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PRE-TRIAL CHAMBER I

Before: Judge Claude Jorda, Presiding Judge
Judge Akua Kuenyehia
Judge Sylvia Steiner

Registrar: Mr Bruno Cathala

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

Public Document

**Request for Leave to Appeal the First Decision on the Prosecution Requests and
Amended Requests for Redactions under Rule 81**

The Office of the Prosecutor

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1. Introduction:

1. On 15 September 2006, the Honourable Single Judge filed the ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’.¹
2. In this decision, the Single Judge opines that “the ultimate purpose of the redactions proposed by the Prosecution is to preserve the non-disclosure of the identity of those witnesses on whom the Prosecution intends to rely at the confirmation hearing because (i) their safety, or that of their families, could be gravely endangered were their identities to be revealed by the Defence at this stage; and (ii) no other protective measure that could significantly minimise such a danger is currently available and feasible”.²
3. In terms of the conclusion that no other protective measures are available, the Single Judge cites the recent deterioration in the security situation in the DRC as a result of the elections.
4. Nonetheless, the Single Judge proceeds to conclude that even redactions of the identities of the witnesses would not necessarily be an appropriate solution because “the Chamber has found that, even if heavily redacted, the unredacted parts of certain witness statements, transcripts of witness interviews, and investigators’ notes and reports of witness interviews would lead to the identification of the relevant Prosecution witnesses”.³ The Single Judge also rejects the proposal of the Prosecution to delay the transmission of the identities until just before the confirmation hearing, on the grounds that it “(i) would be prejudicial to the Defence’s preparation of the confirmation hearing due to the number of witness statements and transcripts of witness interviews involved; and (ii) would be an inadequate solution should the charge be confirmed because the identity of the relevant witnesses would be disclosed a long time prior to their being called to testify at trial”.
5. The Single Judge then refers to article 69(4) of the Statute, which provides that the Chamber may rule on the admissibility of evidence on which the parties intend to rely at the confirmation hearing “taking into consideration *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness”.⁴ The Single Judge extrapolates from the use of the phrase ‘*inter alia*’, that this power could also be extended to allow the Chamber

¹ ICC-01/04-01/06-437

² At page 7.

³ At page 7.

⁴ Emphasis added.

in the present circumstances to consider the “adequate protection of the witnesses on whom the parties intend to rely at the confirmation hearing”⁵ as one of the factors to be considered when determining whether to admit evidence.

6. The Single Judge therefore concludes that this factor allows the Chamber to rule that the witness statements, notes, reports and transcripts in question cannot be disclosed to the Defence, even in redacted form, in the present circumstances. The Judge therefore invites the Prosecution to consider obtaining the consent of the witnesses in question to disclose their identities to the Defence, or to consider utilising summary evidence, in which case, it should file the proposed summaries by 25 September 2006.
7. The Defence is extremely surprised and concerned by this decision, which appears to resile from earlier positions of the Single Judge regarding the right of the Defence to access certain information in order to be in a position to effectively challenge the charges.
8. The Defence therefore seeks leave to appeal the decision pursuant to article 82(d) of the Rome Statute, on the grounds that the impugned decision affects the fair and expeditious conduct of the proceedings, and an immediate resolution of the issue would materially advance the proceedings

2. Submissions:

2.1 Legal threshold to appeal

9. The Defence observes that the Appeals Chamber has determined that the threshold for being granted leave to appeal pursuant to article 82(d) consists of two components: “[t]he first concerns the prerequisites for the definition of an appealable issue and the second the criteria by reference to which the pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber.”⁶
10. In terms of this first component, the identification of an appealable issue, the Appeals Chamber further specified that it was necessary for the moving party to identify a subject or topic, the resolution of which has been necessary for the judicial determination in question (the impugned decision).⁷
11. In this regard, the Defence respectfully submits that the Single Judge committed appealable errors by:

⁵ At page 8.

⁶ Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC/01/04-168 at para. 8.

⁷ Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC/01/04-168 at para. 9.

- Failing to refer to the factual basis or legal criteria which was utilised by the Single Judge to determine that the safety of the witnesses and their families would be endangered by disclosing the information in question to the Defence;
- Reversing earlier legal findings, issued on an *inter partes* context, on the basis of *ex parte* proceedings and submissions;
- Failing to consider that firstly, it was due to the request of the Prosecution that the confirmation hearing was postponed to a time-period, when it could be expected that the security situation in the DRC would deteriorate as a result of the elections, and secondly, that this deterioration in security also precludes Defence investigations being conducted in the DRC, which thus rules out the possibility that the identities of prosecution witnesses will be disclosed to non-Defence team members (i.e. potential Defence witnesses);
- Violating the presumption of innocence by predicating conclusions on the assumption that the charges against Thomas Lubanga Dyilo will be confirmed;
- In the context of the criteria for admission of evidence, taking into consideration irrelevant considerations and failing to take into consideration relevant considerations, such as the question as to whether the proceedings can be conducted in a fair manner under the present circumstances if summaries are admitted as evidence; and
- In accordance with the principle of necessity and proportionality, failing to consider alternative, more reasonable solutions which would have been more consistent with the requirements of fairness and equality of arms.

2.2 Criterion of Fairness

12. With respect to the criterion of fairness, the Defence maintains the position it elucidated in its previous request for leave to appeal: that fairness can not automatically be achieved by equating the procedural rights of all participants.⁸ There are particular components of fairness which accrue to the Defence rather than the Prosecution or victims, and the right to a fair trial can also require that a degree of procedural leniency is applied to the Defence in appropriate circumstances as a consequence of the Court's residual duty to ensure fairness,⁹ the principle of *in dubio*

⁸ The Defence would like to incorporate by reference the arguments set out in paragraphs 32-34 of its 'Request for Leave to Appeal the 'Décision sur les demandes de participation à la procédure a/0001/06, a/0002/06, et a/0003/06 dans le cadre de l'affaire Le Procureur v. Thomas Lubanga et de l'enquête en République démocratique du Congo' dated 7 August 2006.

⁹ In the case of *R v. Finta*, which related to an accused charged under Canadian law with crimes against humanity, the Canadian Supreme Court held that "a court has residual discretion to relax in favour of the

pro reo,¹⁰ and the difficulties faced by the Defence in international criminal proceedings.¹¹

13. The Defence also observes that in a prior decision regarding a Prosecution request for leave to appeal, the Single Judge concluded that decisions regarding the scope of protective measures are “directly related to the fairness of the proceedings insofar as non-disclosure could affect the ability of the Defence to fully challenge the evidence of the relevant Prosecution witnesses and has an impact on the rights of the Defence pursuant to articles 61 (3) and (6) (b) and 67 (1) of the Statute.”¹² The Defence submits that in order to be consistent with this decision, the Chamber must also conclude that this issue addressed in this first decision regarding the Prosecution requests for redactions under Rule 81 is also directly relevant to the fairness of proceedings.

2.2.1 Failure to set out the factual basis and legal criteria utilised to determine the existence of a risk to the witnesses’ security

14. As noted above, the Defence submits that the impugned decision fails to elucidate the legal and factual basis for concluding that disclosure of the identities of the Prosecution witnesses to the Defence would create a risk to these witnesses and or their families. The Defence has not been privy to the issues and concerns discussed during the Rule 81 *ex parte* hearings.¹³ Accordingly, equality of arms requires that at the very least, a decision which has such fundamental impact on the ability of the Defence to prepare its case and challenge Prosecution evidence should provide some indication of the factual and legal criteria which was utilised to determine the existence of a risk to the witnesses’ security.

accused a strict rule of evidence where it is necessary to prevent a miscarriage of justice.” R v Finta, 1994, 1 SCR 701 < <http://scc.lexum.umontreal.ca/en/1994/1994rcs1-701/1994rcs1-701.html> >

¹⁰ See for example, the Prosecutor v. Kayishema and Ruzindana, in which the ICTR stated that “if doubt exists, as a matter of statutory interpretation, that doubt must be interpreted in favour of the accused.” Judgment of 21 May 1999, Case No. ICTR-95-1-T, para. 103 < <http://69.94.11.53/default.htm> > . The ICTR subsequently held that this principle also applies to procedural issues. See, ‘Decision on the Defence Motion, pursuant to Rule 72 of Rules of Procedure and Evidence, pertaining to, *inter alia*, lack of jurisdiction and defects in the form of the Indictment’ dated 25 April 2001, Prosecutor v. Karemera Case No. ICTR-98-44-T < <http://69.94.11.53/default.htm> > and Trial Judgement of 2 September 1998, Prosecutor v. Akayesu , at

paras. 319 and 501 < <http://69.94.11.53/default.htm> >

¹¹ See R. May, and M. Wierda *International Criminal Evidence* (Transnational Publishers 2003) pages 267-268.

¹² Decision on the prosecution motion for reconsideration and, in the alternative, leave to appeal, 23 June 2006, ICC-01/04-01/06-166 at para. 32.

¹³ For example, in the concluding paragraph of the decision of 15 September 2006, the Judge asks the OTP to revise its redactions in light of the concerns raised by the single judge at hearings held on 8 September 2006 and 12 September 2006.

15. Indeed, in the absence of more elaborate criteria, the Defence can only conclude that the decision appears to be predicated on a presumption that disclosure to the Defence will *ipso facto* create a risk of safety to these witnesses. How else can the Defence reconcile the fact that although the Single Judge stated in the decision of 19 May 2006, that recourse to *ex parte* proceedings for Rule 81(4) would only be allowed on an exceptional basis,¹⁴ every single Prosecution application for protective measures has been filed on an *ex parte* basis pursuant to Rule 81(2) or (4); there have been no *inter partes* applications filed in accordance with the procedure set out in Rule 87. The exception has thus become the rule.
16. The Defence therefore considers that the fact that the Single Judge concluded that the disclosure of the identities to the Defence could potentially endanger the applicants is either a conclusion regarding the professional competence of the Defence team, or an allegation regarding the potentially dangerous propensities of Thomas Lubanga Dyilo.
17. The Defence has done absolutely nothing to give the Chamber any reason to believe that its professional integrity, including its duty of confidentiality, is in question.
18. The Defence also notes that the Registry has passively monitored Thomas Lubanga Dyilo's communications since his arrest in accordance with Regulation 174 of the Regulations of the Registry and has not had any indications that Thomas Lubanga Dyilo has, or is likely to violate protective measures.
19. The Defence further submits that although it is confident that the Single Judge's decision was issued in good faith, the Chamber must be extremely cautious regarding the impact of its decisions on the appearances of justice and impartiality. The impugned decision could give the impression to the public that the Court considers that Thomas Lubanga Dyilo is dangerous and has reason to seek retaliation against victims and witnesses. In this regard, the Defence notes that the European Court of Human Rights has concluded that security measures imposed on a suspect must be limited to what is strictly necessary for security reasons because measures, such as handcuffing a suspect or accused in public, create the impression that the suspect/accused is dangerous, and may foster the conclusion in the eyes of the public that he is therefore guilty.¹⁵
20. For the above reasons, the Defence considers that the issue as to whether the Chamber can *proprio motu* conclude that that disclosure of the identities of the applicants to the

¹⁴ 'Decision Establishing General Principles Governing Applications to restrict Disclosure pursuant to Rule 81(2) and (4) of the Statute' ICC-01/04-01/-06 at para. 13.

¹⁵ S. Treschel, Human Rights in Criminal Proceedings (Oxford University Press Oxford 2005) at page 175.

Defence would create a real risk of endangerment to the safety of the applicants, without any objective or real indications to this effect, directly concerns the fairness of the proceedings.

2.2.2 Reversing Earlier Legal findings on an ex parte basis

21. The Defence respectfully submits that the impugned decision contradicts earlier decisions of the Chamber regarding the applicability of Rule 81, and the use of summary evidence against the Defence as opposed to the general public.
22. The Defence refers to its submissions in paragraph [...] to the effect that rather being the exception, Rule 81(4) *ex parte* hearings have become the rule.
23. Regarding the use of summary evidence, in its decision of 15 May 2006, the Single Judge held that “pursuant to rule 76 of the Rules, and unless the single judge authorises otherwise under rule 81 of the Rules, the Prosecution must disclose to the Defence the names and the statements of the witnesses on which it intends to rely at the confirmation hearing, regardless of whether the Prosecution intends to call them to testify or to rely on their redacted statements, non-redacted statements, or a written summary of the evidence contained in those statements”.¹⁶
24. In the view of the Defence, this statement clearly implies that the use of summary evidence was not intended to be imposed as a protective measure against the Defence – the Prosecution remains under an obligation to provide the statements of witnesses to the Defence even if it intends to rely on summaries during the hearing. Any other finding would contradict the Single Judge’s pronouncement to the effect that the decision of the Prosecution to rely on documentary evidence, as opposed to live testimony, “shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.¹⁷ How can the Defence’s rights not be prejudiced if it is precluded from challenging the credibility of the witness, the consistency of their statement, the precise details (as opposed to summarised version) which provide the basis for the witness’s factual observations and conclusions? The Single Judge held in the decision of 19 May 2006 that “non-disclosure of the identity of the witnesses on whom the Prosecution intends to rely at the confirmation hearing (i) could affect the ability of the Defence to fully challenge the evidence and credibility of those witnesses; and (ii) has an impact on the rights of

¹⁶ At page 6.

¹⁷ Paragraph 95 of the Annex to the Decision of 15 May 2006.

the Defence pursuant to articles 61(3) and (6)(b) and 67(1)(b) of the Statute”.¹⁸ If redaction of the identities of witnesses impacts on the rights of the Defence, surely the withholding of the entire statement from the Defence must impact even more on the rights of the Defence.

25. The Defence referred in an earlier filing to the jurisprudence of the ICTY concerning summaries to the effect that “within the context of a fair trial the obligation to disclose exculpatory material implies the disclosure of the exculpatory material in its original form, and not in the form of a summary. The *raison d’être* behind the disclosure rules is undoubtedly to permit the accused to make effective use of that material. The Trial Chamber is of the view that if the exculpatory material is enclosed in a statement, it is the statement that needs to be disclosed. The Defence rightly pointed out in its Motion that “[t]he ‘material’ contemplated by Rule 68 in this instance are the words of the witnesses as recorded in the statements not the Prosecutor’s impressions of those statements.”¹⁹ These conclusion must apply with equal force to key evidence relied upon by the Prosecution.
26. The single judge also held that a teleological interpretation of article 61(5) and 68(5) suggests that the objective of using summaries during the confirmation hearing was to protect witnesses from the potential trauma of testifying in Court. Thus, in contradistinction to Rule 81, its purpose was to protect the witnesses from the effects of testifying twice rather than the possible consequences of disclosure to the Defence.
27. The question must be addressed as to whether it is fundamentally unfair for the Chamber to resile from its prior legal findings in the context of *ex parte* proceedings, and whether it violates the principle of legal certainty for it to reverse its decision at this juncture, in a decision issued 13 days before the scheduling for the confirmation hearing. In addition, although the Defence may have in theory, filed a response to Rule 81 applications (within 5 days), the rather vague applications filed thus far gave the Defence no warning that the use of summaries was in issue. In any case, the Defence did not receive the relevant (redacted) Rule 81 application dated 12 September until 18 September at 6pm – that is, several days after the decision was issued.
28. In addition, the Defence is concerned that the fact that the Chamber has been intimately reviewing the evidence means that even if the Prosecutor relies on

¹⁸ At paragraph 30.

¹⁹ Decision on “Motion for Relief From Rule 68 Violations by the Prosecutor and For Sanctions to be Imposed Pursuant to Rule 68*bis* and Motion for Adjournment While Matters Affecting a Fair Trial and Justice can be Resolved”, Prosecutor v. Brdjanin, 30 October 2002, at para. 26 < <http://www.un.org/icty/brdjanin/trialc/decision-e/31123823.htm> >

summaries during the hearing, the Chamber will actually be familiar with the full contents of the statements. Thus, whilst article 61(7) requires that the Chamber can only base its decision on the hearing itself, it will be difficult for the Chamber not to consider the relevance of the summaries in light of the full version of the statements which they have previously reviewed.

29. In this regard, article 61(1) provides that “the hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel”. How can the hearing be in the presence of the Defence if the Defence has only been privy to a minimal component of the evidence which has been extensively reviewed by the Chamber and discussed with the Prosecution in *ex parte* hearings? Article 61(6) enshrines the right of the Defence to challenge the evidence presented by the Prosecutor, but how can the Defence challenge this evidence if, in accordance with the terms of the 15 September 2006 decision, the only information it has in this regard is “a brief introduction of the relevance and probative value of the summary evidence”,²⁰ which has been drafted by the Prosecution!

2.2.3 Failing to consider the temporal scope of the security situation in the DRC

30. The current security situation in the DRC has been attributed to the results of the election. The fact that the DRC was intending to hold elections at this time was known to the Chamber when it issued its decision of 24 May 2006²¹ to postpone the confirmation hearing, and to reschedule it on a date which was between the first and second rounds of the election.
31. The request for postponement was filed by the Prosecutor, who informed the Chamber in its filing of 12 May 2006 that it would not be in a position to disclose to the Defence the identities of certain witnesses on which the Prosecution intends to rely at the confirmation hearing and the unredacted version of their statements prior to the implementation of protection measures on 28 July 2006.²² The Prosecution further argued that “the Defence must have access to the identities and the unredacted versions of the statements of the witnesses referred to in the Prosecution’s Submission

²⁰ Page 10 of the 15 September 2006 decision.

²¹ ‘Decision on the Postpone of the Confirmation Hearing and the Adjustment of the Timetable Set in the Decision of the Final System of Disclosure’ ICC-01/04-01/06

²² ‘Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Timetable Set out in the Decision on the Final System of Disclosure’ dated 24 May 2006 ICC-01/04-01/06

and the Prosecution's Request because otherwise "it will not be a position to adequately consider the evidence of these witnesses".²³

32. In the decision, the Single Judge "agree[d] with the Prosecution in that the identities of the said witnesses must be included in the Prosecution Charging Document and List of Evidence that the Prosecution must file 30 days before the confirmation hearing". The Single Judge also referred to the submission of the Victims and Witnesses Unit to the effect that "the protection measures sought by the Prosecution for the witnesses referred to in the Prosecution's Submission can only be fully implemented towards the end of August 2006".²⁴

33. The Defence respectfully submits that the initial decision to postpone the confirmation hearing and to hold it on the 28 September 2006 was thus predicated on the conclusions that firstly, in order to respect the rights of the Defence, it was necessary to disclose unredacted versions of the statements on which the Prosecution intended to rely at the confirmation hearing; secondly, that in order to do so, it was necessary for protective measures to be put in place; and thirdly, that it would be possible to implement such measures by the end of August.

34. In the view of the Defence, the fact that the third element has not been realised at this point in time does not render the first conclusion moot. If it is not possible to implement the protective measures, and thus provide unredacted versions to the Defence, then the rights of the Defence under articles 61(3) and (6) and 67 of the Statute will be violated.

35. In this regard, the Defence seriously questions whether a temporary situation should be used as grounds for issuing a decision which will have profound, long term consequences. In this connection, the Defence notes that the Chamber has recently issued an order to the effect that the confirmation hearing will not take place on the 28 September 2006, although it is yet to be determined when the actual date will be. In any case, the Defence refers to the findings of the ICTY that the general security situation in a country does not in itself constitute valid grounds for ordering protective measures against the Defence.²⁵

²³ Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Timetable Set out in the Decision on the Final System of Disclosure' dated 24 May 2006 ICC-01/04-01/06, citing para 9 of OTP request .

²⁴ At page 4.

²⁵ See for example, Decision of 3 July 2000 in Prosecutor v. Brdjanin and Talic "the prevailing circumstances within the former Yugoslavia *cannot by themselves* amount to exceptional circumstances" which would justify protective measures (para 11) < <http://www.un.org/icty/brdjanin/trialc/decision-e/00703PM213035.htm#14> > The Chamber relied on the Decision on the Prosecution's Motion Requesting Protective Measures for Witness R, 31 July 1996, Prosecutor v. Tadic ("Second Tadic Protective Measures Decision").

36. Finally, the Defence is concerned that the Chamber is only analysing the security situation through the lens of OTP witness issues. In fact, the security situation precludes the Defence from being able to conduct its own investigations or to interview potential Defence witnesses – there is thus no possibility at this point in time that any information pertaining to Prosecution witnesses would be disseminated to third persons during the course of investigative inquiries. The inability of the Defence to conduct its own investigations also places an onus on the Chamber to take adequate and appropriate measures to protect the Defence in light of this handicap –such as ensuring that the Defence has full access to Prosecution evidence and exculpatory evidence in unredacted form, so that even if the Defence is not able to present its own evidence, at the very least, it is in a position to properly put the Prosecution case to proof. In this connection, in the 19 May 2006 decision, the Single Judge referred to principles set out by the European Court of Human Rights, namely: “in order to ensure that the accused receives a fair trial, any difficulties caused to the Defence by a limitation on its rights must be sufficiently counterbalanced by procedures followed by the judicial authorities”.²⁶ Why have no such counter-balancing measures been ordered in the present case?

2.2.4 Violating the presumption of innocence by predicated conclusions on the assumption that the charges against Thomas Lubanga Dyilo will be confirmed

37. As noted in the introduction, the Single Judge characterised the proposal of the Prosecution to simply delay the transmission of the redacted versions of the statements until a few days before the hearing as an “inadequate solution should the charges be confirmed because the identify of the relevant witnesses would be disclosed a long time prior to their being called to testify at trial”.²⁷
38. The conclusion would only have any resonance if the Single Judge was indeed of the view that the charges will be confirmed, and the case will thus proceed to trial.
39. Article 66 of the Statute clearly states that everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law. The Defence stresses that this presumption translates to “a right to be treated in accordance with this principle”.²⁸ The Defence therefore submits that this requires that any and every decision pertaining to Thomas Lubanga Dyilo must be predicated on the fact that he is

²⁶ At para 32.

²⁷ At page 8.

²⁸ Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994), at para. 7. < <http://www1.umn.edu/humanrts/gencomm/hrcom13.htm> >

presumed innocent, and the onus is on the Prosecution to prove that there is sufficient evidence to confirm the charges. However, the above-cited conclusion of the Single Judge reverses this presumption by assuming that the confirmation of the charges is a likely possibility.

40. It also serves to make the confirmation of the charges a *fait accompli* by denying the Defence access to the very materials that it needs in order to be in a position to vigorously challenge the Prosecution request to confirm the charges.

2.2.5 The criteria for the admission of evidence

41. As discussed at paragraph 5 above, the Single Judge held that the adequate protection of witnesses is a factor which the Chamber can rely on when determining the admissibility of evidence under article 69(4).
42. The import of this statement is not entirely clear to the Defence, but it appears to suggest that the Chamber can consider admitting evidence in a particular format, which might generally be inadmissible, if the use of that format is necessary to protect the witness.
43. The Single Judge does not cite any legal authorities for employing such a criterion in the context of the relevance and weight of evidence, but merely relies on judicial discretion.
44. In this regard, the Defence finds the following statement of ICTY Judge Robinson regarding the use of judicial discretion to admit evidence to be compelling:

5. Rule 89(C) provides:

"A Chamber may admit any relevant evidence which it deems to have probative value."

The Rule gives a discretionary power to a Chamber to admit relevant evidence with probative value. It does not mandate the admission of that kind of evidence. The temptation to read the rule as saying that, once evidence is relevant and has probative value, it should be admitted, must be resisted. A determination as to the circumstances for the proper exercise of the discretionary power to admit relevant evidence with probative value must be made in the light of the general object and purpose of the Statute, and, more importantly, in the context of other provisions of the Statute and Rules which

impact on that exercise. The discretion should not be exercised where to do so conflicts with other Rules and the general scheme for the admission and presentation of evidence established by the Rules; in particular, where special regimes are established by the Rules for the admission of certain types of evidence, the discretionary power under Rule 89(C) must yield to the operation of those regimes.²⁹

45. The Defence therefore submits that any addition criteria devised by the Chamber for the admission of evidence must yield to the criteria which are explicitly set out in the Statute and Rules, in particular, the criteria explicitly set out in article 69(4); namely, the prejudice that such evidence may cause to a fair trial, or to a fair evaluation of the witness.
46. The use of summaries prevents the Defence from being able to fairly evaluate the witnesses in question. In addition, in the view of the Defence, to introduce what is essentially a security issue into the question of admissibility of evidence is to invite the conclusion that someone may be charged or not, convicted or acquitted (if this criterion is utilised during the trial stage), depending on the prevailing security situation in the DRC! In accordance with article 67(1), all persons shall be entitled to the minimum guarantees in this article, in full equality. However, if the Chamber proceeds to utilise the criterion of the availability of protective measures to determine the admission of evidence, someone who is arrested in 3 or 6 months time when the security situation in the DRC has improved, will have a fairer confirmation hearing than Thomas Lubanga Dyilo. The Defence thus reiterates that temporary measures implemented for reasons of expediency should not be used to justify measures, such as the admission of evidence, which will have long term consequences.

2.2.6 Failing to consider alternative, more reasonable solutions which would have been more consistent with the requirements of fairness and equality of arms

47. The Chamber recently issued a decision,³⁰ informing the parties that the confirmation hearing would not take place on 28 September 2006.

²⁹ Dissenting Opinion of Judge Robinson, Prosecutor v. Aleksovski, 16 February 1999 at para. 5 <<http://www.un.org/icty/aleksovski/appeal/decision-e/90216EV35916.htm>>

³⁰ Décision sur le report de l'audience de confirmation des charges ICC-01/04-01/06-454 dated 20 September 2006.

48. Even though the impugned decision was issued 5 days earlier, due to the present state of the disclosure process, the Single Judge must have been cognisant of the fact that the confirmation hearing would inevitably be delayed at the time that the impugned decision was issued.
49. The Defence therefore questions why, in May, when the Prosecution requested a postponement in the confirmation hearing, this was considered to be a necessary and proportionate response to the problem of non-availability of protective measures whereas in the impugned decision, the Single Judge opted for a much more draconian (from the perspective of the Defence) alternative.
50. It is not possible for the Defence to properly comment on the submissions of the Registry regarding the feasibility and availability of protective measures, since it was filed on an *ex parte* basis. Nonetheless, the Defence respectfully submits that it is reasonable to expect that the situation will improve once the elections are finalised.
51. If, to the contrary, the security situation continues over a longer period, or deteriorates further, then this would be grounds for considering whether it is even possible to continue with the proceedings given the impossibility for conducting Defence investigations. Thus, the more reasonable approach would have been for the Single Judge to consider whether, given the present situation in the DRC, it is fair to the Defence to proceed to the confirmation hearing under such circumstances (the fact that it is not possible to provide the full version of the statements to them at this point in time, and the fact that the Defence cannot conduct their own investigations in the DRC). .

2.3 The Criterion of Expeditionousness

52. The Defence firstly refers to the statement of the Single Judge that “the relevant rules on disclosure are a key tool in the Court’s criminal procedure to ensure the fundamental right of any person to a fair and expeditious trial, and that they must be interpreted in a way consistent with, *inter alia*, the rights of the accused to be informed promptly and in detail of the nature, cause, and content of the charges and to have adequate time and facilities to prepare the Defence”.³¹
53. The Defence also refers to the conclusion of the Single Judge in a decision dated 23 June 2006 that the criteria for granting protective measures, including the non-disclosure of the identity of witnesses on which the Prosecution intends to rely at the

³¹ Decision of 15 May 2006 at page 14.

confirmation hearing “significantly affect both the fair and expeditious conduct of the proceedings against in the case against Thomas Lubanga Dyilo. Moreover, in the opinion of the single judge, an immediate resolution may materially advance the proceedings in such a case [...] The single judge also considers that this issue is directly related to the expeditious conduct of the proceedings insofar as it is intimately connected to the process of seeking and implementing other less restrictive measures for the protection of those witnesses on which the Prosecution intends to rely at the confirmation hearing.”³²

54. In the view of the Defence, these conclusions are equally, if not more applicable to the disclosure of witness statements in a summary form. The Defence should not be prejudiced by the fact that the first decision on Rule 81 applications has been issued at a later stage of the proceedings.
55. The question as to whether the Defence has a right, prior to the confirmation hearing, to be informed of the Prosecution case through disclosure of the full versions of the statements and documents in question is directly related to the right of the Defence to be informed promptly of the details of the Prosecution case against Thomas Lubanga Dyilo. In addition, in the absence of any transparent criteria as to why the Chamber considered it necessary to order such measures against the Defence, the Defence must contest all future such applications in order to counter any public or internal perception that the measures were warranted by the dangerous or unethical propensities of the Defence.
56. Finally, the Defence observes that Rule 122(3) provides that before turning to the merits of the confirmation hearing, “the Presiding Judge of the Pre-Trial Chamber shall ask the Prosecutor and the person whether they intend to raise objections or make observations concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing”.
57. In the view of the Defence, the impugned decision will have the consequence of severely hampering Defence preparation in the lead up to the confirmation hearing. It would therefore be incumbent on the Defence to raise this issue before the Presiding Judge.
58. However, the Defence submits that it would be a waste of time and resources to delay consideration of these issues until that point in time since if the submissions of the Defence are well-founded, the confirmation hearing would have to be again postponed

³² Decision on the Prosecution Motion for Reconsideration and, in the Alternative, Leave to Appeal ICC-01/04-01/06-166

and the Court should order that the disclosure process commence afresh for all documents and statements which have been disclosed in summary form.

2.4 The Requirement that an immediate resolution of these issues would materially advance the proceedings

59. The legal principles adumbrated in the impugned decision will presumably govern all future such applications, and concretely, all pending applications in the lead up to the confirmation hearing.
60. The hearing for the confirmation of charges represents an extremely valuable opportunity for the Defence to seek the release of their client on the basis that there are not sufficient grounds to believe that he committed a crime under the jurisdiction of the court. The Defence submits that disclosure of witness statements in summary form will severely impede the ability of the Defence to meaningfully review or challenge these statements, it would be extremely unfair, not to mention a waste of resources to continue the proceedings and keep Thomas Lubanga Dyilo in custody if the test for confirming charges is not properly met due to the fact that the ability of the Defence to effectively participate in the confirmation hearing was frustrated by the use of summaries.
61. In the view of the Defence, it is therefore imperative to seek an immediate resolution from the Appeals Chamber in order to resolve the issues set out above, and thereby clarify whether Thomas Lubanga Dyilo's rights under the Statute have been sufficiently respected during the disclosure process, to enable the court to proceed to the confirmation hearing.

3. Relief Sought

62. For the reasons set out above, the Defence respectfully requests that the Honourable Pre-Trial Chamber grants the Defence leave to appeal the decision of 15 September 2006.



Defence counsel

Jean FLAMME

Dated this 21st day of September, 2006

At The Hague