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THE APPEALS CHAMBER

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

Registrar: Mr Bruno Cathala

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

Public Document

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

The Office of the Prosecutor
Mr. Luis Moreno-Ocampo, Prosecutor
Mrs Fatou Bensouda, Deputy Prosecutor
Mr. Fabricio Guariglia, Senior Appeals
Counsel
Mr. Ekkehard Withopf, Senior Trial
Attorney

Counsel for the Defence
Mr. Jean Flamme
Ms. Veronique Pandanzyla

1. Introduction:

1. On 15 September 2006, the Honourable Single Judge issued the “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”.
2. On 21 September 2006, pursuant to article 82(1)(d), the Defence filed its “Request for Leave to Appeal the First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”.
3. On 28 September 2006, the Single Judge issued the “Decision on Second Defence Motion for Leave to Appeal”, in which the Single Judge granted leave to appeal in relation to the following three issues:
 - a. whether the Decision lacked factual reasoning in light of the fact that it was issued during *ex parte* proceedings for non-disclosure of identity of Prosecution witnesses under rule 81(4) of the Rules;
 - b. whether the principle of necessity and proportionality was appropriately applied in deciding on the non-disclosure of identity of some Prosecution witnesses for the purpose of the confirmation hearing; and
 - c. whether the use at the confirmation hearing of summary evidence in relation to Prosecution witnesses for which non-disclosure of identity has been granted is permissible under the Court’s applicable law.
4. In accordance with Regulation 65 of the Regulations of the Court, the Defence is required to file a document in support of the appeal within 10 days of notification of the decision granting leave to appeal.¹
5. The Defence incorporates by reference the arguments set out in its request for leave to appeal.

2. Submissions

2.1 Lack of Factual Reasoning

6. The Defence has not been privy to the issues and concerns discussed during the Rule 81 *ex parte* hearings.² The Defence therefore asserted in its request for leave to appeal that equality of arms requires that at the very least, a decision which has such a fundamental impact on the ability of the Defence to prepare its case and

¹ The deadline for filing the brief was 9 October 2006 4pm. Prior to the expiration of the deadline, the Defence requested a limited extension due to the technical difficulties it was facing. The Defence therefore respectfully seeks the leave of the Appeals Chamber to accept the current filing as validly done. The Defence would also like to express its appreciation to the IT section for its assistance in resolving the issue.

² 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.

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.

7. In the decision granting leave to appeal, the Single Judge "acknowledges that the factual reasoning did not enter into specific details of each and every witness covered by the Decision [and] that the Single Judge took this approach considering that the Decision was issued during *ex parte* proceedings for non-disclosure of identity of Prosecution witnesses under rule 81(4) of the Rules".³
8. The Single Judge did not certify leave to appeal in relation to the question as to whether the legal basis for non-disclosure was sufficiently adumbrated in the impugned decision. As such, the question on appeal is limited to the inquiry as to whether the factual circumstances cited by the Single Judge meet the threshold requirements for imposing protective measures.
9. The Defence contested the factual basis of the impugned decision on the grounds that the factual justification for the decision is limited to the following observations: firstly, that the security situation in the DRC has had an impact on the range of options available for the protection of victims and witnesses; secondly, in such a scenario, non-disclosure of the identities of witnesses is the only feasible measure which is available to protect many Prosecution witnesses; and thirdly, even if heavily redacted, the unredacted portions of the materials in question would still lead to the identification of the relevant witness.⁴
10. The Single Judge also describes the "ultimate purpose" of the redactions as being to "preserve the non-disclosure of the identity of those witnesses on whom the Prosecution intends to rely at the confirmation hearing because [...] their safety, or that of their families, could be gravely endangered were their identities to be revealed to the Defence at this stage".⁵ However in the view of the Defence, this does not in itself constitute a factual finding since the Single Judge has not actually discussed how or why the disclosure of their identities could endanger the safety of the witnesses or their families.

³ At page 6.

⁴ At page 7.

⁵ At page 7.

11. In the decision granting leave to appeal, the Single Judge implies that the factual basis described in the decision may have been circumscribed by the fact that more thorough discussions took place during the preceding *ex parte* proceedings.
12. In the view of the Defence, it is therefore necessary to consider firstly, notwithstanding the need to withhold certain protected information, whether the Single Judge provided the minimum amount of information required to satisfy the right of the Defence to be informed of the basis for the decision, and secondly, whether this information meets the requisite threshold for imposing the protective measure in question.
13. Regarding the question of the sufficiency of reasons, the Defence respectfully submits that failure to provide adequate factual reasons violates the right of the Defence to a fair trial, and may give rise to the conclusion that the decision was arbitrary.
14. The duty to explain in a reasoned verdict the legal and factual criteria that have been used to make a decision has been addressed in ICTY jurisprudence. The Appeals Chamber has stated that the “*right of an accused under Article 23 of the Statute to a reasoned opinion is an aspect of the fair trial requirement embodied in Articles 20 and 21 of the Statute*”.⁶ The Trial Chamber must “*indicate its view on all of those relevant factors which a reasonable Trial Chamber would have expected to take into account before coming to a decision.*”⁷
15. Although the impugned decision was predicated on an *ex parte* application, and further discussed in *ex parte* proceedings, the Defence submits that rather than obviating the need to provide particulars in relation to the justification for each witness, in light of the impact of the decision on the ability of the Defence to effectively prepare for the confirmation hearing, the Single Judge remained under a firm obligation to sufficiently inform the Defence of the factual basis for the decision. Thus, in the ICTY case of Prosecutor v. Brdjanin and Talic,⁸ the Pre-Trial

⁶ *Furundzija Appeals Judgment*, 21 July 2000, paragraph 69 < <http://www.un.org/icty/furundzija/appeal/judgement/index.htm> >

⁷ *Prosecutor v Milutinovic*, IT-99-37-AR65.3, *Decision Refusing Milutinovic Leave to Appeal*, 3 July 2003, paragraph 22. < <http://www.un.org/icty/milutinovic/appeal/decision-e/030703.htm> >

⁸ *Prosecutor v. Brdjanin and Talic*, *Decision on Second Motion by the Prosecution for Protective Measures* 27 October 2000 <http://www.un.org/icty/brdjanin/trialc/decision-e/01027PM213940.htm> Before assessing the jurisprudence of the ICTY on this issue, it is important to distinguish between the different types of protective measures that are available. Whilst it is clear that protective measures that are requested vis-à-vis the public are often considered and dealt with briefly by the Trial Chambers, without expounding the reasoning behind the decision, the level of legal and factual reasoning required in relation to requests for redactions vis-à-vis the Defence is far greater. The Defence submits that the Appeals Chamber must be careful to distinguish between these two different sorts of applications in its assessment of the jurisprudence on this issue.

Judge observed that “any *ex parte* proceedings infringe upon the accused’s right to a fair trial, and – particularly where the application is to deny the accused at this stage the identity of these witnesses – the accused must be given sufficient information to enable him to decide whether or not to oppose that application. The arguments advanced to justify the protective measures sought should therefore be set out in such a way that the basis for the application is disclosed as far as possible without revealing the identity of the particular witness for whom the protection is sought.”

16. In a subsequent decision,⁹ the Pre-Trial Judge instructively set out a hypothetical example “to demonstrate how the salient details of an application for protective measures could be given on an *inter partes* basis without revealing the identity of the witness. The prosecution could state (on a confidential basis only):

The witness, who is a Bosnian Muslim, currently resides outside the former Yugoslavia, but he proposes to return within a month to live in the Federation of Bosnia and Herzegovina in a municipality where the majority of persons are Bosnian Serbs and in relation to which the [XYZ Agency] has reported that there is presently a high risk of retaliation if it were known that a Bosnian Muslim was to give evidence against a Bosnian Serb.

It is proposed that the witness will give evidence directly relating to the participation of the accused in planning certain incidents alleged in the indictment. He has expressed fears to an OTP investigator concerning his security, and the security of his family, should the accused learn of his identity, and he has stated as the objective basis for those fears that he has heard from other proposed witnesses for the prosecution that they have received anonymous telephone calls threatening them and their families with violence if they give evidence in this case. The persons making those threats claimed to be acting on behalf of the accused. Such threats had already been reported to the OTP by those other proposed witnesses. The OTP has formal, sworn, statements by the witness and by the other proposed witnesses verifying these facts.

⁹ Prosecutor v. Brdjanin and Talic, Third Decision on Prosecution Request for Protective Measures, 8 November 2000 <http://www.un.org/icty/brdjanin/trialc/decision-e/01108PM213938.htm>

The OTP has been unable to verify that the persons making these threats were in fact acting on behalf of the accused.

Any investigation on behalf of the accused would necessarily take place at least in part within the municipality where the witness will be living.

The details could then be completed on an *ex parte* basis, which would identify the municipality involved, the nature of the evidence to be given, and any relationship between the witness and the accused. The prosecution could also file on an *ex parte* basis the additional objective material (including the formal, sworn, statements) upon which it relies for its claim that, despite the obligations imposed upon the accused and their Defence teams, there should be no disclosure even to them at this stage.

Such an application by the prosecution for protective measures could not identify the witness, but it would provide the accused with sufficient information to decide whether to oppose the application.

17. Regarding the second issue as to whether the impugned decision did in fact sufficiently delineate the factual bases for the imposition of the measures in question, the threshold test for ordering the non-disclosure of the identity of a witness under Rule 81(4) was addressed by the Single Judge in the decision of 19 May 2006. The Single Judge emphasised that non-disclosure is “an exceptional measure, as opposed to a general rule, insofar as such measure “(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 the Defence pursuant to articles 61(3) and 61(6)(b) and 67(1) of the Statute”; and [emphasis added] can be granted only, insofar as it is an exceptional measure, if: (i) other protective measures which are less restrictive of the rights of the Defence have been previously sought from the Victims and Witnesses Unit ; and (ii) exceptional circumstances surrounding the relevant witness still require the non-disclosure of his or her identity due to the infeasibility or insufficiency of such measures”.

18. There are thus three components of any factual assessment for protective measures; firstly, that the factual circumstances of the particular witness are of such an exceptional nature that non-disclosure of their identity is required to protect their safety or that of their families, secondly, that it be employed only if less restrictive measures are not available and if the measures in question are necessary; and thirdly, that this measure be employed exceptionally, rather than as a general rule.
19. In this regard, the impugned decision motivates the use of non-disclosure by referring to the fact that the security situation in the DRC has rendered other protective measures unavailable at this point in time. In the view of the Defence, this factor satisfies component two, but not the first and third components insofar as the exceptional circumstance must inhere to the witness in question, and must not relate to broader considerations, such as the prevailing security situation or the timing of disclosure, which impact on all and any witness, and thus have the potential to transform such protective measures into a general rule rather than an exceptional measure.
20. In terms of the inquiry as to whether exceptional circumstances exist with respect to a particular witness, the jurisprudence of the ICTY has consistently maintained that firstly, it is necessary to establish the “likelihood that the Prosecution witness will be interfered with or intimidated once their identity is made known to the accused and his counsel, but not the public (fears expressed by potential witnesses are not in themselves sufficient to establish a real likelihood that they may be in danger or at risk; what is required is something more)”;¹⁰ secondly, the prevailing security circumstances in a region do not in themselves justify the imposition of protective measures;¹¹ and thirdly, that although one could in general, hypothesise that the longer the time between the disclosure of their identities and the commencement of the trial, the greater the possibility of risk for victims, “absent specific evidence of the risk that persons to whom the Defence speaks in the course of its investigations may reveal the identity of particular witnesses, the likelihood that interference will eventuate is not sufficiently great to justify the extraordinary measures sought by the Prosecution under Rule 69 (A).”¹²

¹⁰¹⁰ Milosevic at para. 29.

¹¹Prosecutor v. Milosevic, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, 19 February 2002, at para 18. <http://www.un.org/icty/milosevic/trialc/decision-e/20219PM517175.htm> citing Decision of 3 July 2000 in Brdjanin and Talic at para 28.

¹²Prosecutor v. Brdjanin and Talic, Decision on Second Motion by Prosecution for Protective Measures, 27 October 2000 at para 18 et seq. < <http://www.un.org/icty/brdjanin/trialc/decision-e/01027PM213940.htm> >

21. In relation to the first aspect - the assessment as to whether disclosure to a particular Defence team would create an objectively founded risk- the ICTY has distinguished between persons associated with the defendant, who would not ordinarily be privy to Defence materials, and the Defence team. Thus, in the Milosevic case, the Prosecution referred to the fact that a person associated with the political party of the accused had publicly announced an intention to intimidate witnesses. The Chamber refused to rely on this incident as the “threat was not made by the accused and [...] there is no suggestion the accused prompted this threat.”¹³
22. In relation to the third point, the ICTY Trial Chamber observed:¹⁴

It is obvious that what would usually be sufficient to show that a witness may be in danger or at risk if that witness’s identity is directly disclosed *to the public* would not usually be sufficient to show that the witness may also be in danger or at risk if that witness’s identity is disclosed only to the accused and the Defence team – where obligations are also imposed upon the accused and the Defence team in relation to further disclosure by them. As in the Protective Measures Decision, the Trial Chamber accepts that the greater the length of time between the disclosure of the identity of a witness and the time when the witness is to give evidence, the greater the potential for interference with that witness, and that, once the Defence commences (quite properly) to investigate the background of the witnesses whose identity has been disclosed to them, there is a risk that those to whom the Defence has spoken may reveal to others the identity of those witnesses, with the consequential risk that the witnesses will be interfered with. However, the Trial Chamber in that Decision went on to say:

But it does not accept that, absent specific evidence of such a risk relating to particular witnesses, the likelihood that the interference will eventuate in this way is sufficiently great as to justify the extraordinary measures which the prosecution seeks in this case in relation to every witness.

It must be demonstrated in relation to the particular witness for whom protective measures are sought that there is sufficient possibility that he or she may be threatened or interfered with

¹³ Prosecutor v. Milosevic, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, 19 February 2002, at para 29 <http://www.un.org/icty/milosevic/trialc/decision-e/20219PM517175.htm>

¹⁴ Prosecutor v. Brdjanin and Talic, Second Decision on Protective Measures, Decision of 27 October 2001 Para 18 < <http://www.un.org/icty/brdjanin/trialc/decision-e/01027PM213940.htm> >

as to warrant the conclusion that, despite the obligations imposed upon the accused and their Defence teams, there should be no disclosure even to them at this stage. The prosecution has rightly accepted that Article 20.1 of the Tribunal's Statute makes the rights of the accused the first consideration, and the need to protect victims and witnesses the secondary consideration.

23. The above considerations were further developed in the Milosevic case. In light of the impact of non-disclosure on the ability of the Defence to effectively prepare their case prior to the commencement of the trial, the Trial Chamber concluded that it was also necessary to take into consideration the factual criteria applicable to the use of anonymous witnesses, in particular, the importance of the testimony to the Prosecution case, and whether there is any *prima facie* evidence that the witness is untrustworthy.¹⁵

24. In terms of the importance of the witness to the Prosecution case, the Defence is of the view that this extends to an obligation to inform the Defence of the category of the witness in question.¹⁶ In this regard, the Prosecution "fully" recognised in their appeal brief of 5 July 2006 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."¹⁷ It might also have been the case that the Defence would not have disputed the exceptional non-disclosure of the identities of purely 'crime base' witnesses who do not refer to the acts and conduct of Thomas Lubanga Dyilo or his alleged subordinates.

25. Finally, it should be born in mind that the balancing test utilised by the ICTY was developed in the context of the right of victims to adequate protection *versus* the right of the Defence to be informed of the prosecution case in a timely manner. Hence, the rights of the Defence were only infringed with respect to the

¹⁵ Prosecutor v. Milosevic, Decision of 19 February 2002, at paras. 25 and 26 < <http://www.un.org/icty/milosevic/trialc/decision-e/20219PM517175.htm> >

¹⁶ In this regard, in the Prosecutor v. Brdjanin and Talic decision of 3 July 2001, the Pre-Trial Judge held that the category of witness will be relevant to the impact on the defence's ability to prepare its case (see paras. 34 and 35) In the second decision on Protective Measures, the Pre-Trial Judge ordered the Prosecutor to inform the Chamber of the categories of witnesses to which the measures applied.

¹⁷ Prosecution's Document in Support of the Appeal 5 July 2006, ICC-01/04-01/06-183 At para. 7.

timing of disclosure. In contrast, non-disclosure to the Defence of any witness information during the pre-confirmation stage impacts not only on the right of the Defence to be informed in a timely manner, but also the concrete right set out in article 61 to challenge prosecution evidence at the confirmation hearing. This therefore militates in favour of a stricter application of protective measures than that which is employed during the pre-trial stage at the ICTY.

26. The Defence further notes that the above components were set out for the use of Rule 81(4) and in fact, the Single Judge has not imposed any legal or factual criteria which should be met before resorting to summaries. The Defence observes that Article 68(5) requires the demonstration of “grave endangerment”. If article 68(5) does indeed allow the Prosecution to withhold statements from the Defence, as opposed to the general public (which the Defence disputes for the reasons set out in section 3), then it should entail a higher threshold than Rule 81(4).

However, apart from the observation that it is not possible to redact the documents without disclosing the identity of the witness, the Single Judge does not explain how statements which may have qualified for protection under Rule 81(4), meet the additional requirements for qualifying for the measures set out in article 68(5). Finally, the decision does not address the requirement that such measures should not be prejudicial or inconsistent with the rights of the Defence.

2.2 Whether the requirements of proportionality and necessity were met

27. The Single Judge characterised this issue as “whether, since the confirmation hearing has already been postponed, since Thomas Lubanga Dyilo has been in the detention centre for six months, and since any improvement of the security situation in the DRC in the coming months is unpredictable, the single judge has appropriately applied the principle of necessity and proportionality in deciding on the non-disclosure of identity of some Prosecution witnesses for the purpose of the confirmation hearings”.¹⁸

28. The Single Judge further characterised the alternative suggestion of the Defence as being that the confirmation hearing should be indefinitely suspended.¹⁹ However, the submissions of the Defence were that the impugned decision failed to meet the requisite test of necessity and proportionality as it failed to consider:

¹⁸ At page 7.

¹⁹ At footnote 24 citing pages 9-11 of the defence request for leave to appeal.

- the impact of the deterioration in security in the DRC on the likelihood that the witnesses could be endangered by Defence investigations (given that it would not be possible to conduct investigations under such circumstances);
- whether the imposition of measures which fundamentally impact on the fairness of the proceedings was a proportional response to a temporary deterioration of the security situation in the DRC;
- in the event that the security situation is not likely to improve in the near future, whether to impose appropriate measures to counterbalance the rights of the Defence, given the Single Judge's adoption of the statement that "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."²⁰

29. In terms of the first issue, as the Single Judge is aware from the statements of the Defence during the preceding Status Conference, the current security situation in the DRC also restricts the ability of the Defence to conduct investigations in the DRC. It is therefore extremely unlikely (if it all) that any information regarding the witnesses in question would be disseminated by the Defence in the course of its investigations.

30. In the impugned decision, the Single Judge opines that disclosing the statements to the Defence a few days prior to the commencement of the confirmation hearing "would be in an inadequate solution should the charges be confirmed because the identity of the relevant witnesses would be disclosed a long time prior to their being called to testify at trial".²¹

31. The Defence is unlikely to conduct any investigations whilst the Pre-Trial Chamber is drafting its decision, and the status of the case is uncertain. If the charges are indeed confirmed, then the case should, to the extent possible, be 'trial ready'. Pursuant to the right of the accused to a speedy trial, it would thus be incumbent on the Prosecutor to disclose the identities to the Defence as soon as practicable in order to facilitate the ability of the Defence to finish reviewing Prosecution evidence and prepare its strategy before the commencement of the trial. The present disclosure of the identities of the witnesses would facilitate this requirement.

²⁰ 19 May 2006 Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Statute ICC-01/04-01/06-108 decision at para. 32.

²¹ Impugned decision at page 8.

32. In this regard, the Defence strongly submits that the disclosure of witness identities should be implemented prior to the commencement of the trial in order to facilitate the ability of the Defence to appreciate the consistency of the prosecution case *in totu* and not just prior to the testimony of the respective witness.²² The Defence therefore expresses its concern regarding the statement of the Single Judge that present disclosure would be a “long time prior to their being called to testify at trial”.
33. In the event that the charges are not confirmed, then the basis for possible witness intimidation becomes moot.
34. The Defence therefore submits that the criterion of necessity has not been met.
35. Regarding the requirement of proportionality, the Defence submits that if the security situation is indeed temporary, then the appropriate solution would indeed have been either to stay the hearing pending the implementation of the required protective measures, or, to invite the Prosecutor to consider proceeding to the confirmation hearing without the witnesses in question.
36. As set out in the Defence request for leave to appeal, the previous decision to postpone the confirmation hearing from July until September appears to have been 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;²³ 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.
37. 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.

²² See *inter alia*, Prosecutor v. Brdjanin and Talic, Decision of 3 July 2000 at para 38. The defence also observes that the decision of 19 February 2002 in the Milosevic case, which was cited by the Prosecution in their appeal brief of 5 July 2006, should be interpreted in light of the extremely short pre-trial stage for that case, and the fact that the Appeals Chamber granted joinder of the Croatia and Bosnia indictments after the trial had commenced. The Prosecution was thus forced to continue pre-trial disclosure during the actual trial stage. As such, it would not have been possible to order that disclosure of the witnesses identity take place prior to the commencement of the trial.

²³ ‘Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Timetable Set in the Decision on the Final System of Disclosure’ dated 24 May 2006 citing para 9 of OTP request for postponement.

38. 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.
39. Although the victims and the international community have the right to a remedy, as recognized by the Declaration adopted by the General Assembly on the Rights of Victims,²⁴ it is subject to the caveat that the exercise of this right must not prejudice the accused.²⁵ Similarly, whilst article 6(3) of the Declaration provides that States must avoid any unnecessary delay in the disposition of cases, presumably a delay is not unnecessary if it is required to secure a fundamental right of the Defence. This is logical: is the victim's right to an effective remedy really served by an unsafe confirmation process? It should also be noted that there are victims who may appear for the Defence, and who have an equal right to secure the truth, as determined by a full and fair adjudication of all alleged facts, which will not be possible if the Defence is unable to access the unredacted versions of Prosecution statements or to conduct its own investigations. The Defence has not yet been disclosed the summaries in question. However, if they have been redacted in a similar manner to the victims' applications, then it is reasonable to expect that the date and localities of certain events will have been redacted, thus eliminating the possibility for the Defence to even invoke a basic alibi Defence.
40. In this regard, the Defence adopts the position of the eminent legal philosopher Ronald Dworkin the rights of the Defence enshrined in the Statute will be meaningless unless the court is willing "to give up whatever marginal benefit [it] would receive from overriding these rights when they prove inconvenient."²⁶
41. Regarding the fact that Thomas Lubanga Dyilo is currently in detention, the Defence notes that this factor was not cited in the impugned decision, and furthermore, that its relevance is questionable in light of the request for provisional release filed by the Defence. The Defence also submits that as a matter of law, the Defence should not be forced to abrogate the fairness of the proceedings and the fundamental principle of equality of arms in order to satisfy their right to a speedy trial.

²⁴ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly Resolution 40/34 of 29 November 1985 < http://www.unhchr.ch/html/menu3/b/h_comp49.htm >

²⁵ Article 6(b) Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

²⁶ Ronald Dworkin, *Taking Rights Seriously*, (1978) page 193 cited in *Milosevic Case (Appeal Against Trial Chamber's Decision on Assignment of Defence Counsel)* ICTY-02-54-AR73.7 (29 September 2004) < Assigned Counsel Steven Kay confirmed at an oral hearing on 21 October 2004 that Ronald Dworkin had communicated his support of the right of Milosevic to defend himself in those circumstances. Transcripts page 23. < <http://www.un.org/icty/transe54/041021DR.htm> >

42. In the event that the security situation is unlikely to improve or stabilize in the near future, then the Defence submits that this necessarily invites the inquiry as to whether it is possible to continue with the proceedings under such circumstances.
43. If the current security situation in the DRC hinders both the ability of the Registry to implement protective measures and the ability of the Defence to conduct investigations on the territory of the DRC, then it is reasonable to conclude that absent an improvement in the security situation, these impediments will continue after the confirmation hearing.
44. The Office of the Prosecutor has had the benefit of over a year to conduct investigations on the territory of the DRC. Whilst the Prosecutor was under a mandate to investigate incriminating and exculpatory evidence on an equal basis, the Prosecutor did not have the benefit of instructions from the client.
45. In this connection, the Defence refers to the findings of the ICTY Appeals Chamber in the Tadic case to the effect that:
- under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case. The Trial Chambers are mindful of the difficulties encountered by the parties in tracing and gaining access to evidence in the territory of the former Yugoslavia where some States have not been forthcoming in complying with their legal obligation to cooperate with the Tribunal. Provisions under the Statute and the Rules exist to alleviate the difficulties faced by the parties so that each side may have equal access to witnesses. The Chambers are empowered to issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.²⁷
46. Hence, if a Defence team is precluded from conducting investigations in the territory of a State or from procuring the attendance of witnesses, then an appropriate remedy would be to request the Chamber to stay the proceedings and

²⁷Tadic Appeals Judgement of 15 July 1999 at para. 52.
<http://www.un.org/icty/tadic/appeal/judgement/index.htm>

provisionally release the accused, rather than reserving consideration of the impact of the inequality of arms until a later stage.²⁸

47. [see confidential annex]

48. The Defence therefore submits that the impugned decision failed to meet the requisite test of proportionality.

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

49. The Single Judge has characterized this issue as “whether the use at the confirmation hearing of summary evidence in relation to Prosecution witnesses for which non-disclosure of identity has been granted is permissible under the Court's applicable law”.

50. The Single Judge further opines at footnote 26 of the Decision on leave to appeal that the option of using summaries as a measure for protective information from the Defence is “expressly provided for in article 61(5) and 68(5) of the Statute. Moreover, if, as stated in the Defence Request for Leave to Appeal, such an option were *per se* incompatible with Thomas Lubanga Dyilo's right to a fair trial, it would not have been included in two provisions of the Statute”.

51. In response, the Defence is of the view that the purpose of utilizing summaries is to protect the witnesses in question from disclosure to the public, rather than disclosure to the Defence, and that this interpretation is more consistent with the inherent ambiguity of articles 61(5) and 68(5) of the Statute, contrasted with the express provisions of article 67 of the Statute.

52. The Defence agrees with the statement of the Single Judge in the 19 May 2006 decision 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.

²⁸ “In such circumstances, the defence, after exhausting all the other measures mentioned above, has the option of submitting a motion for a stay of proceedings. The Defence opined during the oral hearing that the reason why such action was not taken in the present case may have been due to trial counsel's concern regarding the long period of detention on remand. The Appeals Chamber notes that the Rules envision some relief in such a situation, in the form of provisional release, which, pursuant to Sub-rule 65(B), may be granted "in exceptional circumstances". It is not hard to imagine that a stay of proceedings occasioned by the frustration of a fair trial under prevailing trial conditions would amount to exceptional circumstances under this rule.” at para 55.

53. As noted above in connection with the first issue on appeal, a fundamental distinction needs to be drawn between measures which aim to protect witnesses from the public, and measures which impact on the Defence: “whilst the balance dictates clearly in favour of an accused’s right to the identity of witnesses which the Prosecution intends to rely upon (subject to protective measures granted), it dictates against making public supporting material where such disclosure might lead to witness identification and therefore endanger such victims or witnesses. The reason for this distinction is primarily because the former goes to the ability of the accused to prepare his Defence, whilst the latter does not.”²⁹ It is through this lens that the use of summary evidence should be viewed.

54. The use of summaries means that the Defence does not have access to the questions posed to the witness, nor can it assess the subtleties of language used by the witness, which is often indicative of the confidence with which it asserts a particular position. These aspects are particularly important for the Defence in circumstances in which the OTP does not intend to call the witnesses to testify, and as such, the Defence can not clarify any aspects of their testimony. The Defence also refers to the obligation of the Prosecution under article 67(2) to disclose any information which may affect the credibility of prosecution witnesses under article 67(2). The Defence is of the view that the text of the statements is essential information going towards the credibility of a witness. As a practical matter, without access to the full statements, it is impossible for the Defence to contest an assertion of probative value made by the Prosecution.

55. In addition, to the extent that the summaries constitute hearsay thrice or more removed, failure to provide the full statements to the Defence would impact not only on their probative value, but the threshold question as to whether such summaries would be admissible at all under such circumstances.

56. In this connection, the Defence submits that the jurisprudence of the ICTY regarding the use of documentary evidence in lieu of *viva voce* testimony is highly illuminating.

57. In the Milosevic case, the Appeals Chamber upheld the decision of the Trial Chamber not to admit a dossier compiled by an OTP investigator, which contained summaries of witness statements.³⁰

²⁹ Prosecutor v. Milosevic, decision of 19 February 2002, at para. 32.

³⁰ Prosecutor v. Milosevic, 30 September 2002 Decision regarding admission of investigator’s summary:< <http://www.un.org/icty/milosevic/appeal/decision-e/30115034.htm> > . See also the decision in Prosecutor v. Kordic and Cerkez Decision On The Prosecution Application To Admit

58. The Appeals Chamber considered firstly, that the summaries constituted the investigator's impression of the contents of the witness statements, and as such, usurped the role of the Chamber to make such determinations.³¹ The Defence submits that this finding is highly relevant to the order to the Prosecutor to comment on the probative value of the witness summaries. of the Trial Chamber that the summaries in question was inadmissible

59. Secondly, in relation to summaries prepared by a party for the purposes of litigations, the Appeals Chamber concluded that:

What the Trial Chamber in effect said was that, where the summary of material is prepared by an employee of the party who seeks to rely upon the summary [...]:

(i) a summary of that material should not be regarded as reliable unless the material itself is in evidence so that the Trial Chamber may make its own assessment of the material;

(ii) were the Trial Chamber to rely upon the summary without having the opportunity to make its own assessment of its reliability, the public perception of a verdict based upon that summary would be that the verdict was unsafe; and

(iii) if the statements were admitted, the summary would become unnecessary.³²

60. Finally, the Appeals Chamber rejected the assertion that the lack of probative value or unreliability of summaries could be cured by providing the full statements to the Defence, but not tendering such statements into evidence, since the Prosecution should not rely on the Defence to vigorously follow up on any discrepancies between the statements and the summary.³³ The Defence submits that this conclusion must apply with equal force to the situation in which the full statements have been provided to the Chamber but not the Defence.

61. In the context of Rule 92*bis*, which permits the Court in certain circumstances to admit written statements in lieu of oral testimony, Judge Hunt observed as follows:

The Tulica Report And Dossier Into Evidence < <http://www.un.org/icty/kordic/trialc/decision-e/90729EV58864.htm> > 29 July 1999

³¹ At para. 17.

³² At para. 23.

³³ At para. 24.

There is no basis on which a mere summary of the statement could be admitted pursuant to Rule 92*bis*, unless by consent. This was one of the issues dealt with by the Appeals Chamber in the *Galic* Decision. If, as is usual in statements taken by prosecution investigators at an early stage of their investigations, the statement contains much material which is irrelevant to the issues in the particular trial, the prosecution may tender what it regards as the relevant part of the statement – as expressly provided for in Rule 92*bis* (A) – and, where this is disputed, it is for the Trial Chamber to determine whether other parts should also be tendered in the particular circumstances of the case. Summary evidence was one of the issues dealt with by the Appeals Chamber in the *Milosevic* 2002 Decision, but that was in relation to evidence which summarised material provided by other persons and which was not itself in evidence. The Appeals Chamber stated that, in every such case, the basic issue is whether the material being summarised would itself be admissible. The better course to be pursued by the prosecution would be to prepare a *new* statement by the witness to be tendered pursuant to Rule 92*bis* which includes only the specific matters which the prosecution seeks to prove through that witness, and then to have the witness attest to the truth of the new statement to enable it to be tendered pursuant to Rule 92*bis*. It can then be left to the accused to cross-examine the witness on, *inter alia*, any other material which is available from the earlier statement (which must also, of course, be supplied to the accused). This is not an issue which the majority has thought it necessary to discuss in its decision, and therefore nothing further need be said about it in this Dissenting Opinion.³⁴

62. Although the above observation was indeed issued in the context of a dissenting opinion, as noted by Judge Hunt, this aspect of his opinion did not contradict the findings of the majority, as was in fact premised on the findings of the Appeals Chamber regarding the operation of Rule 92*bis* in the *Galic* case.³⁵ The Defence also observes that the potential use of summaries for Rule 92*bis* was discussed in a Status Conference when the rule was first implemented in 2001.

³⁴ Prosecutor v. Milosevic, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement at para 12 And 13. < <http://www.un.org/icty/milosevic/appeal/decision-e/031021diss.htm> >

³⁵ See Prosecutor v. Galic Appeals Chamber decision of 7 June 2002, in particular, para 46.

The Presiding Judge suggested that in order to expedite and focus the proceedings, the Prosecution could consider preparing ‘fresh statements’ with the proviso that all previous statements be disclosed to the Defence, so that the Defence could verify whether all relevant portions of the prior statements were included.³⁶

63. The Defence further observes that the use of summaries for incriminating evidence has been employed as a tool to assist the Defence and the Chamber during the pre-trial stage, and not as a protective measure. For instance, Rule 65 *ter* (E)(i) and (ii) of the ICTY RPE provides that in addition to filing a Pre-Trial brief, the Prosecutor shall file “for each count, a summary of the evidence which the Prosecutor intends to bring regarding the commission of the alleged crime and the form of responsibility incurred by the accused [...] (ii) the list of witnesses the Prosecutor intends to call with [...] a summary of the facts on which each witness will testify”.³⁷ This obligation runs concurrently, not alternatively, to the obligation to disclose statements and exhibits under the ICTY Rules of Procedure (Rule 66).

64. The Defence also incorporates by reference its submissions set out in its request for leave to appeal regarding the applicability of the findings of the ICTY regarding the use of summaries for exculpatory evidence.

65. On the basis of the above survey of the use of summaries in international proceedings, and in order to give full effect to the express requirement in article 68(5) that the use of summaries should not be prejudicial to or inconsistent with the rights of the Defence, the Defence submits that a proper interpretation of articles 61(5) and 68(5) and Rule 81(5) requires that the prosecution be precluded from relying on summaries at the confirmation hearing, unless it has previously disclosed the corresponding statements to the Defence.

3. Concluding Remarks

66. The Defence is aware that both the Prosecution and the Single Judge have repeatedly emphasized the limited nature of the confirmation hearing, and in

³⁶ Prosecutor v. Brdjanin and Talic (Transcript of 18 May 2001, <http://www.un.org/icty/transe36/010518SC.htm> at page 282).

³⁷ Rev. 38, amended as of 13 June 2006, <

particular, the fact that its purpose is to review the sufficiency of the evidence, and not to determine the truth of the allegations.

67. However, the Statute clearly sets out the right of the Defence to object to the charges, challenge the evidence presented by the Prosecutor and present its own evidence. This therefore requires that other correlative provisions of the Statute should be interpreted in a manner which gives full effect to these rights, rather than nullifying their utility.

68. In order to challenge evidence in an effective manner, it is imperative that the Defence be put in a position to contest the source and foundation of the witness's assertions: i.e. was that person in a position to accurately assess the circumstances, or to identify Thomas Lubanga Dyilo, or to comment on issues such as chain of command.

69. The Defence further notes that whilst the respective Statutes of the ICTY and ICTR provide the Defence with an opportunity to request that the Chamber assess the sufficiency of Prosecution evidence before the commencement of the Defence stage,³⁸ the ICC Statute and Rules do not appear to envisage a similar procedure. In addition, there is no express requirement for the Prosecution to file an elaborate Pre-Trial Brief setting out its legal theories and the manner in which the evidence correlates to the charges.

70. The Defence therefore submits that the confirmation hearing must by default perform the dual function of informing the Defence in detail of the nature and parameters of the Prosecution case so that it is in a position to expeditiously proceed to trial if the charges are confirmed, and providing the Defence with a meaningful opportunity to avoid proceeding to a fruitless trial on the basis of unreliable evidence or unsustainable allegations.³⁹

71. For that reason, the Defence strongly submits that the disclosure obligations set out in the Statute should be interpreted in a manner which gives full effect to both objectives.

4. Relief Sought:

³⁸ Rule 98bis.

³⁹ In this regard, the committal and no case to answer proceedings in the United Kingdom, or grand jury indictment confirmation process might be far more analogous than the indictment confirmation processes and subsequent pre-trial stages at the ad hoc Tribunals See *inter alia*, C. Safferling, Towards an International Criminal Procedure, (Oxford University Press, 2003) at page 181.

72. .For the reasons set above, the Defence respectfully requests that the Honourable Appeals Chamber:

- allow the Defence grounds of appeal, and thereby direct the Single Judge to reconsider the impugned decision in accordance with the legal and factual findings of the Appeals Chamber; and
- direct the Pre-Trial Chamber to apply the legal and factual findings of the Appeals Chamber to any pending motions or motions which have been decided in the interim.



Jean Flamme, Counsel for the Defence

Dated this 10th day of October, 2006

At The Hague, The Netherlands