

16. In this regard, the single judge, in her oral decision issued at the hearing on 26 April 2006, pointed out that “it is the Chamber’s view that it is the prevention of Defence’s access to the specific content of any proceeding under rules 81 and 82 of the Rules, as opposed to depriving the Defence from any knowledge of the fact that such proceedings exist, what can really contribute to the protection of

¹¹ For instance, in England and Wales, the Court of Appeals in *R. v. Davis, Johnson and Rowe* [1993], 1 W.L.R. 613, at p. 617:

- i. held that, although *ex parte* applications limited the rights of the Defence, in rare but serious cases the public interest justifies resorting to them in order to protect sensitive information; and
- ii. set out a specific procedure for Prosecution *ex parte* applications to seek exceptions on its disclosure obligations from the Court on the basis of public interest immunity. According to this procedure, the Prosecution had to give notice to the Defence of any *ex parte* application unless revealing the existence of such an application would reveal “the nature of the evidence” for which the Prosecution requested authorization not to disclose.

Subsequently, in *R. v. Keane*, the Court of Appeal emphasised that the *ex parte* procedure outlined in *R. v. Davis, Johnson and Rowe* should be used in exceptional cases because it was “contrary to the general principle of open justice in criminal trials” (See *R. v. Keane* [1994], 1 W. L. R., 746, at p. 750).

¹² In *Jasper v. United Kingdom*, “Judgment”, 16 February 2000, Application No. 27052/95, paras. 52 *et seq.*, the fact that the Defence was notified of the fact that the Prosecution made an *ex parte* application to the trial judge to withhold material in its possession on the grounds of public interest immunity (although such notification did not specify the category of material that the Prosecution sought to withhold) was one of the key factors in the finding of the European Court of Human Rights “[...] that, as far as possible, the decision-making procedure complied with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.”

victims and witnesses, the preservation of ongoing investigations and the protection of the confidentiality of the information".¹³

17. In the view of the single judge, the criteria referred to above, whereby a less restrictive measure is to be preferred if it produces a similar result, along with the *rationale* behind her oral decision of 26 April 2006 together lead to the conclusion that the Defence must:

- i. be informed of the existence and legal basis of any Prosecution *ex parte* application under rule 81 (2) or (4) of the Rules;
- ii. be allowed the opportunity to present submissions on (i) the general scope of the provisions that constitute the legal basis of the Prosecution's *ex parte* application; and (ii) any other general matter which in the view of the Defence could have an impact on the disposition of the Prosecution application;
- iii. be provided, at the very least, with a redacted version of any decision taken by the Chamber in any *ex parte* proceedings under rule 81 (2) or (4) of the Rules held in the absence of the Defence.

18. The single judge considers, however, that the Defence is not entitled to obtain a redacted version of any document filed *ex parte*, or of transcripts of any hearing held *ex parte*, pursuant to rule 81 (2) and (4) because the very meaning of *ex parte* excludes any opportunity

¹³ Transcript of the Hearing Held on 26 April 2006, ICC-01-04-01-06-T-5-CONF-EN, p. 6, lines 5 to 10.

for the Defence to present arguments, documents, materials or orders in relation to the specific content of the Prosecution *ex parte* application.

19. The single judge considers that this interpretation is fully consistent with the jurisprudence of the European Court of Human Rights, according to which, where the Defence was given notice of an *ex parte* Prosecution Application for leave not to disclose certain materials in its possession on public interest immunity grounds and had an opportunity to inform the Trial Chamber of the main lines of defence, the Court was satisfied that “the defence were kept informed and permitted to make submissions and participate in the above decision-making process as far as possible without revealing to them the material which the prosecution sought to keep secret on public interest grounds.”¹⁴

20. The single judge notes that the Defence may also file applications under rule 81 (4) of the Rules for *ex parte* proceedings in the absence of the Prosecution, and considers that recourse to *ex parte* proceedings in the absence of the Prosecution pursuant to rule 81 (4) of the Rules should be subject *mutatis mutandis* to the same principles set out above.

III. Confidential and Under-Seal Applications under Rule 81 (2) and (4), and the Principle of Publicity of Decisions and Orders of the Pre-Trial Chamber

¹⁴ *Jasper v. United Kingdom*, *supra* footnote 12, para. 55.

21. The single judge notes that the only express mention of under-seal motions in the Statute and the Rules can be found in rules 87 and 88 of the Rules dealing with protective and special measures.
22. The single judge also notes that, according to regulation 14 (c) of the Regulations of the Registry, the expression “under seal” means “confidential; accessible and known only to a limited number. Each organ and/or participant shall compile and maintain a list of persons that had access to each document, material, order or decision under seal.”
23. In this regard, the single judge has already stated in her Decision *Reclassifying Certain Documents in the Record of the DRC Situation*¹⁵, that “the classification of a document as either ‘under seal’ or ‘confidential’ does not deny access to any person or entity entitled to participate in the proceedings...and that the difference between classifying a document as ‘under seal’ or ‘confidential’ relates only to the use of different handling codes.”¹⁶
24. Hence, in the view of the single judge, while “under-seal” applications are not permitted pursuant to rule 81 (2) of the Rules, those pursuant to rule 81 (4) must be confined to applications relating to protection of victims and witnesses when exceptional circumstances exist that make the classification of the parties’ applications as “confidential” insufficient;

¹⁵ “Decision *Reclassifying Certain Documents in the Record of the Situation in the Democratic Republic of the Congo*”, issued by Judge Sylvia Steiner acting as single judge on 21 April 2006, ICC-01/04-140.

¹⁶ *Ibid*, p. 5.

25. Furthermore, the single judge considers that the principle of publicity of proceedings, as enshrined in article 67 (1) of the Statute, rule 15 of the Rules, and regulation 8 of the Regulations, requires,¹⁷ at the very least, some type of publicity of all decisions and orders of the Chamber by way of posting on the web site of the Court: (i) a non-redacted version of such decisions and orders; (ii) a redacted version; or (iii) a general announcement of their existence without going into detail.¹⁸
26. In the view of the single judge, this obligation also covers those decisions taken in “confidential” or “under seal” proceedings

¹⁷ The European Court of Human Rights has emphasised consistently that the publicity of the proceedings is an important guarantee of the fairness of the trial insofar as it offers protection against arbitrary decisions. Moreover, according to the Court, it builds confidence by allowing the public to see the administration of justice (see *inter alia Pretto and others v Italy*, Application No. 7984/77, “Judgment”, 8 December 1983, para. 21; and *B and P v United Kingdom*, Application No. 36337/97 and 35947/97, “Judgment”, 24 April 2001, para. 36). However, Article 6 (1) *in fine* distinguishes between the publicity of judicial bodies’ decisions and that of proceedings, so that while decisions are not subject to exceptions, the proceedings are subject to certain exceptions “in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.” (see particularly *B and P v United Kingdom*, Application No. 36337/97 and 35947/97, “Judgment”, 24 April 2001, paras. 37, 47 and 49).

Article 8 (5) of the American Convention on Human Rights also enshrines the principle of publicity in criminal proceedings by establishing that “criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.” The Inter-American Commission on Human Rights (Annual Report 1992-3, Chapter IV (right to a fair trial), Section G (final observations)), in applying this provision to the secret courts established in Colombia to prevent attacks upon the judiciary at a time of emergency but subsequently maintained as part of ordinary legislation during preliminary proceedings, has held: “Although secret trials are intended to serve a good purpose, i.e., to protect the safety and lives of the judges, they nonetheless seriously violate the guarantees of due process and increase the margin for judicial error to the point that those people who are tried in secret are in danger of becoming victims of a miscarriage of justice. The Commission urges the Government of Colombia to continue to seek ways to reconcile the twofold and not conflicting objectives of guaranteeing fully the lives and safety of judges, without diminishing the guarantees of due process.”

¹⁸ To date, all decisions taken by Pre-Trial Chamber I in the context of the investigation of the DRC situation and the case against Thomas Lubanga Dyilo have been publicised on the web site of the Court in one of the three ways mentioned above.

pursuant to rule 81 (2) and (4) of the Rules, no matter whether they are also *ex parte*.

27. However, the single judge considers that, upon good cause being shown by the party initiating “confidential” or “under-seal” proceedings pursuant to rule 81 (2) or (4) of the Rules, the publicity of a given order or decision of the Chamber can be postponed until the reason for the postponement no longer exists;¹⁹

IV. Applications for Leave not to Disclose the Identity of Prosecution Witnesses for the purpose of the Confirmation Hearing pursuant to rule 81 (4) of the Rules

28. The single judge set out in the Decision on the Final System of Disclosure “that, pursuant to rule 76 of the Rules, and unless the single judge authorises otherwise under rule 81 of the Rules, the Prosecution must disclose to the Defence the names and the statements of the witnesses on which it intends to rely at the confirmation hearing, regardless of whether the Prosecution intends to call them to testify or to rely on their redacted statements, non-redacted statements, or a written summary of the evidence contained in those statements.”²⁰
29. The single judge notes that (i) article 68 of the Statute and rule 81 (4) of the Rules provide for non-disclosure of identity as a plausible protective measure for Prosecution and Defence witnesses at the

¹⁹ For instance, all documents relating to issuing a warrant of arrest for Thomas Lubanga Dyilo were not publicised on the web site of the Court until Thomas Lubanga Dyilo was transferred to the premises of the Court in The Hague.

²⁰ Decision on the Final System of Disclosure, p. 6.

confirmation hearing, and (ii) this measure can only be authorised by the Chamber pursuant to rule 81 (4) of the Rules to ensure their security and that of their families.

30. The single judge is mindful that non-disclosure of the identity of witnesses on whom the Prosecution intends to rely at the confirmation hearing (i) could affect the ability of the Defence to fully challenge the evidence and credibility of those witnesses; and (ii) has an impact on the rights of the Defence pursuant to articles 61 (3) and (6) (b) and 67 (1) (b) of the Statute.²¹

31. Hence, in the view of the single judge, non-disclosure of the identity of witnesses on whom the Prosecution intends to rely at the confirmation hearing can be authorised only exceptionally when, due to the particular circumstances surrounding a given witness, non-disclosure of identity is still warranted because less restrictive protective measures have been sought from the Victims and Witnesses Unit but were considered infeasible or insufficient;²²

²¹ The European Court of Human Rights has also highlighted this point. For instance, in *Kostovski v The Netherlands*, Application No. 11454/85, "Judgment", 20 November 1989, the applicant's allegation was based on the use as evidence, by the Utrecht District Court and the Amsterdam Court of Appeal, of reports of statements made by two anonymous persons. The European Court of Human Rights acknowledged in that case at para. 42: "[...] If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculcating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious."

²² This interpretation is consistent with the framework set out by the European Court of Human Rights. The Court held in *Kostovski v The Netherlands*, *supra* footnote 21, para. 44 that: "[...] Although the growth in organised crime doubtless demands the introduction of appropriate measures, the Government's submissions appear to the Court to lay insufficient weight on what the applicant's counsel described as 'the interest of everybody in a civilised society in a controllable and fair judicial procedure'. The right to a fair administration of justice holds so prominent a place in a democratic society (see *Delcourt*, "Judgment", 17 January 1970, Series A no. 11, p. 15, § 25) that it cannot be sacrificed to expediency. The Convention does not preclude reliance, at the investigation stage of criminal proceedings, on

32. The single judge considers that this interpretation is fully consistent with the jurisprudence of the European Court of Human Rights, according to which, although restrictions on disclosure of relevant evidence might be permissible in certain cases as a result of weighting the rights of the accused against competing interests:

- (i) “Only such measures restricting rights of the defence which are strictly necessary are permissible under Article 6 § 1”;²³ and
- (ii) “In order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by procedures followed by the judicial authorities”.²⁴

sources such as anonymous informants. However, the subsequent use of anonymous statements as sufficient evidence to found a conviction, as in the present case, is a different matter. It involved limitations on the rights of the defence which were irreconcilable with the guarantees contained in Article 6 (art. 6).”

The Inter-American Court of Human Rights has been particularly strict on this matter. In the case of *Bamaca-Velazquez*, “Judgment”, 25 November 2000, the Court held at para. 103: “In this respect, the Court considers that the videotape with the testimony of Nery Ángel Urizar García, contributed by the Commission as documentary evidence, lacks autonomous value, and the testimony that it contains cannot be admitted as it has not complied with the requirements for validity, such as the appearance of the witness before Court, his identification, swearing in, monitoring by the State and the possibility of questioning by the judge.” See also para. 29 of the concurring opinion of Judge García Ramírez in the case of *Bamaca-Velazquez*.

²³ *Jasper v. United Kingdom*, *supra* footnote 12, para. 52. See also *Van Mechelen and Others v. The Netherlands*, “Judgment”, 23 April 1997, Application No. 21.363/93; 21364/93; 21427/93; and 22056/93, para. 58.

²⁴ *Jasper v. United Kingdom*, see *supra* footnote 12, para. 52. See also *Doorson v. The Netherlands*, “Judgment”, 26 March 1996, Application No. 20524/92, para. 72; *Van Mechelen and Others v. The Netherlands*, see *supra* footnote 23, para. 54; and *Artner v. Austria*, Application No. 13161/87, “Judgment”, 28 August 1992, paras. 20-24.

33. Moreover, the single judge highlights that, according to article 61 (5) of the Statute, the Prosecution at the confirmation hearing “shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged”.
34. Hence, in the view of the single judge, the Prosecution need not present at the confirmation hearing all incriminating evidence that might be in its possession, particularly that on which the Prosecution states that it places lesser reliance;
35. As a result, according to the single judge, applications for leave not to disclose the identity of Prosecution witnesses under rule 81 (4) of the Rules should be made on an exceptional basis.

V- Mandatory Disclosure of Potentially Exculpatory Excerpts in the Statements of Witnesses on Whose Oral or Written Evidence the Prosecution Intends to Rely at the Confirmation Hearing

36. In the view of the single judge, the right of the Defence pursuant to article 67 (2) of the Statute to disclosure “as soon as practicable” of any potentially exculpatory excerpts contained in the statements of witnesses on whose written or oral testimony the Prosecution intends to rely at the confirmation hearing:
- i. is closely linked to its right pursuant to article 67 (1) (b) of the Statute to have adequate time and facilities to prepare for the confirmation hearing; and

- ii. is of the utmost importance for effective exercise by the Defence of its right under article 61 (6) (b) of the Statute to challenge the evidence presented by the Prosecution at such a hearing;

37. Furthermore, the single judge considers that the right to a fair hearing provided for in the *chapeau* of article 67 (1) of the Statute, interpreted in accordance with internationally recognised human rights standards, permits the competent Chamber in appropriate circumstances to exceed the specific terms of article 67, as shown by the express reference to “minimum guarantees” in the *chapeau* of such provision.²⁵

38. As a result, the single judge considers that interpretation of rule 81 (2) and (4) of the Rules “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”²⁶, and in particular in light of articles 61 (6) and 67 (1) and (2) of the Statute, leaves no room to authorise redaction of potentially exculpatory excerpts from the statements of witnesses on whose written or oral

²⁵ The Inter-American Court of Human Rights has advanced a similar practice in relation to article 8 of the American Convention on Human Rights. As the Court has held in its Advisory Opinion 11/90, 10 August 1990, para. 24, although this provision “[...] provides that every person has the right to a hearing, with due guarantees by a tribunal in both types of proceedings, it spells out in addition certain *minimum guarantees* for those accused of a criminal offense. Thus, the concept of a fair hearing in criminal proceedings also embraces, at the very least, those *minimum guarantees*. By labeling these guarantees as *minimum guarantees* the Convention assumes that other, additional guarantees may be necessary in specific circumstances to ensure a fair hearing.”

This interpretation is also consistent with the use made by the European Court of Human Rights of the general right to a “fair hearing” in order to fill some of the gaps in article 6 (3) of the European Convention on Human Rights and Fundamental Freedoms (See *Harris, D.J., O’Boyle, M., and Warbrick, C, Law of the European Convention on Human Rights*, Butterworths, 1995, pp. 202-203).

²⁶ Article 31 (1) of the Vienna Convention on the Law of Treaties.

testimony the Prosecution intends to rely at the confirmation hearing;²⁷

VI- Temporary Nature of Redactions Authorised not to Prejudice Ongoing Investigations in the Case

39. The single judge considers that, according to article 61 (4) and (9) of the Statute, and as provided for in the Decision on the Final System of Disclosure, the investigation in the current case must be brought to an end by the time the confirmation hearing starts, barring exceptional circumstances that might justify later isolated acts of investigation;²⁸
40. Furthermore, in the view of the single judge, the Prosecution, according to rule 121 (4) and (5) of the Rules, must (i) provide the Defence with the Prosecution's Amended Charging Document and/or List of Evidence fifteen days before the confirmation hearing and (ii) file such document in the record of the case.²⁹
41. Hence, according to the single judge, any redaction authorised to protect information related to the ongoing investigation in the current case against Thomas Lubanga Dyilo can only be temporary.

²⁷ May, R. and Wierda, M. have stated in relation to the broader question of the Prosecution's obligation to disclose potentially exculpatory sensitive information, which is not dealt with in this decision, that on the one hand, the "Prosecution is not relieved of its duty to disclose exculpatory material by rules concerning confidentiality or witness protection"; on the other hand, in exceptional circumstances some redactions of "irrelevant but sensitive portions of a document"²⁷ can be authorised by the Chamber (*May, R., Wierda, M.*, International Criminal Evidence. Transnational Publishers, 2002, p. 79).

²⁸ Annex I to the Decision on the Final System of Disclosure, paras. 130 and 131.

²⁹ *Ibid*, para. 59.

VII. Conclusion

For above-mentioned reasons, the single judge:

DECIDES that for the purpose of the confirmation hearing:

- (i) all future Prosecution applications under rule 81 (2) shall be filed *inter partes* so as to notify the Defence of the existence of the application and its legal basis;
- (ii) to the extent necessary, any such application shall be accompanied by an *ex parte* annex containing the specific details of the application;
- (iii) the proceedings related to any Prosecution application under rule 81 (2) shall be conducted *ex parte* with the Prosecution, and that the Defence shall not be provided with redacted versions of any document filed, or of the transcripts of any hearing held, during such *ex parte* proceedings;
- (iv) the Defence shall have five days after the filing of the application to make submissions on (i) the scope of the provision(s) under which the application has been brought; and (ii) any other general matter which in the view of the Defence

could have an impact on the disposition of the Prosecution's application;

- (v) that, at the very least, a redacted version of any Chamber decision in proceedings relating to any Prosecution application under rule 81 (2) of the Rules shall be communicated to the Defence;
- (vi) in principle, any Chamber decision in proceedings relating to any Prosecution application under rule 81 (2) of the Rules shall be publicised by posting on the official web site of the Court: (i) a redacted version of any such decision; or (ii) if the sensitivity of the information so requires, a general announcement of the decision.

DECIDES that for the purpose of the confirmation hearing:

- (i) all future applications by the Prosecution or the Defence to restrict disclosure under rule 81 (4) of the Rules shall be filed *inter partes* so as to notify the other party of the existence of the application, its legal basis, and of any request for *ex parte* proceedings that might be contained in such an application;
- (ii) to the extent necessary, any such application shall be accompanied by an *ex parte* annex containing specific details of the application and of the request for *ex parte* proceedings;

- (iii) a decision to conduct *ex parte* the proceedings relating to an application under rule 81 (4) shall be subject to the applicant showing that: (i) it serves a sufficiently important objective; (ii) it is necessary in the sense that no less restrictive measure could suffice to achieve a similar result; and (iii) the prejudice to the interest of the other party in playing a more active role in the proceedings must be proportional to the benefit derived from conducting them *ex parte*;
- (iv) at the very least, a redacted version of the Chamber decision on any request for *ex parte* proceedings shall be communicated to the other party;
- (v) if the proceedings under rule 81 (4) of the Rules are to be conducted *ex parte*, then the other party shall not be provided with a redacted version of any document filed, or of the transcripts of any hearing held, during such *ex parte* proceedings;
- (vi) if the proceedings under rule 81 (4) of the Rules are to be conducted *ex parte*, then the other party shall have five days after the decision on the *ex parte* nature of the proceedings to make submissions on: (i) the scope of the provisions under which the application has been brought; and (ii) any other general matter which in its view could have an impact on the disposition of the application;

- (vii) at the very least, a redacted version of any Chamber decision in proceedings relating to any application under rule 81 (4) of the Rules shall be communicated to the other party;

- (viii) in principle, any Chamber decision in proceedings relating to applications under rule 81 (4) of the Rules shall be publicised in the manner referred to above concerning decisions on applications under rule 81 (2) of the Rules.

DECIDES that, for the purpose of the confirmation hearing, any restriction on disclosure to the Defence of the names and/or portions of the statements of the witnesses on whom the Prosecution intends to rely at the confirmation hearing must be authorised by the Chamber pursuant to rule 81 (4) of the Rules upon evaluating the exceptionality of the request and the infeasibility or insufficiency of less restrictive protective measures;

DECIDES that any Prosecution request pursuant to article 68 of the Statute and rule 81 (4) of the Rules for non-disclosure of the identity of Prosecution witnesses at the confirmation hearing to ensure their safety or that of their families shall be granted only if :

- (i) the Prosecution has first sought protective measures from the Victims and Witnesses Unit concerning the relevant witness;
and

- (ii) the Prosecution shows that, due to exceptional circumstances surrounding the relevant witness, non-disclosure of identity remains necessary due to infeasibility of protective measures sought or insufficiency of protective measures adopted within the framework of the protection program of the Victims and Witnesses Unit as a result of the Prosecution request.

DECIDES that non-disclosure of identity of Prosecution witnesses for the purpose of the confirmation hearing shall not be granted under rule 81 (2) or (4) of the Rules except to ensure the safety of Prosecution witnesses and their families and under the conditions set out in this decision.

DECIDES that no redaction of potential exculpatory excerpts from the statements of witnesses on whom the Prosecution intends to rely at the confirmation hearing shall be granted pursuant to Applications under rule 81 (2) or (4) of the Rules;

DECIDES that any redaction in the statements of witnesses on whose written or oral testimony the Prosecution intends to rely at the confirmation hearing in order not to prejudice the ongoing investigation in the case against Thomas Lubanga Dyilo: (i) shall be temporary and (ii) shall not be maintained beyond the 15-day time limit provided for in rule 121 (4) and (5) of the Rules;

DECIDES that the publicity of any Chamber order or decision may be postponed if good cause is shown by the party initiating “confidential” or “under-seal” proceedings pursuant to rule 81 (2) or (4) until the reason for postponement no longer exists;

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

Judge Sylvia Steiner
Single Judge

Dated this Friday 19 May 2006

At The Hague

The Netherlands