

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No: ICC-01/04-01/06

Date: 23 June 2006

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 Redacted Version

**DECISION ON THE PROSECUTION MOTION FOR RECONSIDERATION
AND, IN THE ALTERNATIVE, LEAVE TO APPEAL**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Ekkehard Withopf, Senior Trial Lawyer
Ms. Christine Chung, Senior Trial Lawyer

Counsel for the Defence

Mr Jean Flamme

I. Background

1. On 19 May 2006, Judge Sylvia Steiner acting as single judge of Pre-Trial Chamber I (the "Chamber") issued the Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Statute (the "Decision").¹

2. According to the Decision, the need to establish certain general principles governing applications to restrict disclosure pursuant to rule 81 (2) and (4) of the Rules of Procedure and Evidence (the "Rules") arose from the proceedings in the case against Thomas Lubanga Dyilo,² including *inter alia* the hearing held with the Prosecution and the Defence on 24 and 26 April 2006 (the "hearing"), the *in camera* hearing with the Prosecution on 2 May 2006 (the "*in camera* hearing") and several filings of the parties in relation to the hearing and the *in camera* hearing,³ such as the filings of 6 April,⁴ 19 April,⁵ 24 April,⁶ 2 May⁷ and 8 May 2006.⁸

3. Furthermore, in light of the Prosecution's Application pursuant to Rule 81 (2) and (4) of the Rules⁹ filed by the Prosecution on 24 April 2006 (the "Prosecution Application"), the Decision complemented the Decision on

¹ ICC-01/04-01/06-108 Subsequently on 22 May 2006, the single judge issued the Decision Rectifying Typographical or Other Formal Errors of the Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Statute (ICC-01/04-01/06-115) Further to this decision, the Registry filed a corrigendum to the Decision on 30 May 2006 (ICC-01-04-01/06-108-Corr)

² The Decision, para 5

³ *Ibid*, paras 2 to 5

⁴ ICC-01/04-01/06-66-Conf and ICC-01/04-01/06-68

⁵ ICC-01/04-01/06-81-Conf-Exp

⁶ ICC-01/04-01/06-83-US-Exp

⁷ ICC-01/04-01/06-91 and ICC-01/04-01/06-83-92

⁸ ICC-01/04-01/06-93-Conf

⁹ ICC-01/04-01/06-83-US-Exp

the Final System of Disclosure and the Establishment of a Timetable¹⁰ (the "Decision on the Final System of Disclosure") issued by the single judge on 15 May 2006, in which general rules on disclosure prior to the confirmation hearing were laid down.¹¹

4. On 24 May 2006, the Prosecution filed its Motion for Reconsideration and, in the Alternative, Leave to Appeal (the "Prosecution Motion"), in which the Prosecution requested the Chamber to reconsider some of the principles established in the Decision or to confirm that such principles provide only preliminary guidance and can be adapted in the context of a concrete dispute or controversy.¹² Furthermore, if such principles are considered by the Chamber as enforceable legal standards, the Prosecution requested, in the alternative, that the Chamber grants leave to appeal under article 82 (1) (d) of the Rome Statute (the "Statute") on the relevant issue or issues.¹³
5. According to regulation 65 (3) of the Regulations of the Court (the "Regulations"), the Defence had the right to file a response to the Prosecution Motion within three days of its notification. However, the Defence has not filed any such response.

II. General Principles Set Out in the Decision as Enforceable Legal Standards

6. The Prosecution submits that "[...] it is difficult for the OTP to assess what effect the Single Judge intends to give to these 'principles'".¹⁴ Hence, the

¹⁰ ICC-01/04-01/06-102

¹¹ The Decision, para 5

¹² The Prosecution Motion, para 77

¹³ *Ibid*, paras 5 and 77

¹⁴ *Ibid*, para 4

Prosecution first requests the Chamber to confirm whether the principles set out in the Decision provide “preliminary guidance” so that they may be adapted in the context of a concrete dispute or controversy; or whether, on the contrary, such principles establish enforceable legal standards.¹⁵

7. As set out in the Decision, the Decision responds to a need arising from the ongoing proceedings in the case against Thomas Lubanga Dyilo and complements the Decision on the Final System of Disclosure.¹⁶ Accordingly, it establishes enforceable legal standards concerning applications under rule 81 (2) and (4) of the Rules. This is why no explicit or implicit reference to “preliminary guidance” can be found anywhere in the Decision.

III. Prosecution Request for Reconsideration

8. The Prosecution requests the Chamber to reconsider some of the principles set out in the Decision, which it submits constitute a principal element of the Decision.¹⁷ The Prosecution supports its request because, in its view, they are substantive principles announced outside the context of any controversy or disputed issue and because the Prosecution has, for the most part, not been given the opportunity to respond to the Defence arguments.¹⁸
9. The single judge recalls that, according to article 21 (1) of the Statute, the Court shall, first and foremost, apply the statutory framework provided by the Statute, the Rules, and the Elements of the Crimes. Furthermore, according to article 21 (2) of the Statute, in interpreting this framework,

¹⁵ Ibid, paras. 4, 5 and 77

¹⁶ The Decision, para 5

¹⁷ The Prosecution Motion, para. 6.

¹⁸ Ibid, paras 6 to 8

“the Court may apply principles and rules of law as interpreted in its previous decisions.”

10. The single judge recalls that in her recent Decision on the Prosecution Motion for Reconsideration¹⁹ issued on 23 May 2006, she stated “[...] that, in principle, the statutory framework set out by the Statute and the Rules do not provide for a motion for reconsideration as a procedural remedy against any decision taken by the Pre-Trial Chamber or the single judge.”²⁰ Furthermore, Pre-Trial Chamber II, in its 28 October 2005 Decision on the Prosecutor’s Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification²¹ also emphasised that “[t]he instruments governing the Court’s procedure make no provision for such a broad remedy as an unqualified ‘motion for reconsideration’”.²²
11. Moreover, for the reasons set out in section IV.2, the single judge considers that the claims of the Prosecution that the principles for which reconsideration is sought were not related to any controversy or disputed issue and that it did not have an opportunity to address the underlying matters are unfounded.
12. For these reasons, the Prosecution request for reconsideration must be rejected *in limine*. Hence, the single judge will now consider the Prosecution request for leave to appeal on the four issues identified in the Prosecution Motion.

¹⁹ ICC-01/04-01/06-123

²⁰ *Ibid*, p 3

²¹ ICC-02/04-01/05-60

²² *Ibid*, para 18

IV. Prosecution Request for Leave to Appeal

IV.1 Preliminary Observations

13. The Prosecution requests that the Chamber grant it leave to file an appeal on the following four issues, which, according to the Prosecution, are dealt with in the Decision: (i) “the validity of ‘general principles’ which do not arise from a concrete dispute and do not resolve any pending application;”²³ (ii) “the issue of the strong presumption in favour of disclosure of witness identities for the confirmation hearing, without balancing other factors;”²⁴ (iii) “the issue of whether the investigation must be completed prior to the confirmation hearing, except exceptional steps, and the related ruling that Rule 81 (2) therefore cannot justify redactions or non-disclosure past the confirmation hearing;”²⁵ and (iv) “*ex parte* filings under Rules 81 (2) and (4) can never be made without contemporaneous notification to the other party.”²⁶
14. As provided for in article 82 (1) (d) of the Statute,
- 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.
15. The single judge recalls that, according to the *Décision relative à la requête du Procureur sollicitant l’autorisation d’interjeter appel de la décision de la Chambre du 17 janvier 2006 sur les demandes de participation à la*

²³ The Prosecution Motion, p 25

²⁴ *Ibid*, p 27

²⁵ *Ibid*, p 29

²⁶ *Ibid*, p 32

procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6²⁷ issued by the Chamber on 31 March 2006 and the Decision on the 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 issued by Pre-Trial Chamber II on 19 August 2005,²⁸ in order to grant leave to appeal, the issue identified by the Prosecution must, in addition to having been dealt with in the relevant decision, meet the following two cumulative criteria:

- a. It must be an issue that would significantly affect (i) both the fair and the expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
- b. It must be an issue for which in the opinion of the Pre-Trial or Trial Chamber an immediate resolution by the Appeals Chamber may materially advance the proceedings.

16. Hence, the single judge will now analyse whether any of the four issues identified by the Prosecution meets these two cumulative criteria. In doing so, the single judge will consider the relevant issue irrespective of the specific position taken in the Decision. Only if both criteria are met, will the single judge grant leave to appeal.

IV.2 Validity of 'General Principles' Which do Not Arise from a Concrete Dispute and Do Not Resolve any Pending Application

17. The Prosecution submits that the Decision announces certain substantive principles outside the context of any controversy or disputed issued and

²⁷ ICC-01/04-135 See in particular para 28

²⁸ ICC-02/04-01/05-20 –US-Exp Unsealed according to the Decision ICC-02/04-01/05-52, issued on 13 October 2005 See in particular para 20

without previous notice to the parties,²⁹ and it identifies four instances on which it bases its claim. The first two refer to findings of the single judge with regard to the procedure for making applications under rules 81 (2) and (4) of the Rules.³⁰ The second two refer to the temporary nature of redactions under rule 81 (2) of the Rules as a result of the temporal scope of the ongoing investigation of Thomas Lubanga Dyilo.³¹

18. In the view of the single judge, before analysing whether the issue identified by the Prosecution meets the two cumulative criteria above-mentioned, it is first necessary to determine whether the Decision involves such an issue or whether, on the contrary, such an issue is not related to the Decision.

19. Concerning the two instances identified by the Prosecution in relation to the findings of the single judge with regard to the procedure for making applications under rules 81 (2) and (4) of the Rules, the single judge recalls that the Prosecution Application, which referred to several witness statements,³² was filed "under seal, *ex parte* Prosecution only" on 24 April

²⁹ The Prosecution Motion, paras. 4 and 9 to 12

³⁰ According to the Prosecution the Decision "[a]nnounces broad rules governing applications under Rule 81 (4), which apply applications for confidentiality under articles 54, 72 and 93, and to protect the safety of witnesses, victims and their families, under article 68, without linking those rules to any single concrete application by either party under any of these articles" (the Prosecution Motion, paragraph 12). The Prosecution also submits that the Decision "[d]etermines that an *ex parte* filing under Rules 81 (2) and (4) can never be made without giving contemporaneous notice of existence of the filing to one's adversary, although there is no pending application under either rule of which the defence has not been informed" (the Prosecution Motion para 12)

³¹ According to the Prosecution, the Decision "[a]pparently determines that the OTP is prohibited from continuing the investigation of the pending charges after the confirmation hearing, absent exceptional circumstances, although no party has requested such limitation and there has been no complaint with respect to the OTP's conduct of its investigation thus far" (the Prosecution Motion, para. 12). In addition, the Prosecution submits that the Decision "[f]inds that Rule 81 (2) can never serve as a basis for court authorized non-disclosure of information which might prejudice the ongoing investigation of the current case, divorced from consideration of any of the pending applications under Rule 81 (2) and absent any request by the defence for any such broad limitation" (the Prosecution Motion, para 12)

³² The Prosecution Application, para 2

2006.³³ Moreover, the Prosecution informed the Pre-Trial Chamber that “[...] it will file further similar applications once the Pre-Trial Chamber has ruled upon the present application, thus allowing the Prosecution to take into account any guidance and direction that the Pre-Trial Chamber may provide.”³⁴ According to the Prosecution,

“While preparing the proposed redactions, the Prosecution has made a distinction between the different legal justifications for limiting disclosure, as provided for in the Rome Statute and the Rules:

“(i) Disclosure of evidence or information, which may lead to the endangerment of the safety or security of a witness/victim or his or her family (Article 68 (5) of the Rome Statute; Rules 81 (3) and (4) of the Rules”)

(ii) Disclosure of material or information, which may prejudice further or ongoing investigation (Rule 81 (2) of the Rules); and

(iii) Disclosure of national security information (Article 72 of the Rome Statute; Rules 81 (3) and 81 (4) of the Rules).”³⁵

20. The single judge also recalls that on 2 May 2006, the Defence filed the Defence Motion Regarding Ex Parte Hearing of 2 May 2006,³⁶ in which it requested the Chamber *inter alia* to: (i) “reject the Prosecutor’s attempt to utilise Articles 54 (3) (e), and 67 (2) and Rule 81 (2) to evade their

³³ The single judge also recalls that in the Prosecution’s Observations on Disclosure filed by the Prosecution on 6 April 2006 (ICC-01/04-01/06-66-Conf), the Prosecution informed the Pre-Trial Chamber and Duty Counsel for the Defence that: (i) it was continuing to investigate crimes for which Thomas Lubanga Dyilo is allegedly responsible and that, for this reason, the Prosecution had an interest in not disclosing information which could jeopardise such an investigation prior to its decision whether to amend the arrest warrant against Thomas Lubanga Dyilo; and that (ii) for this purpose, the Prosecution intended to use the procedural mechanism provided for in rule 81 (2) of the Rules (the “Prosecution’s Observations on Disclosure”, paragraph 10 (i)). In the same filing, the Prosecution affirmed that (i) it anticipated that, in respect of statements of victims and witnesses which fall within the scope of the Prosecution’s disclosure obligations, steps pursuant to articles 68 (1) and 68 (5) of the Statute and rule 81 (4) of the Rules will be necessary to protect the safety of the victims and witnesses and members of their families, including by authorising the non-disclosure of their identities prior to the commencement of the trial, and that (ii) the Prosecution was well aware of the procedural mechanism which for this purpose is set out in rule 81 (4) of the Rules (the “Prosecution’s Observations on Disclosure”, paragraph 10 (ii)).

On the other hand, in the Submission of Potentially Exculpatory Evidence filed by the Prosecution on 19 April 2006 as “confidential, *ex parte* Prosecution only” (the “19 April 2006 Prosecution Filing”), the Prosecution brought to the attention of the Chamber an item of potentially exculpatory material which it claimed could, for the time being, not be revealed to the Defence due to its confidentiality obligations under article 54 (3) (e) of the Statute (ICC-01/04-01/06-81-Conf-Exp)

³⁴ *Idem*

³⁵ *Ibid*, para 9

³⁶ ICC-01/04-01/06-93

fundamental obligation to disclose exculpatory materials to the Defence”; (ii) “reject the application of the Prosecution not to disclose the identities of witnesses just prior to trial”; (iii) “order the Prosecutor to disclose the aforementioned exculpatory material and identities to the Defence forthwith in order to enable the Defence to effectively prepare for the confirmation hearing”; (iv) “order that all future motions for non-disclosure and protective measures shall be filed on an *inter partes* basis – with an *ex parte* confidential”; (v) “order that all future hearings under Rule 81 (2) shall – to the extent possible – be held on an *inter partes* basis, with the provision that the specific details of the application may be discussed at the end of the hearing on an *ex parte* basis;” and (vi) “order that all future hearings under Rule 81 (4) shall be held on an *inter partes* basis”.³⁷

21. On the other hand, concerning the issues of the temporary nature of the redactions under rule 81 (2) of the Rules and the temporal scope of the investigation of Thomas Lubanga Dyilo, the single judge recalls that the Prosecution Application and the Supplemental Briefing Provided in Respect of the Application pursuant to Rule 81 (2) and Rule 81 (4) of 21 April 2006 (the “Prosecution Supplemental Brief”)³⁸ filed by the Prosecution on 9 May 2006 requested authorisation from the Pre-Trial Chamber to disclose to the Defence redacted version of witness statements on which the Prosecution intends to rely at the confirmation hearing.³⁹ Several of the proposed redactions were based on the alleged prejudice to the ongoing investigation into Thomas Lubanga Dyilo which would result from disclosure of the relevant information to the Defence prior to the confirmation hearing.⁴⁰

³⁷ Ibid, para 43

³⁸ ICC-01/04-01/06-95-US-Exp

³⁹ The Prosecution Application, paras 1 and 40, and the Prosecution Supplemental Brief, para 58.

⁴⁰ According to paragraph 10 of the Prosecution Application, all the proposed redactions marked with number (2) sought only to safeguard the ongoing investigation into Thomas Lubanga Dyilo. In addition, the ongoing

22. In this context, the issue of the temporal nature of any redaction granted under rule 81 (2) of the Rules, which is closely connected to that of the temporal scope of the investigation of Thomas Lubanga Dyilo, is material to the Chamber's decision on the Prosecution request for redactions under rule 81 (2) of the Rules.
23. Moreover, the single judge emphasises the fact that the Prosecution has had the opportunity to present its views on the issues dealt with in the Decision.⁴¹
24. Accordingly, in the view of the single judge, none of the four instances alleged by the Prosecution in support of its claim that the Decision raises the issue of "the validity of 'general principles' which do not arise from a concrete dispute and do not resolve any pending application" provides support for such a claim. On the contrary, in all four instances, the

investigation of Thomas Lubanga Dyilo was also one of the grounds on which the proposed redactions marked with numbers (6), (7), (8) and (9) were based. See the annexes to the Prosecution Application.

⁴¹ The two instances identified by the Prosecution in relation to the findings of the single judge with regard to the procedure for making applications under rule 81 (2) and (4) of the Rules were first addressed by the Prosecution in the Prosecution Application, and subsequently in:

- a. the *In Camera* hearing of 2 May 2006, in which *inter alia* the Prosecution addressed at length the issue of *ex parte* applications under rule 81 (2) and (4). See the initial statement of the Prosecution in that hearing (ICC-01-01-01-06-T-6-Exp-EN, pp. 3 to 11). Concerning the regime encompassed by the term *ex parte* in the context of applications under rule 81 (2) and (4) of the Rules, the Prosecution explained its position as follows (ICC-01-01-01-06-T-6-Exp-EN, p. 6, lines 15 to 23) REDACTED
- b. the Prosecution Supplemental Brief (paras. 7 to 39), in which *inter alia* the Prosecution discussed at length different aspects of its application for non-disclosure of identity prior to the confirmation hearing and the redaction of identifying information from the statements of witnesses on which the Prosecution intends to rely at such a hearing.

On the other hand, concerning the issue of the temporary nature of the redactions under rule 81 (2) of the Rules and the related question of the temporal scope of the investigation of Thomas Lubanga Dyilo, in the Prosecution Observations of Disclosure filed on 6 April 2006, the Prosecution informed the Chamber and Duty Counsel for the Defence that, prior to its decision as to whether to amend the arrest warrant against Thomas Lubanga Dyilo, the Prosecution has an interest in not disclosing information which might jeopardise the ongoing investigation of Thomas Lubanga Dyilo (ICC-01/04-01/06-81-Conf-Exp, para. 10 (i)). Moreover, the Prosecution had the opportunity to present its view on this matter in the Prosecution Application (paras. 2 to 5), the *in camera* hearing on 2 May 2006 (ICC-01-04-01-06-T-6-Exp-EN, pp. 44 to 58) and the Prosecution Supplementary Brief (paras. 55 to 57), in which the Prosecution explained the basis of its proposed redactions under rule 81 (2) of the Rules for the purpose of the confirmation hearing, and sought the guidance and direction of the Chamber on the scope of such redactions.

Decision addresses matters raised by the parties in the ongoing proceedings of the case against Thomas Lubanga Dyilo.

25. As a result, the Prosecution's characterisation of the Decision as being of a "quasi-legislative" nature has no factual basis.⁴² Hence, due to the fact that no leave to appeal can be granted for an issue which is not dealt with in the Decision, there is thus no need to analyse whether the above-mentioned issue meets any of the two cumulative criteria provided for in article 82 (1)(d) of the Statute.

IV.3 The Issue of the Strong Presumption in favour of Disclosure of Witness Identity for the Confirmation Hearing without Balancing Other Factors

26. According to the Prosecution, the Decision, outside the consideration of any concrete application for non-disclosure under article 68 of the Statute and rule 81 (4) of the Rules, established a strong presumption that names and prior statements of all witnesses upon which the Prosecution intends to rely at the confirmation hearing must be disclosed.⁴³ In this regard, the Prosecution submits that "[t]he availability of protective measures cannot arbitrarily be limited, based on generalized findings or presumptions, without substantially affecting the fairness of the proceedings [...]" insofar as it denies victims and witnesses their right to have the merits of their individual circumstances considered.⁴⁴ In addition, it is the view of the Prosecution that "[f]orcing inappropriate disclosure of the identity of the witnesses at an early stage of proceedings also risks the very outcome of

⁴² The Prosecution Motion, para 53.

⁴³ *Ibid*, para 17

⁴⁴ *Ibid*, para 59

the trial, as it may leave a witness wrongly exposed to threats, intimidation or violence.”⁴⁵

27. Furthermore, according to the Prosecution, the strong presumption set out in the Decision creates a substantial risk of delaying the proceedings because “[t]he consideration of measures by the OTP and VWU (and the potentially affected witness) takes considerable time and resources, and the implementation of measures, especially the measure of relocation, also imposes a significant burden on the Court”.⁴⁶ Moreover, the Prosecution emphasises that the importance of this issue and of the viability of witness protection to the activities of the Court means that the issue warrants immediate resolution.⁴⁷

28. At the outset, the single judge would emphasise that the Decision does not establish any presumption which could have a negative impact on the merits of an application for protection purposes for non-disclosure prior to the confirmation hearing of the identity of those witnesses on which the Prosecution intends to rely at that hearing. On the contrary, what the Decision states is that non-disclosure prior to the confirmation hearing of the identity of Prosecution witnesses:

- a. constitute an exceptional measure, as opposed to the general rule,⁴⁸ insofar as such a measure: “(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) of the Statute”;⁴⁹ and

⁴⁵ Ibid, para 61.

⁴⁶ Ibid, para 61

⁴⁷ Ibid, para 63

⁴⁸ After the explanations of the Prosecution in the *in camera* hearing held on 2 May 2006 about the reasons why the identity of the witnesses referred to in the Prosecution Application should be kept from the Defence, REDACTED

⁴⁹ The Decision, para 31.

b. can be granted only, insofar as it is an exceptional measure, if: (i) other protective measures which are less restrictive of the rights of the Defence have been previously sought from the Victims and Witnesses Unit; and (ii) exceptional circumstances surrounding the relevant witness still require the non-disclosure of his or her identity due to the infeasibility or insufficiency of such measures.⁵⁰

29. Furthermore, the Decision does not state that the only other available measure for the protection of the witnesses on whom the Prosecution intends to rely at the confirmation hearing is their relocation. Although this is the position of the Prosecution,⁵¹ it is not shared by the representatives of the Victims and Witnesses Unit⁵² and is a matter about which the Decision has made no finding.

30. The single judge also underscores that the issue of non-disclosure prior to the confirmation hearing for protection purposes of the identity of those witnesses on which the Prosecution intends to rely at that hearing has arisen during the proceedings of the case against Thomas Lubanga Dyilo.⁵³

31. This notwithstanding, for the reasons set out below, the single judge considers that, regardless of the position embraced in the Decision, the determination of the criteria to be met for granting applications for protection purposes for non-disclosure prior to the confirmation hearing of the identity of those witnesses on which the Prosecution intends to rely at

⁵⁰ Ibid, para. 32 and pp 22 and 23

⁵¹ As the Prosecution stated in the Prosecution Supplemental Brief, para 16 REDACTED

⁵² As the Registry explained in the *in camera* hearing held on 2 May 2006 (ICC-01-04-01-06-T-6-Exp-EN, p 33, lines 23 to 25, p 34, lines 1 to 25 and p 35, lines 1 and 2) REDACTED

⁵³ In this regard, the single judge recalls that in paragraph 2 of the Prosecution Application, the Prosecution requested the non-disclosure prior to the confirmation hearing of the identity of several of the Prosecution witnesses. In addition, the Prosecution informed the Chamber (i) that, given that redacting witness statements is a resource-intensive task, the Prosecution, seeking to make efficient use of its resources, decided to obtain first the views of the Chamber on the question of redactions prior to engaging in further redactions, and (ii) that the purpose of the Prosecution Application was to obtain "guidance and direction" from the Chamber on this issue in order to prepare further similar applications.

that hearing would significantly affect both the fair and the expeditious conduct of the proceedings in the case against Thomas Lubanga Dyilo. Moreover, in the opinion of the single judge an immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings in such a case.

32. In the view of the single judge, this issue is directly related to the fairness of the proceedings insofar as non-disclosure could affect the ability of the Defence to fully challenge the evidence of the relevant Prosecution witnesses and has an impact on the rights of the Defence pursuant to articles 61 (3) and (6) (b) and 67 (1) of the Statute.
33. The single judge also considers that this issue is directly related to the expeditious conduct of the proceedings insofar as it is intimately connected to the process of seeking and implementing other less restrictive measures for the protection of those witnesses on which the Prosecution intends to rely at the confirmation hearing.
34. Furthermore, the single judge holds that an immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings in the case against Thomas Lubanga Dyilo insofar as (i) the Prosecution has repeatedly informed the Chamber that it intends to file further applications under article 68 of the Statute and rule 81 (4) of the Rules; and (ii) according to the 24 May 2006 Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Time Table Set in the Decision on the Final System of Disclosure (the "Decision on the Postponement of the Confirmation Hearing")⁵⁴, any such application in relation to the witnesses included in the Prosecution Charging Document

⁵⁴ ICC-01/04-01/06-126.

and List of Evidence shall be made as soon as practicable and no later than the 28 August 2006.⁵⁵

IV.4 The Issue of Whether the Investigation Must Be Completed prior to the Confirmation Hearing, Except Exceptional Steps, and the Related Ruling that Rule 81 (2) Therefore Cannot Justify Redactions or Non-Disclosure Past the Confirmation Hearing

35. According to the Prosecution, the Decision converts a prosecutorial policy to have the investigation largely completed before the confirmation hearing into an inflexible rule,⁵⁶ and is therefore erroneous insofar as it does not take into consideration (i) the different standards of review that the Prosecution must meet at the confirmation hearing and at trial, (ii) the fact that the Prosecution disclosure obligations continue after the confirmation hearing, (iii) the fact that, according to article 61 (9) of the Statute, the charges can be amended after the confirmation hearing; and (iv) the lack of an express limitation of the investigative powers of the Prosecution in article 54 of the Statute.⁵⁷
36. Furthermore, the Prosecution submits that the “[...] apparent determination in the Decision that the investigation relating to confirmed charges must largely be discontinued after confirmation” affects both the fairness and expeditiousness of the proceedings and the outcome of the trial. Moreover, the Prosecution alleges that the immediate resolution of this matter by the Appeals Chamber will materially advance the proceedings insofar as the loss of investigative opportunities could not be

⁵⁵ Ibid, p 8

⁵⁶ The Prosecution Motion, para 32

⁵⁷ Ibid, para 30.

remedied after trial and the impact of an appeal on this issue in the forthcoming preparations for the confirmation hearing will be minimal.⁵⁸

37. The single judge would first emphasise that the finding challenged by the Prosecution refers solely to the temporal scope of the ongoing investigation of Thomas Lubanga Dyilo and does not mean that under all circumstances the Prosecution is prevented from conducting investigative steps after the confirmation hearing.⁵⁹
38. Contrary to what the Prosecution claims, the single judge considers that, apart from being supported by the literal, contextual and teleological interpretations of article 61 of the Statute,⁶⁰ the challenged finding presents the necessary flexibility because: (i) on the one hand, it prevents the Prosecution from routinely undertaking additional investigative steps to fill the gaps in the case against Thomas Lubanga Dyilo after the charges have been confirmed so that by the time the trial starts, the evidentiary nature of the case against which Thomas Lubanga Dyilo must prepare has substantially mutated to his detriment; and (ii) on the other hand, it anticipates that exceptional circumstances might justify additional investigative steps after the confirmation hearing, which is fully consistent with the possibility of amending the charges under article 61 (9) of the Statute.

⁵⁸ *Ibid*, para 72.

⁵⁹ As shown by the references in paras. 32 and 68 of the Prosecution Motion, the Prosecution has obviously misinterpreted the finding of the single judge.

⁶⁰ This finding follows from the literal interpretation of paragraphs (4) and (9) of article 61 of the Statute because while the former explicitly states that the investigation may be continued before the confirmation hearing, the latter does not give the Prosecution such a power once the charges have been confirmed. Furthermore, this finding is supported by a contextual interpretation of article 61 of the Statute in light of (i) the lack of any other statutory provision which explicitly extends the investigation of a given case beyond the confirmation hearing; and (ii) the structure of the Statute, which first regulates the investigation and the prosecution in Part 5 (including the investigative powers of the Prosecution provided for in article 54 of the Statute) and then in Part 6 regulates the proceedings after the charges have been confirmed. This finding is also supported by the object and purpose of article 61 of the Statute, which seeks to prevent the Prosecution from routinely substantially mutating the evidentiary nature of the case against the defendant between the confirmation of the charges and initiation of the trial. Such a mutation would be at odds with the procedural rights of the defendant to fully prepare for and participate in the confirmation hearing granted by article 61 of the Statute.

39. The single judge deems that the issue of the temporal scope of the ongoing investigation into Thomas Lubanga Dyilo is totally unrelated to the different standards of proof which the Prosecution must meet at the confirmation hearing and at trial. The fact that the Prosecution does not need to present all the evidence gathered during the investigation at the confirmation hearing does not mean that the Statute and the Rules provide for two different investigation stages: (i) before the confirmation hearing to gather enough evidence to meet the standard required for the confirmation of the charges and (ii) after the confirmation hearing to find additional evidence allowing the Prosecution to meet the "beyond reasonable doubt" standard at trial.⁶¹
40. Moreover, the single judge considers that the issue of the scope of the ongoing investigation of Thomas Lubanga Dyilo is totally unrelated to the Prosecution disclosure obligations under the Statute and the Rules. The fact that the investigation of Thomas Lubanga Dyilo must, in principle, be completed before the confirmation hearing does not mean that all incriminating evidence and potentially exculpatory materials must be disclosed prior to that hearing. On the contrary, what the Prosecution must disclose prior to the confirmation hearing is (i) the evidence on which the Prosecution intends to rely at that hearing; and (ii) the bulk of the materials which are potentially exculpatory within the scope of article 67 (2) of the Statute, which were obtained from or belong to Mr Thomas Lubanga Dyilo or which are otherwise material for the Defence's preparation of the confirmation hearing according to rule 77 of the Rules.⁶² Hence, a second

⁶¹ Embracing the two-investigation-stage approach would have meant accepting a routine substantial mutation of the Prosecution's case from an evidentiary perspective after the charges are confirmed and before the initiation of the trial

⁶² See the explanation contained in Annex I to Decision on the Final System of Disclosure, paras. 116, 117 and 124 to 131. See also the timetable on pages 6 to 9 of the Decision on the Postponement of the Confirmation Hearing and the provisional timetable on pages 7 to 13 of the Decision on the Final System of Disclosure

disclosure phase will necessarily take place after the confirmation hearing and prior to the commencement of the trial in accordance with article 64 of the Statute.

41. The Prosecution also challenges the finding of the single judge concerning the temporary nature of the redactions granted under rule 81 (2) of the Rules in order not to prejudice the ongoing investigation of Thomas Lubanga Dyilo.⁶³ The single judge deems that this finding goes hand in hand with the finding on the temporal scope of the investigation of Thomas Lubanga Dyilo. Considering that the investigation must, in principle, be concluded before the initiation of the confirmation hearing and that, as provided for in rule 121 (4) and (5) of the Rules, the Prosecution must file the Prosecution Amended Charging Document and/or List of Evidence 15 days before the hearing, the justification for any redaction pursuant to rule 81 (2) of the Rules does not longer exist once this time-limit has expired.

42. This notwithstanding, for the reasons set out below, the single judge considers that, regardless of the position embraced by the Decision, the determination of the temporal scope of the ongoing investigation of Thomas Lubanga Dyilo and the consequent temporary nature of the redactions granted under rule 81 (2) of the Rules so as not to prejudice the investigation would significantly affect the fair and expeditious conduct of the proceedings in the case against Thomas Lubanga Dyilo. Furthermore, in the opinion of the single judge an immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings of the case.

⁶³ As stated on page 23 of the Decision, such redactions "shall not be maintained beyond the 15-day time limit provided for in rule 121 (4) and (5) of the Rules "

43. In this regard, the single judge considers that this issue is directly related to the fairness of the proceedings insofar as the substantial mutation between the confirmation hearing and the commencement of the trial of the evidentiary nature of the case against Mr Thomas Lubanga Dyilo as a result of routine investigative steps taken by the Prosecution to fill the gaps of the case against him is at stake.
44. The single judge also considers that this issue is directly related to the expeditious conduct of the proceedings of the case against Thomas Lubanga Dyilo, particularly if the Prosecution is allowed to undertake all sorts of routine investigative steps after the charges against Thomas Lubanga Dyilo have been confirmed.
45. Moreover, in view of the fact that the confirmation hearing has been rescheduled for 28 September 2006, and that, in its planning, the Prosecution must therefore take into consideration that the ongoing investigation of Thomas Lubanga Dyilo must be, in principle, brought to an end accordingly, the single judge is of the view that an immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings of the case.

IV.5 The Issue of *Ex Parte* Filings under Rules 81 (2) and (4) Can Never Be Made without Contemporaneous Notification to the Other Party

46. According to the Prosecution, “[t]here is no *ex parte* application made to date of which the defence lacks awareness, and thus, this ruling is again made outside the context of any concrete or pending dispute”.⁶⁴ Moreover,

⁶⁴ The Prosecution Motion, para 42

the Prosecution “[...] is not aware of any case in which the European Court of Human Rights has been called upon to decide whether a lack of notice necessarily fails to satisfy the requirements of Article 6 (1).”⁶⁵ Hence, “[t]he blanket decision that there can never be circumstances that could justify delaying *inter partes* notification of the existence of an *ex parte* application under Rule 81 (1) and (4) of the Rules”⁶⁶ affects the fairness of the proceedings insofar as: (i) it is tantamount to a prejudgement and denial of the consideration of any future applications on the merits; and (ii) it may substantially impair the ongoing investigation.⁶⁷

47. Furthermore, the Prosecution submits that the immediate resolution of the issue is required as it may “ [...] impair the ability of the parties to capitalize on investigative tools and sources [...]”;⁶⁸
48. The single judge underscores that the issue of the regime encompassed by the term *ex parte* in the context of applications under rule 81 (2) and (4) of the Rules was raised by the fact that the Prosecution made several *ex parte* filings, including the Prosecution Application and the Prosecution Supplemental Brief,⁶⁹ with the aim to not only prevent the Defence from responding to the content of such filings but to also deprive the Defence of any knowledge about the existence of such filings.⁷⁰
49. To date, neither the European Court of Human Rights nor the Inter-American Court of Human Rights has affirmed the consistency of “secret”

⁶⁵ Ibid, para 45

⁶⁶ Ibid, para 74

⁶⁷ Ibid, para 75

⁶⁸ Ibid, para 76

⁶⁹ In this regard, the single judge underscores that, in its initial statement at the *in camera* hearing on 2 May 2006, the Prosecution emphasised REDACTED

⁷⁰ As the Prosecution stated in its initial statement at the *in camera* hearing on 2 May 2006 (ICC-01-04-01-06-T-6-Exp-EN, p. 5, lines 23 to 25 and p. 6, lines 1 to 6) REDACTED

applications for non-disclosure and related proceedings with internationally human rights standards.

50. On the contrary, what the European Court of Human Rights has endorsed to date is a regime encompassed by the term *ex parte* in which “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 interests grounds”.⁷¹ This is in addition to the acknowledgement that the *ex parte* proceedings constitute a restriction on the rights of the Defence, and, therefore, resorting to them is limited to those cases in which the requirements of necessity and proportionality are met.⁷²
51. Moreover, as the single judge already stated in the bench decision issued at the hearing of 26 April 2006, “[...] 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 victims and witnesses, the preservation of ongoing investigations and the protection of the confidentiality of the information.”⁷³
52. This also seems to have been the Prosecution approach when it filed a public redacted version, as opposed to a redacted version for the Defence only, of its 7 June 2006 Submission of Information on the Prosecution’s Efforts to Obtain the Consent of the Information Provider to Disclose to the Defence an Item of Potentially Exculpatory Material (the “7 June 2006 Prosecution Submission”).⁷⁴ The single judge points out that notice of the

⁷¹ *Jasper v United Kingdom*, “Judgment”, 16 February 2000, Application No 27052/95, para 55

⁷² The Decision, footnotes 10 and 12

⁷³ Transcript of the hearing held on 26 April 2006, ICC-01-04-01-06-T-5-CONF-EN, p 5, line 25 and p. 6, lines 1 to 10

⁷⁴ ICC-01/04-01/06-142

relationship of this matter, which is also the subject of the 19 April 2006 Prosecution Filing, with the Prosecution confidentiality obligations under article 54 (3)(e) of the Statute had been previously given to the Defence only.⁷⁵ Indeed, the single judge underscores that the Defence was given notice of the existence of this matter despite the strong opposition of the Prosecution at the *in camera* hearing on 2 May 2006.⁷⁶

53. In this regard, the single judge observes that the 7 June 2006 Prosecution Submission seems to indicate a change of approach insofar as it now sees no danger in giving notice not only to the Defence but also to the public of the existence and a full explanation of the current status of a matter related to its confidentiality obligations under article 54 (3) (e) of the Statute.
54. This notwithstanding, for the reasons set out below, the single judge considers that, regardless of the position embraced by the Decision, the determination of the regime encompassed by the term *ex parte* in the context of applications under rule 81 (2) and (4) of the Rules, is an issue which would significantly affect both the fair and the expeditious conduct of the proceedings in the case against Thomas Lubanga Dyilo. Moreover, in the opinion of the single judge, an immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings in such a case.
55. In the view of the single judge, this question is directly related to the fairness of the proceedings, insofar as what is at stake is the Defence

⁷⁵ The 26 April 2006 Decision was issued on the bench by the single judge in closed session. In addition, the public redacted version of the "Decision on the Prosecution Filing of 19 April 2006 and Application of 24 April 2006", issued by the single judge on 22 May 2006, redacted all references to the fact that the 19 April 2006 Prosecution Filing was related to the Prosecution's confidentiality obligations under article 54 (3) (e) of the Statute.

⁷⁶ As the Prosecution indicated at the *in camera* hearing of 2 May 2006 (ICC-01-04-01-06-T-6-Exp-EN, p. 8, lines 12 to 21) REDACTED

procedural right to be aware and, as far as possible, to have a say in the disposition of the Prosecution motions seeking to restrict the disclosure prior to the confirmation hearing of evidence and materials, to which, as a general rule according to the Statute and the Rules, the Defence is entitled to have access.

56. The single judge also considers that this issue is directly related to the expeditious conduct of the proceedings because, as shown by the above-mentioned jurisprudence of the European Court of Human Rights,⁷⁷ the regime encompassed by the term *ex parte* is connected to the shaping of a regime under which the Defence can get notice and participate as far as possible in the decision-making process of the Prosecution applications.

57. Moreover, considering that the Prosecution has repeatedly informed the Chamber of its intention to file further applications under rule 81 (2) and (4) of the Rules⁷⁸ and considering that the Decision on the Postponement of the Confirmation Hearing establishes several deadlines for making such applications,⁷⁹ it is the view of the single judge that an immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings in the case against Thomas Lubanga Dyilo.

V. Conclusion

For the above-mentioned reasons, the single judge:

⁷⁷ *Jasper v United Kingdom*, supra footnote 71, paras 52 to 58. See also, the jurisprudence cited in footnotes 9 to 13 of the Decision.

⁷⁸ In addition, on 19 June 2006, the Prosecution filed the "Prosecution's Application pursuant to Rule 81 (2)", in which the Prosecution requests the Chamber to authorise redactions in several additional witness statements (ICC-01/04-01/06-153-Conf, and *ex parte* annexes).

⁷⁹ Decision on the Postponement of the Confirmation Hearing, pp 6 to 8.

DECIDES to restate that the Decision establishes enforceable legal standards governing applications under rule 81 (2) and (4) of the Rules.

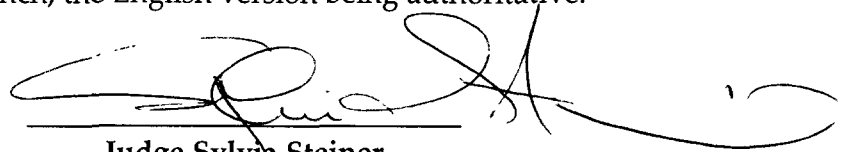
DECIDES to reject *in limine* the Prosecution request for reconsideration.

DECIDES to deny the Prosecution request for leave to appeal in relation to the issue of the validity of 'general principles' which do not arise from a concrete dispute and do not resolve any pending application.

DECIDES to grant the Prosecution leave to appeal the Decision on the following three issues:

- (i) The issue of the determination of the criteria to be met for granting applications for protection purposes for non-disclosure prior to the confirmation hearing of the identity of those witnesses on which the Prosecution intends to rely at the confirmation hearing;
- (ii) The issue of the temporal scope of the ongoing investigation of Thomas Lubanga Dyilo and the consequent temporary nature of those redactions granted under rule 81 (2) of the Rules in order not to prejudice that investigation; and
- (iii) The issue of the regime encompassed by the term *ex parte* in the context of applications under rule 81 (2) and (4) of the Rules.

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



Judge Sylvia Steiner
Single Judge

Dated this Friday 23 June 2006

At The Hague

The Netherlands