**Cour
Pénale
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**International
Criminal
Court**

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Date: **24 May 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
vs. THOMAS LUBANGA DYILO**

Public Document

Motion for Reconsideration and, in the Alternative, Leave to Appeal

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Background

1. On 19 May 2006, the Single Judge of the Pre-Trial Chamber (Single Judge) rendered the "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Statute." (19 May 2006 Decision). The Decision followed a series of submissions in writing and oral submissions of both Parties.[1] These submissions commented on the "interim system of disclosure" as established by the Single Judge and upon an *in camera* hearing held on 2 May 2006, to consider applications made by the OTP under Rule 81(2) and (4) of the Statute and to notify the Single Judge of potentially exonerating information as to which the OTP has confidentiality obligations under Art. 54(3)(e).

2. Among other things, the 19 May 2006 Decision resolved issues raised in a defence motion entitled "Defence Motion Regarding Ex Parte Hearing of 2 May 2006." Under the regulations, the OTP was entitled to 21 days to respond to this motion. The period to respond had not yet elapsed, nor had it been modified by the Chamber, when the 19 May 2006 Decision was rendered.

3. On 22 May 2006, the Single Judge rendered the "Decision on the Defence Motion Concerning the Ex Parte Hearing of 2 May 2006", which confirmed that the previous decisions of the Single Judge, and in particular the 19 May 2006 Decision, had already addressed the substantive issues in the Defence motion and formally decided on the remaining requests for relief.

Context of the present motion for reconsideration and, in the alternative, leave to appeal

4. This application requests the alternative remedies of reconsideration or leave to appeal because the 19 May 2006 Decision issues "general principles" which in

[1] As further detailed in the 19 May 2006 Decision, at page 2.

certain instances do not decide any issue yet presented in these proceedings. The OTP fully appreciates that these general principles were likely issued for the sake of promoting efficiency and clarity in the period leading to the confirmation hearing, currently scheduled to take place on 27 June 2006. Because the 19 May 2006 Decision announced certain substantive principles outside the context of any controversy or disputed issue, however, and in most of these cases without the OTP having been afforded the opportunity to respond to the defence's arguments, it is difficult for the OTP to assess what effect the Single Judge intends to give to these "principles."

5. The OTP therefore seeks reconsideration to determine if it is the Chamber's intention to enforce strictly certain of the general principles identified in the 19 May 2006 Decision. If the Chamber determines to reconsider the principles, or considers the principles to provide preliminary guidance which might themselves be adapted in the context of a concrete dispute or controversy, the OTP need not seek leave to appeal. If, however, the Chamber considers the "general principles" to announce already enforceable legal standards, then the OTP respectfully submits that the general principles can be expected to have serious consequences for the fairness and efficiency of these proceedings. The OTP is entitled in this circumstance to seek leave to appeal, and it requests the Single Judge to consider its arguments in support of leave to appeal.

The motion for reconsideration

6. By Decision dated 23 May 2006, the Single Judge has previously declined to consider a motion for reconsideration, based on: (a) adoption of reasoning of Pre-Trial Chamber II that the Statute and Rules do not expressly recognize the procedural vehicle of a motion for reconsideration; (b) the consideration that the Prosecution conceded that the Single Judge had to a high extent considered the Prosecution's main observations relating to the decision from which reconsideration was sought; and (c) the consideration that the Prosecution had not

requested the Pre-Trial Chamber to reconsider the principal, substantive element of the decision from which reconsideration was sought.

7. Insofar as this application seeks reconsideration of the 19 May 2006 Decision, it addresses principal, substantive elements of that Decision as to which: (a) the Prosecution's arguments were not considered by the Chamber, because the time for the Prosecution's response to the Defence Motion Regarding Ex Parte Hearing of 2 May 2006 had not elapsed before the Decision was issued; (b) the Prosecution's arguments were not considered by the Chamber, because the Prosecution was not given an opportunity to be heard; or (c) the Decision makes no reference to the Prosecution's arguments and therefore it cannot be said whether the Prosecution's arguments were considered.

8. The Prosecution also respectfully submits that the reasoning of Pre-Trial Chamber II, which is adopted in the 23 May 2006 Decision of the Single Judge denying a prior motion for reconsideration, mistakenly fails to take into account the ability of the judges of this court to apply "general principles of law derived by the Court from national laws of legal systems of the world" pursuant to Article 21(1)(c). In particular, the Prosecution refers to the national systems that it identified as allowing for reconsideration of decisions under certain conditions in paragraph 7 of the Prosecution's prior motion for reconsideration.[2]

Aspects for reconsideration

9. The Prosecution specifies the following five aspects for reconsideration by the Pre-Trial Chamber: (a) the manner and extent to which the Decision establishes "general principles" in advance of any controversy which has been presented in the proceedings;[3] (b) the adoption of a strong presumption, before considering the specifics of any application under Rule 81(4), that the names and prior statements

[2] *See also Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No.2)]*, House of Lords, [2000] 1 A.C. 119, 15 January 1999 (court possesses inherent jurisdiction to correct earlier injustice or when parties have been subjected to an unfair procedure).
[3] See 19 May 2006 Decision, at para. 5.

of a witness upon which the OTP intends to rely at the confirmation hearing must be disclosed, regardless of whether the Prosecution intends to call them to testify, to rely on their redacted statements, or a written summary of the evidence contained in those statements;[4] (c) the apparent ruling that the OTP's investigation in the current case "must be brought to an end by the time the confirmation hearing starts, barring exceptional circumstances that might justify later isolated acts of investigation";[5] (d) the determination that Rule 81(2) cannot be used after the time of confirmation as a basis for non-disclosure of information which might prejudice the ongoing investigation in the current case;[6] and (e) the ruling that an ex parte filing under Rules 81(2) and (4) can never be made without giving contemporaneous notice of the existence of the filing to the other parties.[7]

(a) The validity of the "general principles," which were announced without notice to the parties and apart from consideration of a concrete dispute

10. The issuance of the "general principles" was not a matter on which the OTP previously has been given the opportunity to be heard.

11. The OTP respectfully submits that the manner and extent to which the Decision establishes "general principles," apart from any consideration of a dispute presented in the proceedings, is itself erroneous. While the OTP fully appreciates that the adoption of general principles can hold out the prospect of promoting efficiency, it exceeded the proper judicial function to establish, in a manner divorced from any concrete controversy and not resolving any concrete controversy, the legal framework announced in the Decision.[8] All of the usual reasons that courts avoid engaging in legislation militate against the propriety of the "general principles."[9] Nor is it ultimately efficient to establish general principles apart from a dispute presented in the case. Here, for example, as will be

[4] 19 May 2006 Decision, paras. 28-35.
[5] 19 May 2006 Decision, para. 39.
[6] 19 May 2006 Decision, paras. 39-41and page 23.
[7] 19 May 2006 Decision, at para. 17.
[8] The Decision itself, in its final pages, sets only rules for future conduct; it does not result in any decision on a pending application.
[9] *See infra* authorities cited at para. 13.

demonstrated below, the establishment of rules of general application necessarily means that the Chamber is pre-deciding disputes the facts of which have not yet been presented or perhaps even arisen. Some of the applications of the general principles, which the Chamber is not in a position to foresee, will be controversial for one party or another. Others may impose a regime with which no party agrees, regarding a matter as to which there was no dispute. Thus the failure to proceed on a case-by-case basis can encourage more, rather than less, disputes and litigation.

12. The 19 May 2006 Decision, for example:
    - Announces broad rules governing applications under Rule 81(4), which apply to 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;
    - Apparently 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 any such limitation and there has been no complaint with respect to the OTP's conduct of its investigation thus far;
    - Finds 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;
    - Determines that an ex parte filing under Rules 81(2) and (4) can never be made without giving contemporaneous notice of the 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.

13. The Prosecution respectfully submits that it is not a "judicial function," within the meanings of Art. 39(2) or Art. 40 of the Statute, to decide questions so divorced from a live dispute in the case and therefore necessarily hypothetical or abstract. The principle has been affirmed many times in international criminal tribunals in which the judicial function is defined precisely as in this court.[10] As Judge Sidwha of the Appeals Chamber in the case of *Prosecutor v. Tadic* elaborated in a Separate Opinion:

> A tribunal having international criminal jurisdiction should be careful not to convert itself into a free or general advisory body. Its enunciation of the law must be on a case to case basis and limited to the lis before it . . . . The International Court of Justice, by Article 96 of the United Nations' Charter, has an advisory capacity. Civil and criminal court basically have none, unless it is directed by law or is directly relevant to a particular matter in a case, which it would do only in a lis and that too after the parties were given a proper opportunity to produce evidence in the matter, if they proposed to do so").[11]

14. The 19 May 2006 Decision, by its terms, anticipates disputes which are not presented rather than resolving any concrete dispute or application. In the case of the apparent ruling about the duration of the investigation, the "principle" announced is not even one relating to disclosure. In the view of the Prosecution, this approach is fundamentally flawed. The Chambers are not free to engage in

[10] *See, e.g.*, *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4, Judgment of the Appeals Chamber, 1 June 2001, para. 23 (noting that Appeals Chamber "does not have advisory power" and contrasting International Court of Justice and enumerated powers of certain municipal courts); *Prosecutor v.Slobodan Milosevic*, Case No. ICTY-IT-02-54-T, Order on Prosecution's Motion for a Ruling Concerning the Relationship Between Rule 68 and Rule 70, 19 April 2004 (declining to rule on the relationship between the two rules, because the question was not presented in respect to "a particular issue in this case," and the Chamber deemed it "not the Trial Chamber's role to issue advisory opinions on matters of general concern."); *Prosecutor v. Aloys Simba*, Case No., ICTR-2001-76-1, Decision on Defence Motion Alleging Defects in the Form of the Indictment, 26 January 2004, para. 5 (court has "no jurisdiction" to decide motions regarding indictments which had been superseded). Caselaw from the tribunals pertaining to mootness also is relevant.

[11] *Prosecutor v. Tadić*, Case No. IT-94-1, Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 109.

abstract interpretation, outside the context of a lis, which results in a "legal framework" to be applied in future disputes as if the framework itself is the governing text. Rather, the Statute and the rules provide the only properly legislated framework, and in accordance with basic principles of fair judicial proceedings, these texts should be applied on a case-by-case basis. Only in this fashion is the proper deference paid to Statute and Rules and the potential dangers created by unnecessarily broad judicial rulings avoided.[12]

15. Among other negative consequences, the issuance of advisory opinions, or legal frameworks for future application, results in the anomaly that the parties are unfairly hindered in their ability to seek leave to appeal. This Chamber, for example, has denied leave to appeal on grounds that the OTP has advanced only "hypothetical" or insufficiently substantiated reasons to believe that the affects on the fairness and efficiency of the proceedings will be substantial.[13] The dilemma of the party applying for leave, however, is obviously acute when the decision itself facially decides no concrete dispute.

16. For this reason, the OTP seeks reconsideration of the 19 May 2006 Decision, insofar as it announces the "general principles." If the intent of the Decision is to set preliminary guidelines for the parties, such that the Chamber considers only the subsequent concrete applications of the "legal framework" to create enforceable legal standards, then there is no need for the OTP to seek leave to appeal. If, by contrast, the framework itself is meant to be enforceable, such that, for example, the parties cannot seek reconsideration of aspects of the framework

[12] The only Statute or Rule-based authorization for the Chamber to enter decisions regarding disclosure are contained in Art. 61(3), which provides that the Chamber "may issue orders regarding the disclosure of information for the purposes of the hearing," and Rule 121(2), which permits the Chamber to take "necessary decisions" regarding disclosure between the Prosecutor and the person in respect of whom a warrant of arrest or a summons to appear has been issued. These provisions, however, are nowhere cited as a basis for the Decision, nor could they furnish a basis for the "general principles," given the lack of relation between the pending application and the principles announced. Were Art. 61(3) or Rule 121(2) interpreted to authorize the development of a framework as "general" as the once announced here, the article and rule could not be harmonized with Arts. 39(2) and 40, which define "judicial" functions.

[13] Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-135, 31 March 2006 (31 March 2006 Decision), para. 48.

when thc Chamber turns to considering concrete applications, then in the OTP's view it is fair to consider the framework itself to have changed the manner in which future proceedings will be conducted, and thus it requests the Single Judge to consider its application for leave to appeal.

(b) *The strong presumption, before considering the specifics of any single application under Rule 81(4), that the names and statements of all witnesses upon which the OTP intends to rely at the confirmation hearing must be disclosed*

17. The second ruling which the OTP respectfully submits warrants reconsideration is the determination, outside the consideration of any concrete application for non-disclosure sought under Art. 68 and Rule 81(4), that there is a strong presumption that names and prior statements of all witnesses upon which the OTP intends to rely at the confirmation hearing must be disclosed. This determination appears to respond to arguments advanced in the "Dcfence Motion Regarding Ex Parte Hearing of 2 May 2006" – arguments which the Prosecution was not given an opportunity to address because of the issuance of the Decision within the 21-day time period affordcd the Prosecution to respond to the motion under Regulation 34.

18. The Decision establishes a threshold under which the OTP must: (a) apparently routinely seek protective measures from the VWU in the first instance; and (b) demonstrate "exceptional" circumstances to justify non-disclosure of the names and prior statements of any witness upon which it intends to rely at the confirmation hearing.[14] Although Rule 81(4) applies equally to all participants, the Decision does not address if these standards will be applied to all applications under Rule 81(4).

19. Again, the OTP does not dispute that in the course of considering a concrete application, the Chamber has significant discretion to determine that disclosure of a name and prior statements of a witness hearing must be made. The OTP also

[14] 19 May 2006 Decision, para. 31, pages 22-23.

fully recognizes that it will often be the case that the defence will have a strong justification for disclosure of witness identity when the witness is relied upon by the OTP at the confirmation hearing.

20. The strong presumption of disclosure of witness identities imposed by the Decision, without consideration of the content of any pending application, is nonetheless insufficiently flexible, in the OTP's view. This is because Art. 68 and Rule 81(4) requires a case-by-case weighing of competing interests which is necessarily dependant on the facts relating to the witness, the defence, and the character of the information the witness is expected to offer. The Statute does not create any hierarchy which assumes a favouring of defence interests over victim and witness interests. To the contrary, the Statute requires a robust consideration of victim and witness interests – one widely acknowledged to be stronger than in any existing criminal justice system. It also expressly requires the Chamber to take into consideration "all relevant factors" when considering protection measures, and permits measures so long as they are not "prejudicial to or inconsistent with the rights of the accused." Art. 68(1).

21. The OTP respectfully submits that the governing texts render it inappropriate for the Decision to have announced threshold requirements for the submission of an Art. 81(4) application for the protective measure of non-disclosure. It may be that such requirements emerge over time based on a record of applications built by the parties and the Chamber. The anticipatory ruling, however, cannot be reconciled with Art. 68(1) or Rule 81(4), because the balancing inquiry is necessarily fact-bound. The presumption arguably insufficiently takes into account, for example, that the nature of the information upon which the OTP will rely. If twenty unnamed inhabitants of a village testify that schools and hospitals within a town were attacked, for example, the defence interest in disclosure of the names of those inhabitants is manifestly weaker than if the OTP is relying exclusively on a statement of an insider witness to establish that the accused gave the order to attack civilians. A portion of a witness statement which is strongly corroborated

by physical evidence likewise results in a different balancing of interests between the witness and the accused than one which is not.

22. To anticipate that the balance of interests will be struck in favour of disclosure to the defence, without a consideration of the individual circumstances of the witness and the nature of the information offered by the OTP, is at odds not only with Art. 68(1), but with the very human rights jurisprudence relied on in the Decision. The European Court of Human Rights (ECHR) has consistently stated that the disclosure of the identity of victims and witnesses may put their life, liberty and security at stake, and that such interests, similarly protected by the European Convention, need to be balanced against the rights of the defence "in appropriate cases",[15] such as to hold that the entitlement to disclosure of relevant evidence is "not an absolute right".[16]

23. Presuming disclosure to the defence, without engaging in individualized inquiry, also insufficiently regards the specific burden of proof which applies to confirmation hearings under Art. 61. If as a matter of human rights jurisprudence it is condoned that, in extremely limited and judicially controlled circumstances, reliance on information from an anonymous witness might be permitted *at trial* to determine guilt or innocence under a "beyond a reasonable doubt" standard,[17] it is

[15] *Van Mechelen et al. v. Netherlands*, ECtHR Judgement, 23 April 1997, R.J.D. 1997-III 36, paras. 52-55 ("the use of statements to found a conviction is not under all circumstances incompatible with the Convention; the principles of fair trial require a balancing of the interests of the witnesses or victims and the defence), relying on *Doorson v. Netherlands*, ECtHR Judgement, 26 March 1996, R.J.D. 1996-II 6, paras. 68 *et seq.* (trial not rendered unfair by reliance on prosecution of two anonymous witnesses, when the conviction did not rely decisively on the witnesses' information, the witnesses were questioned by the investigating judge, who knew the witnesses' identities, as well as defence counsel, although the accused was not present). The OTP is not maintaining that reliance on anonymous witnesses would be permitted at ICC trials; the relevance is the standard established in the human rights jurisprudence on which the Decision relies.
[16] *Jasper v. United Kingdom*, ECtHR Judgement, 16 February 2000, (2000) 30 EHRR 441, paras. 51-52; *Fitt v. United Kingdom*, ECtHR Judgement, 16 February 2000, ECHR 2000-II, para. 44-45; *Rowe and Davis v. United Kingdom*, ECtHR Judgement, 16 February 2000, ECHR 2000-II, paras. 60-61; *Atlan v. United Kingdom*, ECtHR Judgement, 19 June 2001, para. 40.
[17] *Van Mechelen et al. v. Netherlands*, ECtHR Judgement, 23 April 1997, R.J.D. 1997-III 36, para. 52. See also Claus Kreß, *Witnesses in Proceedings before the International Criminal Court: An Analysis in the Light of Comparative Criminal Procedure*, in Horst Fischer, Claus Kreß and Sascha Rolf Luder (eds.), "International and National Prosecution of Crimes under International Law: Current Developments" (Nomos, Berlin, 2001), pp. 371-372.

difficult to see how that human rights jurisprudence can serve as a basis for imposing a presumption of disclosure of identities of every witness upon which the prosecution relies at the *confirmation hearing* in this Court, when the Prosecution's burden at that hearing is far less onerous.[18]

24. A similar perspective is furnished by the *ad hoc* tribunal practice. In the *ad hoc* tribunals, it was typical in the case of any witness whose identity had not been disclosed during the pre-trial stage for the Trial Chamber to order the disclosure of identifying information either just before trial, or a certain number of days before the witness was scheduled to testify.[19] By the Decision, this Chamber strongly presumes the type of full disclosure of witness identity – before the confirmation hearing – which was required at the *ad* hoc tribunals only just before trial. The difference in burdens of proof at the confirmation stage and at trial calls into question this equivalence.

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[18] *See* David Donat-Cattin, A*rticle 68: "Protection of the victims and witnesses and their participation in the proceedings"*, in Otto Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article, 1999, p. 883.
("During the Pre-Trial stages of the proceedings, it is neither necessary nor wise that the Prosecutor be required to supply all the evidence she/he has collected. Nor would this undermine the rights of the accused. To require submission of all evidence collected would conflict directly with the Prosecutor's duty, outlined in article 54 paras. 1 (b), (c) and 3 (f), to guarantee confidentiality and ensure the protection of victims and witnesses. 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.").

[19] *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14, Decision on the Defence Motion for Protective Measures for Witnesses D/H and D/I, 25 September 1998, p. 2 (ordering the defence to disclose the identity of its witnesses to the Prosecution only two working days before the date scheduled for their testimony); *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion to Exempt Witness Statement from Trial, T.Ch., 26 April 2002, p.3 (ordering that disclosure of redacted witness statements by the Prosecution to the accused should take place not less than 10 days before the witness would testify and to the amici curiae not less than 30 days in advance); *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Fourth Omnibus Motion for Leave to Amend the Witness List and Request for Protective Measures, T.Ch., 21 November 2003, p. 4 (imposing a time limit for disclosure of redacted witness statements of 21 days prior to witness testimony in case of disclosure to the defence, and not less than 30 days in case of disclosure to the amici curiae); *Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T, Decision on Juvénal Kajelijeli's Motion for Protective Measures for Defence Witnesses, T.Ch., 3 April 2001, para. 20 (setting time limit for disclosure of defence unredacted statements 21 days prior to witness testimony); *Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-2000-61-I, Decision on Prosecution Request for Protection of Witnesses, T.Ch., 11 February 2004, p. 4 (ordering the Prosecution to disclose identifying information to the defence no later than 21 days before the commencement of trial).

25. The OTP reiterates that in the case of any witness who has provided information upon which the OTP will place meaningful reliance at the confirmation hearing, it fully expects that identifying information will be disclosed in advance of the hearing. For this reason, case-by-case determinations in these proceedings might ultimately lead to an emerging practice like that anticipated by the Decision. However, it is respectfully submitted that the anticipatory ruling, which applies equally to all potential witnesses, is error insofar as it fails to provide the fact-based balancing to which victims and witnesses are fully entitled under the Statute. As the Chamber is aware, in this proceeding, because of the ongoing nature of the conflict, disclosing the identity of any witness who lives in the conflict zone as a practical matter is very likely to result in the relocation of that witness. The Chamber is aware that the OTP fully recognizes that in number of instances, this step will be necessary. The OTP also respectfully maintains, however, that it fails fully to regard the interest of victims and witnesses to presume that the step of re-location will be necessary in advance of the Chamber's consideration of the witness' individual circumstances or the nature of the information provided by that witness.

26. The Single Judge may, in addition, be overlooking a remedy which is available to the Chamber as an alternative to ordering disclosure of witness identity. It is entirely appropriate for the Chamber to determine that the non-disclosure of the identity of any witness upon whom the Prosecution relied at the confirmation hearing may or did result in the OTP failing to meet its burden of establishing "substantial grounds" to believe that Lubanga committed each of the crimes with which he has been charged. The Chamber's power, in addition to being the gatekeeper of non-disclosure under Rule 81(4), is to exercise its prerogatives under Art. 61(7)(b) to find that "insufficient evidence" has been presented or to adjourn a hearing and request further evidence, under Art. 61(7)(c). The OTP does not lightly suggest that this option be pursued. In the balance, however, it may be preferable, and more protective of victim and witness interests, for the Chamber to consider the information offered by an unnamed witness, in context,

before determining whether disclosure of the witness' identity is indeed necessary to avoid prejudicing the rights of the defence. In other words, the Chamber will always retain the ultimate remedy of compelling the OTP to seek witness re-location, as a means of meeting its burden of proof, and it may be prudent for the Chamber to exercise this remedy as an alternative to presuming that pre-emptive re-locations of each witness will be required.

(c) The apparent ruling that the OTP's investigation in the current case must end, absent exceptional circumstances, upon confirmation of the charges

27. The OTP also respectfully requests the Single Judge to reconsider the statement in the Decision that "the investigation in the current case must be brought to an end by the time the confirmation hearing starts, barring exceptional circumstances that might justify later isolated acts of investigation."[20] This portion of the Decision conveys in a more emphatic form similar language in the 15 May 2006 "Decision on the Final System of Disclosure and the Establishment of a Timetable." (hereinafter, "15 May 2006 Decision").[21]

28. The parties raised no question about the proper duration of the OTP's investigation, and never submitted briefing or argument on the question. Indeed the statement in the Decision is made only as a basis for making other rulings about disclosure. The 15 May 2006 Decision, for example, reasons that because the current investigation must be completed by confirmation, under Art. 61(4) and (9), it must be the case that the OTP "must be" in possession or control of "most, if not all," potentially exculpatory materials which it must disclose under Art. 67(2), even before the confirmation hearing. The 19 May 2006 Decision reasons similarly that because the OTP's current investigation must be concluded, barring exceptional circumstances, by the confirmation stage, it cannot be that Rule 81(2) can be used as a basis for non-disclosure of information which might prejudice the ongoing investigation of Lubanga after confirmation.

[20] 19 May 2006 Decision, para. 39.
[21] 15 May 2006 Decision, paras. 130-31.

29. It is respectfully submitted that the reasoning in the Decision is erroneous. Article 61(4) and (9) cannot be used to limit the timing of the OTP's disclosure obligations under Art. 67(2) and Rule 81(2). Art. 67(2) imposes a broad and ongoing duty, throughout the case, to disclose potentially exonerating evidence, whenever that evidence is obtained and "as soon as practicable." Rule 81(2) similarly is one of a set of rules relating to disclosure throughout the pre-trial phase; if the reasoning in the Decision were correct, the entire set of rules would refer to "pre-confirmation" instead of "pre-trial" disclosures.

30. Nor in any event does Art. 61(4) and (9) have the interpretation that the Decision confers. The reasoning of the Decision is that because Art. 61(4) expressly states the Prosecutor's ability to continue the investigation and amend or withdraw charges before confirmation, by negative implication, the power to continue to investigate must cease after confirmation. This inference, however, is clearly at odds with: (1) the fact that the "beyond a reasonable doubt" standard applicable at trial undoubtedly requires more compelling proof than that required for confirmation; (2) the provisions in the Statute expressly relating to the OTP and the duties and powers of the Prosecutor with respect to investigations, which do not limit investigative steps to the pre-confirmation phase; (3) the duties and powers themselves, such as duties of disclosure and powers of seeking international cooperation, which likewise are not limited to the pre-confirmation stage; and (4) the express recognition in Art. 61(9) even after charges are confirmed, at any time before trial, the charges may be amended upon leave of court.[22] Notably, Art. 64 expressly empowers the Trial Chamber to provide for

[22] There is support among commentators for the proposition that investigation can continue post confirmation of charges. *See* Kuniji Shibahara, *Article 61: "Confirmation of the Charges before trial"*, in Otto Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article, 1999, p. 791 ("The Prosecutor can continue investigation before and during the confirmation hearing, and even after the charges are confirmed."); Hakan Friman, "*Investigation and Prosecution*", in Lee (ed.), The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence, 2001, p. 531 ("The closure of the pre-trial phase does not, however mean that the case is by then completely prepared for trial..."). Moreover, in *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecution's Application for Leave to Disclose Further Material and Defence Renewed Motion to Cease Investigations, 30 September 2004, p.2, the Trial Chamber denied an explicit defence

the disclosure of documents and information "not previously disclosed," and thus strongly undermines the premise of the Decision that investigation and disclosure finish before confirmation. Article 64 also expressly refers to the Trial Chamber's exclusive power to order the production of "evidence collected prior to the trial," which makes clear that such collection is permissible.

31. It is perhaps the meaning of the Decision that the Single Judge anticipates that as a factual matter, and in most cases, the investigation of the charges presented for confirmation will largely be completed before confirmation. The OTP fully agrees that as a policy matter, this degree of completion should be the goal. In addition, the OTP believes that the Chambers are fully aware, through the filings and disclosures of the OTP in this proceeding and the Uganda proceeding, that the OTP is in fact substantially succeeding in meeting the goal of being well prepared for trial even at the time that it first seeks arrest.

32. Still, the OTP has grave concerns about any conversion of this prosecutorial policy into an inflexible rule. In addition to lacking any statutory basis, forbidding the OTP to conduct investigation after the confirmation hearing would have serious negative consequences. The Prosecutor's obligation is at all times to seek truth and to investigate exonerating circumstances equally; halting the investigation at the confirmation stage curtails the OTP's ability to fulfil these duties. There are also implications for equality of arms, since presumably the defence is not similarly limited, but the OTP must possess the ability to seek information – incriminating or exonerating – regarding anticipated defences.

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request for an order to for the OTP to "Stop Investigation," which in turn had been prompted by belated disclosures on the part of the OTP, in violation of a prior order to complete discovery by a certain date. After the arrest of the accused but before the start of the trial, upon finding the defence had contacted five of the OTP witnesses, the OTP had re-interviewed those witnesses for clarification and sought to interview a further person. (*See* Transcript of Hearing of 9 September 2004, pp. 177-181). The Trial Chamber denied the motion by the Defence for an order to stop the Prosecution investigation and granted the Prosecution motion for disclosure of the said statements, although it warned the OTP that further late disclosures would not serve the interest of the parties or the administration of justice. (Decision, p. 2).

33. In addition, in the investigations currently underway, particularly because the conflicts are ongoing, it cannot be discounted that more compelling or determinative forms of proof might well be available for the OTP to collect only *after* confirmation. If areas under investigation become more secure as the case proceeds, or the apprehension of named persons and the confirmation of charges lessens any degree of threat posed by those arrested, it may become possible to gain access to testimony or other forms of proof which more directly bear upon guilt or innocence. A scenario also not unlikely in this court's proceedings is one in which either targets or governments successfully resist cooperation in the early stages of a case, and access to more compelling evidence therefore cannot be obtained until after confirmation.

34. Given the circumstances just described, converting a prosecutorial policy of aspiring to trial-readiness by the time of confirmation into an enforceable rule requiring such readiness, upon pain of being deemed in violation of disclosure obligations, creates the following risks: (a) impairing trial efficiency rather than promoting it, particularly given the types of cases selected as the first cases of this court; (b) rewarding targets or governments who may successfully resist cooperation in the early stages of the case, by creating an assurance that the evidence against them can never substantially be improved following confirmation.

35. The OTP reiterates that nothing in the reasoning here prevents the Chamber from determining that disclosure violations under Art. 67(2) and/or Rule 81(2) have occurred, if and when they occur. In fact, the OTP fully expects, for example, that it will complete the disclosure of information which is potentially exonerating vis-à-vis the current charges before the confirmation hearing. It also can reasonably anticipate, however, that it will both obtain – and disclose – other exonerating information before trial. The Chamber obviously will retain its ability to determine that any such disclosure was not made "as soon as practicable" after the information came into the OTP's possession. To date,

however, there has been no finding that the OTP has violated any disclosure obligation, and in the absence of any such finding, or any allegation that the OTP's investigation has exceeded the scope permitted under the Statute, the OTP respectfully submits that the Chamber should re-consider, or re-characterize, its statement that "the investigation in the current case must be brought to an end by the time the confirmation hearing starts, barring exceptional circumstances . . . ."

(d) the determination that Rule 81(2) cannot be used after the time of confirmation as a basis for non-disclosure of information which might prejudice the ongoing investigation in the current case

36. As is described above, in paras. 27-28, the 19 May 2006 Decision rules, again in the absence of any defence request for such a ruling or any briefing on the question, that Rule 81(2) cannot be relied upon as authority for post-confirmation non-disclosure of information which would prejudice the ongoing investigation of confirmed charges.

37. The legal infirmity in this ruling has already been discussed *supra* at paras. 32-34. Nothing on the face of Rule 81(2) limits the applicability of the "ongoing investigation" as a basis for non-disclosure to the pre-confirmation stage. To the contrary, Rule 81(2) expressly acknowledges that non-disclosure on the ground of an ongoing investigation may persist until trial, because the last sentence of the rule provides that any material previously protected by the Chamber may not be introduced into evidence at "during the confirmation hearing *or the trial* without adequate prior disclosure to the accused."

38. The effect of the Decision's unduly narrow view of the reach of Rule 81(2) can only be to unfairly impair the OTP's ability to continue to investigate the charges which it must prove beyond a reasonable doubt. It the OTP ultimately decides to rely on the information at trial, it must disclose the information in any event, because the last sentence of the rule is unequivocal. Before that determination is made, however, the rule leaves the OTP free to rely upon the rationale of the

"ongoing investigation" to pursue a lead without disclosing that lead to the defence.

39. Categorically cutting off the OTP's ability to invoke Rule 81(2) after confirmation, moreover, will carry serious practical consequences. If the OTP is in the process of gathering evidence after confirmation, for example, even assuming that the evidence is being gathered in an "exceptional" circumstance as envisioned by the Decision, it may be that a provider (for example, a State or an IGO or NGO), will not want its identity to be known to the accused but also does not qualify for Art. 54(3)(e) protection. If the provider's name is contained in material otherwise subject to disclosure, the OTP will be deprived of the means of even temporarily protecting the provider's identity. It is also not uncommon for new evidence relating to the confirmed charges to come into existence after confirmation (to take some examples: if new providers makes available further information regarding the accused's alleged crimes or criminal methods, or the accused engages in further acts while imprisoned which show his association with colleagues, or continuing command and control of colleagues, or one of the accused former colleagues, fearing prosecution, begins providing information against the accused). If the existence of the possible "lead" cannot be temporarily withheld from disclosure, the defence's knowledge of the development, or simply the OTP's inability to offer an assurance that the "lead" will remain confidential, can destroy the OTP's ability to obtain the evidence. Otherwise disclosable material might contain information about a certain investigative method the OTP or a cooperating entity may need to use as a means of obtaining evidence. Again, disclosing the method to the accused obviously will thwart the collection of the evidence.

40. The "ongoing investigation" privilege indeed has been readily acknowledged in human rights jurisprudence,[23] and exists widely in national legal systems.[24] The

[23] *See Lietzow v. Germany*, ECtHR Judgement, 13 February 2001, ECHR 2001-I, para. 47 (Court acknowledges the need for criminal investigations to be conducted efficiently, and notes also the consequence that confidentiality of investigative information might need to be maintained temporarily to

predecessor to ICC Rule 81(2) are similar rules in the ICTY and ICTR which were routinely invoked by the OTP and used as authority by the Chambers, even after confirmation.[25]

41. The strong rationales in support of the "ongoing investigation" privilege – wherever it exists – are the need to protect ongoing investigative activities from interference by the accused, to encourage the provision of relevant evidence by providing a means of protecting sources, and to protect investigative methods. As the European Court of Human Rights stated in *Jasper v. United Kingdom*:

> the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the right of the accused (...). In some cases it may be necessary to withhold certain evidence from the

prevent suspects from tampering with evidence and undermining the course of justice). These principles were also relied upon in Migoń v. Poland, ECtHR Judgement, 25 June 2002, para. 81.

[24] *See, e.g. R. v. Mokbel* (No.2) [2005] VSC 502, 19 December 2005, para. 25 ("...as a general proposition it may be a good ground for refusing production of documents if the production is likely to jeopardise an ongoing investigation."), para. 26 (the standard to be met is that of a "real risk that the ongoing investigation may be jeopardized") and para. 36 (Objection to the production of documents upheld where they contain reports summarising investigations in relation to a several allegations, some ongoing, which reveal police methodology in investigating complaints); *R. v. Mokbel* [2005] VSC 410, 4 November 2005, para. 88 (Objection to the production of documents upheld on the grounds, *inter alia*, of it containing information concerning the identity of informers and others who had provided information. The Court observed that the investigation "...is ongoing and has not reached a stage of completion..."); *Toronto Star Newspapers Ltd. v. Canada*, 204 C.C.C. (3d) 397, 14, Ontario Superior Court of Justice, ("there are circumstances where the police utilize a particular technique to investigate a particular crime that, if revealed generally, might undermine the use of that technique, both with respect to a current investigation as well as in future investigations (...) then the court will allow that technique to remain concealed in order to promote the greater societal interest of the effective investigation of criminal activity"); *Roviaro v. United States*, 353 U.S. 53, 59 (1957) ("the purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation").

[25] *See, e.g., The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera*, Case No. ICTR-98-44-PT, Decision On Joseph Nzirorera's Motion to Compel Inspection and Disclosure, Rules 54, 66 (B) And 68 Of The Rules Of Procedure and Evidence, T.Ch., 5 July 2005, para. 6 (Document relating to confirmed charges kept *ex parte* and confidential, during proceedings post confirmation of charges, on basis of rationale that it contained information, disclosure of which would jeopardize, *inter alia*, the Prosecution's ongoing investigations). Reported cases are rare, but the OTP understands that the practice in the tribunals included the granting of "ongoing investigation" protections post-confirmation.

defence so as to preserve the fundamental right of another individual or to safeguard a public interest.[26]

To arbitrarily make these protections wholly unavailable following confirmation and in advance of trial would not only be contrary to the express terms of Rule 81 itself, but would also significantly impair the cooperation interests of providers and sources, and the investigative capabilities of the OTP as the organ charged with investigating and prosecuting the cases before the Court.

(e) the ruling that an ex parte filing under Rules 81(2) and (4) can never be made without giving contemporaneous notice of the existence of the filing to the other parties.

42. Finally, the OTP respectfully seeks reconsideration of the Decision insofar as it determines that no *ex parte* filing under Rule 81(2) or (4) can be made without disclosing at least the existence of the filing.[27] There 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. In addition, this ruling adopts the position of the defence, as set forth in the "Defence Motion Regarding Ex Parte Hearing of 2 May 2006," although the Prosecution's time to respond to this motion had not yet elapsed when the 19 May 2006 Decision was issued.

43. The Prosecution readily acknowledges that it will be a very rare instance in which even the mere fact of the filing of an *ex parte* application would not be disclosed to an adversary. It is nonetheless erroneous, in the Prosecution's view, for the Decision entirely to foreclose the possibility, and imprudent for the Decision to do so prior to any concrete case or example arising.

44. The ruling is not grounded in any statutory provision or rule, nor could it be, since no provision of the statute or rules forbids an *ex parte* filing in which the confidentiality of the fact of the filing is also maintained. Settled jurisprudence

[26] *See Jasper v. United Kingdom*, ECtHR Judgement (merits), Grand Chamber, App. No. 27052/95, 16 February 2000, (2000) 30 EHRR 441, para. 52; *see also Fitt v. United Kindgom*, para. 45, and *Rowe and Davis v. United Kingdom*, para. 61, both cited in footnote 16.
[27] 19 May 2006 Decision, para. 16-17.

exists from the ICTY and ICTR, however, where the rules regarding *ex parte* filings also do not specifically address whether *inter partes* notice of the fact of the filing is required. ICTY and ICTY precedents establish that *ex parte* filings may be warranted "where the disclosure to the other party or parties in the proceedings of the information conveyed by the application, *or of the fact the application itself*, would be likely to prejudice unfairly either the party making the application or some person or persons involved in or related to that application".[28]

45. Nor can the ECHR precedent cited by the decision correctly be relied upon for the proposition that notice of the fact of the *ex parte* filing is a required component of a fair proceeding. *Jasper v. United Kingdom*, ECHR Application No. 27052/95, 16 February 2000, paras. 52 *et seq.*, found that providing notice of the fact of an *ex parte* filing satisfied Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms, but the OTP 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).

46. Indeed, as the ICTY and ICTR precedents suggest, it has not been deemed violative of international human rights standards to maintain the confidentiality of even the fact of the existence of an *ex parte* filing, so long the confidentiality is conditioned on the existence of a court's finding of a justifying, extraordinary circumstance.

47. In Great Britain, for example, the other jurisdiction cited in the relevant portion of the Decision, the House of Lords stated that British law had traditionally recognized the possibility of a "highly exceptional" criminal case in which "the

[28] *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9, Decision on (1) Application by Stevan Todorović to Re-Open the Decision of 27 July 1999, (2) Motion By ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, T.Ch., 28 February 2000, paras. 39 and 41 (emphasis added). *See also Prosecutor v. Brđanin and Talić*, Decision on Second Motion by Prosecution For Protective Measures, Case No. IT-99-36, T.Ch., 27, October 2000, para. 11; *Prosecutor v. Milutinović et al.*, Decision on Application by Dragoljub Ojdanić for Disclosure of Ex Parte Submissions, Case No. IT-99-37-I, 8 November 2002, para. 23; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-PT, Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure, 5 July 2005, para. 5

public interest would be injured even by disclosure that an *ex parte* application is to be made." *Regina v. H. and Others*, [2004] 2 A.C. 134, para. 20. While acknowledging that non-disclosure of the fact of the application could raise extremely serious questions under ECHR standards, the House of Lords stressed that the possibility could not be eliminated, and particularly should not be eliminated "without application [of the principles announced in ECHR precedents] on a case-by-case basis according to the particular facts of the case before it." *Id.* at para. 33. The House of Lords found: "It is entirely contrary to the trend of Strasbourg decision-making to hold that in a certain class of case or when a certain kind of decision has to made a prescribed procedure must always be follow." *Id.*

48. Again, the blanket prohibition on any *ex parte* filing under Rule 81(2) and (4) in which notice of existence of the filing might be withheld from the defendant is far from a theoretical concern to these proceedings. Rule 81(4), in particular, has broad reach and applies to protections which might be sought under a number of articles, including Articles 54, 68, 72 and 93.

49. It can be anticipated, for example, that the lack of an option for any party to even seek the Chamber's determination as to whether the fact of the filing may be withheld could prove especially problematic in the case of applications seeking protection of national security information, under Art. 72, documents and information furnished solely to provide leads, under Art. 54(3)(e). One of the well recognized rationales for permitting *ex parte* applications to be made with only delayed notification to the defence is the recognition that the disclosure of an existence of a filing can "'let the cat out of the bag' so as to stultify the application" itself.[29] In acknowledgment that information provided under Articles 54(3)(e) and 72 can be extremely sensitive, the Statute and Rules afford this information the highest level of protection. A categorical ruling by this Chamber that the existence of any filing under Rule 81(4) must routinely be disclosed

[29] *See R. v. Michael George Davis*, (1993) 97 Cr. App. R. 110, 114.

threatens to undermine cooperation from the providers of this information, because it increase the risk that the defence will learn of the information.

50. This result is especially unfortunate because an alternative, flexible rule which would permit a party at least to attempt to demonstrate the necessity of non-disclosure of the existence of the application has little disadvantage. In any instance where the Chamber, after consideration of the facts and circumstances, determines that disclosure is necessary, notification of the defence will likely have been delayed only a matter of days. If the Chamber, to the contrary, finds an exceptional case in which the application for non-disclosure to the defence, or delayed disclosure to the defence, to be warranted, the Chamber will have preserved a compelling interest in non-disclosure, in a manner which also safeguarded the good will of the provider.

The application for leave to appeal

51. The Prosecution respectfully requests that, if the Chamber declines to reconsider any or all of the issues addressed above, then the Chamber grant leave to appeal on those issues not reconsidered. The Prosecution submits that each of the five issues significantly affects the fair and expeditious conduct of the proceedings, and in some cases will also affect the outcome of the trial. Further, in each case material resolution of the issue by the Appeals Chamber will materially advance the proceedings.[30]

[30] On the interpretation and application of the elements of Article 82(1)(d), the Prosecution refers to its previous submissions in the Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-103, 23 January 2006 at paras 12, 29 and 37-38 and footnotes 4 and 5 and in the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-141, 24 April 2006 (Application for Extraordinary Review) at paras 39-60. In particular, the Prosecution reiterates its arguments that once an issue significantly affects the fair conduct of the proceedings, or the expeditious conduct of the proceedings, then the first limb of Article 82(1)(d) has been satisfied and the Chamber should proceed to consider whether immediate resolution of the issue by the Appeals Chamber would materially advance the proceedings – see in particular Application for Extraordinary Review at paras 49-52.

52. The potential impact of each of the underlying issues – the potential curtailment of the OTP's investigation, the effective protection of victims and witnesses and the extent of procedures for the protecting sensitive information – upon the conduct of investigations and prosecutions underscores the importance of promptly resolving these issues.

a) the validity of the "general principles" which do not arise from a concrete dispute and do not resolve any pending application

53. If the Chamber determines that it intends the "principles" set out in the Decision to constitute binding rules which cannot be varied in light of the individual circumstances of particular applications, or the Chamber declines to reconsider the validity or effect of the "principles," then the Prosecution submits that the issuance of the "principles" constitutes an error which significantly affects the fairness of the proceedings. As argued above, the Chamber has arguably exceeded any power that it has to make judicial orders for the purposes of disclosure. Expanding the scope of the judicial function inherently impacts upon the fairness of the proceedings, particularly when, as here, the expansion is the result of the Chamber arguably engaging in quasi-legislative functions which are entrusted to the States-Parties.[31]

54. The categorical nature of the decision establishing "general principles" reinforces the grave impact on the fairness afforded the parties. By pronouncing ahead of time how future situations will always be dealt with, if they arise, the Chamber is pre-judging the merits of any application by a party that falls within those parameters, without considering the individual circumstances of the application, or even hearing the party's views. The fact that the Chamber is endeavouring to provide certainty to the proceedings does not detract from the fact that this particular approach, if it indeed does establish fixed rules rather than flexible "general principles", leads to a denial of the right to have the individual merits of

[31] Further, the Pre-Trial Chamber in making such blanket rulings is pronouncing on issues with far-reaching consequences properly the province on the Trial Chamber, and is encroaching on the statutory division in Article 61(11).

an application considered and of the right to be heard on the relevant legal standard – core elements of the fairness of the proceedings.[32]

55. In addition, as is discussed above, the attempt to expedite the proceedings via the "general principles" is counterproductive. The delivery of a legal framework on issues which have not caused a dispute between the parties is itself slowing the proceedings, because both parties are responding to the validity of the rules which address hypothetical issues, rather than advancing the case. One of the rationales behind the requirement that the judicial function is limited to deciding a controversy or dispute is indeed the principle that it is more efficient to allow the parties themselves to narrow the scope of the issues on which there is a genuine dispute and on which judicial determination is required.

56. Immediate resolution by the Appeals Chamber of the validity of the manner and extent to which the Decision announced "general principles" will materially advance these proceedings. Most fundamentally, to leave unresolved the proper interpretation of what constitutes a "judicial" function could result in other acts on the part of the Chamber which exceed its authority and cannot effectively be undone after trial. In addition, if the "general principles" are left in place without review, their broad and sweeping nature means that any errors caused by their application during the proceeding and any prejudice caused to parties whose arguments deserved more individualized consideration, cannot effectively be redressed as part of any final appeal. Finally, the enforcement of these "principles" will have a substantial and ongoing effect on the conduct of the pre-trial proceedings.

57. Immediate resolution by the Appeals Chamber of the correctness and proper parameters of the "general principles" will, by contrast, promote efficiency by providing certainty on a core issue of the proper scope of judicial decision-

[32] Fairness includes "the ability of a party to a proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour" - 31 March 2006 Decision, para. 38, footnote 50.

making. If the Decision is determined to have been erroneous, the appeal will allow proceedings to progress in a more orderly, focused fashion and avoid unnecessary litigation over hypothetical issues.

b) the issue of the strong presumption in favour of disclosure of witness identity for the confirmation hearing, without balancing other factors

58. The Statute is widely acknowledged to put in place a robust system of protection for victims and witnesses. It provides a broad range of possible measures, including non-disclosure, to ensure their safety and wellbeing, taking into account the often unstable and insecure circumstances in which the individuals live.

59. The availability of protective measures cannot arbitrarily be limited, based on generalized findings or presumptions, without substantially affecting the fairness of the proceedings, particularly as experienced by the victims and witnesses. Enforcing a strong presumption that the identity of each witness upon whom the OTP relies cannot fail to be disclosed for the purposes of the confirmation hearing, absent a demonstrated consideration of an individualized application, denies that witness or victim a right to have the merits of his or her individual circumstances considered. Indeed, any fundamental alteration of the requirement in Art. 68(1) that "all relevant factors" be balanced in considering protective measures impacts on the fairness of the proceedings vis-à-vis the victims and witnesses affected.

60. Any witness who is compelled to relocate because of a disclosure of identifying information not required by the Statute, in addition, will additionally suffer substantial and obvious unfairness of being compelled to leave his or her home, perhaps for a period of years, depending on how long the proceedings and/or the risk arising from the disclosure of his or her identity persists.

61. The Prosecution further submits that categorically forcing risk assessment and implementation of protective measures for witnesses, including the extreme

measure of re-location, runs a substantial risk of significantly delaying the proceedings, if the identity of the witness, upon consideration of all relevant factors, might not be deemed sufficiently material to the defence that disclosure of the witness' identity prior to confirmation hearing is required. The consideration of measures by the OTP and the VWU (and the potentially affected witness) takes considerable time and resources, and the implementation of measures, especially the measure of re-location, also imposes a significant burden on the Court.

62. Forcing inappropriate disclosure of the identity of witnesses at an early stage of proceedings also risks the very outcome of the trial, as it may leave a witness wrongly exposed to threats, intimidation or violence. This Court, even more so than the *ad hoc* tribunals, is operating exclusively in unstable or openly violent regions. Disclosure of names and prior statements, moreover, always creates an incremental risk of retaliation, because it increases the witness' identifiability. To apply a presumption that disfavors non-disclosure, when non-disclosure is itself a statutory-provided protective measure, regardless of the circumstances of the witness and the importance of the information upon which the OTP is relying, thus significantly affects both the fairness and potentially the viability of proceedings.

63. The importance of appropriate and viable witness protection to the activities of the Court means that this issue warrants immediate resolution by the Appeals Chamber. If the Decision has erred on this point, then it is not an error which can be addressed as part of any final appeal against judgement. Once the identity of the witness has been inappropriately disclosed, this cannot be remedied later. If witnesses or categories of witnesses are wrongly required to re-locate, there is no remedy which could redress the fundamental disruption to their lives. It is in the interests of all participants, and the Chamber itself, that the proper balance in disclosure of the identity of witnesses is struck at an early stage in proceedings.

This is even more important in the preparation for this first confirmation hearing, which will serve as an example for future similar proceedings before the Court.[33]

c) 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.[34]

64. Rigidly restricting further investigative activities to "exceptional circumstances that might justify later isolated acts of investigation"[35] and denying any use of Rule 81(2) to temporarily protect any ongoing investigative activities supportive of the confirmed case[36] substantially affects the fairness and expeditiousness of the proceedings, and the outcome of the trial.

65. The Prosecutor is obliged to investigate both incriminating and exonerating circumstances equally, in an effort to establish the truth. Any broad limitation on the prerogative to continue investigation of the charges after confirmation thus significantly alters the fairness of the proceedings. The fairness to the Prosecution is substantially infringed, because the Prosecutor is impaired in his ability to conduct the investigation and prosecution and in his ability to investigate all circumstances equally and establish the truth (Art. 54(1)(a)). The Pre-Trial Chamber itself has recognized that fairness "includes respect for the procedural rights of the Prosecutor"[37] and that in respect of the investigation this "means that the Prosecutor must be able to exercise the powers and fulfil the

[33] While the impact of immediate resolution of the issue on other proceedings may not be sufficient to sustain a grant of leave under Article 82(1)(d), it is a factor which can be weighed in deciding whether to grant leave – see Application for Extraordinary Review at para 70 and authorities cited at footnote 135, including *The Prosecutor v Casimir Bizimungu et al*, Case No. ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005, para 5 and *Prosecutor v Mile Mrksic*, Case No. IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003.

[34] Although these two issues were addressed separately for the purposes of reconsideration, the determination that Rule 81(2) redactions could not be maintained more than 15 days before the confirmation hearing is based on the ruling that the investigation must stop at the confirmation hearing (with only exceptional and isolated acts afterwards). Therefore the two items form a single issue for the purposes of leave to appeal.

[35] 19 May 2006 Decision, para. 39.

[36] 19 May 2006 Decision, para. 41 and page 23.

[37] 31 March 2006 Decision, para. 38.

duties listed in article 54."[38] The obligation on the Prosecutor to seek to establish the truth does not expire with the confirmation hearing.

66. The fairness of the proceeding, as experienced by the accused, is also significantly affected. The defence has the right under the Statute to rely on the Prosecutor's investigation, throughout the proceeding, of exonerating circumstances.

67. The fairness of the proceeding is also affected in that a premature or overly broad curtailment of the OTP's investigation alters the institutional balance between the Pre-Trial Chamber and the Trial Chamber. It is the Trial Chamber, and not the Pre-Trial Chamber, for example, which is charged with the conduct of proceedings after the confirmation hearing, *see* Art. 61(11), and which will determine the evidence admitted at trial and the manner in which that evidence will be admitted, *see* Art. 64(8)(b).

68. Prematurely and artificially terminating investigations may also significantly affect the expeditious conduct of proceedings. Effective and comprehensive investigations are a prerequisite to efficient and expeditious trials, as well as fair ones. In the contexts in which this court acts, it is critical that the Prosecutor retain sufficient flexibility to continue investigative activities after confirmation of the charges, particularly because more direct or compelling evidence might become available only after confirmation. If entire categories of evidence are potentially never introduced at trial because the OTP could not obtain the evidence until after the confirmation hearing, this could significantly impede the efficiency of the trial.[39]

69. Finally, the very outcome of the trial is also substantially affected by the apparent determination in the Decision that the investigation relating to confirmed charges must largely be discontinued after confirmation. Obviously, if the Prosecutor is

[38] 31 March 2006 Decision, para. 39.
[39] See paras. 32-34, above.

unable to continue his investigations, particularly in situations where newly available evidence is likely to be equally valuable or extensive as the evidence obtained before confirmation, then any subsequent trial risks being run based on only partial evidence. Such a circumstance could result in grave prejudice to the OTP, the defence, or victim-participants.

70. Turning to the decision that non-disclosure of information which might prejudice the ongoing investigation in this case may not be maintained after the confirmation hearing, circumstances are likely to be presented under which there is a compelling public interest in maintaining certain, limited redactions to information in order to preserve the conduct of ongoing investigative activities. This could involve the temporary protection of sources or operations during certain ongoing investigative efforts, but it could also be required, for example, to protect the efficacy of a request for cooperation to a state which has not yet been executed by the time of the confirmation hearing. A blanket ruling that such redactions can never apply after the confirmation hearing risks compromising investigations and thus affecting the fairness of the resulting proceedings. The fairness of the proceedings are also affected by the arbitrary and erroneous denial of an express procedural avenue provided for all parties in the Rules, and which further forms an important vehicle through which the Prosecutor is able to fulfil his statutory mandate.

71. If the Prosecutor is denied the means of preserving opportunities to carry out investigative steps when opportunities arise or sources present themselves, then this may also affect the outcome of the trial. Any incremental evidence has the possibility of altering the facts shown by the evidence as a whole. The ability of the Prosecution to substantiate the charges at trial might be impaired. Equally, if the lost investigative opportunity is one which might have benefited the defence, the defence then is subject to injustice.[40]

[40] In determining whether to grant leave, the Chamber should consider both the chances that the adverse impact on fairness will come to pass, but also the degree of impact on fairness if it does occur. See e.g. *The*

72. The premature termination of the investigation is an issue for which immediate resolution by the Appeals Chamber will obviously materially advance the proceedings. The inappropriate curtailment of investigative opportunities, through loss of the opportunity to rely on Rule 81(2) after confirmation, also cannot effectively be remedied after judgement. There will be irreparable prejudice to the Prosecution in its fulfilment of its statutory obligations, and to the defence in its right to have the Prosecution fully investigate all circumstance equally to establish the truth – i.e. to the fair conduct of the proceedings from the perspective of both parties – if investigative opportunities are improperly restricted in either fashion. However, allowing leave to appeal on these issues will not delay the proceedings, as the appeal need not have any impact on the timetable leading to the confirmation, but would rather allow a clarification of the right and obligation of the Prosecutor to continue aspects of the investigation after that confirmation. The prejudice to the fair conduct of the proceedings if this decision is incorrect and allowed to stand is thus extreme, while the impact of allowing the appeal on this issue to proceed is minimal.

d) ex parte filings under Rules 81(2) and (4) can never be made without contemporaneous notification to the other party

73. Fairness, as noted by the Pre-Trial Chamber, "includes respect for the procedural rights of the Prosecutor, the Defence, and the Victims".[41] The blanket deprivation of a procedural right, to file applications on a completely ex parte basis, if required under certain limited circumstances, affects the fairness of the proceedings *vis-à-vis* both the Prosecution and the defence. This general principle is even more apparent in the current situation, when the procedural right in question is an important tool to protect highly sensitive interests (the protection of witnesses and confidential information) in the most serious instances.

Prosecutor v Théoneste Bagosora et al, Case No. ICTR-98-41-T, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses, 21 July 2005 at para. 9.

[41] 31 March 2006 Decision, para. 38.

74. The 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(2) or (4), also effectively prejudges the issue of whether the circumstances of a case will ever require this level of protection for a period of time. Prejudgement, and the denial of future applicants to have their motions considered on their merits, also affects the fairness of the ongoing proceedings.[42]

75. Given the sensitivity of the witness protection matters, and the information provided under the confidentiality protections of Art. 72 or Art. 54(3)(e), a blanket decision which categorically prohibits any attempt to maintain the confidentiality of the existence of an *ex parte* filing may substantially impair the ongoing investigation. For example, if witnesses and providers of information lose confidence in the ability or commitment of all organs of the Court to take the necessary measures to protect them, the proceedings would substantially be affected, through a loss of cooperation. The limitation on the ability of the Prosecutor to effectively conduct his investigation and exercise his investigatory powers under Article 54 thus affects the fairness of the proceedings,[43] as does the analogous limitation the Decision imposes upon the defence.

76. This is also an issue on which immediate resolution is required. Like the other issues which impair the ability of the parties to capitalize on critical investigative tools and sources, this is not a matter that can be remedied as part of a final appeal. The right to maintain the confidentiality of information cannot be reinstated once the existence of a filing is made known to another party. Given the delicacy of issues such as witness protection, and the provision of crucial investigative leads under Article 54(3)(e), it is important that the flexibility to deal with the most sensitive cases if they arise is clarified immediately: it is the categorical nature of the Chamber's ruling on this issue that creates the need for immediate resolution.

[42] See para. 54, above.
[43] i.e. his powers under Art. 54(3)(d) and (e) – 31 March 2006 Decision, para. 39.

Relief sought

77. The Prosecution thus respectfully requests that the Chamber:

(i) Confirm that the general principles provide preliminary guidance, which may themselves be adapted in the context of a concrete dispute or controversy; or

(ii) Reconsider the principles, as addressed in paragraphs 17-50, above.

78. In the alternative, if the Chamber does not grant elements of the relief requested above, then the Prosecution respectfully requests that the Chamber grant leave to appeal under Art. 82(1)(d) on the relevant issue or issues.

Luis Moreno-Ocampo
Prosecutor

Dated this 24th day of May 2006
At The Hague, The Netherlands

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