

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : **English**

No.: **ICC-01/04-01/06**
Date: **20 October 2006**

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding
Judge Erkki Kourula
Judge Philippe Kirsch
Judge Navanethem Pillay
Judge Georgios M. Pikis

Registrar: Mr Bruno Cathala

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

Public Redacted Document

**Prosecution's Response to "Defence Appeal Brief in Relation to First Decision on the
Prosecution Requests and Amended Requests for Redactions under Rule 81"**

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Introduction

1. In relation to the grounds of appeal raised by the Appellant and the relief sought:
 - On the first issue raised by the Appellant, the Prosecution expresses no view on whether the factual findings supporting the authorization of non-disclosure of identities was adequate, although it believes that the level of specificity required in the findings is not the level proposed by the Appellant. The Prosecution would not oppose the Appeals Chamber remanding the matter to the Single Judge for the confined purpose of permitting her further to specify the factual basis for her determinations. Given the limited scope of the issue on appeal, and the impending date of the confirmation hearing, the Prosecution respectfully submits that in the event the Chamber is doubtful of the adequacy of the findings, this may be the most expeditious course.
 - On the second issue, to the extent that the Appeals Chamber considers that it is in a position to address the issue, the Prosecution opposes this ground of appeal as the Appellant has not demonstrated any error which would justify appellate intervention in the discretionary decision of the Single Judge.
 - On the third issue, the Prosecution opposes this ground of appeal as the Statute and the Rules clearly support the use of summaries in the manner contemplated in the impugned Decision.
2. The Prosecution notes that a recent decision of this Chamber has settled that non-disclosure of the identity of witnesses upon whom the Prosecution intends to rely at the confirmation hearing is permissible, although it should be viewed as the exception rather than the rule.¹

Procedural History

3. On 15 May 2006, the Single Judge issued the “Decision on the Final System of Disclosure and the Establishment of a Timetable”.²

¹ Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence”, ICC-01/04-01/06-568, 13 October 2006 (“13 October Appeal Judgment”), paras. 34-39.

² ICC-01/04-01/06-102 (“15 May Decision”).

4. On 19 May 2006, the Single Judge issued the “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules”.³
5. On 15 September 2006, the Single Judge issued the “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”.⁴
6. On 21 September 2006, Counsel for Thomas Lubanga Dyilo filed a “Request for Leave to Appeal the First Decision on the Prosecution’s Requests and Amended Requests for redactions Under Rule 81”.⁵
7. On 27 September 2006, the Prosecution filed its “Substantive Response to Thomas Lubanga Dyilo’s 21 September 2006 Request for Leave to Appeal”.⁶
8. On 28 September 2006, the Single Judge granted leave to appeal in respect of three issues.⁷
9. On 10 October 2006,⁸ the Appellant filed a “Defence Appeal Brief in Relation to First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”.⁹
10. The Prosecution hereby files its response to the Appeal Brief.

Background

11. The Pre-Trial Chamber has imposed, and the Prosecution has implemented, an open and expansive approach to disclosure in the context of the confirmation hearing. The Prosecution has consistently endeavoured at the pre-confirmation stage to provide the Appellant with as much information and evidence as possible, in particular in respect of potentially exculpatory material and inspection of items which may be material to

³ ICC-01/04-01/06-108 (“19 May Decision”).

⁴ ICC-01/04-01/06-437 (“the Decision” or the “impugned Decision”).

⁵ ICC-01/04-01/06-456.

⁶ ICC-01/04-01/06-481 (“Prosecution Response to Request for Leave”).

⁷ Decision on Second Defence Motion for Leave to Appeal, ICC-01/04-01/06-489 (“Decision Granting Leave”). Leave was granted to appeal: (i) whether the Decision lacked factual reasoning in light of the fact that it was issued during *ex parte* proceedings for non-disclosure of identity of Prosecution witnesses under rule 81 (4) of the Rules, (ii) whether the principle of necessity and proportionality was appropriately applied in deciding on the non-disclosure of some Prosecution witnesses for the purpose of the confirmation hearing, (iii) whether the use at the confirmation hearing of summary evidence in relation to Prosecution witnesses for which non-disclosure of identity has been granted is permissible under the Court’s applicable law.

⁸ On 9 October 2006, the Appellant filed a “Request for Extension of Time” (ICC-01/04-01/06-533), requesting that the deadline for filing the document in support of appeal be extended until “no later than 10am 10 October 2006”. The Prosecution did not oppose that request (ICC-01/04-01/06-547). On 12 October 2006, the Appeals Chamber granted the extension of time and accepted the filing of the Appeal brief (ICC-01/04-01/06-562).

⁹ ICC-01/04-01/06-546 (“Appeal Brief”).

the preparation of the defence.¹⁰ Further, the Prosecution has consistently recognized that the identities of its core witnesses must be disclosed to the Appellant, in advance of the confirmation hearing.¹¹ The confirmation hearing was first postponed from its initial date of 27 June 2006 in order to maximize disclosure, in particular by ensuring that protective measures are put in place for victims and witnesses to allow the disclosure of the identities of the core witnesses to the Appellant.¹² As the proceedings have continued, the security situation in the DRC deteriorated, and VWU presented its recommendations, it has become clear that the degree of disclosure in relation to the identity of certain witnesses cannot be as comprehensive as the Single Judge and the participants had initially intended, mainly because the circumstances prevailing in the DRC severely restrict the range of options that are available to the Court in order to fulfill its duty to ensure the safety as well as the physical and psychological well-being of witnesses.¹³

12. Despite these difficulties, the Appellant has already received extensive disclosure from the Prosecution; more than is required under the relevant provisions of the ICC Statute and Rules, and certainly far more than would have been disclosed at this early stage of proceedings in the other international criminal courts and tribunals.¹⁴ Substantial disclosure of evidence which the Prosecution intends to rely on at the confirmation hearing was made to the Appellant by 28 August 2006, significantly in advance of the statutory requirement of 30 days before the confirmation hearing, which is now

¹⁰ The Prosecution continues to seek to provide the Appellant with unredacted statements of witnesses where circumstances permit: see e.g. Prosecution Application pursuant to Rules 81(2) and 81(4), ICC-01/04-01/06-518-Conf, 5 October 2006, para. 10.

¹¹ Prosecution's Request pursuant to Rule 121(7) for Postponement of the Date of the Confirmation Hearing, ICC-01/04-01/06-113-Conf-Exp, 22 May 2006, para. 9; See also ICC-01/04-01/06-T-7-Conf-Exp-EN, 23 May 2006, in particular page 36, lines 1-8; ICC-01/04-01/06-T-14-Conf-Exp-EN, 25 August 2006.

¹² Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Timetable set in The Decision on the Final System of Disclosure, ICC-01/04-01/06-126, 24 May 2006, p. 4, referring to the Appellant having "access to the identities and the unredacted versions of the statements of the witnesses referred to in the Prosecution's Submission and the Prosecution's Request" (emphasis added). See further Prosecution's Response to the Defence Request for Interim Release, ICC-01/04-01/06-531, 9 October 2006, paras. 24-25.

¹³ The Single Judge has stressed that the recent restrictions are due to "the exceptional circumstances in the present case" – Decision Granting Leave, p. 8; See also Decision concerning the Prosecution Proposed Summary Evidence, ICC-01/04-01/06-517, 4 October 2006 ("Decision on Proposed Summary Evidence"), pp. 3-4.

¹⁴ For a summary of the extent of the Prosecution's disclosure, see ICC-01/04-01/06-T-20-EN, 26 September 2006, page 55, lines 3-17. The Prosecution notes the submissions of the Appellant in paras. 25 and 66-71. The Prosecution submits that the disclosure regime for the purpose of the confirmation hearing must be considered in the context of the limited scope and objectives of that hearing, the different standard of proof required and the different consequences of a positive finding when compared with trial. The Prosecution incorporates its submissions in the "Prosecution's Document in Support of Appeal", ICC-01/04-01/06-183, 5 July 2006, paras. 8-10, by reference.

scheduled to commence on 9 November 2006.¹⁵ Crucially, the Appellant has also received substantial disclosure of potentially exculpatory material, including potentially exculpatory material relating to the witnesses whose identities have not been disclosed, which is in no way affected by the impugned Decision.¹⁶

13. The measures approved by the impugned Decision are of limited scope, and the Decision does not impose blanket restrictions on disclosure.¹⁷ REDACTED.¹⁸

14. The Prosecution further submits that the Single Judge has demonstrated a balanced and reasonable approach to the complex issue of weighing defence interests and the protection of victims and witnesses. The Decision did in fact invite the Prosecution to consider various options with respect to the witnesses covered by the Decision, as the Appellant has suggested it should have.¹⁹ The Single Judge has also made it clear that the Prosecution cannot rely on details which have been redacted, which might otherwise increase the weight to be given to the evidence of a witness, and has emphasized that relying on summary evidence “shall necessarily have an impact on the probative value of the summary evidence authorised”.²⁰

15. The impugned Decision was the result of a prolonged and fact-intensive discourse, over many months.²¹ The record reveals the number and frequency of filings and conferences devoted to disclosures to the defence and witness protection. The Single Judge had before her detailed information about the witnesses, the statements, the security risks through a series of filings and hearings, and after hearing from the Prosecution and the VWU issued a Decision which built on earlier decisions of the Single Judge.²² These extended procedures before the Single Judge, the limited scope of the confirmation hearing,²³ and the burden of proof at the confirmation hearing form an integral part of the context in which the impugned Decision should be viewed.

¹⁵ Rule 121(3).

¹⁶ See e.g. Decision on Proposed Summary Evidence, p. 6-7.

¹⁷ In contrast to the implication in para. 22 of the Appeal Brief, the Prosecution is not seeking blanket redaction of identities “in relation to every witness”. The Prosecution further submits that the fact that a Trial Chamber in the ICTY, on the particular facts of that case, was not satisfied that the evidence justified protective measures is of limited relevance to the instant appeal.

¹⁸ REDACTED.

¹⁹ Appeal Brief, para. 35; Decision, p. 10 (option (i)).

²⁰ Decision on Proposed Summary Evidence, p. 4.

²¹ This process had been ongoing for approximately 5 months when the impugned Decision was issued.

²² See para. 18, and footnote 29, below.

²³ The Single Judge has referred a number of times to the limited scope of the confirmation hearing (see e.g. 19 May Decision, para. 34; Impugned Decision, p. 8; Decision Granting Leave, p. 8; Decision on Proposed Summary Evidence, p. 5. See also 15 May Decision, paras. 55-56). The manner in which the confirmation

16. Finally, and in relation to the proper considerations in determining restrictions on disclosure under Rule 81(4), the Prosecution notes that the Appellant had multiple opportunities to make submissions on the legal standard applicable to the applications and any other matter which might impact on their disposition.²⁴ Many of the concerns that the Appellant is now raising before the Appeals Chamber would have been addressed if he had taken proper advantage of the opportunities afforded him. In principle, the failure of the Appellant to address issues of which he had fair notice before the original Chamber should not be able to be remedied through an appeal.²⁵ These failures by the Appellant to raise arguments in response to the applications, in particular relating to the interpretation of Rule 81(4) and the proper considerations in making determinations under that rule, before the Pre-Trial Chamber in a timely fashion is of even more concern given the pending confirmation hearing, which has already been postponed twice and is scheduled to commence on 9 November 2006.²⁶

The first ground – whether the Decision lacked factual reasoning in light of the fact that it was issued during *ex parte* proceedings for non-disclosure of identity of Prosecution witnesses under rule 81 (4) of the Rules

17. The Prosecution submits that the first issue certified for appeal by the Single Judge relates to whether the factual reasoning in the Decision satisfies the obligation to provide a reasoned decision. The Prosecution notes that the Single Judge specifically did not grant leave to appeal the sufficiency of the legal reasoning.²⁷ The Prosecution therefore does not agree with the Appellant's characterization of the issue as "whether

hearing will be conducted will be the subject of a status conference on 26 October 2006: Decision on the date of the confirmation hearing, ICC-01/04-01/06-521-tEN, 5 October 2006, at p. 5.

²⁴ The very purpose of ordering the Prosecution to file an *inter partes* version of any application under Rule 81 in the 19 May Decision was to inform the Defence of the legal basis of any such application so that they would have "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" (para. 17). The Appellant never filed any response to any of the numerous applications citing Rule 81(4) as the legal basis – see footnote 45, below. See also, Prosecution's Response to Thomas Lubanga Dyilo's 27 September 2006 Request for Leave to Appeal the Second Decision on Prosecution Requests for Redactions, ICC-01/04-01/06-497, 3 October 2006, paras. 25-29.

²⁵ See e.g. *The Prosecutor v. Kambanda*, ICTR 97-23-A, Appeal Judgement, 19 October 2000, paras. 25-27; *The Prosecutor v. Akayesu*, ICTR-96-4-A, Appeal Judgement, 1 June 2001, para. 361, 408; *Prosecutor v. Blaskic*, IT-95-14-A, Appeal Judgment, para. 222; *Prosecutor v. Kupreskic*, IT-95-16-A, Appeal Judgement, 23 October 2001, para. 408; *Prosecutor v. Delalic et al*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 724; *Prosecutor v. Blagojevic*, IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace his Defence Team, 7 November 2003, para. 10.

²⁶ The Prosecution submits that the likely delay to proceedings may be considered in deciding whether to refuse to examine an argument when a party failed to raise the issue in a timely fashion before the appropriate Chamber.

²⁷ Decision Granting Leave, p. 7.

the factual circumstances cited by the Single Judge meet the threshold requirements for imposing protective measures.”²⁸

The degree of factual reasoning detailed in the Decision

18. The Decision built on, and referred to, a series of prior decisions, filings and hearings (albeit mostly *ex parte*),²⁹ and the Prosecution has no doubt that the Single Judge had available to her sufficient factual information to make the required determinations,³⁰ even if they are not explicit in the text of the Decision. The Prosecution defers to the assessment of the Appeals Chamber regarding the adequacy of the factual findings in the Decision.

19. The Prosecution recognizes that the right to a reasoned decision is an important element of the right of all participants to a fair process. Such a right requires that the Chamber “address the essential issues which were submitted to its jurisdiction”,³¹ and

²⁸ Appeal Brief, para. 8. The Prosecution notes that the Appellant has not identified the nature of the error allegedly made by the Single Judge (contrast 13 October Appeal Judgment, para. 19). The Prosecution interprets the Appeal Brief as alleging a procedural error, in as much as the Single Judge failed to provide sufficiently detailed reasons (Appeal Brief, paras. 13-16); and also alleging an error of law (error of applied law) in that the Single Judge failed to properly demonstrate that she had correctly applied the legal standard for protective measures to the facts (Appeal Brief, paras. 17-25). In respect of the second alleged error, the Prosecution submits that this does not form part of the issue certified for appeal as the Single Judge expressly did not certify the legal aspects of the Decision for appeal. The Prosecution further notes that the Appellant’s submission regarding whether the Decision established sufficient criteria for the use of summaries is misconceived (Appeal Brief, para. 26). The purpose of the Decision was not to authorize summaries, and while it was premised on summaries being an available option, there was no requirement to detail the considerations at this stage.

²⁹ In addition to the Prosecution’s applications and amended applications, these include the “Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Timetable set in The Decision on the Final System of Disclosure”, ICC-01/04-01/06-126, 24 May 2006 (which refers at p. 3 to the status conference held on 23 May 2006, ICC-01/04-01/06-T-7-Exp-EN); “The Submission of the Registrar on Assessments of the feasibility and availability of protective measures in terms of the order of Pre-Trial Chamber I on 5 September 2006”, ICC-01/04-01/06-411-Conf-Exp, 11 September 2006. The VWU explained its recommendations, and the Prosecution provided its response, in a hearing on 23 August 2006 (ICC-01/04-01/06-T-12-Conf-Exp). The Single Judge also held an *inter partes* hearing at which the parties discussed general measures relating to witness protection, though not the specific applications which were the subject of the impugned Decision, on 29 August 2006 (ICC-01/04-01/06-T-15-Conf-EN). Furthermore, at hearings on 1, 8 and 12 September 2006 (ICC-01/04-01/06-T-16-Conf-Exp, ICC-01/04-01/06-T-18-Conf-Exp and ICC-01/04-01/06-T-19-Conf-Exp), VWU participated actively and presented the Single Judge with its independent assessment of the necessity and scope of the proposed redactions.

³⁰ See also Prosecution’s Response to the Defence Request for Interim Release, ICC-01/04-01/06-531, 9 October 2006, paras. 12-13.

³¹ *Helle v. Finland*, ECtHR, Judgment of 19 December 1997, para. 60; *Jokela v. Finland*, ECtHR, Judgement of 21 May 2002, para. 73.

while a Chamber need not articulate every step in its reasoning,³² it must indicate the major matters of importance to the decision.³³

20. The relevant legal principles include the maxim that the degree of reasoning which will satisfy this right depends on the nature of the decision, and must be determined based on the circumstances of the case.³⁴ One such consideration is the complexity of the issue at hand: the more complex the issue, the more care must be exercised in articulating the factors relied upon.³⁵ More detailed reasoning may also be appropriate when the ruling is decisive for a substantive right of a participant.³⁶ The reasoning given in the formal decision should not be viewed in isolation, but should be considered in light of the surrounding proceedings and in the context of relevant supporting decisions.³⁷

21. A reasoned decision serves to ensure that participants may make effective use of any appeal, and that an Appeals Chamber may meaningfully review the decision.³⁸ It also serves to demonstrate that the parties have been heard.³⁹ The Prosecution submits that in some circumstances, in the context of *ex parte* proceedings or filings, the degree of factual reasoning that can be presented in an *inter partes* decision may legitimately be

³² *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgement, 26 May 2003, para. 217; *Prosecutor v. Kvočka et al*, IT-98-30/1-A, Appeals Judgement, 28 February 2005 para. 398. See also *Prosecutor v. Ntakirutimana*, ICTR-96-17-A, Appeals Judgement, 13 December 2004, para. 432.

³³ *Prosecutor v. Ojdanić et al.*, IT-99-37, Decision on Provisional Release, Separate Opinion of Judge Shahabuddeen, 30 October 2002, para. 11. See also *Prosecutor v. Ojdanić et al.*, IT-99-37, Decision on Provisional Release, 30 October 2002, para. 6; *Prosecutor v. Simatović*, IT-03-69, Decision on Provisional Release, 28 July 2004, para. 9: must indicate all relevant factors which a reasonable Trial Chamber would have been expected to take into account.

³⁴ *Prosecutor v. Furundžija*, IT-95-17/1-A, Appeals Judgement, 21 July 2000, para. 69, citing *Ruiz Torija v. Spain*, ECtHR, Judgment of 9 December 1994, para. 29, and *Van de Hurk v. The Netherlands*, ECtHR, Judgment of 19 April 1994, para. 61. Approved in *Prosecutor v. Musema*, ICTR-96-13-A, Appeals Judgement, 16 November 2001, para. 18.

³⁵ *Prosecutor v. Kupreškić et al*, IT-95-16-A, Appeals Judgement, 23 October 2001, para. 39; *Prosecutor v. Kvočka et al*, IT-98-30/1-A, Appeals Judgement, 28 February 2005, para. 24.

³⁶ See e.g. *Georgiadis v. Greece*, ECtHR, Judgment of 29 May 1997, para. 43.

³⁷ *Prosecutor v. Milošević*, IT-02-54, Decision on the Interlocutory Appeal by the *Amici Curiae* against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 24 January 2004, para. 7. See also *H. v. Belgium*, ECtHR, Judgement of 30 November 1987, Joint Concurring Opinion of Judges Lagergren, Pettiti and Macdonald “The question whether a judgment is so deficient in reasoning as to amount to a denial of the right to a fair hearing and a failure of justice, is therefore one which necessarily has to be appreciated in the light both of the particular case and of the judgment as a whole.”; *Bell v. Jarvis*, 236 F.3d 149 (U.S. Court of Appeals, 4th Circuit, 2000) “although the better course would have been for the trial judge to make detailed findings, the findings made, viewed in conjunction with the known circumstances of the case and the record developed, provide a sufficient basis for reviewing courts” to exercise their function.

³⁸ *Prosecutor v. Nikolić*, IT-02-60/1-A, Appeals Judgement, 08 March 2006, para. 96; *Prosecutor v. Babić*, IT-03-72-A, Appeals Judgement, 18 July 2005, para. 17; *Hirvisaari v. Finland*, ECtHR, Judgement of 27 September 2001, [2001] ECHR 559, para. 30; *Suominen v. Finland*, ECtHR, Judgement of 1 July 2003, paras. 36-37.

³⁹ *Suominen v. Finland*, ECtHR, Judgement of 1 July 2003, paras. 36-37.

limited so as not to prejudice the interests protected by the *ex parte* nature of the proceedings.⁴⁰

22. If the Appeals Chamber were to conclude that the factual reasoning is insufficient then it would seem appropriate for the Appeals Chamber to remand this matter to the Single Judge for the confined purpose of detailing the factual basis on which the Decision was made.⁴¹ In light of the approaching date set for the commencement of the confirmation hearing, this may be the most expeditious means of resolving the matter.

The specific test proposed by the Appellant is not appropriate

23. The Prosecution submits that the level of specificity that the Appellant would require of the Single Judge's determinations is incorrect, especially at this stage in the proceedings.⁴² The ICTY authorities first cited by the Appellant⁴³ relate to the level of detail which could be provided in an application for protective measures, when circumstances permit such detail. Such cases about applications for protection are not relevant here. The Appellant did not challenge or request for further explication of any of the applications,⁴⁴ despite explicit and repeated opportunities.⁴⁵ To attempt to remedy this deficiency through an appeal, when there was a procedural avenue for raising it before the Pre-Trial Chamber, is inappropriate.⁴⁶

⁴⁰ The Appeals Chamber noted, in its 13 October Appeal Judgment, that the Pre-Trial Chamber has a discretion to determine, within the framework of the applicable law, whether applications or hearings should be made *ex parte* (para. 66). On the same basis, the Prosecution submits that there must be some discretion in the extent to which information is maintained *ex parte*. In these instances, the Chamber might render additional findings or reasoning *ex parte*, if it finds that such confidential treatment is warranted in the circumstances.

⁴¹ The Prosecution submits that, if necessary, some factual findings could be made *ex parte*, or under seal, to provide a full record of the decision but without compromising the interests protected by the *ex parte* nature of aspects of the proceedings. The Appellant appears to recognize the possibility of reasons being given in such a way: see Defence Appeal Brief in Relation to Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, ICC-01/04-01/06-577, 16 October 2006, para. 14, referring to the possibility of supplementing reasons in a confidential annex.

⁴² Appeal Brief, paras. 15-16.

⁴³ Appeal Brief, paras. 15-16.

⁴⁴ For example, details such as the category of the witness – Appeal Brief, paras. 23-24. The Prosecution is not conceding that the disclosure of any particular detail would be appropriate, but this issue should have been raised and argued before, and decided by, the Single Judge.

⁴⁵ The Applicant never filed a response to any of the numerous Prosecution *inter partes* filings identifying Rule 81(4) as the basis for the redactions sought, including: Prosecution's Application pursuant to Rules 81(2) and 81(4), ICC-01/04-01/06-341-Conf, 18 August 2006; Prosecution's Application pursuant to Rules 81(2) and 81(4), ICC-01/04-01/06-347-Conf, 23 August 2006; Prosecution's Application pursuant to Rules 81(2) and 81(4) with Further Details, ICC-01/04-01/06-358-Conf, 28 August 2006; Prosecution's Amended Application pursuant to Rules 81(2) and 81(4), ICC-01/04-01/06-381-Conf, 4 September 2006; Prosecution's Application pursuant to Rules 81(2) and 81(4), ICC-01/04-01/06-392-Conf, 6 September 2006; Prosecution's Application pursuant to Rules 81(2) and 81(4), ICC-01/04-01/06-395-Conf, 7 September 2006.

⁴⁶ See, e.g., Decision on Defence Motion for Leave to Appeal, ICC-01/04-01/06-338, 18 August 2006, p. 8.

24. The jurisprudence of the other international criminal courts and tribunals do not support the approach advocated by the Appellant. The Prosecution notes that the Appellant has relied exclusively on the jurisprudence of the ICTY, relating to protective measures imposed in advance of trial, to support the proposition that the exceptional nature of the circumstances justifying the protective measure must “inhere to the witness in question”.⁴⁷ The Prosecution agrees that protective measures, at whatever stage in the proceedings, should be evaluated in light of the individual characteristics of the witness.⁴⁸ However in considering the nature of the required findings, the difference between a confirmation hearing and a trial cannot be ignored. The objective of the confirmation hearing, the nature of the presentation of evidence, the assessment of evidence by the Chamber and the standard which the evidence must meet,⁴⁹ as well as the consequences for the accused, all differ from that at trial.⁵⁰ The balance to be struck between the interests of the accused and the interests of victims and witnesses may therefore legitimately be different prior to the confirmation hearing, when any potential trial is still many months away, as opposed to during the immediate preparation for that trial.⁵¹ The Prosecution submits that these factors all support the determination made by the Pre-Trial Chamber, which may be different at this stage as compared with the trial stage, and that the Chamber should not be required to articulate the particular circumstances of each witness that justify protective measures.

25. A more balanced consideration of tribunal jurisprudence supports this view. The jurisprudence confirms that individual discussion of the personal characteristics of the witnesses is not required in decisions imposing protective measures,⁵² especially at the pre-trial stage. In *Prosecutor v Norman*, the Trial Chamber explicitly distinguished protective measures at the pre-trial phase of the Court proceedings from protective

⁴⁷ Appeal Brief, para. 19.

⁴⁸ The Prosecution notes that the Single Judge did perform this assessment prior to issuing the Decision – “and after having carefully examined each individual case”, Decision, p. 7.

⁴⁹ The legal threshold for the confirmation of charges (substantial grounds under Article 61 (7)) is lower than for conviction at trial (beyond reasonable doubt under Article 66 (3)).

⁵⁰ See further “Prosecution’s Document in Support of Appeal”, ICC-01/04-01/06-183, 5 July 2006, paras. 8-10.

⁵¹ The ECHR has recognized that the protection of identities of witnesses is subject to a different appraisal during the pre-trial or investigative phases, as compared with using such evidence in a trial – see footnote 79, below.

⁵² See e.g. *Prosecutor v. Bizimungu*, ICTR-99-50-T, Decision on Prosecutor’s Motion for Protective Measures for Witnesses, 22 September 2000; *Prosecutor v Nyiramasuhuko*, ICTR-97-21-T, Decision on Prosecutor’s Motion for Protective Measures for Victims and Witnesses, 27 March 2001; *Prosecutor v Bicomumpaka*, ICTR-99-50-T, Decision on Prosecutor’s Motion for Protective Measures for Witnesses, 12 July 2000; *Prosecutor v Renzaho*, ICTR-97-31-I, Decision on Prosecutor’s Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 17 August 2005. In the context of the ICTY, see e.g. *Prosecutor v Seselj*, IT-03-67-PT, Decision on the Prosecution’s Sixth Motion for Protective Measures for Witnesses, 8 December 2005.

measures at the trial stage,⁵³ and went on to observe that “in matters of such delicacy and sensitivity, it would be unrealistic to expect either the Prosecution or the Defence, at the pre-trial phase, to carry the undue burden of having each witness narrate in specific terms or document the nature of his or her fears as to the actual or anticipated threats or intimidation.”⁵⁴

26. Finally, a number of ICTR⁵⁵ and SCSL⁵⁶ chambers have highlighted that a factor the Single Judge relied upon – the security situation in a particular region – can support a finding of exceptional circumstances warranting the imposition of protective measures. For example, in *Prosecutor v Bizimungu*, the Trial Chamber took into account the fact that the security situation prevalent in Rwanda and neighbouring countries could be of such nature as to put at risk the lives of victims and potential prosecution witnesses, and allowed non-disclosure of the identity of witnesses until twenty one days prior to the testimony of a witness at trial.⁵⁷

⁵³ *Prosecutor v. Norman*, SCSL-2003-08-PT, Decision on the Prosecution’s motion for immediate protective measures for witnesses and victims and for non public disclosure, 23 May 2003, considering “the need for the protection of witnesses’ identities, at the pre-trial phase as distinct from the trial phase” (para. 10, emphasis in original).

⁵⁴ *Prosecutor v. Norman*, SCSL-2003-08-PT, Decision on the Prosecution’s motion for immediate protective measures for witnesses and victims and for non public disclosure, 23 May 2003, para. 14 (emphasis in original). The Court further stated that “even though the Court must, in such matters, seek to balance the right of the Accused to a fair and public trial with the interest of the witnesses in being given protection, such a right is subject to derogating exceptional circumstances (Article 17 (2) of the Statute) and the existing context of the security situation in Sierra Leone does justify, at this point in time, delaying the disclosure of the identities of witnesses during the pre-trial phase” (para 15). See further cases cited in footnote 56, below.

⁵⁵ In addition to the cases cited in footnote 52, above, see e.g. *Prosecutor v. Gatete*, ICTR-2000-61-I, Decision on prosecution request for protection of witnesses, 11 February 2004; *Prosecutor v. Musema*, ICTR-96-13-T, Decision on the Prosecutor’s motion for protection of witnesses, 20 November 1998. The Trial Chamber in *Prosecutor v. Semanza* went as far as taking judicial notice of the security situation affecting potential witnesses in Rwanda – ICTR-97-20-I, Decision on the prosecution motion for the protection of witnesses, 10 December 1998, para. 6.

⁵⁶ *Prosecutor v. Norman*, SCSL-2003-08-PT, Decision on the Prosecution’s motion for immediate protective measures for witnesses and victims and for non public disclosure, 23 May 2003, paras. 9-11. A similar approach was adopted in the cases of *Prosecutor v Gbao*, SCSL-2003-09-PT, Decision on the Prosecutor’s motion for immediate protective measures for witnesses and victims and for non-public disclosure, 10 October 2003; *Prosecutor v. Kamara*, SCSL-2003-10-PT, Decision on the Prosecutor’s motion for immediate protective measures for witnesses and victims and for non-public disclosure, 23 October 2003; and *Prosecutor v. Fofana*, SCSL-2003-11-PD, Decision on the Prosecutor’s motion for immediate protective measures for witnesses and victims and for non-public disclosure, 16 October 2003.

⁵⁷ *Prosecutor v. Bizimungu*, ICTR-99-50-T, 22 September 2000, paras. 10 and 15. Similarly, *Prosecutor v Simba*, the Trial Chamber stated that “The evidence of the volatile security situation in Rwanda, and of potential threats against Rwandans living in other countries, indicates that witnesses could justifiably fear that disclosure of their participation in the proceedings of this Tribunal would threaten their safety and security. These submissions have not been contradicted by the Defence. Accordingly, exceptional circumstances have been established” (ICTR-2001-76-I, Decision on prosecution request for protection of witnesses, 4 March 2004, para. 4). The Prosecution further submits that the approach taken by the other tribunals to the assessments of protective measures, while illustrative, is not binding on the Court. Where the underlying circumstances and principles to be applied are similar, it may be persuasive. However the Court should also be conscious of the specific factual and legal context in which it operates – see, e.g. *Prosecutor v. Norman*, SCSL-2003-08-PT, Decision on the

The second ground – whether the principle of necessity and proportionality was appropriately applied in deciding on the non-disclosure of some Prosecution witnesses for the purpose of the confirmation hearing.

27. The Prosecution submits that, if the Appeals Chamber holds that the factual reasoning in the Decision was not sufficient in relation to the first issue, then the Appeals Chamber may not be in a position to consider whether the Single Judge applied the principles of necessity and proportionality appropriately. However, to the extent that the Appeals Chamber deems it appropriate to consider this issue, the Prosecution will briefly set out its position regarding the ultimate determination made by the Single Judge, which it believes to have been appropriate, and address the arguments raised by the Appellant.
28. There is no longer any question that in appropriate and special circumstances the identity of witnesses can be withheld from disclosure to the Appellant for the purposes of the confirmation hearing. The Appeals Chamber has recently confirmed that non-disclosure of witness identity is an available, if exceptional, option that the Pre-Trial Chamber may order, after assessing the relevant factors.⁵⁸ The Appeals Chamber further recognized that the fact that a substantial number of identities have not been disclosed does not mean that the criteria have been unreasonably, or incorrectly, applied. Rather, the outcome depended on an evaluation of the particular circumstances by the Pre-Trial Chamber.⁵⁹ The Prosecution believes that the Single Judge engaged in precisely this assessment of the relevant factors in this case. As a result, in some cases the identities of witnesses have been disclosed to the Appellant; in others, where necessary authorization has been granted to the Prosecution, such identities have not been disclosed.⁶⁰
29. The Prosecution submits that, while all of the precise considerations and factual findings of the Single Judge may not have been detailed in the Decision, the protective measure of non-disclosure of the identity of some prosecution witnesses for the purpose of the confirmation hearing was necessary and proportionate in the prevailing

Prosecution's motion for immediate protective measures for witnesses and victims and for non public disclosure, 23 May 2003, para. 11.

⁵⁸ 13 October Appeal Judgment, paras. 35-36. The Prosecution notes that a number of the Appellant's submissions appear to question whether non-disclosure of identity can ever be appropriately ordered (see, e.g. Appeal Brief paras. 37-39). To this extent, the Prosecution submits that the Appeals Chamber should disregard these submissions.

⁵⁹ 13 October Appeal Judgment, para. 36.

⁶⁰ See para. 13, above.

circumstances. The substantive ruling was discretionary, given that the inquiry was heavily dependant on factual considerations, and accordingly should be afforded deference.⁶¹ The Prosecution submits that the Single Judge had ample material before her to properly order such measures. Certainly, the factors raised by the Appellant fail to demonstrate any discernible error in relation to either necessity or proportionality.

Necessity of the non-disclosure of identities for the purpose of the confirmation hearing

30. The Single Judge made an explicit finding that the redaction of the identity of certain witnesses was necessary at this stage in the proceedings. None of the factors raised by the Appellant discloses any error in the Single Judge's determination.

31. First, the Single Judge refers explicitly in the Decision to the deterioration in the security situation in the DRC as a factor justifying the imposition of the protective measures.⁶² It has already been discussed above that reliance on this factor in determining that protective measures are required is reasonable.⁶³

32. The Prosecution further submits that, in addition to the deterioration in the security situation in the DRC, the Single Judge had abundant factual information to sustain a finding of necessity, before and during the *ex parte* proceedings on protective measures from *inter alia* the neutral and independent perspective of the Victims and Witness Unit and from the Prosecution, which the Single Judge took into consideration prior to making the Decision.⁶⁴

33. The Appellant claims that the Single Judge in her determination of necessity should have addressed the circumstance that the Defence cannot investigate in the DRC, and

⁶¹ According to the ICTY Appeals Chamber, appellate review of a discretionary decision examines "not whether the decision was correct, in the sense that the Appeals Chamber agrees with that decision, but rather whether the Trial Chamber has correctly exercised its discretion [...] It is for the party challenging the exercise of a discretion to identify for the Appeals Chamber a "discernible" error made by the Trial Chamber [...] e.g.] failed to give weight or sufficient weight to relevant considerations" *Prosecutor v Milosevic*, IT-99-37-AR73 and IT-01-50-AR73 and IT-01-51-AR73, Reasons For Decision on Prosecution Interlocutory Appeal From Refusal To Order Joinder, 18 April 2002, para 4-5. See also *Milosevic v Prosecutor*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, para 9-10; *Prosecutor v Sainovic and Ojdanic*, IT 99-37-AR65, Dissenting Opinion of Judge David Hunt on Provisional Release, 30 October 2002, para 22; *The Prosecutor v Karemera et al*, ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, para 9.

⁶² On page 7 of the Impugned Decision, the Single Judge stated that "Considering that the recent deterioration of the security situation in some parts of the Democratic Republic of the Congo ("the DRC") has had an impact on the range of protective measures currently available to and feasible for witnesses on whom the Prosecution or the Defence intends to rely at the confirmation hearing; and that, in this scenario, and having carefully examined each individual case, non-disclosure of identity *vis-à-vis* the Defence for the purpose of the confirmation hearing is currently the only available and feasible measure for the necessary protection of many Prosecution witnesses".

⁶³ See para. 26, above.

⁶⁴ See para. 18, and in particular footnote 29, above.

therefore that there is very little chance that the Defence could reveal information regarding witness identity.⁶⁵ The Prosecution submits that the manner in which the Single Judge addressed this issue does not constitute an error. First, the Appellant's argument assumes, without basis, that the Defence would need to be present in the DRC for there to be a risk of disclosure of identifying information. Further, the Appellant has emphasized that it wishes to conduct investigations in the DRC prior to the confirmation hearing. The Defence has hired a member of the Defence team, who the Prosecution understands to be based in the DRC,⁶⁶ to assist the Defence team in its investigations at this stage.⁶⁷ In these circumstances, the Prosecution submits that if the Single Judge did not consider the purported inability of the Defence to conduct investigations directly in the DRC, this was reasonable.⁶⁸

34. The Appellant also expresses his "concern" that the Single Judge stated that any disclosure of identities ordered by herself would result in "a long time" passing before the affected witnesses would be called to testify at trial.⁶⁹ The Single Judge's statement was not inappropriate. Since the Single Judge will not herself determine the timing of trial-related disclosures, it was entirely reasonable – and responsible – for her to consider the likelihood or possibility that pre-confirmation disclosure might result in the exposure of witnesses for "a long time." The timing of trial-related disclosures is in any event not a matter appropriate for determination on this appeal.⁷⁰

Proportionality of the non-disclosure of identities for the confirmation hearing

35. The Prosecution submits that the two considerations which the Appellant claims that the Single Judge failed to take into account in her determination of the proportionality of the relevant protective measures – namely the alternative option of delaying the confirmation hearing,⁷¹ and the failure of the Pre-Trial Chamber to make orders to assist the Defence⁷² – do not disclose any error on the part of the Single Judge. Rather, the Prosecution submits that the Single Judge has constantly been alert to the

⁶⁵ Appeal Brief, paras. 28-29.

⁶⁶ REDACTED.

⁶⁷ REDACTED.

⁶⁸ Contrast Appeal Brief, paras. 28, 46.

⁶⁹ Appeal Brief, para. 32.

⁷⁰ The Prosecution notes that disclosure prior to trial, if the charges are confirmed, will be the responsibility of the Trial Chamber, not the Pre-Trial Chamber – see e.g. Art 61(11).

⁷¹ Appeal Brief, paras. 28, 35-38, 42-43.

⁷² Appeal Brief, paras. 28, 45-46.

necessity of ensuring that the impact on the Defence of any restriction on disclosure is not disproportionate to the interests being protected.

36. The Appellant argues that an alternative solution that the Single Judge was obligated to consider, given the temporary insecurity in the DRC, would have been to stay the proceedings pending the implementation of protective measures, or to invite the Prosecution to consider proceeding to the confirmation hearing without the witnesses in question.⁷³ The Prosecution submits that the Appellant has not demonstrated that he has suffered such prejudice, as a result of the failure of the Single Judge to further postpone the confirmation hearing, that it renders the measures ordered disproportionate.⁷⁴
37. The Appellant is likewise in error when he claims that the Single Judge failed to consider other less onerous measures.⁷⁵ The Decision did invite the Prosecution to consider proceeding without the witnesses as one option.⁷⁶ The Prosecution had accordingly made its determinations and, in adjudicating these matters, the Single Judge even went so far as to order that the Prosecution was prohibited from relying on certain summaries because of the risk to the relevant witnesses.⁷⁷ Thus there was no failure to consider the option of non-reliance.
38. Nor is the Appellant correct in asserting it was improper or unfair for the Single Judge to alter an initial evaluation that unredacted statements should be provided in advance of the confirmation hearing.⁷⁸ This Chamber has now made it clear that non-disclosure of identity is permissible, if exceptional, at the confirmation stage. The

⁷³ Appeal Brief, paras 35, 42 to 46.

⁷⁴ Any prejudice that the Appellant has suffered, moreover, is as a result of the Appellant's failure to formally request any delay in the confirmation hearing from the Single Judge, even after the Prosecution made a request that the Appellant state his position on the timing of the confirmation hearing. The Prosecution drew various factual statements made by the Appellant regarding challenges that he faced to the attention of the Pre-Trial Chamber, and requested that the Pre-Trial Chamber order the Appellant to clarify whether he would make such a formal request or not - Prosecution's request to order the Defence to inform the Pre-Trial Chamber by 24 August 2006 at the latest whether the Defence will request the postponement of the Confirmation Hearing, ICC-01/04-01/06-339-Conf, 18 August 2006.

⁷⁵ Appeal Brief, para. 35.

⁷⁶ Decision, p. 10 (option (i)).

⁷⁷ Decision on Proposed Summary Evidence, pp. 5-6.

⁷⁸ In contrast to the assertion of the Appellant, the initial postponement of the confirmation hearing was not predicated on the necessity of disclosing all witness identities to the Defence (Appeal Brief, paras. 36-37). The Prosecution reiterates that the primary reason underlying the initial postponement of the confirmation hearing was to put protective measures in place for the core witnesses that the Prosecution intends to rely on at the confirmation hearing and thus for disclosure of their unredacted statements (see further Prosecution's Response to the Defence Request for Interim Release, ICC-01/04-01/06-531, 9 October 2006, paras. 24-25). The Prosecution never submitted, and the Single Judge never found, that protective measures sufficient to allow the disclosure of unredacted statements of all witnesses would be in place by late August.

Single Judge's determination to permit the non-disclosure of identifying information thus runs afoul of no legal limit, despite the earlier aspiration of herself and the Prosecution. In addition, as is explained above, the determination to permit the non-disclosure of identifying information followed recommendations made by the VWU and a deterioration in the security situation in the DRC. The Single Judge, throughout the process of considering protective measures and disclosure, remained alert to the impact of the redactions on the fairness of the proceedings, including taking into consideration the particular stage of the proceedings,⁷⁹ throughout the process of making the Decision.

39. The second consideration raised by the Appellant is also without basis as the Single Judge took the interests of all parties and the fairness of the proceedings into account in making the Decisions. Furthermore, to the best of the Prosecution's knowledge, the Appellant has requested no such additional measures from the Pre-Trial Chamber.⁸⁰ In the absence of such a request, the Prosecution submits that any failure by the Chamber to make the kind of orders alluded to by the Appellant does not show that the determination of proportionality was unreasonable or otherwise flawed.⁸¹

40. The Prosecution submits that the measures adopted by the Single Judge have been entirely reasonable and proportionate in all the circumstances, including the security situation in the DRC, the assessment of the VWU, and the stage of the proceedings.

The third ground – whether the use at the confirmation hearing of summary evidence in relation to Prosecution witnesses for which non-disclosure of identity has been granted is permissible under the Court's applicable law.

41. The issue certified for appeal relates to whether summary evidence can ever be used by the Prosecution at the confirmation hearing in relation to a witness for whom non-

⁷⁹ The ECHR has regularly contrasted "reliance, at the investigation stage, on sources such as anonymous informants [as opposed to] the subsequent use of their statements by the trial court to found a conviction is another matter" (emphasis added) – *Kostovski v Netherlands*, ECtHR, Judgment [1989] ECHR 20, 20 November 1989, para. 444; *Windisch v. Austria*, ECtHR, Judgment, 27 September 1990, para. 30; *Vanyan v. Russia*, ECtHR, Judgment, 15 March 2006, para. 46. See also Emmerson & Ashworth, *Human Rights and Criminal Justice* (2001), p. 394. A similar approach can also be found in the jurisprudence of the ICTY: May & Wierda, *International Criminal Evidence* (2002), p. 180 ("When granting protective measures, a distinction must be drawn between the pre-trial and the trial stage of proceedings", and quoting *Prosecutor v Blaskic*, Decision on the Application of the Prosecutor Requesting Protective Measures, 5 November 1996, as stating "victims and witnesses merit protection, even from the accused, during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself").

⁸⁰ Contrast Appeal Brief, paras. 28, 45-46.

⁸¹ The very ICTY case quoted in the Appeal Brief refers to assistance from the Chamber "when faced with a request by a party for assistance in presenting its case". Appeal Brief, para. 45.

disclosure of identity has been granted. The Prosecution submits that under the plain terms of the Statute, the use of summary evidence is an option if the circumstances require.⁸² Whether the use of particular summaries is fair in the specific context of a given confirmation hearing requires consideration of a range of factors,⁸³ and is a matter for the discretion of the relevant Pre-Trial Chamber.

42. As the Single Judge noted in the Decision Granting Leave, the use of summary evidence is explicitly provided for in the Statute.⁸⁴ Article 61(5) gives the Prosecution the option of using a summary of evidence for the purposes of the confirmation hearing, without any restrictions. Article 68(5) specifically allows the Prosecution to use a summary of evidence, and to “withhold” “disclosure of evidence or information”, for any proceedings prior to the commencement of the trial, where disclosure may gravely endanger the security of a witness. Given these provisions, the Appellant’s contention that summaries can never be used without full disclosure of the identity and all underlying statements of the witness in question is untenable. The identity of the witness may not be disclosed in the summary where this would endanger the security of the witness. To argue that summaries can only be used to protect the identity of a witness from the public, or can only be used where the underlying statements have been fully disclosed, contradicts the plain language of Article 68 (5) such as “the disclosure of evidence or information” (as disclosure is an obligation that only applies *vis-à-vis* the defence), and “withhold such evidence or information”.⁸⁵ It is very clear from the wording of Article 68 (5) that summaries may be used where disclosure of evidence or information may lead to the grave endangerment of the security of a witness or his or her family.

43. Rule 81(4)⁸⁶ explicitly lists Article 68 as one of the statutory bases on which orders for non-disclosure of identity may be based. The withholding of information under Article 68(5) must therefore necessarily include the ability to use summaries in order

⁸² The Single Judge has stressed that the recent restrictions are due to “the exceptional circumstances faced in the present case” - Decision on Proposed Summary Evidence, p. 3-4; see also Decision Granting Leave, p. 8.

⁸³ See further Prosecution Response to Request for Leave, para. 24. The Prosecution also notes that summaries in the context of the present confirmation hearing are not to be used for all, or for the core, witnesses.

⁸⁴ Decision Granting Leave, footnote 26.

⁸⁵ The Prosecution notes that Article 68(5) refers to dangers posed by the disclosure of evidence or information. The Prosecution submits that “information” in this context should naturally be read to include the identity of the witness in question.

⁸⁶ As previously noted, the Appeals Chamber has recently confirmed that Rule 81(4), relating to the non-disclosure of the identity of a witness, can be used to withhold the identity of a witness from the defence for the purposes of the confirmation hearing – 13 October Appeal Judgment, paras. 34-39.

not to disclose the identity of the witness, and the withholding of evidence must include non-disclosure of their statements if this is required in order not to disclose their identity. As previously observed by the Appeals Chamber, Rule 76 on pre-trial disclosure relating to prosecution witnesses is subject to the protection and privacy of victims and witnesses under rules 81 and 82.⁸⁷

44. The Prosecution submits that there is nothing in the procedural law of the Court to suggest that the use of summaries is limited to situations where protective measures, such as non-disclosure of identities, have not been ordered. Consequently, a permissible use of summary evidence at the ICC includes its use as a protective measure under Article 68(5).⁸⁸ This is supported by the drafting history of the Statute.⁸⁹ Further, and in contrast to the implication of the Appellant, the use of summaries has not impaired the Appellant's access to potentially exonerating information. The Single Judge has safeguarded the Defence rights under Article 67(2) and the Prosecution has scrupulously complied with its obligations.⁹⁰
45. A further fact supporting the Single Judge's determination to permit the use of summaries is the emphasis by her that the probative value of the evidence presented in

⁸⁷ Rule 76 (4). See also 13 October Appeal Judgment, para. 35.

⁸⁸ The Prosecution has been unable to find any support in the 19 May Decision for the contention of the Appellant that the Single Judge considered that "a teleological interpretation of article 61(5) and 68(5) suggests that the objective of using summaries during the confirmation hearing was to protect witnesses from the potential trauma of testifying in Court." (Appeal Brief, para. 52). The Prosecution does note that in the 15 May Decision, the Single Judge stated that:

"A teleological interpretation of articles 61 (5) *in fine* and 68 (5) of the Statute suggests that they aim first and foremost to ensure the safety of Prosecution witnesses, and minimise the potentially traumatic effects of giving testimony in court by exempting witnesses from the requirement to do so twice, first before the Pre-Trial Chamber and again before the Trial Chamber." (para. 98, emphasis added)

⁸⁹ For example, the majority of delegations at the Rome Conference expressed a preference to maintain an independent provision for the use of summaries in Article 68, on Protection of the victims and witnesses and their participation in the proceedings, rather than merging it as part of Article 61 - UN Doc. A/CONF.183/C.1/WGPM/L.58/REV.1, 06 July 1998. See further in relation to Article 68(5), "The Prosecutor should therefore be able to submit necessary evidence in such a way as to protect the confidentiality and, if possible, anonymity of witnesses at this stage": Donat-Catin, "Article 68: Protection of victims and witnesses and their participation in the proceedings" in Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court* (1999), p. 883.

⁹⁰ Whilst the Prosecution has disclosed most of the potentially exculpatory material, it is not bound to disclose all potentially exculpatory material at this stage. The disclosure of potentially exculpatory material under Article 67 (2) of the Statute is an ongoing obligation that must continue throughout the proceedings - Prosecution's Response to the Defence Request for Interim Release, ICC-01/04-01/06-531, 9 October 2006, paras. 31-33. For details of these disclosures, see ICC-01/04-01/06-T-20-EN, 26 September 2006, page 55, lines 3-17. The Prosecution submits that the analogy between incriminating and exonerating information that the Appellant seeks to draw, whereby exonerating information cannot be disclosed in the form of a summary (Appeal Brief, para. 64, referring to Application for Leave to Appeal, para. 25) is misguided. The *raison d'être* for disclosure of exculpatory material may be to allow the accused the make effective use of the material, which may be undermined by the disclosure of summaries. However the *raison d'être* of the disclosure of incriminating evidence is very different, to put the accused on notice and allow him to prepare for the hearing, and therefore the same arguments against the disclosure of summaries do not apply.

a summary will necessarily be affected.⁹¹ The Single Judge has been provided with unredacted statements and transcripts, and therefore will always be able to judge the character and quality of the summarization. The Appellant speculates that the proposed summaries may contain unreliable evidence.⁹² Even if this were so, it would be a matter for the Pre-Trial Chamber to consider in ruling on whether to allow the summary in connection with the confirmation of the charges, and what weight to give it.⁹³

46. The cases on which the Appellant relies again are ICTY cases which deal with the use of summaries of evidence at trial, rather than in a confirmation hearing. Such decisions must be read in the context of the provisions, and stage of proceedings, to which they relate. The question before the Appeals Chamber relates to the use of summary evidence under specific provisions of the ICC Statute, and at a stage in proceedings, which have no equivalents in the ICTY Rules. In contrast to the cases cited, which deal with the trial stage, the ICC provisions are already expressly limited to “proceedings conducted prior to the commencement of the trial”.⁹⁴ The Prosecution submits that the limitations on the use of summary evidence which the Appellant seeks to draw from the ICTY jurisprudence cited therefore have no application to the ICC system. The reliance by the Appellant on decisions relating to ICTY Rule 92*bis* only further underscores the inapplicability of the ICTY jurisprudence, because such decisions deal with a procedure quite different from the ICC’s confirmation hearing.⁹⁵ This ICTY procedure provides for the use of written statements and not summaries, and imposes specific conditions appropriate to such a procedure but which are nowhere to be found in the ICC provisions on summary evidence prior to trial.

47. The Prosecution therefore submits that nothing in the jurisprudence or arguments presented by the Appellant shows any reason to depart from the plain language of Article 68(5) and Rule 81(4), under which summaries may be used to facilitate non-disclosure of the identity and statement of a witness under appropriate circumstances.

⁹¹ Decision on Proposed Summary Evidence, p. 4. See further para. 14, above.

⁹² Such as “hearsay thrice or more removed”: Appeal Brief, para. 55.

⁹³ Such decisions are essentially for the exercise of the discretion of the Pre-Trial Chamber: they are not issues which can properly be determined in the abstract by the Appeals Chamber. The Prosecution submits that the possibility that such a situation may arise is not a reason to rule that summaries can never be used.

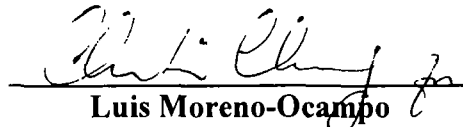
⁹⁴ Article 68(5). In the case of Article 61(5), this applies only to summaries used at the confirmation hearing.

⁹⁵ ICTY Rule 92*bis* states *inter alia* that “A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to the proof of a matter other than the acts and conduct of the accused as charged in the indictment”.

Conclusion

48. For the above referred reasons the Prosecution:

- does not express a view on the first issue under appeal, insofar as it relates to the adequacy of the factual findings, but opposes the Appellant's view as to the level of specificity required in the findings;
- submits that if the Appeals Chamber determines that it is in a position to consider the second issue, the Appeals Chamber should deny the appeal in relation to that issue;
- respectfully requests the Appeals Chamber to deny the appeal in relation to the third issue.



Luis Moreno-Ocampo
Prosecutor

Dated this 20th day of October 2006
At The Hague, The Netherlands