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Date: **5 July 2006**

THE APPEALS CHAMBER

Before:	**Judge Sang-Hyun Song, Presiding Judge** **Judge Philippe Kirsch** **Judge Georghios M. Pikis** **Judge Navanethem Pillay** **Judge Erkki Kourula**
Registrar:	**Mr Bruno Cathala**

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

Public Document
Prosecution's Document in Support of the 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).[1] The Prosecution sought reconsideration of the Decision, and, in the alternative leave to appeal on 24 May 2006.[2] On 23 June 2006, the Single Judge issued her "Decision on the Prosecution Motion for Reconsideration and, in the Alternative, Leave to Appeal" (Public Redacted Version)[3], rejecting the motion for reconsideration[4], but granting leave to appeal in relation to the following issues:

   - The determination of the criteria to be met for granting applications for protection purposes for non-disclosure prior to the confirmation hearing of the identity of those witnesses on which the Prosecution intends to rely at the confirmation hearing;[5]

[1] Hereinafter, the "Decision".
[2] Motion for Reconsideration and, in the Alternative, Leave to Appeal, No. ICC-01/04-01/06-125; hereinafter, "Prosecutor's Motion".
[3] ICC-01/4-01/06-166; hereinafter, the "Decision on Leave".
[4] The Prosecution has put extensive argument and authorities before the Single Judge twice, in each case proving still further support for the inherent power of the Pre-Trial Chamber to reconsider its previous decisions in appropriate circumstances ("Motion for Reconsideration", ICC-01/04-01/06-120, 22 May 2006, paras. 4-9; Prosecutor's Motion, paras. 6-8). In each case, the Single Judge has rejected the proposition *in limine*, without addressing any of the arguments or legal authorities provided by the Prosecution ("Decision on the Prosecution Motion for Reconsideration", ICC-01/04-01/06-123, 23 May 2006; Decision, paras. 8-12). The Prosecution considers that the emerging system is an inefficient one, which places an undue burden on the Appeals Chamber. Where a party has not been given a full opportunity to be heard, or where a decision contains a minor or manifest error, there should be a process by which these situations can be addressed before the first-instance Chamber. If there is not, then participants will be forced in each and every instance to seek to appeal the decision, a process which is far more resource intensive for both the party and for the Court than addressing the matter before the first-instance Chamber. The Prosecution expressly reserves its right to raise again the issue of whether the legal regime of the Court, including the inherent powers of its Chambers, allows for the special remedy of reconsideration.
[5] Hereinafter, the "first issue".

- The temporal scope of the ongoing investigation of Thomas Lubanga Dyilo and the consequent temporary nature of those redactions granted under Rule 81 (2) of the Rules in order not to prejudice that investigation;[6] and
- The regime encompassed by the term ex parte in the context of applications under Rule 81 (2) and (4).[7] [8]

2. The Prosecution submits that the three issues involve errors of law by the Single Judge, warranting corrective action by the Appeals Chamber, and is accordingly advancing three cumulative grounds of appeal. The Decision misconstrues legal provisions and standards governing sensitive aspects of the Court's functioning pertaining to the protection of victims and witnesses, of ongoing investigations and of confidential information. Further, the Decision purports to establish *general principles of an enforceable nature*[9], binding for the instant proceedings, but arguably also applicable beyond the specific circumstances of this case due to their "general" character. The "general principles" adopted by the Decision, as will be demonstrated below, (a) reduce the scope of the protective function of Rule 81; (b) restrict the Prosecution's ability to efficiently complete its investigation and prepare its case for trial; and (c) limit the Court's ability to protect confidential information.[10]

3. In particular, these "general principles", while developed on the basis of policy considerations that the Prosecution does not necessarily oppose, create an overly rigid regime, lacking the necessary latitude for proper case-by-case

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[6] Hereinafter, the "second issue".
[7] Hereinafter, the "third issue". See Decision on Leave at *dispositif*, p. 25. The Single Judge denied leave to appeal in relation to the issue of the validity of "general principles" which do not arise from a concrete dispute and do not resolve any pending application.
[8] On 26 June 2006, the Prosecution sought extensions of both the applicable page and time limits (see "Prosecutor's Motion for Extensions of the Time and Page Limits, ICC-01/04-01/06-167). The extensions were granted by the Appeals Chamber on 3 July 2006 (Decision on the "Prosecutor's Motion for Extensions of the Time and Page Limits"), ICC-01/04-01/06-177). The Prosecution is nonetheless filing this document before the expiration of the new time limit, with a view to contributing to the expeditious determination of the issues.
[9] See Decision on Leave, para. 7 (the 19 May 2006 Decision "establishes enforceable legal standards").
[10] In its Motion the Prosecution made extensive submissions on the merits of the Decision, which were required for the purposes of the reconsideration that was primarily being sought. The Prosecution herewith incorporates by reference all the arguments contained in the Motion which are applicable to the three issues in relation to which leave to appeal has been granted (see Motion, paras. 17-50). The Prosecution will nonetheless re-state and/or summarize a number of those arguments in this document.

determinations. This regime, it is submitted, can have serious detrimental consequences for the Court's operations, including its ability to provide protection in an effective and resource-efficient manner. For instance, by importing the standards and requirements governing trial-related disclosure to the confirmation hearing stage, the Decision effectively forces the Prosecution and the VWU to concentrate all their efforts pertaining to witness protection prior to that hearing, thereby significantly stretching their limited resources. The impugned ruling does not allow for an alternative and more efficient system, phasing witness protection by incremental steps up to the trial stage.

4. The Prosecution respectfully submits that the errors vitiating the impugned "principles" ought to be reversed by the Appeals Chamber. At a minimum, their scope should be modified, and their "enforceable" nature relaxed, thus allowing for a careful consideration of specific applications for restrictions on disclosure on a case-by-case basis.[11]

The Prosecution's First ground of Appeal: The Criteria for Allowing Non-Disclosure of the Identity of Witnesses prior to the Confirmation Hearing ("First Issue")

5. The Decision establishes that the non-disclosure of the identity of witnesses on whom the Prosecution intends to rely at the confirmation hearing "can be authorized only exceptionally when, due to the particular circumstances surrounding a given witness, non-disclosure of identity is still warranted because less restrictive protective measures have been sought from the Victims and Witnesses Unit but were considered infeasible or insufficient".[12] In her Decision on Leave, the Single Judge has clarified that the Decision does not intend to

[11] For instance, a Judge or Chamber should decide on an application by a State requesting that the very existence of an *ex parte* filing related to national security information remain concealed from other participants on the basis of the merits of that application, rather than foreclosing any discussion by applying an absolute "general principle".
[12] Decision, para. 31.

establish a "presumption which could have a negative impact on the merits of an application for protection purposes for non-disclosure prior to the confirmation hearing of the identity of those witnesses on which the Prosecution intends to rely at that hearing". Rather, the Single Judge emphasizes that non-disclosure is "an exceptional measure, as opposed to the general rule", and one that can only be granted where (i) other, less restrictive measures have been sought from VWU, and (ii) exceptional circumstances surrounding the witness still require non-disclosure due to the inadequacy of other measures.[13]

6. The Prosecution maintains its position that the Decision establishes an overly rigid system, tilting from the outset the balance in favour of one of the competing interests by creating a *general rule of disclosure* of the identity of witnesses on which the Prosecution intends to rely at the confirmation hearing. In this sense, the Decision does indeed establish a "presumption of disclosure", which must be rebutted by the applicant seeking non-disclosure in each case. Further, the Decision, for the purposes of adopting this general rule, misconstrues the nature of the confirmation hearing (and with it, the scope of the rights of the defence at this particular stage) and unduly imports standards and requirements that apply to the trial stage. The Prosecution submits that any decision purporting to establish principles governing disclosure at the confirmation hearing should primarily focus on the specific nature and scope of that hearing, and of the pre-trial phase, in general.

7. As stated in the Prosecution's Motion[14], it is not disputed that in the course of considering a concrete application, a Chamber will enjoy significant discretion to determine whether the name of a witness must be disclosed before the confirmation hearing. The Prosecution also 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 heavily relied upon by the Prosecution at the confirmation hearing. The critical question, however, is whether it is legally correct to state that non-disclosure of witness identity constitutes an "exception"

[13] Decision on Leave, para. 28.
[14] Para. 19

for the purposes of the confirmation hearing, or whether, as advocated by the Prosecution, a Chamber or Judge should rather approach the required balancing exercise placing all competing interests and values on an equal footing, in light of the more limited procedural significance of the hearing.

8. The Decision fails to perform the required procedure-oriented analysis. Rather, it erroneously treats the confirmation hearing *qua* a trial, and effectively equates the defence's right to "challenge the evidence" adduced by the Prosecution under Article 61 (6) (b) with the trial-related right of confrontation under Article 67 (1) (e). [15] This error is further compounded by the Judge's reliance on human rights jurisprudence pertaining to the right of accused persons to challenge witnesses *at the trial stage*, disregarding the critical fact that under the same jurisprudence cited, the use of protective measures such as non-disclosure of a witness identity is *permissible* during the investigation and pre-trial phases.[16]

9. The Prosecution submits that the scope of the right enshrined in Article 61 (6) (b) must be viewed in light of the particular nature of the confirmation hearing. As the Single Judge has correctly stated in an earlier decision, "the scope of the confirmation hearing is limited to determining whether sufficient evidence exists to establish substantial grounds to believe that a person has committed the crimes charged."[17] Consequently, the function of the Pre-Trial Chamber is not to make a determination of "truth in relation to the guilt or innocence of the person against whom a warrant of arrest or a summons to appear has been issued".[18] Rather, the

[15] The expansive interpretation of the right enshrined in Art. 61 (6) (b) is patent in the language chosen by the Single Judge: non-disclosure of the witness identity "could affect the ability of the defence to *fully challenge the evidence and credibility* of those witnesses" (emphasis added); See Decision, para. 30.

[16] *Kostovski v. The Netherlands*, ECtHR Judgment, 20 November 1989, A166, para. 41 ("to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 (art. 6-3-d, art. 6-1) provided the rights of the defence have been respected"); *Doorson v. The Netherlands*, ECtHR Judgment 26 March 1996, Reports 1996-II, para. 69 ("the Convention does not preclude reliance, at the investigation stage, on sources such as anonymous informants"); *Van Mechelen and Others v. The Netherlands*, ECtHR Judgment, 23 April 1997, Reports 1997-III, para. 52 ("the use of statements made by anonymous witnesses to found a conviction is not under all circumstances incompatible with the Convention."), see also *Birutis and Others v. Lithuania*, ECtHR Judgment, 28 March 2002, para. 29, *Krasniki v. The Czech Republic*, ECtHR Judgment 28 February 2006, para. 75.

[17] See "Decision on the Final System of Disclosure and the Establishment of a Timetable," 15 May 2006, ICC-01/04-01/06-102, p. 5.

[18] "Decision on the Final System of Disclosure and the Establishment of a Timetable", para. 55. This is reiterated in para. 56.

purpose of the hearing is primarily to assess the evidence so as to determine whether the Prosecutor has a case which merits being sent for trial, under the specific standard of proof ("substantial grounds") enshrined in Article 61 (7).[19] Consequently, the hearing, consistent with its summary character[20], ought to be confined to an examination of the legal correctness and genuineness of the charges and evidence brought by the Prosecution, examined *on their face*, with a view to determining whether a trial on those charges is warranted.[21]

10. The Prosecution accordingly submits that the right to challenge the evidence adduced by the Prosecution recognized in Article 61 (6) (b) must be seen as allowing for an initial -and necessarily more general in nature- challenge to that evidence (for instance, by indicating inherent contradictions in a statement, or inconsistencies between different items of evidence adduced by the Prosecution). Full challenges to, and scrutiny of, the credibility of a witness' evidence is a matter that ought to be reserved for trial, the stage in which that evidence will be heard by the trier of fact and where the ultimate question of the guilt or innocence of the accused will be discussed.[22] In light of these considerations, the rationale for the Decision's general rule in favor of disclosure must consequently fail.[23]

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[19] Shibahara, Article 61 in Triffterer Otto, Commentary to the Rome Statute of the International Criminal Court, pp. 785-6. See also Marchesiello, Michele, "Proceedings before the Pre-Trial Chambers," in *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II, Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.,), Oxford: Oxford University Press, 2002, pp. 1245: "the determination of the PTC will exclusively establish whether there are reasonable grounds to proceed further to the trial phase, with no other inference as to the responsibility of the accused...Accordingly, there is nothing definitive or preclusive in the determination of the PTC."

[20] Shibahara, p. 786.

[21] For an example of similar procedural devices in comparative law, see the Model Code of Criminal Procedure for Ibero-America, Buenos Aires, 1989, Arts. 267 et seq, regulating the so-called "intermediate procedure" (*procedimiento intermedio*) (for description of the procedure, see the introductory remarks (*Exposición de Motivos*) pp. 24 et seq.), and French Code of Criminal Procedure, Art. 211. Shibahara (p. 786) provides as another example of a similar model the so-called *Zwischenverfahren* (intermediate or "middle" procedure) in the German Code of Criminal Procedure (§ 203).

[22] The Prosecution recognizes that if and when live witnesses are heard at the confirmation hearing, then a more intense challenge to the evidence of those witnesses may be warranted, and full disclosure before their testimony will be required.

[23] The Prosecution submits that this position is compatible with the practice of the *ad hoc* tribunals, whereby in the case of any witness whose identity had not been disclosed during the pre-trial stage the Trial Chamber orders the disclosure of identifying information either just before trial, or a certain number of days before the witness was scheduled to testify. See *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

11. The Prosecution further submits that the Decision also fails to properly assess not only the specific protections offered to victims and witnesses by Article 68 (1) of the Statute, but also the relevant jurisprudence of the European Court of Human Rights (ECHR), which 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",[24] such as to hold that the entitlement to disclosure of relevant evidence is "not an absolute right".[25] Art. 68, in turn, 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, and does not create any hierarchy which assumes a favouring of defence interests over victim and witness interests. It also expressly requires the Chamber to take into consideration "all relevant factors" when considering protection measures, and permits

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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).

[24] *Van Mechelen and Others v. The Netherlands*, ECtHR Judgment, 23 April 1997, Reports 1997-III, 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. The Netherlands*, ECtHR Judgment 26 March 1996, Reports 1996-II, 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 Prosecution is not maintaining that reliance on anonymous witnesses would be permitted at ICC trials, but merely describing the standard established in the human rights jurisprudence on which the Decision relies.

[25] *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.

measures so long as they are not "prejudicial to or inconsistent with the rights of the accused." Art. 68(1).

12. It is accordingly submitted that the correct interpretation of Article 68 (1) and Rule 81 (4), far from establishing a system whereby disclosure of a witness' identity becomes the general principle and non-disclosure the exception, requires a careful weighing of all competing interests, placed on an equal level, and of all relevant circumstances, on a case-by-case basis.[26] Moreover, the question of the availability and adequacy of protective measures other than non-disclosure/redaction of identifying features should not be construed as a mandatory pre-requisite that must be exhausted prior to any Rule 81 (4) application, as the Decision does; rather, the availability of such measures may properly form part of the overall analysis to be undertaken by the Judge or Chamber in each case, including considerations as to the most efficient manner to prevent dangers to the life or well-being of victims and witnesses and/or their families.[27]

13. Finally, the Prosecution restates two important points that it had advanced in its Motion: firstly, the Prosecution stresses that in the case of any witness who the Prosecution considers to be of central importance for the purposes of the confirmation hearing, it fully expects that identifying information will be disclosed in advance of the hearing, once the necessary protective measures are in

[26] Only to give an example already included in the Prosecution's Motion, 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 Prosecution is relying exclusively on a statement of an insider witness to establish that the accused gave the order to attack civilians.

[27] In relation to the specific issue of the availability of alternative measures, the Prosecution further notes that the Decision on Leave states that the Single Judge has made no finding as to whether the "other available measures" are, in the specific instances of this case, effectively confined to relocation or not, and suggests that the Registry considers that a broader spectrum of measures is available (see Decision on Leave, para. 29). The Prosecution submits that (a) the record so far does not indicate the instant availability of further protective measures -other than relocation- that may be effectively implemented at this stage *in lieu* of non-disclosure of witness identity; and (b) that non-disclosure, like relocation, are, first and foremost, *prophylactic* measures, aimed at avoiding or minimizing risks to victims and witnesses, and should be distinguished from *reactive* measures, such as a response system, which aim at avoiding that risks that have already materialized lead to concrete and/or further harm.

place;[28] secondly, it is submitted that no Judge or Chamber of this Court is rendered powerless by the positions advanced in this document. It would be entirely appropriate for the Pre-Trial 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 Prosecution failing to meet its burden of establishing "substantial grounds" to believe that the person charged committed each of the crimes with which he has been charged, under its authority under Art. 61(7)(b).[29] Whereas the Prosecution would expect a Chamber to approach this authority with great caution, the fact remains that no Chamber of this Court is obliged to confirm a charge substantiated by unnamed witnesses if that Chamber considers that doing so would be inconsistent with the rights of the defence.

The Prosecution's Second Ground of Appeal: The Temporal Scope of the Investigation ("Second Issue")

14. The Single Judge erred in Law in holding that the Prosecution is prevented, absent "exceptional circumstances", from conducting investigations after the confirmation hearing and in holding that consequently, the Prosecution may not maintain redactions performed under Rule 81 (2) beyond the 15-day time limit provided for in Rule 121 (4) and (5).[30] The Prosecutor reiterates his submissions from paragraphs 27 to 41 of the Prosecutor's Motion. The Prosecutor acknowledges that a state of trial-readiness will generally be expected to have been reached by the time of the confirmation hearing and accordingly does not disagree with the underlying policy considerations behind the Decision. The Prosecutor however submits that such expectations or policy considerations should not be elevated to legally binding and inflexible obligations.

[28] As a consequence, case-by-case determinations in these proceedings might ultimately lead to an emerging practice like that anticipated by the Decision.
[29] See Prosecutor's Motion, para. 26. The Chamber will at all times be in possession of all the necessary information, including the identities of the witnesses.
[30] See Decision, paras. 39 et seq.

15. In the 19 May 2006 Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Statute, the single Judge erroneously stated in paragraph 9 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 investigations". The Single Judge consequently decided that any redaction in the statements of witnesses on whose written or oral testimony the Prosecution intends to rely at the confirmation hearing in order not to prejudice the ongoing investigation in the case against Thomas Lubanga Dyilo: (i) shall be temporary and (ii) shall not be maintained beyond the 15-day limit provided for in rule 121 (4) and (5) of the Rules.

16. The Prosecution firstly submits that, as the same Decision shows, there is no provision in the ICC Statute or Rules in support of such a rigid restriction on the investigative powers of the Prosecutor. The Single Judge has drawn her conclusion from (a) the lack of an explicit provision allowing for an extension of the investigation beyond the Article 61 confirmation hearing stage, and (b) a teleological interpretation, whereby the Prosecution would purportedly be barred from "routinely undertaking additional investigative steps" after confirmation of the charges, in order to avoid that the "evidentiary nature" of the case against the accused mutates to his detriment.[31] The Prosecution submits that both propositions are flawed.

17. The first proposition overlooks the fact that under Article 61 (9), charges, once confirmed, may be amended upon leave of the Court, which necessarily entails the possibility of investigations continuing after the confirmation hearing. The Single Judge attempts to reconcile this particular provision with her ruling by stating that the Decision allows for "exceptional circumstances" and is accordingly "fully consistent with the possibility of amending the charges under Article 61 (9) of the Statute". This reasoning must necessarily imply that amendment of the charges post-confirmation hearing can only be possible under

[31] See Decision on Leave, paras. 37-40, and footnote 60. The Prosecution notes that the Single Judge has provided the full reasoning for her conclusion in the Decision on Leave, and not in the first Decision.

"exceptional circumstances" as well. However, nothing in the language of Article 61 (9) suggests that amendment of the charges is subject to specific limitations or constraints other than the requirements of leave and notice to the accused. If the drafters of the Statute had intended a restrictive regulation, whereby amendment of the charges would constitute an exceptional step, they would have stated that principle in the law and would have presumably regulated the circumstances allowing for such exceptional practice.

18. The Prosecution must further take issue with the concept of "exceptional circumstances" for the purposes of authorizing additional investigative steps, a requirement that is nowhere to be found in the Court's basic documents and is further left undefined as to its contents and scope by the Single Judge's rulings. As the Prosecution submitted in its Motion, the particular nature of the Court and the features of the situations the Court is called to deal with provide for a framework where additional investigative steps post-confirmation hearing may have to take place with some frequency, despite all efforts by the Prosecution to be trial-ready at the time of the presentation of charges. Due to the ongoing nature of the conflicts in the situations where the Court is currently intervening, it cannot be discounted that more compelling or determinative forms of proof might well be available for the Prosecution to collect only *after* confirmation. The same principle applies to investigative steps that were initiated prior to the confirmation hearing (such as a mass grave exhumation, a site inspection or the taking of statements from a range of persons), but that due to security or logistical problems can only be completed after the confirmation hearing. Further, 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.

19. Given the circumstances just described, embracing an "exceptional circumstances" standard to deal with what may easily become recurring challenges to the Court's work cannot be considered to be an adequate interpretation of the applicable legal provisions and principles.[32] As already stated in the Prosecution's Motion[33], establishing a mandatory rule of completion of the investigation by the time of the confirmation hearing 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, as a general principle, the evidence against them will not be substantially improved following confirmation.

20. The Prosecution must now address the second leg of the Singe Judge's reasoning, namely that allowing for post-confirmation hearing could lead to the "evidentiary nature of the case" against the accused "mutating to his detriment".[34] At the outset, the Prosecution must note that the presumption that any subsequent investigative steps will operate to the accused's detriment overlooks the clear principle enshrined in Article 54 (1) (a) whereby the Prosecution is required to investigate incriminating and exonerating circumstances equally. Hence, it may be *preventing* the Prosecution from continuing ongoing investigative steps or conducting further investigative steps what effectively operates to the detriment of an accused, to the extent that it may deprive that accused from accessing evidence that could be of an exonerating nature.

21. The Single Judge's reasoning further assumes a prejudice caused by an – undefined- "evidentiary mutation" without giving due consideration to the existing procedural principles and safeguards. If and when additional investigative

[32] The Prosecution further notes that the Single Judge's reference to "two investigations", one pre-confirmation hearing to gather sufficient evidence for the purposes of that hearing, and one pre-trial, conducted with a view to meeting the "beyond reasonable grounds" (Decision on Leave, para. 39) standard is misleading. Firstly, the Prosecution's arguments and examples have consistently referred to *supplementary* investigative steps, not to an entirely new line of investigation; secondly, Judges of this Court are vested with sufficient authority to avoid any abuse by imposing strict schedules and deadlines for the disclosure of evidence and the commencement of proceedings.
[33] See paras. 33-34.
[34] Decision on Leave, para. 38.

steps lead to a transformation of the charges against an accused, for instance, by leading to the addition of new crimes or by the modification of the theory of responsibility invoked, then the safeguards enshrined in Article 61 (9) step in, and a fresh confirmation hearing will be required with full participation of the accused, who will enjoy the panoply of rights enshrined in Article 61 and Rule 121. In cases where the amendment does not entail the addition of new charges or the substitution of more serious charges, the requirements of adequate notice to the accused and of leave being granted by the Pre-Trial Chamber should take care of any risk of unfairness to the accused, who can oppose the amendment and request the Chamber not to grant leave. Thus, any "mutation" in the charges based on additional evidence gathered by the Prosecution can be properly controlled by the Chamber and the accused on the basis of the existing legal provisions.

22. Moreover, if and when additional evidence is obtained post-confirmation hearing and the Prosecution intends to rely on that evidence at trial, then that evidence must be disclosed to the accused in a timely manner under the relevant provisions of the Statute and the Rules.[35] If, under the rationale of the Single Judge's first ruling on disclosure, there is no requirement that the Prosecution submit all the evidence in its possession for the purposes of the confirmation hearing, but only what is required to meet its burden of proof, then there cannot be any arguable prejudice to the accused caused by post-confirmation hearing disclosure of further evidentiary material.[36] It is difficult to see why post-confirmation hearing disclosure of evidence which was in the Prosecution's possession prior to that hearing would cause no prejudice to the accused, but the same disclosure of fresh material would entail an "evidentiary mutation" of the case, to the accused's detriment.[37] The Prosecution respectfully submits that the reasoning of the Single Judge does not hold.

[35] See, e.g., Rule 76 (1) requiring disclosure of witness statements "sufficiently in advance to enable the adequate preparation of the defence".
[36] The Prosecution is not referring here to exculpatory material in the Prosecution's possession at the time of the confirmation hearing, which under the Single Judge's first ruling must be disclosed prior to the hearing (see Annex I, paras. 119 *et seq*).
[37] It may be that the Single Judge's underlying assumption is that the Prosecution has no authority to improve its case after the confirmation hearing, and conversely, that the accused somehow has a right to the

23. If the Prosecution enjoys the authority under the Statute to continue with the taking of investigative steps beyond the confirmation hearing[38], then restrictions on disclosure with a view to avoiding prejudice to ongoing investigations is not limited temporarily by the time-limit provided for in Rule 121 for the purposes of pre-confirmation hearing disclosure. The issue of redactions or non-disclosure of details that may jeopardize on-going investigations must thus be determined on a case-by-case basis, and on the merits of each application for non-disclosure.

24. The Prosecution finally notes that the position advanced herein is fully consistent with existing international criminal practice. Cases from the ICTY and the ICTR confirm that the Prosecutor is entitled to conduct ongoing investigative activities at various stages of the proceedings. In its Decision on the Prosecutor's Request for Authorization to delay disclosure of Rule 70, information, the ICTY Trial Chamber in *Prosecutor v Thomir Blaskic* on 6 May 1998, accepted in paragraph 8, that there are situations that permit the Prosecutor not to disclose documents to the defence if such a disclosure may prejudice further or ongoing investigations, be contrary to the public interest or affect the security interests of any state[39].

Prosecution's case remaining "frozen" after confirmation of the charges. It is respectfully submitted that no such right can be found anywhere in the Statute or the Rules.

[38] The Prosecution stresses that the proposition that investigation can continue post confirmation of charges is supported by existing commentary. *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..."), Olásolo, Hector, *Corte Penal Internacional ¿dónde investigar? : especial referencia a la Fiscalia en el proceso de activación*, Valencia : Tirant lo Blanch, 2003, p. 120-121. 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 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).

[39] In *The Prosecutor v Ivan Cermak and Mladen Markac (Case no. IT-03-73-PT)* Decision on Prosecution Motion Seeking Leave to Amend the Indictment, *(19 October 2005)*, the Trial Chamber observed as follows: *"However the Chamber accepts the Prosecution's submission that it may properly conduct ongoing investigations against an Accused after an Indictment has been confirmed."* Similarly, in the

Similarly, in the ICTR case of *The Prosecutor v Jean Mpambara,*[40] the Trial Chamber held in the course of the trial, that one of the factors which it will have to consider in deciding on the Prosecution's Motion to add a new witness is "*whether the late discovery of the witnesses arose from fresh investigations*". The emerging jurisprudence has thus supported the prosecution's right to investigate even during trial and has acknowledged the possibility of further investigation after the Prosecution has closed its case.

25. The Prosecutor therefore submits that the Decision of the Single Judge that investigations must cease prior to the confirmation hearing and the related ruling that no further redactions are permissible after the confirmation is erroneous in law, and should be reversed by the Appeals Chamber.

The Prosecution's Third Ground of Appeal: The Regime Encompassed by the Term Ex Parte in the Context of Rule 81 (2) and (4) Applications ("Third Issue")

26. The Prosecution finally submits that the Single Judge made an error of law when she established a mandatory system, with no possibility of exceptions, whereby "the Defence must (i) be informed of the existence and legal basis of any Prosecution *ex parte* application under rule 81 (2) or (4) of the Rules" and therefore obtained other consequential procedural rights.[41]

ICTR case of *The Prosecutor v Elie Ndayambaje (Case no ICTR-96-8-T)* Decision on the Defence Motion of Utmost Urgency to Resolve all Difficulties Posed by the File Processing and, in Particular, Issues of Evidence Disclosure, Judicial Calendar and Non-Enforcement of Decisions of the Trial Chamber in the Ndayambaje Case. *(16 April 1998)*, the Trial Chamber reminded the Prosecution *"of its obligation under Rule 68 to disclose exculpatory evidence, should such information be discovered during the course of further investigations"*.

[40] *The Prosecutor v Jean Mpambara (*No. ICTR-2001-65-T, Decision on the Prosecution's Request to Add Witness AHY (27 September 2005). See also *The Prosecutor v Hadzihasanovic, (*Case No. IT-01-47-T, Decision on the Prosecution's Application to Re-open Case (1 June 2005), para 42, the Trial Chamber confirmed that the Prosecutor can continue to investigate further leads even in the course of the trial and acknowledged the possibility of further investigation after the Prosecution has closed its case.

[41] Decision, para 17. The Decision also grants the Defence the right to present certain submissions and to be provided, at the very least, with a redacted version of any decision taken by the Chamber in any such *ex parte* proceedings. The Prosecution considers these additional rights to be consequential on the notice of the fact of the *ex parte* application and if, as submitted below, there may be certain circumstances in which

27. The Prosecution firstly submits that *ex parte* applications can include applications where the other participants are not given notice of the existence of the application or filing. The Single Judge recognises this possibility in the Decision, based on Regulation 24(4) of the Regulations of the Registry.[42] The fact that *ex parte* applications can, if appropriate, be made without giving the other party notice of the fact of the application is supported by jurisprudence of the ICTY[43] and the ICTR,[44] which have repeatedly held that *ex parte* filings may be entertained "where the disclosure to the other party or parties in the proceedings of the information conveyed by the application, *or of the fact of 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".[45] It is further consistent with national jurisprudence[46] and the very meaning of the term "*ex parte*".[47]

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a party may file an *ex parte* application without notice to the other party then the Prosecution submits that in such circumstances these additional, consequential elements of the regime also would not apply.

[42] Decision, para 14. This is also supported by the approach to ex parte filings in the Rules of Procedure and Evidence, as Rule 88(4) only contemplates responses to *inter partes* motions, implying that *ex parte* motions would not have been notified to the other party.

[43] See e.g. *Prosecutor v Brdjanin and Talic*, IT-99-36-PT, Decision on Prosecution Application for Oral Hearing of Rule 66(C) Motion, 1 June 2001, para. 3; *Prosecutor v Brdjanin and Talic*, IT-99-36-PT, Decision on Second Motion by Prosecution For Protective Measures, 27 October 2000, para. 11; *Prosecutor v Simic et al.*, IT-95-9-PT, Decision on (1) Application by Stevan Todorovic 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, 28 February 2000, paras. 39 and 41. *Prosecutor v Blaskic*, IT-95-14-T, Decision on the Defence Motion for Protective Measures for Witnesses D/H and D/I, 25 September 1998 also appears to have been filed and decided without any indication that the Prosecution had notice.

[44] See e.g. *Prosecutor v Karemera et al.*, ICTR-98-44-T, Decision on Defence Motion for an Order Requiring Notice of *Ex Parte* Filings and to Unseal a Prosecution Confidential Motion, 30 May 2006, para. 3; *Prosecutor v Karemera et al.*, ICTR-98-44-PT, Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure, 5 July 2005, para. 5; *Prosecutor v Rwamakuba*, ICTR-98-44C-PT, Decision on Prosecutor's Motion for an Order for Temporary Transfer of Witnesses Pursuant to Rule 90*bis*, 23 May 2005, para. 5.

[45] *Prosecutor v Simic et al.*, IT-95-9-PT, Decision on (1) Application by Stevan Todorovic 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, 28 February 2000, para. 41 (emphasis added). This statement has been adopted and approved regularly in both the ICTY and ICTR, including in each of the cases cited in footnotes 43 and 44 above.

[46] *R v Davis and others* (1993) 97 Cr App R 110 at 114; *R v H and others* [2004] 2 AC 134 at para. 20.

[47] *Black's Law Dictionary (8th ed)* defines an "ex parte motion" as "A motion made to the court without notice to the adverse party; a motion that a court considers and rules on without hearing from all sides" (at p. 1036); *The Dictionary of Canadian Law (2nd ed)* defines "ex parte" as "an order made at the instance of one party without the opposite party having had notice of the application" (at p. 416, quoting *Anderson v Toronto-Dominion Bank* (1986) 9 CPC (2d) 179). *Osborn's Concise Law Dictionary (9th ed)* notes that an

28. The "fundamental principle" identified in the ICTY and ICTR jurisprudence is that *ex parte* filings should be used "where it is thought to be necessary in the interests of justice to do so that is, justice to everyone concerned".[48] Whether the *ex parte* nature of an application should include keeping the fact of that application from the other party therefore depends on whether this is required to ensure fairness to all relevant persons. In this respect, disclosure decisions are treated no differently.[49]

29. Given the range of circumstances which may arise, especially in light of the situations in which the Court operates and the early stage of its operations, it is crucial that these assessments are made on the merits of each application, without any artificial restrictions. The ICTR has regularly held that assessment of whether *ex parte* motions are justified "requires consideration on a case-by-case basis",[50] and that a "Defence motion seeking a general declaration of law is not

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ex parte application is "[n]ow called a 'without notice' application under Civil Procedure Rules 1998" (at p. 159).

[48] *Prosecutor v Simic et al.*, IT-95-9-PT, Decision on (1) Application by Stevan Todorovic 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, 28 February 2000, para. 41; see further *Prosecutor v Brdjanin and Talic*, IT-99-36-PT, Decision on Second Motion by Prosecution For Protective Measures, 27 October 2000, para. 11; *Prosecutor v Karemera et al.*, ICTR-98-44-T, Decision on Defence Motion for an Order Requiring Notice of *Ex Parte* Filings and to Unseal a Prosecution Confidential Motion, 30 May 2006, para. 3; *Prosecutor v Karemera et al.*, ICTR-98-44-PT, Decision on Motion to Unseal Ex Parte Submission and to Strike Paragraphs 32.4 and 49 from the Amended Indictment, 3 May 2005, para. 11.

[49] Many of the cases cited above relate to disclosure and the protection of witnesses – and in each case they were analysed according to the general principles and the circumstances of that particular case (including *Prosecutor v Karemera et al.*, ICTR-98-44-PT, Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure, 5 July 2005; *Prosecutor v Brdjanin and Talic*, IT-99-36-PT, Decision on Second Motion by Prosecution For Protective Measures, 27 October 2000; *Prosecutor v Simic et al.*, IT-95-9-PT, Decision on (1) Application by Stevan Todorovic 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, 28 February 2000).
Even an authority cited in the Decision (at footnote 11) recognises that in certain circumstances an *ex parte* application to restrict disclosure can be made without notice to the Defence: *R v Davis and others* (1993) 97 Cr App R 110 at 114, "In that event the Prosecution should apply to the court, *ex parte*, without notice to the defence." See further Niblett, *Disclosure in Criminal Proceedings* (1997) at p. 133.

[50] *Prosecutor v Karemera et al.*, ICTR-98-44-T, Decision on Defence Motion for an Order Requiring Notice of *Ex Parte* Filings and to Unseal a Prosecution Confidential Motion, 30 May 2006, para. 4; *Prosecutor v Karemera et al.*, ICTR-98-44-PT, Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure, 5 July 2005, para. 5; *Prosecutor v Rwamakuba*, ICTR-98-44C-PT, Decision on Prosecutor's Motion for an Order for Temporary Transfer of Witnesses Pursuant to Rule 90*bis*, 23 May 2005, para. 5.

warranted."[51] Similarly in the seminal ICTY case, "the Trial Chamber [did] not believe that it is either possible or appropriate to define the circumstances in which such motions are appropriate by any limiting definition."[52]

30. Regardless of whether or not disclosure of the fact of the current filings may have caused prejudice in the instant case, the Prosecution submits that the Single Judge could not properly generalise from one decision[53] and conclusively determine that it will only ever be "the specific content of any proceedings", rather than the fact of the proceedings, that can "contribute to the protection of victims and witnesses, the preservation of ongoing investigations and the protection of the confidentiality of the information."[54] While the Prosecution does not dispute the proposition that "a less restrictive measure is to be preferred if it produces a similar result",[55] the error in the Decision is to assume on the basis of a very small number of applications that such a "similar result" will *always* be produced by notifying the Defence of the fact of the application in all future circumstances.

31. The Decision has a very broad reach, with the regime extending to restricting the use of *ex parte* applications to protect information under Articles 54, 68, 72 and 93.[56] The Prosecution submits that there may well be situations in which the specific nature of the evidence concerned, the witness or victim, or the identity or concerns of the information provider may require keeping the fact of the application from the Defence to avoid prejudice. The ability to make applications wholly *ex parte* if required, that is, without notice of the fact and legal basis of the

[51] *Prosecutor v Karemera et al.*, ICTR-98-44-PT, Decision on Defence Motion for an Order Requiring Notice of *Ex Parte* Filings and to Unseal a Prosecution Confidential Motion, 30 May 2006, para. 4.
[52] *Prosecutor v Simic et al.*, IT-95-9-PT, Decision on (1) Application by Stevan Todorovic 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, 28 February 2000, para. 41. National courts have also avoided being put in a "straitjacket", holding that "The consistent practice of the court, in this and other fields, had been to declare principles, and apply those principles on a case-by-case basis according to the particular facts of the case before it, but to avoid laying down rigid or inflexible rules." *R v H and others* [2004] 2 AC 134 at para. 33.
[53] Oral decision of 26 April 2006, the rationale of which was the explicit basis for the impugned ruling. See the Decision, para 17.
[54] Decision, para 16.
[55] Decision, para. 17.
[56] Any application to restrict disclosure to protect information under these articles must be brought under Rule 81(4), and is therefore subject to the restrictions in the Decision. See further Prosecutor's Motion, paras. 48-49 and 75.

application, may be particularly important in effectively protecting national security information or highly sensitive information obtained to provide further leads under Article 54(3) (e). The nature of a situation may be that only a very small number of states or organizations are in a position to furnish such information, and to disclose the fact of an application and its legal basis may in some circumstances be tantamount to revealing the identity of the provider.[57] Even if this situation does not arise, limiting the measures that the Prosecution can take to obtain and protect such information in absolute terms and without a statutory basis was in error. There may also be other rare cases in which, given the status of the case and the nature of the evidence and witness, knowledge of the fact and legal basis of an application could allow the Defence to deduce the source or nature of the evidence, which would defeat the very purpose of the application.[58] Such cases will be an exception, but the Prosecution submits that there was no legal basis for the Single Judge to exclude any such possibility ahead of time, and divorced from the circumstances of a given application.

32. The Prosecution further submits that while the European Court of Human Rights has found that in one set of circumstances notification of the fact of an application made *ex parte* was sufficient to comply with the relevant human rights obligations,[59] this does not mean that an *ex parte* application in other circumstances would not comply with those same obligations. Indeed, as the Prosecution has already stated, it is unaware of any regional human rights case in which a failure to give notice of an *ex parte* application necessarily failed to comply with the relevant human rights obligation.[60] On the other hand, both national and international jurisdictions have explicitly preserved the right to allow

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[57] The Prosecution further notes that a State should be given a proper chance to be heard on the issue of whether disclosure of the existence of an *ex parte* filing could jeopardize its national security, as protected by Article 72, a further argument militating against a blanket principle forcing disclosure of the existence of *ex parte* applications in all circumstances.
[58] This was precisely the concern of the UK Court of Appeal when it specifically left open the possibility of *ex parte* applications without notice to the other party, as there may be cases where notice of the fact of the application "could 'let the cat out of the bag' so as to stultify the application": *R v Davis and others* (1993) 97 Cr App R 110 at 114.
[59] Decision, paras. 15 and 19.
[60] See further Prosecutor's Motion, paras. 45-46.

ex parte applications without notice to the Defendant, including in matters of restrictions on disclosure.[61]

33. The Decision is premised on *ex parte* applications necessarily being a restriction on the rights of the Defence, and therefore requiring that they be balanced against the rights of the Defence and be the least restrictive measure available.[62] This may not always be the case, in particular given the wide scope of Rule 81 (2). The Decision also applies to, for example, an application to redact unrelated details in order to safeguard further investigations of a different person for an unrelated case. In such a situation there is no right of the Defence to have access to this information. The human rights jurisprudence relied upon by the Single Judge to justify the principles of proportionality and the least restrictive measure focus on direct interference with the rights of the applicant in those cases.[63] The Prosecution accepts that where the holding of proceedings or filing of an application *ex parte* would constitute a restriction on the rights of the Defence, then the filing of a document *ex parte* and without notice to the Defence should be proportionate and the least restrictive measure that could achieve that objective. However the Prosecution submits that there may be some applications for redactions or other restrictions on disclosure which are based on considerations so far removed from the case against the accused that they do not impact on his rights, and in such cases this balancing exercise may not be appropriate.

34. The importance of the protection of victims and witnesses, dealing with sensitive information provided on a confidential basis, and maintaining the integrity of investigations (including investigations of other suspects for unrelated crimes), requires a cautious and delicate approach. While such matters must always be addressed with due consideration to protecting the rights of the Defence, given the often uncertain situations in which the Court operates each case should be

[61] See authorities cited in footnotes 43, 44, 49, 52 and 58 above. See further Prosecutor's Motion, para. 47.
[62] Decision, paras. 13 and 17.
[63] Decision, paras. 13 and 17, and in particular footnote 11. The ICTY jurisprudence cited in the Decision on this issue deals with direct, fundamental rights of the Defence such as the imposition of counsel and detention prior to trial. Likewise *Jasper v United Kingdom* (Decision, footnotes 12 and 14) concerned the non-disclosure of material immediately prior to and during trial. While the Prosecution recognizes that disclosure of relevant material is an important right of the Defence, the Decision goes beyond these boundaries and also applies to applications covering completely unrelated information.

addressed on its merits to determine the level of confidentiality required. This more flexible, nuanced approach where each application is considered on its merits does not disadvantage any party, as the Chamber will always be able to order that the opposing party is notified if it considers that the level of confidentiality is not justified; rather it will ensure that important interests can be fully safeguarded in all circumstances.[64]

35. The Prosecution therefore submits that the Single Judge erred in law when she issued an "enforceable legal standard"[65] that *ex parte* applications under Rule 81 (2) or (4) could *never* be made without notice to the Defence, regardless of the individual circumstances of the case, the impact that such notice may have on the interests of any person or the impact that filing the application without notice would have on the rights of the Defence in that context.

Remedy sought

36. The Prosecution requests the Appeals Chamber to allow the Prosecution's grounds of appeal, reverse those "general principles" from the Decision which have been impugned and substitute its own legal findings for the Single Judge's in relation to the said principles, in accordance with the arguments advanced in this document. Alternatively, the Prosecution requests the Appeals Chamber to instruct the Single Judge to interpret the impugned principles in a flexible manner, allowing for individual determinations based on the merits of each application.

37. In addition, the Prosecution respectfully requests an expeditious determination by the Appeals chamber, particularly in view of the timeline included in the Decision on the Postponement of the Confirmation Hearing.[66] The Single Judge Decided *inter alia* that the Prosecution should disclose potentially exculpatory material and

[64] See further Prosecutor's Motion, paras. 50 and 75. If necessary, where an application is accepted on a wholly *ex parte* basis, then other options to safeguard the interests of the accused could be discussed in the circumstances of that case.
[65] Decision on Leave, para. 7.
[66] Decision of 24 May 2006 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 24-05-2006.

the names and the statements of the witnesses the prosecution intends to rely on at the confirmation hearing, no later than 28 August 2006.[67]

Luis Moreno-Ocampo
Prosecutor

Dated this 5th day of July 2006
At The Hague, The Netherlands

[67] The Single Judge further gave a deadline of 28 August for the Prosecution to make requests under Rule 81 for exceptions to disclose evidence included in the Prosecution's Charging document and list of evidence (para. 10). Inspection under Rule 77 is to take place no later than 31 August 2006 (paras 4 and 5).

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