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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 Second 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 21 September 2006, the Single Judge issued the ‘Second Decision on the Prosecution Requests and Amended requests for Redactions under Rule 81’.¹
2. In terms of the application of Rule 81(2), the Single Judge observes that “none of the redactions proposed by the Prosecution under rule 81(2) of the Rules is based on the need to protect information related to the ongoing investigations in the current case against Thomas Lubanga Dyilo”.² Nonetheless, the Single Judge subsequently concludes that “there is a need to authorise several redactions in several of the documents, witness statements, and transcripts of witness interviews [...] so as:
 - (i) not to prejudice further investigations, which *inter alia* includes protecting the identity of:
 - a. Prosecution sources when the relevant organisation has expressly requested that its identity not be revealed to the Defence at this stage of the proceedings, and when the person supplying the document to such an organisation or the contact person(s) of such organization in the DRC currently resides in a risk area;
 - b. Prosecution sources when the individual who transmitted the document to the Prosecution currently resides in a area of risk;
 - c. Persons who are believed not to be Prosecution sources, are referred to in handwritten notes which are not part of the content of the relevant documents, and are currently leaving, or may be currently leaving, in areas of risk”.³
3. In relation to the clear caveat in the Statute and Rules that the Prosecution cannot rely on evidence at the confirmation hearing without adequate prior disclosure to the Defence, the Single Judge appears to hold that this only applies to the particular section of the document which the prosecution wishes to rely on, rather than the document in its entirety. Thus, the Single Judge states that “without prior adequate disclosure to Thomas Lubanga Dyilo, the Prosecution cannot rely on those parts of the documents, witness statements and transcripts of witness

¹ Although the cover page of the decision has the date 20 September 2006, the decision was only notified to the Defence on 21 September 2006.

² At page 8.

³ At page 9.

interviews for which redactions are authorised in the present decision”.⁴ The converse of this finding would thus be that the Prosecution can rely on the non-redacted sections of the documents.

4. The Defence is of the position that this decision will significantly impede the ability of the Defence to contextualise and challenge the credibility and authenticity of Prosecution evidence. The Defence also respectfully submits that the Single Judge has relied on an interpretation of Rules 81(2) and (4) which is inconsistent with the plain meaning of the Statute and Rules.
5. 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

6. 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.”⁵
7. 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).⁶
8. In setting out the appealable issues, it is not necessary for the party seeking leave to address the merits of the appeal, nor indeed, is it feasible to do so within the limited time frame for filing a request for leave to appeal.
9. In this regard, the Defence respectfully submits that the impugned decision raises the following appealable issues:

⁴ At page 10.

⁵ 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.

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. 9.

- i. Whether the Single Judge was entitled to rely on on *ultra vires* submissions of the Registry, which went to the heart of the impartiality of the Registry, and thus the overall fairness of the *ex parte* Rule 81 proceedings;
- ii. Whether the protection afforded by rule 81(2) should extend to the protection of confidential materials in *other* investigations (investigations which are not conducted against Thomas Lubanga Dyilo), and whether the Single Judge failed to address how disclosure of such information could in fact cause prejudice to such investigations;
- iii. Whether the requirement that the prosecution is prohibited from relying on evidence protected under Rule 81(2) and Rule 82 without adequate prior disclosure to the Defence is met by disclosing the unredacted components of a redacted document; and
- iv. Whether the impugned decision creates a form of privilege for the prosecution sources in question which is not provided for in either the Statute or the Rules.

3. The Criterion of Fairness

10. The Defence would like to incorporate by reference its submissions regarding the definition of fairness, as set out in its ‘Request for Leave to Appeal the First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’,⁷

3.1 The Ultra Vires Submissions of the Registry

11. At page 8 of the impugned decision, the Single Judge refers to the “Recommendations of the Registrar on Protective Measures for Prosecution Witnesses”,⁸ and in particular, the recommendation that “the longer the time between the disclosure of the identity of the witnesses and the time when the witnesses are to testify, the greater the danger to the witnesses; and that in the view

⁷ Dated 21 September 2006, at para 12 an

⁸ ICC-01/04-01/06-US Exp (filed on a confidential ex parte basis).

of the Registrar, among other protective measures, the non-disclosure of the identity of some of the witnesses prior to the commencement of the trial is a protective measure that could minimise the risk to the safety of the relevant witness”.⁹

12. The Defence is not in a position to verify whether this is an accurate depiction of the stance of the Registry, or whether it may have been taken out of context, since the original submissions were filed on an *ex parte* basis. However, the Defence observes that the Registry reiterated this position in almost exactly the same manner during the Status Conference convened on 26 September 2006.
13. Although the Single Judge cites a recommendation from the Council of Europe in apparent support of the position of the Registry, this recommendation only refers to the delay of witness identities as a possible measure, whereas the Registry appears to have recommended this measure as the most appropriate in light of the particular circumstances of these witnesses.
14. The position of the Registry therefore appears to be predicated on the belief that disclosure of the witnesses’ identities to *this particular Defence team* would endanger the safety of the witnesses in question. In this regard, the recommendation does not even refer to a risk of danger, but rather varying levels of danger. The Registry also predicated their recommendation on the assumption that the case would proceed to trial.
15. The fundamental unfairness of this position can be illustrated by applying the same conclusion to the Prosecution: that the disclosure of identities of Defence witnesses to professional legal staff members of the ICC would *ipso facto* endanger these witnesses. The Defence is reasonably confident that the Prosecution would object to such a slur on their professional integrity, but can the Court sanction double standards being applied to the respective parties?
16. Nonetheless, it appears from the text of the decision that the Single Judge relied on this recommendation in formulating her ultimate decision, since this is only the section of the decision which addresses why there is a need to redact the identities of the witnesses in question.
17. The 19 May 2006 decision on the application of Rules 81(2) and (4) stipulates that consultation with the Victims and Witnesses Unit (VWU) regarding the availability and feasibility of protective measures for a given witness was a preliminary requirement for all Rule 81 applications. In the view of the Defence,

⁹ Page 8-9.

this implies that the Registry should act in such scenarios in a manner similar to an expert witness: the VWU should advise on technical aspects pertaining to the range of protective measures available, and the feasibility of implementing such measures, but it should not replace the role of the judge as the ultimate arbiter of fact and law.

18. The Defence therefore submits that the 19 May 2006 decision did not vest the VWU with a mandate to assess or advise the Prosecutor (or indeed the Court) on the likelihood that the witness in question could be at risk as a result of the disclosure of their identity to the Defence team.
19. Even if the Registry purports to rely on past jurisprudence of the ICTY regarding protective measures for sensitive witnesses, the Defence notes that such jurisprudence stresses that the delay of witness identities is an exceptional measure, which can only be applied after considering whether it is warranted in the particular circumstances of the witness in question.¹⁰ It is not possible to rely on the security situation in a given area as grounds in itself for justifying such measures, nor is it possible to make a blanket assumption that such measures are warranted, merely on the basis of past practice at other courts.
20. Accordingly, the Registry could not have recommended such a measure without first forming a conclusion that the witness in question faced a particular danger if his/her identity was disclosed to this particular Defence team, which is clearly a far from impartial stance. Nor, in the view of the Defence, should the Registry adopt a position which is fundamentally opposed to the rights of the Defence.
21. In this regard, Rule 18 of the Rules of Procedure and Evidence provides that the VWU shall “act impartially when cooperating with all parties and in accordance with the rulings and decisions of the Chambers”. Rule 20(1) of the Rules of Procedure and Evidence also stipulates that the “Registrar shall organize the staff of the Registry in a manner that promotes the rights of the Defence, consistent with the principle of fair trial as defined in the Statute”. This duty is of paramount importance given the fact that the Defence is not an organ of the Court, and relies on the Registry for administrative support. The Defence is particularly dependent on the Registrar to act in an impartial manner, and to “[a]dvice the Prosecutor and

¹⁰ See inter alia the criteria set out in Prosecutor v. Milosevic, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, 19 February 2002, <http://www.un.org/icty/milosevic/trialc/decision-e/20219PM517175.htm>

the Chambers, as necessary, on relevant Defence related issues”¹¹ during *ex parte* hearings which are conducted with all organs of the Court except the Defence.

22. The Defence respectfully submits that the recommendation of the Registry is fundamentally incompatible with the rights of the Defence in that the delay of the identities will, without doubt, impede the ability of the Defence to challenge the challenging issues pertaining to credibility, chain of custody, collusion or authenticity.
23. It is for this reason that the Defence also submits that ICTY jurisprudence on this point is not automatically transferable. Delaying witness identities at the ICTY impacts on the right of the Defence to be informed of the charges in a timely manner, but ultimately the Defence were disclosed the identities before the first hearing on the merits, and thus before the first opportunity for the Defence to challenge OTP evidence. In contrast, the ICC provides the Defence with a unique opportunity to challenge prosecution evidence before the confirmation of the charge. Thus, an order for non-disclosure of witness identities until after the confirmation hearing does prevent the Defence from fully and effectively challenging the Prosecution case at the first available opportunity to do so.
24. The Defence would like to clarify that it is not requesting the Chamber to review the decision of the Registrar to adopt such a position (which would entail a different standard of review). It is contesting the fact that the Single Judge relied on this *ultra vires* position in formulating her ultimate stance on the appropriateness of the protective measures in question.

3.2 The definition of ongoing investigations for the purpose of Rule 81(2)

25. In the 19 May decision, the Single Judge referred to the decision of 15 May regarding the timing of prosecution investigations (that it should, absent exceptional circumstances, be brought to an end before the confirmation hearing), and the requirement under rules 121(4) and (5) that any evidence pertaining to an amended charging document should be filed at least 15 days before the confirmation hearing, and therefore concluded that “any redaction authorised to protect information related to the ongoing investigation against Thomas Lubanga Dyilo case only be temporary”.¹²

¹¹ Rule 81(1)(d) of the Rules of Procedure and Evidence.

¹² At page 18, paras. 39-41.

26. The Single Judge did not in this decision, nor indeed in any other *inter partes* proceedings, discuss the possibility of adopting a more expansive definition of investigations, such that Rule 81(2) could also encompass investigations against other persons or in other situations.
27. However, the impugned decision appears to rely on a more expansive interpretation of ‘ongoing investigations’
28. This definition is extremely troubling, given the overlap between the situations in Sudan, DRC and Uganda, as it could potentially be utilised by the Prosecutor to withhold key evidence to the Defence regarding the context of the conflict and the role played by non-DRC authorities.
29. In this connection, the Defence submits that such an expansive interpretation is not consistent with the *raison d’être* of Rule 81(2), which is to ensure that the Defence does not interfere with or frustrate the efforts of the Prosecutor to investigate its client. In this regard, what prejudice could arise from disclosing information to the Defence regarding another investigation, which has no impact on Thomas Lubanga Dyilo? The Defence concedes that disclosure to the general public could be deleterious to prosecution tactics but strongly refutes the possibility that disclosure to a team of professional lawyers, who are solely concentrating on the case of Thomas Lubanga Dyilo, could concretely prejudice prosecution investigations in other cases.
30. The Defence refers to the findings of the ICTY, that:

When the required balancing exercise is undertaken before protective measures are ordered, a clear distinction must be drawn between measures to protect individual victims and witnesses in the particular trial and measures which simply make it easier for the prosecution to present its other cases against other persons. Whilst the Tribunal must make it clear to prospective victims and witnesses in other cases that it will exercise its powers to protect them from, *inter alia*, interference or intimidation where it is possible to do so, the rights of the accused in the case in which the order is sought remain the first consideration. It is not easy to see how those rights can properly be reduced to any significant extent because of a fear that the prosecution may have difficulties in finding witnesses who are willing to testify in other cases.¹³

¹³ Prosecutor v. Brdjanin and Talic, Decision on Motion by the Prosecutor for Protective Measures, at para 29 and 30. <http://www.un.org/icty/brdjanin/trialc/decision-e/00703PM213035.htm>

31. The Defence therefore submits that it is fundamentally unfair to subordinate the right of Thomas Lubanga Dyilo to have full access to the evidence against him, to the wish of the Prosecution to cast a complete veil of secrecy over its operations. .

3.3 Definition of redacted and unredacted parts of documents

32. At page 10 of the impugned decision, the Single Judge concludes that “without prior adequate disclosure to Thomas Lubanga Dyilo, the Prosecution cannot rely on those parts of the documents, witness statements, and transcripts of witness interviews for which redactions are authorised in the present decision; and that the probative value of the unredacted parts of the said documents, witness statements and transcripts of witness interviews may be diminished as a result of the redactions proposed by the Prosecution and authorised by the Chamber”.
33. The Defence respectfully submits that the impugned decision errs by implying that even if the Prosecution does not disclose to the Defence the sections of the documents which were redacted, the Prosecution can still rely on the ‘unredacted’ components of the document.
34. In the view of the Defence, if a document or statement has been redacted, it is a redacted document. An unredacted document it is one which has no redactions. That should be a relatively clear and uncontroversial position.
35. Both Rule 81(2) and Rule 82 provide that information protected under these rules cannot be introduced into evidence without adequate prior disclosure to the Defence. This is a mandatory requirement. It is highly artificial and defeats the plain intention of the Statute and Rules to distinguish between the unredacted components of a document and the redacted components, and to thus conclude that it is acceptable for the Prosecutor to rely on the unredacted components at the confirmation hearing since it is in effect, a redacted document.
36. The text of Rule 82 provides, “where material or information is in the possession of control of the Prosecutor [...], the Prosecutor may not subsequently introduce such material or information into evidence”; notably the rule refers to the introduction of the material or information *in totu*, rather than a component of the material or information. Rule 81(2) employs similar language.
37. The purpose of excluding the document in its entirety is that *any* redaction infringes the rights of the Defence. Although the Chamber can play a regulatory

role in authorising protective measures, only the Defence is instructed by Thomas Lubanga Dyilo and thus ultimately, it is the Defence who would be in the best position to ascertain the import of a redaction on its preparation, and on the reliability and credibility of the Prosecution case.

38. Although the impugned decision notes that the probative value of the document in question may be reduced if it is admitted into evidence at the confirmation hearing, the fact that it can still be admitted means that the Chamber may take it into consideration in determining whether there is sufficient evidence, whilst at the same time, the ability of the Defence to properly challenge its probative value, credibility and authenticity during the confirmation hearing would have been denied.
39. The interpretation of the Single Judge also has the potential to establish an extremely dangerous precedent in that Rule 82 and Rule 81(2) do not differentiate between the stage of the proceedings; thus according to the findings of the impugned decision, it would be open to the Prosecution to rely on the unredacted components of redacted documents during the trial stage.
40. The Defence is also of the position that this stance contradicts an earlier statement of the Single Judge, to the effect that “pursuant to articles 61(3)(b), 61(6) and 67(1) and (2) of the Statute and rules 76 and 77 of the Rules, the Defence has the right to access unredacted versions of (i) the evidence on which the Prosecution intends to rely at the confirmation hearing”,¹⁴ which was issued in the context of the Prosecution’s statement that it believed that it was allowed to *proprio motu* redact the very materials which are the subject of the impugned decision. The Defence therefore protests the fact that the Single Judge has apparently reversed her stance, without first providing the Defence with notice that this legal question was in issue, and an opportunity to be heard.

3.4 The decision wrongfully substitutes Rule 81(2) as the governing provision for the protection of the prosecution sources in question, and thereby creates a form of privilege which is clearly not provided for by either the Statute or the Rules;

¹⁴ Decision on the Prosecution practice to provide to the Defence redacted versions of evidence and materials without authorisation by the Chamber, 25 August 2006, ICC-01/04-01/06-355

41. The impugned decision authorises redactions for three different categories of Prosecution sources: persons/organisations, which have received documents from other persons residing in an area of risk, and which have expressly requested that their identities not be disclosed to the Defence at this stage of the proceedings; persons who have transmitted the document to the Prosecution and who live in an area of risk; persons who are not prosecution sources, but are referred to in the document, and who live in an area of risk.
42. Firstly, the Defence submits that the decision fails to describe what it meant by an ‘area of risk’; i.e. whether the risk would originate from the public being informed that this person was cooperating with the court or whether it would originate from the Defence team, and why it is specific to the particular ‘area’. In terms of persons who are neither sources nor witnesses, the Defence fails to comprehend how disclosure to the Defence, as opposed to the general public, could create any risk at all for these persons. Nor does the decision elaborate on how the disclosure of the names of persons who are neither sources nor witnesses could possibly prejudice ongoing investigations. The Defence therefore submits that an overly broad interpretation of Rule 81(2) significantly impacts on the fairness of the proceedings to the extent that by claiming protection under this rule, the Prosecution denies the Defence access to an otherwise accessible source of information,¹⁵ and fundamentally impacts on the “credibility and apparent integrity” of the Court.¹⁶
43. Secondly, the Single Judge has adopted the fundamentally flawed approach of first identifying which rule would allow the relief sought by the prosecution, rather than first identifying which rule is applicable to circumstances of the persons for whom the Prosecutor is seeking protection.
44. In this regard, Rule 81(2) allows the Prosecutor to seek an order for non-disclosure on the basis that such disclosure would prejudice further or ongoing investigations. The Single Judge clearly states that the material in question is not related to further investigations against Thomas Lubanga Dyilo.

¹⁵ G. McIntyre, ‘Equality of Arms – Defining Human Rights in the Jurisprudence of the ICTY’, 25 August 2003, Outreach Seminar: Convergence of Criminal Justice Systems: Building Bridges – Bridging the Gaps < <http://www.isrcl.org/Papers/McIntyre.pdf> >

¹⁶ See comments of the American Bar Association on proposals of the US government to extend the protection for national security information at the ICTY, ABA Section of International Law and Practice, Report on the Proposed Rules of Procedure and Evidence of the International Tribunal to Adjudicate War Crimes in the Former Yugoslavia 1995, page 141-143. cited in L. Moranchek, ‘Protecting National Security Evidence While Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY’ at footnote 18< [http://www.yale.edu/yjil/PDFs/vol_31/Moranchek.pdf#search=%22Rule%2066\(C\)%20laura%20yale%20intelligence%22](http://www.yale.edu/yjil/PDFs/vol_31/Moranchek.pdf#search=%22Rule%2066(C)%20laura%20yale%20intelligence%22) >

45. In terms of the category of sources, who have provided information subject to the caveat that their identities should not be disclosed at this stage of the proceedings, since the organisations in question have already provided information to the Prosecution, the Defence queries how the disclosure of their identity could now prejudice Prosecution investigations.
46. The Defence further submits that the Prosecution should not be able to rely on Rule 81(2) by default by arguing that if the organisations do not consent, their ability to conduct further investigations will be prejudiced to the extent that that organisation may not provide information in the future.
47. Such an approach would render the cooperation regime of the ICC nugatory. The Prosecution has the power to request cooperation from NGOs in accordance with article 54(3)(c).¹⁷ In seeking cooperation from NGOs, the Prosecutor may agree not to disclose the identity of the information provider. Nonetheless, such an agreement is subject to the conditions set out in article 54(3)(e): that firstly, the information was obtained on the condition of confidentiality; secondly, it was obtained solely for the purpose of generating new evidence and not for the purpose of being used as evidence; and thirdly, if it is used as evidence in itself, it must be disclosed in advance to the Defence.
48. Neither the Statute nor the Rules allow the information provider to stipulate any further conditions, for example, the condition that disclosure to the Defence of the identity of the organisation be delayed until after the evidence is introduced in court.
49. The Defence therefore submits that the impugned decision implicitly abrogates the powers of the Court to the extent that it vests the right to decide on whether the organisation should be obliged to disclose their identity to that organisation, rather than the Pre-Trial Chamber. Such a privilege is evidenced not only by a refusal to cooperate, but also a refusal to cooperate unless certain conditions are met.
50. In this connection, the Defence refers to the ‘Decision on Prosecutor’s request for Authorization to Delay Disclosure of Rule 70 Information’, which was issued in the Prosecutor v. Blaskic,¹⁸ which concerned a request from the Prosecutor to delay the disclosure of statements from a humanitarian organisation, on the grounds that their disclosure would prejudice continuing investigations (and were thus protected under Rule 66(c)), which is the equivalent of Rule 81(2), or

¹⁷ NGOs are presumably encompassed by the term ‘arrangements’.

¹⁸ Decision of 6 May 1998, < <http://www.un.org/icty/blaskic/trialc1/decisions-e/80506DE113452.htm>>

alternatively, on the basis that the organisation had not consented to disclosure at this particular time, and was thus protected by Rule 70 (the equivalent of article 54(3)). Notably, the Trial Chamber concluded firstly, that the protection afforded by Rule 66(c) does not extend to witness statements (or prior statements), which “constitutes the “core” which will preserve the principle of an *inter partes* trial and the rights of the accused which derive therefrom”,¹⁹ and secondly, that once the organization in question consents to the use of the documents in question as evidence, the Defence has the right to discovery of the said documents: “According to the Trial Chamber, once its consent has been given, the humanitarian organisation cannot determine if, and if necessary, when it is appropriate to the disclose the prior statements.”²⁰

51. The impugned decision thus appears to create a new form of testamentary privilege which is not foreseen by either the Statute or the Rules.
52. Indeed, the only NGO which has a right not to cooperate with the Court is the ICRC, as the result of its history of neutrality and the unique role it plays in the development and enforcement of international humanitarian law.²¹ The Defence is obviously unaware of the identity and mandate of the organisations in question, but it already has grounds to suspect the neutrality of NGOs operating in the field as a result of several recent public statements,²² and thus strongly rejects the possibility that the ICRC exception could be applied to any other organisation.
53. The Defence thus submits that the impugned decision could have profound consequences for the functioning of the Court (and the Defence). If the Single Judge’s interpretation of the rules if followed, anyone who resides in the DRC could condition their cooperation with the Court on the requirement that their name not be disclosed to the Defence. This would render all future proceedings fundamentally unfair, by infringing the right of the Defence to be informed of the evidence against it.

4. The criterion of expeditiousness

¹⁹ At para. 8.

²⁰ At para. 14.

²¹ Rule 73(4), See also Decision On The Prosecution Motion Under Rule 73 For A Ruling Concerning The Testimony Of A Witness (the ICRC decision), Prosecutor v. Simic et al., 27 July 1999, <http://www.un.org/icty/simic/trialc3/decision-e/90727EV59549.htm>

²² See for example, the joint letter from NGOs to the ICC Prosecutor dated 31 July 2006, http://www.iccnw.org/documents/DRC_joint_letter_eng.PDF

54. The Defence respectfully submits that the right of the Defence to challenge prosecution evidence at the confirmation hearing ensures that the time and resources of the international community are not wasted by insufficiently supported cases, which should not proceed to trial. The Defence further submits that if documents and statements are fundamentally unreliable, it would be in the interests of expeditious proceedings to exclude them from evidence at the earliest stage possible, and thus focus and clarify the parameters of the Prosecution case. The Defence therefore submits that any measures which frustrate or impede the ability of the Defence to mount a vigorous challenge to the sufficiency of the Prosecution's evidence at the confirmation hearing will ultimately be counterproductive for the efficiency and expeditiousness of proceedings.
55. In this connection, the Defence recalls the Shakespearean maxim "Wisely and slow; they stumble that run fast". The Defence is *not* seeking to promote measures which delay or lengthen the proceedings; it simply contests the idea that expediency can be equated to expeditiousness. The chapeau of article 67, which sets out the minimum rights of the Defence, clearly stipulates that fairness and impartiality are the sine qua non of proceedings at the ICC. Accordingly, the right to be tried without undue delay must be implemented in a fair and impartial manner.
56. Similarly, in determining the threshold criteria for leave to appeal, the Defence respectfully submits that the requirements of expeditious conduct must be construed in light of the overarching requirements of fairness. To proceed to the confirmation hearing at breakneck pace will not itself satisfy the right of the international community to receive verification as to whether there are sufficient grounds to proceed to trial: a speedy but unfair judgement would not be worth the paper it is written on. Therefore, in determining whether the measure in question is related to expeditious proceedings, the Defence respectfully submits that it must be measures which expedite fair proceedings.
57. The Defence further submits that the decision hampers the expeditiousness of (fair) proceedings by infringing the right of the Defence to be promptly informed of the details of the prosecution case, which in turns, facilitates the ability of the Defence to devise its strategy and conduct targeted, efficient investigations (rather than fumbling in the dark).
58. The Defence would also like to reiterate its submissions from its Request for Leave to Appeal the first Rule 82 decision; namely, 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”.

59. 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.
60. 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 and the Court should order that the disclosure process commence afresh for all documents and statements which have been disclosed in redacted form.

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

61. 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.
62. As noted above, 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 evidence in redacted form will severely impede the ability of the Defence to meaningfully review or challenge these statements, and to conduct follow up investigations regarding issues of authenticity, credibility, or possible collusion or improper influence. 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 such redactions.
63. 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

2. For the reasons set out above, the Defence respectfully requests that the Honourable Pre-Trial Chamber grants the Defence leave to appeal the Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, dated 21 September 2006.



Defence counsel

Jean FLAMME

Dated this 27th day of September, 2006

At The Hague