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**International
Criminal
Court**



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Date: 4 May 2006

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

Defence Motion Regarding Ex Parte Hearing of 2 May 2006

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4 May 2006

1. Background

1. This motion is submitted in relation to the Prosecution's applications for non-disclosure and protective measures, and the corresponding decision of the Honourable Pre-Trial Chamber to convene an *ex parte* (*in camera*) hearing to hear the Prosecution.
2. As noted by the Honourable Pre-Trial Judge during the hearing on 24th April 2006, in its *inter partes* filing of 6 April 2006,¹ the Prosecutor stated that it anticipates seeking an order under Rule 81(2), and that in respect of statements of victims and witnesses that fall within the scope of the Prosecution's disclosure obligations, steps pursuant to Articles 68 (1) and 68 (5) of the Statute and Rule 81 (4) of the Rules will be necessary to protect the safety of the victims and witnesses and members of their families, including seeking authorisation for the non-disclosure of their identities prior to the commencement of the trial.
3. In addition, the Pre-trial Judge alluded to the following applications of the Prosecution. On 19 April 2006, the Prosecution filed an application in which they brought to the attention of the Chamber an item of potentially exculpatory material that the Prosecution alleged could not be revealed for the time being to the Defence due to its confidentiality obligations under article 54 (3)(e) of the Statute.
4. In the second application of 24 April 2006, filed pursuant to paragraphs 2 and 4 of Rule 81, the Prosecution requested firstly, a ruling of the Pre-Trial Chamber pursuant to Rule 81 (2) of the Rules as to whether information in the possession of the Prosecution that is related to further/ongoing investigations must be disclosed to the Defence, and secondly, authorization of the Pre-Trial Chamber pursuant to Rule 81 (4) of the Rules not to disclose the identities of witnesses and victims to the Defence.
5. The Defence had not been provided with copies of these applications (even in redacted form) and, absent the positive intervention of the Honourable Pre-trial

¹ at paragraph 10 (ii).

Judge during the hearing of 24 April 2006, would not have been aware of their existence. In this regard, the Defence fully concurs with the finding of the Pre-trial Chamber that “the rights of the Defence under article 61 (3), 67 (1) (a) and (b), 67 (2) of the Statute and rules 76 and 77 of the Rules require that the Defence be made aware of the existence of any proceedings under rules 81 and 82 of the Rules concerning exceptions to the Prosecution’s disclosure obligations under the Statute and the Rules”.²

6. Moreover, in light of the fact that the substance of such Prosecution applications impacts upon fundamental rights of the defence, the Defence considers that it is appropriate to submit the following legal observations regarding the scope of orders for non-disclosure and protective measures, and the interplay between such measures and the rights of the defence.
7. In addition, the Defence respectfully submits that the procedure followed by the Chamber to hear such applications should not be *ex parte* in their totality, particularly as regards Rule 81(4) applications, but should include a mechanism which enables the Defence to be informed of the existence of such Prosecution applications, and to respond to their substance.
8. This motion will therefore address firstly the legal aspects of protective measures/orders for non-disclosure, and secondly, the procedural regime for applications for protective measures/orders for non-disclosure.

2. Legal Issues Pertaining to Orders for Non-Disclosure/Protective Measures

2.1 Orders for Non-Disclosure under Articles 54(3)(e), and 67(2)

9. Article 54(3)(e) of the Statute provides that the Prosecutor may agree not to disclose, at any stage of the proceedings, documents or information that the Prosecution obtains on the condition of confidentiality and solely for the

² Transcript of 24 April 2006, line 25 page 5 – line 4 page 6.

purpose of generating new evidence, unless the provider of the information consents.

10. As a preliminary observation, the Defence considers it highly questionable that exculpatory material could meet the description of material provided "solely for the purpose of generating new evidence".
11. Support for this conclusion can be found from Rule 82, which governs the procedure for tendering documents protected under article 54(3)(e) into evidence. In particular, Rule 82(1) provides that in order to mitigate potential prejudice to the accused, such materials can not be introduced into evidence without adequate prior disclosure to the accused. The underlying presumption of rule 82(1) appears to be that the materials are not exculpatory - otherwise there would be no incentive for the Prosecution to either seek the consent of the information provider or disclose the materials to the Defence, and the exclusion of these materials if those conditions are not met would penalise the accused and not the Prosecution.
12. It is also the position of the Defence that article 54(3)(e) should be read in connection with article 54(3)(d) - which allows the Prosecutor to enter into agreements which are not "inconsistent with this Statute". It follows from article 54(3)(d) that the Prosecutor can only agree not to disclose any of the documents covered by article 54(3)(e), if such agreement is consistent with the Prosecutor's other obligations under the Statute.
13. Under article 67(2) of the Statute, the Prosecution is obliged to disclose exculpatory material to the Defence. The only article which expressly qualifies this obligation is article 72 which, as opposed to excusing the prosecution from its obligation to disclose exculpatory materials, sets out a procedure designed to elicit the information provider's consent to such disclosure. It is also significant that the prosecutor can not rely on article 72 absent a request from the affected State.
14. The Defence therefore submits that the logical corollary of article 54(3)(d) is that the Prosecutor's ability to enter into an agreement under article 54(3)(e) not to

disclose material obtained for the purpose of generating new evidence is expressly subject to its obligation to disclose exculpatory material to the Defence. In the case of any conflict between the two obligations, the prosecutor's agreement not to disclose the material would be *ultra vires*, unless the material falls under article 72. In the latter scenario, if efforts to resolve the matter by cooperative means have not been successful, article 72(7) provides that the Chamber retains the ultimate discretion to order the disclosure of exculpatory materials, or take such measures to rectify the potential prejudice to the accused.

15. In this regard, the Defence submits that in accordance with the principle of equality of arms, if the Defence is unable to obtain access to exculpatory materials which are necessary for a fair trial, it would be appropriate to stay the proceedings and release the accused.³

2.2 Orders for Non-Disclosure under Rule 81(2)

16. Rule 81(2) of the Rules of Procedure and Evidence provides that "[w]here material or information is in the possession or control of the Prosecution which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence."

17. Article 51(5) of the Statute stipulates that "[i]n the event of any conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail". The Defence therefore submits that an implied condition of Rule 81(2) is that the Prosecution can only withhold disclosure if, in addition to satisfying the criteria set out in rule 81(2) itself, the Statute permits the Prosecution to withhold disclosure of the category of material in question.

³ See the Appeals Chamber judgment in *Prosecutor v. Tadić* Case No. IT-95-I-A, at para. 55.

18. Rule 81 (2) does not cite any articles of the Statute, and, as noted above, the Statute does not expressly permit the Prosecution to withhold potentially exculpatory materials (apart from the limited situation of article 72).
19. The Defence therefore submits that Rule 81(2) can not be relied upon by the Prosecution as an independent basis for withholding exculpatory material. This interpretation is consistent with the last sentence of Rule 81(2), which appears to contemplate that the material being withheld is potentially incriminating rather than exculpatory material.
20. The Defence further submits that rule 81(2) should in general, be interpreted in a restrictive manner. In contrast to article 54(3)(e), in order to rely on Rule 81(2), the Prosecution must establish that disclosure to the defence may cause prejudice to its investigations. It is the position of the Defence that given the grave incursion into the rights of the accused that would result from withholding disclosure, not just any degree of prejudice would suffice for a ruling under rule 81(2). In this regard, the Defence refers to the decision of the ICTY in the *Prosecutor v. Brdjanin*, in which the Pre-Trial Chamber considered "whether the extent to which it is necessary to deny the rights of the accused in order to assist the prosecution to have indeterminate victims and witnesses testify on its behalf in future cases tilts the balance too far".⁴ The Chamber concluded in the affirmative, noting that the "right to a fair trial holds so prominent a place in a democratic society that it cannot be sacrificed to expediency"⁵ in the form of measures which are designed to make it easier for the prosecution to conduct its future investigations.⁶
21. The Defence respectfully suggests that it would be consistent with the emphasis in article 21(d) of the Statute on adherence to human rights for the Pre-Trial Chamber to adopt a similarly cautious approach to Rule 81(2) requests. This would entail for example, imposing a requirement that the Prosecution establish

⁴ *Prosecutor v. Brdjanin and Talic: Decision On Motion By Prosecution For Protective Measures* (Decision of 3 July 2000) at para. 31.

⁵ *Id.* at para. 31.

⁶ *Id.* at para. 29.

a high degree of prejudice (as opposed to mere inconvenience), and strictly tailoring the order for non-disclosure to the exigencies of the situation.

2.3 Orders for Protective Measures under Articles 68(1) and (5) and Rule 81(4)

22. As a preliminary matter, a distinction must be drawn between protective measures which protect the identity of a witness from the public, and those which may, in exceptional circumstances, be applied against the accused during the pre-trial phase.
23. Article 64(2) of the Statute vests the Trial Chambers with the responsibility to ensure that a trial is fair and expeditious, with full respect for the rights of the accused and due regard for the protection of victims and witnesses. By virtue of the fact that Article 64 juxtaposes the words 'full respect' in contrast to 'due regard', the intention was to underscore that the concerns of victims and witnesses should not, in general, override the rights of the accused.⁷ Similarly, Article 68 states protective measures for victims and witnesses should not be prejudicial to the rights of the accused.
24. This proposition is further supported by the fact that where the Statute contemplates that it is necessary for the rights of the accused to be subordinated to another right, an express exception is stated. For instance, the right of an accused to a public hearing is expressly made subject to other provisions in the Statute, such as the power of the Court to order an *in camera* hearing to protect victims and witnesses. However, it is arguable that as a matter of statutory interpretation, since the Statute has expressly listed these as exceptions, the Court would be precluded from applying any further exceptions which are not consistent with the rights of the accused, and which are not expressly set out in the Statute or Rules.

⁷ This was the reasoning of Judge Stephen in his dissenting opinion in *Tadic Case (Decision on the Prosecutor's Request for Protective Measures for Victims and Witnesses)* ICTY-94-1-T (10 August 1995). This reasoning was subsequently adopted by the majority in the *Prosecutor v. Blaskic, Decision on the Application of the Prosecutor dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses*, 5 November 1996.

25. Further guidance can also be derived from article 67 of the Statute, which sets out the individual rights of the accused, prefaced by "the accused shall be entitled [...] to a fair hearing conducted impartially". The reiteration of the requirement of a fair and impartial hearing within the context of the rights of the accused would seem to imply that the definition of fair trial must not only be consistent with the rights of the accused, but actually centred on the accused. This accords with the fact that the right to fair trial, as set out in various international and regional human rights instruments,⁸ is specifically located within the context of the rights of the accused.
26. In this regard, although the Declaration adopted by the General Assembly on the Rights of Victims⁹ advocates for extensive and meaningful participation of victims in legal proceedings, it attaches the caveat that the exercise of this right must not prejudice the accused.¹⁰ Similarly, article 6(3) of the Declaration provides that States must avoid any unnecessary delay in the disposition of cases. It can therefore be extrapolated from this that the imposition of protective measures should not hinder or delay the ability of the accused to effectively prepare his defence (and in the present scenario, effectively challenge the prosecution evidence that will be lead during the Confirmation hearing).
27. The specific measure requested by the Prosecution is the non-disclosure of the identities of the witnesses/victims prior to the commencement of the trial. In effect, this would mean that the defence would be facing anonymous witnesses for the purposes of the confirmation hearing, and, contrary to their rights under article 61(6)(b) and (c), would thereby be precluded from challenging the credibility of the witnesses in question.
28. Although Rule 81(4) refers to the possibility of authorising the non-disclosure of the identities of witnesses prior to the trial, the wording does not automatically imply that the identities can be withheld from the defence, as opposed to the

⁸ Article 14(1) of the ICCPR, Article 8 (1) of the American Convention of Human Rights, Article 6 of the ECHR. The African Charter of Human Rights does not utilise the phrase 'fair trial' but stipulates specific rights which must be applied by an impartial court or tribunal.

⁹ 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

¹⁰ Article 6(b) Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power n(8)

public. Rule 81 addresses pre-trial disclosure issues and protective measures whereas Rule 87 refers to protective measures which would apply during the trial proceedings.

29. A logical interpretation of Rule 81(4) is that it permits the Pre-trial Chamber to redact the identities of witnesses from documents, which would normally be disclosed to the public, in order to preserve the option for the witness to request protective measures pursuant to Rule 87 during the trial proceedings.
30. This interpretation is also consistent with Rule 81(5), which provides that any information withheld by the Prosecutor pursuant to article 68(5) cannot be introduced into the confirmation hearing without prior adequate disclosure to the accused. Article 68 (5) itself provides that "[w]here the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of a trial, withhold such evidence or information and instead submit a summary thereof.
31. The Defence submits that the use of the word 'proceedings' as opposed to 'process' implies that summaries may be used to replace witness testimony during proceedings (i.e. the confirmation hearing) but not during the disclosure process itself. After all, how can the Chamber conduct an effective and objective inquiry in relation to whether is sufficient evidence on which to confirm the charges if they have only be provided with summaries of witness statements, as drafted by the Prosecution? In addition, given the fact that Mr. Lubanga Dyilo is in detention, he should be given a real and effective opportunity to challenge at the earliest point in time the grounds for his continued custody.
32. Thus, an interpretation of Rule 81(4) which permitted the Prosecution to withhold the identities of the witnesses from the defence until just prior to the trial would either conflict with Rule 81(5) or mean that the Prosecution would be precluded from relying on these witnesses during the confirmation hearing. The latter possibility would still constitute a gross infringement of the right of

the accused to be informed promptly of the nature of the case against him, and to have adequate time to conduct investigations into the credibility of prosecution witnesses. It would therefore violate the caveat attached to measures under article 67 that they should not prejudice the rights of the accused.

3. Procedural Issues Pertaining to Orders for Non-Disclosure and Protective Measures

33. Although, as noted above, the Prosecution alluded to their intention to request protective measures in their filing of 6 April 2006, their subsequent motions under Rules 81(2) and (4) were filed on an *ex parte* basis. Moreover, although the Chamber ruled that the Defence had the right to be notified of the existence of such motions, the substance will be discussed at an *ex parte* hearing.
34. The Defence acknowledges that unless some aspects of the Prosecution's motions are communicated and discussed on an *ex parte* basis it may defeat the underlying rationale for the motions. Nonetheless, the Defence respectfully submits that the procedural measures adopted thus far by the Prosecution go beyond what is strictly necessary, and thus upset the delicate balance between recognising legitimate safety concerns for victims and respecting the rights of the defence.

3.1 Rule 81(2)

35. In terms of the position regarding *ex parte* filings and hearings under the Rules of Procedure and Evidence, Rule 81(2) provides that applications under this rule shall be heard on an *ex parte* basis by the Chamber. It does not however provide that the Prosecution's **application** should be *ex parte*, or that the Chamber's eventual **decision** should be *ex parte*.

36. In this regard, the Defence would like to refer to the general principle of international human rights law that any restriction on an accused's rights must adhere to a basis proportionality principle. As explicated by the ICTY Appeals Chamber:¹¹

*any restriction of a fundamental right must be in service of "a sufficiently important objective," and must "impair the right... no more than is necessary to accomplish the objective."*¹² Similarly, while the International Covenant on Civil and Political Rights allows some restriction of certain civil rights where "necessary to protect national security, public order (ordre public), public health or morals, or the rights and freedoms of others,"¹³ the United Nations Human Rights Committee has observed that any such restrictions "must conform to the principle of proportionality;... they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected."¹⁴ And the ICTY itself has been guided by a "general principle of proportionality" in assessing defendants' suitability for provisional release, noting that a restriction on the fundamental right to liberty is acceptable only when it is "(1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target."¹⁵

¹¹ 'Decision On Interlocutory Appeal Of The Trial Chamber's Decision On The Assignment Of Defense Counsel', Prosecutor v. Milosevic, Appeals Chamber Decision of 1 November 2004, at para. 17.

¹² *Elloy De Freitas V. Permanent Secretary Of Ministry Of Agriculture, Fisheries, Lands, And Housing*, 1 A.C. 69 (1998) (United Kingdom Privy Council) (striking down a restriction on civil servants' right to demonstrate) (citing Zimbabwean, South African, and Canadian jurisprudence); see also, e.g., *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003) (United States Supreme Court) (finding that a campaign finance law must not restrict the right to free speech substantially more than the extent necessary to advance the state's interest in preventing electoral corruption); *Chassagnou v. France*, 29 E.H.R.R. 615 (2000) (European Court of Human Rights) (holding that only "indisputable imperatives" can justify restrictions on a right protected by the European Convention on Human Rights, and even then only if the restrictions are a "necessary" and "proportionate" means of advancing the state objective) (striking down French law requiring rural landowners to make their land available to hunters); *Edmonton Journal v. Alberta*, 1989 CarswellAlta 198 (Canadian Supreme Court) (holding that a statute restricting the publication of information about divorce proceedings must impair the right to freedom of expression no more than strictly necessary to protect personal privacy).

¹³ International Covenant on Civil and Political Rights, Article 12, para. 3.

¹⁴ Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.6, 12 May 2003, p. 176 ("The application of restrictions in any individual case must... meet the test of necessity and the requirements of proportionality.").

¹⁵ *Prosecutor v. Limaj*, Case No. IT-03-66-AR65, 31 October 2003, para. 13 (three-judge bench of the Appeals Chamber).

37. In line with this principle, any restrictions on the right of the defence to fully participate in the trial must be necessary, and strictly tailored to the requirements of the situation. In this regard, the Defence respectfully submits that adherence to this principle implies that it may be necessary for the Chamber to take positive measures to counteract the restriction of the Mr. Lubanga Dyilo's rights caused by the *ex parte* in camera hearing. For example, the Defence suggests that it would be appropriate to order that a redacted transcript of the hearing be provided to the Defence, and that the Defence should have the opportunity to respond to the Prosecution's submissions, as outlined in the redacted transcript.

3.2 Rule 81(4)

38. Rule 81(4) of the Rules of Procedure and Evidence provides that the Chamber shall "take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72, and 93, and ...68". The rule does not expressly address the procedure which should be utilised to hear such applications, and although the Chamber is vested with the discretion to determine which measures are 'necessary', it is the position of the Defence that this discretion is fettered by the rights of the accused set out in article 67.

39. The question as to whether *ex parte* motions and hearings constitute an unacceptable infringement of the rights of the accused was considered by the ICTY in the *Prosecutor v. Blaskic*.¹⁶ The prosecutor requested to have an *ex parte* hearing to discuss protective measures. The Chamber held that this request deviated from the accused's right to be present at his trial, a right which the accused intended to invoke and which the International Covenant on Civil and Political Rights (*Article 14*) and the Statute of the Tribunal itself (*Article 21, para. 4*) both proclaimed. At the hearing of 18 September, the Prosecutor attempted to

¹⁶ Decision of 2 October 1996 (Decision of Trial Chamber I on the Applications of the Prosecutor Dated 24 June and 30 August 1996 in Respect of the Protection of Witnesses).

circumvent this right by defending the following submission:¹⁷ "There is an accused's right to be present at the trial, but there is no accused's right to be present at every aspect of that trial". The Chamber held in response that this distinction is totally artificial - the right of the accused to be present at his trial obviously includes every one of its stages, commences from the time the indictment is served, and must be respected both during the preliminary proceedings and the trial itself before the appropriate court.

40. The Defence also cites the principle of *in dubio pro reo*: one cannot assume, to the detriment of the defence, that simply because Rule 81(4) does not expressly forbid *ex parte* applications and hearings, they are permitted. This is particularly the case with respect to applications for protective measures, as Rule 87 clearly stipulates that applications for protective measures should not be filed or considered on an *ex parte* basis.
41. Even Rule 88, which is titled 'Special Measures' and thus should logically only be used on exceptional occasions, appears to contemplate that motions for protective measures should generally be filed on an *inter partes* basis (see Rule 88(3), and that the Chamber should only hold an *ex parte* hearing "if necessary" (Rule 88(2)).
42. The Defence respectfully submits that this requirement of necessity should be strictly adhered to by the parties and the Chamber. Regarding applications, given that it is possible for the Prosecution to file a confidential motion with *ex parte* annex (outlining any sensitive issues or identifying information), the Defence strongly contests that it is ever necessary to file an application entirely *ex parte*. In order to justify an *ex parte* hearing, the burden should be on the Prosecution to demonstrate the existence of exceptional circumstances with respect to each potential witness,¹⁸ which warrants the application of the procedure under Rule 88 rather than Rule 87, and further, why it would not be

¹⁷Provisional transcript, page 10, line 31

¹⁸ See for example, Decision On Motion By Prosecution For Protective Measures, *Prosecutor v. Brdjanin and Talic*, (Decision of 3 July 2000) and 'Decision on Prosecution's Motion for Protective Measures' *Prosecutor v. Milosevic* (Decision of 12 February 2002).

possible to provide the Chamber with an *ex parte* annex, whilst discussing the general merits of the application in an *inter partes in camera* hearing.

4. Relief Sought:

43. In light of the above analysis, the Defence respectfully requests the Honourable Pre-Trial Chamber to:

- order the Prosecution to file a redacted version of their applications for non-disclosure and protective measures filed on 19 and 24 April 2006;
- order that a redacted transcript of the hearing convened on 2 May 2006 shall be provided to the Defence;
- reject the Prosecutor's attempt to utilise Articles 54(3)(e), and 67(2), and Rule 81(2) to evade their fundamental obligation to disclose exculpatory materials to the Defence;
- reject the application of the Prosecution not to disclose the identities of witnesses until just prior to trial;
- order the Prosecutor to disclose the aforementioned exculpatory material and identities to the Defence forthwith in order to enable the Defence to effectively prepare for the confirmation hearing;
- order that all future motions for non-disclosure and protective measures shall be filed on an *inter partes* basis - with an *ex parte* confidential annex if necessary;
- order that all future hearings under Rule 81(2) shall – to the extent possible – be held on an *inter partes* basis, with the provision that the specific details of the application may be discussed at the end of the hearing on an *ex parte* basis; and

- order that all future hearings under Rule 81(4) shall be held on an *inter partes* basis;

For Mr. Lubanga,



Jean FLAMME,
Defence counsel

Dated this 4th day of May 2006
At Ghent, Belgium