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THE APPEALS CHAMBER

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

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 Second Decision on the Prosecution Requests
and Amended Requests for Redactions under Rule 81**

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1. Introduction:

1. On 21 September 2006, the Honourable Single Judge issued the ‘Second Decision on the Prosecution Requests and Amended requests for Redactions under Rule 81’.¹
2. The Defence requested leave to appeal the decision pursuant to article 82(d) of the Rome Statute. On 4 October 2006, the Single Judge granted the Defence leave to appeal on the following issues:
 - i. whether the part of the Decision based on rule 81(2) of the Rules lacks factual reasoning in light of the fact that it was issued during *ex parte* proceedings on requests for redactions so as not to prejudice further investigations;
 - ii. whether the requirement that the Prosecution is prohibited from relying at the confirmation hearing on evidence protected under rules 81(2) and (4) without adequate prior disclosure to the Defence is met by disclosing unredacted components of a redacted document, and particularly whether the Prosecution can rely at the confirmation hearing on the unredacted parts of evidence that has been disclosed to the Defence in only a redacted form; and
 - iii. whether the impugned decision creates a form of privilege for Prosecution sources which is not provided for in the Statute or Rules and, in particular, under which conditions restrictions to the disclosure of Prosecution sources are permissible pursuant to rule 81 of the Rules.
3. The Defence incorporates by reference the submissions from its Request for Leave to Appeal the Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81,² and from its Defence Appeal Brief in Relation to First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81.³

2. Legal Submissions:

2.1 Lack of factual reasoning

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 ICC-01/04-01/06-483

³ CC-01/04-01/06-546

2.1.1 Failure to provide sufficient information regarding the reasons for invoking Rule 81(2) and the nature of the prejudice

4. The Defence incorporates by reference its submissions from its previous appeal brief regarding the obligation to provide sufficient reasons, irrespective of the *ex parte* foundation for such decisions.
5. The Defence regrettably found the impugned decision to be quite opaque. For example, at pages 7 to 8, the Single Judge stated that “none of the redactions proposed by the Prosecutor under rule 81(2) of the Rules are based on the need to protect information relating to the ongoing investigation in the current case against Thomas Lubanga Dyilo”.
6. It was not clear from this statement whether the Single Judge was concluding that none of the redactions therefore fell under rule 81(2), whether the redactions relating to the Prosecution’s investigation into other alleged crimes which it attributes to Thomas Lubanga Dyilo, or whether the redactions related to investigations against other persons.
7. In the decision granting leave to appeal on this issue, the Single Judge acknowledged that “the factual reasoning does not enter into the specific details of the further investigations covered by the Decision [and] that the single judge took this approach in view of the fact that the Decision was issued during *ex parte* proceedings on requests for redactions so as not to prejudice further applications under rule 81(2) of the Rules”.⁴
8. The Defence respectfully submits that this lack of clarity is unnecessary: the fact that the Prosecutor is investigating other crimes which it attributes to Thomas Lubanga Dyilo or other persons is not in itself confidential, since the Prosecutor has publicly announced its intention to do so on several occasions.
9. In addition, since the Defence does not know the underlying purpose of the redactions, it is unable to properly formulate its position as to whether disclosure to the Defence would in fact be likely to prejudice the investigations in question – an issue which is also not addressed by the decision.

2.1.2 Failure to individualise the protective measures

⁴ At page 9 .

10. Although the decision refers at page 8 to the general submission of the Registrar that “the longer the time between the disclosure of the identity of the witness and the time when the witnesses are to testify, the greater the danger is for the witnesses”,⁵ the decision does not proceed to evaluate whether this generalised proposition holds true for each statement in question. The Defence respectfully submits that protective measures should be evaluated on an individual basis, in order to properly assess whether the circumstances of the person or evidence in question objectively warrants such exceptional measures: to adopt a blanket approach to protective measures would be to abrogate the duty to adjudicate the merits of each request and could lead to a conclusion that the decision is arbitrary.
11. On pages 11 to 12 of the dispositive section of the decision, the Single Judge authorised redactions to certain documents, without specifying which rule was the basis of the redactions, or why the documents in question qualified for the protective measure in question.
12. Similarly, for the second category of documents and statements addressed in pages 12, the Single Judge does not specify the legal basis for the redactions for these specific documents and statements, nor does the impugned decision stipulate how and why disclosure to the Defence (as opposed to the public) would create an objective likelihood of risk to a victim or witness (or family members), or Prosecution sources (which is a disputed category), and why the measures in question are exceptional. For the reasons set out in the Defence appeal brief dated 10 October 2006, the Defence strongly disputes that the fact that a person resides in an ‘area of risk’, in itself qualifies for protective measures under Rule 81(4).
13. For documents or statements covered by article 54(3)(e), the decision does not contain any indicia which would lead the Defence to believe that the Single Judge analysed and confirmed that the documents conform to the criteria set out in article 54(3)(3); namely, that they were obtained by the Prosecutor “on the condition of confidentiality and solely for the purpose of generating new evidence”.⁶

⁵ The Defence strongly disagrees with this proposition for the reasons set out in its Appeal brief of 10 October 2006.

⁶ The Defence notes that this was confirmed by the ICTY Appeals Chamber in the Prosecutor v. Milosevic, in a decision concerning Rule 70, which is the mirror provision in the ICTY Rules of Procedure and Evidence: ‘Public Version of the Confidential Decision on the Interpretation and Application of Rule 70’ 23 October 2002 <http://www.un.org/icty/milosevic/appeal/decision-e/23102002.htm>

2.1.3 *The lack of reasoning was neither necessary nor proportionate, and the Chamber did not take appropriate counterbalancing measures to remedy the infringement of the right of the Defence to be heard*

14. In the view of the Defence, in light of the fact that the decision does not authorise the complete non-disclosure of the information in question, it should have been possible to provide further information regarding the rationale and necessity for the measures and the category of witness or information, in a confidential annex if necessary.
15. Indeed, the fact that Rule 81 decisions are filed on a public basis routinely equates the right of the Defence to be informed of the basis of a decision (which impacts on Defence rights) with that of the public. The Defence supports the principle of publicity and transparency but does not believe that this principle should operate against the rights of the Defence or water down the right to be informed of the factual basis for a decision.
16. In the particular context of Rule 81(2), the Defence notes that whilst it requires the Chamber to consider the issue on an *ex parte* basis, this requirement is arguably qualified by the fact that the Prosecutor is applying for Rule 81(2) measures for material which it intends to introduce into evidence. The duty to provide adequate reasons is thus far greater in such a scenario, than if the Prosecutor was seeking to withhold information which it did not intend to use at the confirmation hearing (and which was not exculpatory).
17. Moreover, in light of the fact that *ex parte* hearings, by their very nature, infringe the right of the Defence to be heard and Thomas Lubanga Dyilo's right to be present,⁷ it

⁷ The Defence observes that in a decision considering the operation of Rule 66(C), which is the equivalent of rule 81(2), in the Prosecutor v. Blaskic, the Trial Chamber opined that "although it is true that Rule 66 (C) *in fine* does provide for *ex parte* disclosure by the Prosecutor to the Trial Chamber of the information for which confidentiality is sought, it in no manner authorises the holding of *ex parte* hearings on all the measures to be taken to ensure the protection of the witnesses as part of proceedings before the Tribunal". Decision Rejecting the Request of the Prosecutor for *Ex Parte* Proceedings 18 September 1996, <http://www.un.org/icty/blaskic/trialc1/decisions-e/60918ND113277.htm>.

Similarly, in the Prosecutor v. Brdjanin and Talic, the Trial Chamber observed that "Rule 66(C) refers to such an application being made to "the Trial Chamber sitting in camera", and it requires the prosecution to provide the information which is sought to be kept confidential "only to the Trial Chamber". A hearing "in camera" was originally one conducted in the judge's private room, which is often called the judge's Chambers (latin, *camera*), rather than in a courtroom. It now means no more than a hearing in the absence of the public, as provided in Rule 79 ("Closed Sessions"). It does *not* mean an *ex parte* hearing. The distinction drawn in Rule 66(C) between the application (which would normally have to be made on notice to the defence) and the material in question (which must be provided only to the Trial Chamber, and not to the defence) contemplates that such an application need not *necessarily* be an *ex parte* one." (at para 2) 'Decision on Prosecution Application for an

is incumbent on the Chamber to take appropriate counterbalancing measures, such as ensuring that the subsequent decision puts the Defence in a position to comprehend the necessity and rationale for the measures in question, and to immediately assess the impact of the decision on its rights.

18. It should be noted that after a decision is issued, the Defence only have five days within which to request leave to appeal the decision. The Single Judge, in an oral decision, previously refused a request for an extension of time for the filing of leave to appeal, on the grounds that regulation 35 does not apply to deadlines which are not governed by the Regulations of the Court. In the absence of any avenue to request an extension, the Defence is thus compelled to file a request for leave to appeal in order to preserve its rights, and in this particular case, to do so before receiving the documents which were the subject of the decision.
19. Accordingly, the lack of factual reasoning significantly impacts on the ability of the Defence to understand the ramifications on the rights of the Defence and its ability to prepare for the confirmation hearing.
20. Finally, in light of the fact that not all the redactions fall under Rule 81(2), the Defence submits that the impugned decision has failed to address and provide any justification as to why it was necessary and exceptional to consider the applications not falling under Rule 81(2) on an *ex parte* basis.

2.2 Whether the Prosecutor is permitted to rely on unredacted components of redacted statement/information

2.2.1 Question of admissibility as opposed to probative value

21. At page 10 of the impugned decision, the Single Judge concluded 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

Oral Hearing of Rule 66(c) Motion’ 1 June 2001 <http://www.un.org/icty/brdjanin/trialc/decision-e/10601DE215850.htm>

The defence submits this case law in support of the proposition that in order to respect the right of the defence to be present and to be heard, the Chamber should - in a manner which is consistent with the wording of Rule 81(2) and the confidentiality requirements of the application in question – endeavour to provide as much information as possible to the Defence regarding Rule 81(2) applications .

witness interviews may be diminished as a result of the redactions proposed by the Prosecution and authorised by the Chamber”.

22. The clear implication of this statement is 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: the probative value of the document might be diminished, but the Chamber would still be entitled to rely on such evidence in assessing the sufficiency of the evidence.
23. In the view of the Defence, the fact that the documents and statements in question have been redacted pursuant to Rule 81(2) not only goes to the weight and probative value of the material in question, but the very question as to whether such evidence can be relied on at the confirmation hearing.

2.2.2 Principle of Effective Interpretation

24. Rule 81(2) does not provide any express threshold or balancing test, apart from the requirement that Prosecution must establish that disclosure to the Defence (as opposed to the general public) may prejudice further or ongoing investigations. However the Defence submits that this lacuna is addressed by the requirement that the Prosecution is precluded from relying on evidence protected under Rule 81(2) without prior adequate disclosure to the Defence. Thus, if the rights of the Defence are to be fully respected, this caveat must be interpreted in an effective and meaningful manner. It is also notable that the second limb of Rule 81(2) does not distinguish the scope of the obligation to disclose prior to the confirmation hearing as compared to the obligation to disclose prior to the commencement of the trial.⁸ The key issue is the decision of the Prosecutor to rely on the information in question: once this decision has been made, the obligation to disclose is triggered irrespective of whether the proceedings are at the pre or post confirmation hearing stage.
25. Indeed, if, as intimated by the Single Judge’s interpretation of Rule 81(2), the obligation to disclose the information in unredacted form is not triggered by the decision to use the information as evidence, redactions under rule 81(2) could have an unlimited temporal scope. For example, if the charges are confirmed, the Prosecution will be able to maintain the redactions for the duration of the trial (if they relate to

⁸ In this regard, the wording of Rule 81(2) can be contrasted to that of Rule 81(4), which permits the Prosecution to apply for non-disclosure of the identities of victims and witnesses until the commencement of the trial.

further investigations against Thomas Lubanga Dyilo) or until the Prosecutor achieves the desired objective in the case to which the redactions relate.

26. The Defence strongly rejects an interpretation of Rule 81(2) which would allow the Prosecutor's investigations strategies to permanently trump the right of Thomas Lubanga Dyilo to be informed of the evidence against him, and to be in a position to challenge this evidence. The Defence observes that the Prosecution has elected not to bring additional charges at this point in time. It has yet to be determined whether this strategy is consistent with Thomas Lubanga Dyilo's right to expeditious proceedings, and if he is not provisionally released, his right not to be unduly kept in pre-trial detention. However if the Rule 81(2) redactions are related to information pertaining to other potential charges against Thomas Lubanga Dyilo, this begs the question as to whether this exercise of Prosecutorial discretion should be permitted to impact on the rights of Thomas Lubanga Dyilo *vis à vis* this particular charge.
27. If the redactions relate to investigations against other persons, then the Defence fails to see how disclosure to this particular Defence team, which is bound by strong obligations of professional ethics and confidentiality, could have an impact on these investigations. There is also no requirement that the Prosecutor leads all of its evidence at the confirmation hearing. The Prosecutor is thus master of its own strategy, and has the right not to rely on certain evidence (which is incriminating and not exculpatory) if the disclosure would prejudice ongoing investigations, until after the confirmation hearing.
28. The Defence further respectfully submits that the Prosecution is under an obligation to inform potential witnesses and information providers that their statement or information could be disclosed in a range of cases or charges.⁹ In this regard, the

⁹ For example, in the Brdjanin and Talic case, the Pre-Trial Judge criticised the Prosecution for not informing the witness that their statement and identity might be disclosed in other cases. Although the persons in question were no longer on the prosecution witness list because they refused to consent to their identity being disclosed to the accused at any stage, in light of the fact that their statements had been submitted as supporting material for the indictment confirmation, the Pre-Trial Judge ordered that the Prosecution remained under an obligation to disclose their statements to the defence. In addition, in light of the fact that the persons were not intending to testify in the Brdjanin and Talic case, the Pre-Trial Judge concluded that there was no basis to assert that their safety could be jeopardised by disclosure of their identity to the defence in this case. The Prosecution were therefore ordered to disclose the statements in unredacted form. Prosecutor v. Brdjanin and Talic, Decision on Motion by the Prosecutor for Protective Measures, at para32. <http://www.un.org/icty/brdjanin/trialc/decision-e/00703PM213035.htm>

Similarly, pursuant to Rule 75(C) of the Rules of Procedure and Evidence, the Victims and Witnesses Section at the ICTY is obliged to inform witnesses before giving evidence that "his or her testimony and his or her identity may be disclosed at a later date in another case, pursuant to Rule 75 (F)." Rev 38, <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev38e.pdf>

Defence reiterates the legal findings cited in its request for leave to appeal, to the effect 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.¹⁰

2.2.3 Interpretation of mirror provisions at the ICTY and ICTR

29. The Defence further submits that an interpretation of Rule 81(2) to the effect that the Prosecution is precluded from relying on Rule 81(2) in connection with materials and statements which it intends to rely at the confirmation hearing is consistent with jurisprudence of the ICTY and ICTR, and the mirror provisions which were in force at the time the ICC Rules of Procedure and Evidence were adopted.
30. The Defence observes that Rule 81(2) appears to mirror an element of Rule 66(C) of the ICTY and ICTR Rules of Procedure and Evidence, which was introduced into the ICTY Rules of Procedure and Evidence in 1995 at the suggestion of the Prosecution. According to the second annual report of the ICTY, the purpose of this amendment was to “facilitate the acquisition of information from Governments and other sensitive sources.”¹¹
31. The scope of Rule 66(c) was interpreted in the early cases of the ICTY to be limited to materials subject to inspection under Rule 66(B); and as such, it did not extend to

¹⁰ 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>

¹¹Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 A/50/365 - S/1995/728 at para 22, <http://www.un.org/icty/rappannu-e/1995/index.htm>

statements which the Prosecutor was obliged to disclose under Rule 66(A) or exculpatory materials.¹²

32. The version of Rule 66 which was in force at the time when the ICC Rules of Procedure and Evidence were adopted, provided that the obligation to disclose witness statements and supporting material was only subject to rules 53 and 69. The failure to expressly refer to rule 66(C) has lead legal authorities to opine that “[t]hese temporary limitations on disclosure seem to apply only with reference to the materials described in paragraph B of Rule 66. This interpretation would imply that the restrictions on disclosure were not applicable to the supporting material or to the statements of witnesses who were to appear at trial”.¹³
33. It is arguable that the rationale of excluding witness statements and supporting material from the ambit of Rule 66(C) is that the Defence must be in a position to have full access to the material in question in order to properly assess and challenge the credibility of the witness or document in the event that the Prosecution decides to rely on that witness or document in support of the indictment or in support of its case.
34. Although the ICTR has applied Rule 66(c) to a broader category of evidence than the ICTY, its application to witness statements and exhibits was subject to the caveat that the redactions should be temporary, and should be withdrawn prior to the testimony or use of the exhibit in evidence.¹⁴ This thus supports the Defence proposition that once the Prosecution has formulated the intention to use the information or statement in evidence, the obligation to disclose it in unredacted format is triggered in order to facilitate the ability of the Defence to challenge its admission into evidence.

¹² See for example, Prosecutor v. Blaskic, ‘Decision on Prosecutor’s Request for Authorization to Delay Disclosure of Rule 70 information’, 6 May 1998 at para 8: “Sub-Rule 66(c) of the Rules permits the Prosecutor to apply to the Trial Chamber for relief from the obligation to disclose certain documents to the Defence, insofar as such disclosure may prejudice further or ongoing investigations [...]. In this regard, the Trial Chamber is of the opinion that it is clear from the provision that applies only to documents mentioned in Sub-rule 66(B) (that is “any books, documents, photographs and tangible objects” in the Prosecutor’s custody or control) and not to those documents mentioned in Sub-rule 66(A).” < <http://www.un.org/icty/blaskic/trialc1/decisions-e/80506DE113452.htm>>

¹³ S. Zappala, Human Rights in International Criminal Proceedings (Oxford University Press 2003) at page 143. See also Jones and Powles: “Rule 66(A) is not expressly subject to Rule 66(C). Thus, on a literal reading of Rule 66, the Prosecutor cannot apply for relief from the obligation to disclose, under Rule 66(A), supporting material and statements by the accused and prosecution witnesses, by claiming prejudice to ongoing investigations or that it would be against the public interest or it would affect the security interests of a State. ICTR Rule 66(B), like ICTY Rule 66(B) before it was amended, is expressly “subject to sub-Rule (C).” This supports the *a contrario* argument that para. (A) is not “subject to sub-Rule (C)” otherwise it would have so stated.” International Criminal Proceedings (Oxford University Press 2003) at page 650.

¹⁴ Prosecutor v. Nahimana, Decision on the Prosecutor’s Application for Continued Temporary Redaction of One Portion of the Transcripts of Witness X Pursuant to Rule 66 (C) of the Rules of Procedure and Evidence, 6 February 2002, <http://69.94.11.53/default.htm>

2.2.4 Question of ensuing prejudice to the Defence

35. In terms of the question as to whether the use by the Prosecutor on the unredacted components of redacted statements would prejudice the Defence, the Defence submits that in assessing the need for protective measures or non-disclosure “it is not a question of whether the accused can show that they would be prejudiced by the denial of their rights to have the identity of those persons disclosed. The question is whether the Prosecution has established that the interests of justice require that denial of those rights of the accused.”¹⁵
36. Nonetheless, the Defence further submits that the use of the unredacted components of redacted statements and documents would in fact prejudice the ability of the Defence to challenge the Prosecution evidence. The probative value and reliability of a document or statement cannot be assessed in a vacuum. Even if redactions do not relate to the content of the document, they might impact on the ability of the Defence to analyse chain of custody issues, collusion or undue influence, or authenticity. The Defence also submits that although Chambers have held that an unreliable witness might be capable of stating some truthful elements, the overall reliability of a witness or a document requires an analysis of the document *in totu*. For instance, if the Defence were able to establish that the redacted section was patently false or lacked credibility, this may impact on the overall credibility of the document/ statement.
37. Although the Chamber has noted that it will take into account the fact that the documents and statements were redacted when assessing the probative value of this information, the Chamber lacks investigative capacities and is thus unable to positively verify whether the redacted components impact on the overall credibility of the information. Even though the Defence is confident that Chamber undertakes vigorous efforts to protect the rights of the Defence, it cannot replace or compensate for the absence of an effective and vigorous Defence, mounted on the basis of instructions from Thomas Lubanga Dyilo. Accordingly, the use of such redactions infringes the very fairness of the proceedings, by relegating the Defence to the position of passive observer in a process in which it is unable to meaningfully participate or influence.

¹⁵ Prosecutor v. Brdjanin and Talic, Decision on Second Motion by the Prosecution for Protective Measures, 27 October 2000, at para 31, <http://www.un.org/icty/brdjanin/trialc/decision-e/01027PM213940.htm#62#62>

2.3 : Whether the impugned decision creates a form of privilege for Prosecution sources which is not provided for in the Statute or Rules and in particular, under which conditions restrictions to the disclosure of Prosecution sources are permissible pursuant to Rule 81 of the Rules

38. 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.
39. This therefore gives rise to the inquiry as to whether firstly, organisations may provide information to the Prosecution for use in the proceedings, subject to the proviso that their identities not be disclosed to the Defence, and secondly, whether persons who are neither victims nor witnesses, but who live in an area of risk' qualify for protection under the Statute and Rules.

2.3.1 Whether Prosecution sources can condition their cooperation with the Prosecution on conditions which discriminate against the rights of the Defence

40. As a preliminary observation, the Defence is aware that given the unique framework of the Court, it is particularly important to encourage and facilitate voluntary cooperation with a range of entities. For that reason, article 54(3)(d) enables the Prosecutor to enter into such arrangements, not inconsistent with the Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person. This power is therefore subject to other provisions in the Statute, such as the duty to disclose incriminating and exculpatory information to the Defence, and the express requirement that in exercising its powers, the Prosecution shall fully respect the rights of persons arising under the Statute (i.e. Thomas Lubanga Dyilo's rights).¹⁶
41. The Defence therefore strongly disputes the proposition that a person or entity can condition their cooperation with the Prosecutor on the implementation of measures which are fundamentally detrimental to the rights of Defence.
42. In this connection, the Defence refers to the following sections of a decision of the ICTY regarding an application by Stevan Todorovic for materials provided by the

¹⁶ Article 54(1)(c).

International Committee for the Red Cross to the Prosecution and Chamber on an *ex parte* basis:¹⁷

28. From a substantive point of view, the ICRC has contended that many of the affidavits and witness statements "relating to the work of the ICRC" in the material which it had submitted to the Tribunal had been provided by "high government officials and international officials outside the ICRC", and that they had been furnished to the ICRC with permission to submit them to the Tribunal on the basis that the proceedings were being held *ex parte* and in camera. This meant, the ICRC says, that the documents would be seen only by the Tribunal and by "staff in the Office of the Prosecutor, itself an official institution of the Tribunal under Article 16 of the Statute". Had the proceedings not possessed this character, it is said, the ICRC would not have been able to submit all of these materials. The same is true, the ICRC says, of materials relating to its own operational activities which are of considerable sensitivity and had been submitted only on the basis that the hearings were *ex parte*. The ICRC says that the disclosure of these materials to Todorovic, even on a confidential basis, would entail a risk of harm to the integrity of ICRC operations, and that they should not be disclosed.

29. The only matter now put forward by the ICRC which had not been put forward in one or the other of its different approaches to the Second Motion by Todorovic and to the Related Motion by his three co-accused is its reference to the Office of the Prosecutor as "an official institution of the Tribunal". The ICRC appears to assume that the Prosecution is placed in some special position as a party in proceedings before the Tribunal. Article 16 of the Tribunal's Statute, to which the ICRC has referred, describes the Prosecutor as "a separate organ" of the Tribunal but also one which acts "independently" of it. And such an assumption overlooks Article 21.1, which provides that all persons shall be equal before the Tribunal. That includes the Prosecution. It should be clearly understood that, as a party before the Tribunal, the Prosecution is not treated in any special way. Nor, it is hoped, would the Prosecution claim such a special position.

¹⁷ Decision on (1) Application by Stevan Todorovic to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material 28 February 2000
<http://www.un.org/icty/simic/trialc3/decision-e/00228PN511785.htm>

43. The thrust of this decision appears to be that whilst an organisation cooperating with the Prosecutor can seek to rely on assurances of confidentiality, once it has agreed to the disclosure of information in a particular case, it can not request further measures which impinge on the right of the Defence to access such information.
44. In this regard, even article 54(3)(e), which arguably provides the highest form of protection for such arrangements, limits the rights of the information provider to the ability to agree or not agree to the use of the information in evidence, and to decline to answer questions pertaining to the material or its origin on grounds of confidentiality. Furthermore, these rights should be “strictly delineated”,¹⁸ and implemented only when “strictly necessary”.¹⁹
45. In addition, the Defence submits that article 54(3)(e) does not permit the information provider to impose conditions which restricting the timing of disclosure of the Defence, or the right of the Defence to be informed of the source of the information, once the provider has consented to the use of that information in evidence.²⁰
46. It can therefore be extrapolated from the above analysis that if the Prosecutor is circumscribed from accepting additional conditions, which are not foreseen by the

¹⁸ Prosecutor v. Blaskic ‘Decision of Trial Chamber I on the Prosecutor’s Motion for Video Deposition and Protective Measures’ 11 November 1997 at para 10. < <http://www.un.org/icty/blaskic/trialc1/decisions-e/71113PM113320.htm> >

¹⁹ Prosecutor v. Brdjanin and Talic, ‘Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002’ 23 May 2002. The Trial Chamber noted the necessity and utility of a ‘public immunity’ exception, but attached the caveat that the public interest immunity exception should “be excluded where its application would deny to the accused the opportunity to establish his or her innocence”. The Chamber therefore concluded that the protection afforded under Rule 70(B) to confidential information used solely for the purpose of generating new evidence “**does not** relieve the Prosecution of the obligation, pursuant to Rule 68, to disclose to the Defence, “the existence of material known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence” (see paragraphs 18-19).

²⁰ See for example, the following ICTY decisions concerning the mirror provision of article 54(3)(3):

Prosecutor v. Blaskic, Decision on Prosecutor’s request for Authorization to Delay Disclosure of Rule 70 Information, “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.” Decision of 6 May 1998, < <http://www.un.org/icty/blaskic/trialc1/decisions-e/80506DE113452.htm> >

Prosecutor v. Blaskic, ‘Decision of Trial Chamber 1 on Prosecutor’s Requests of 5 and 11 July 1997 on the Protection of Witnesses’. The Trial Chamber acknowledged that “[i]n view of the objectives of Rule 70 of the Rules, the Trial Chamber must also take into account the nature and functions of the humanitarian organisation as well as the harm to all its operations which might be caused by the information’s being disclosed. In this respect, it considers that in light of the humanitarian organisation’s current and future mission, it is fully entitled to seek the application of the provisions of Rule 70 of the Rules.” Nonetheless, the Chamber also insisted that it “must also ensure that the rights of the accused enjoy “full respect” (Article 20(1) of the Statute). It must therefore guarantee that the protective measures are compatible with the right of the accused to a “fair and public hearing” (Article 21(2) of the Statute) and, more particularly, his right “to examine, or have examined, the witnesses against him” (Article 21(4) of the Statute).” In granting the requested measures pertaining to the use of closed sessions, the Chamber emphasised that “each of the parties has equal access to the information in the possession of the humanitarian organisation, so long as the procedures in force in that organisation are respected.” Decision of 10 July 1997. < <http://www.un.org/icty/blaskic/trialc1/decisions-e/70710PM113304.htm> >

Statute and which discriminate against the rights of the Defence, in the context of article 54(3)(e) agreements, they should be further limited in terms of what they can agree to in the context of other agreements which do not comply with the strict criteria of article 54(3)(e).

47. The Defence therefore concludes that the Prosecution is precluded from invoking Rule 81(2) by arguing that their sources might ‘dry up’ if their identities are disclosed to the Defence. The onus is on the Prosecutor to seek cooperation and maintain such cooperation in a manner which is consistent with its obligations under the Statute, including its obligation to disclose to the Defence exculpatory information and information on which it intends to rely at the confirmation hearing.²¹

48. The Defence nonetheless acknowledges that a Prosecution source may request the Chamber to authorise protective measures, provided that the source meets the relevant criteria for the measures in question.²²

2.3.2 Whether persons who are not victims or witnesses (or the family of either) are entitled to non-disclosure of their identity to the Defence

49. The Defence further disputes that the category of sources would qualify for protection under Rule 81(4), or meet the general requirements of necessity and exceptional circumstances which are required for the imposition of measures which impact on the rights of the Defence.

50. Rule 81(4) refers to the safety of victims and witnesses, and their families. In this regard, the Defence notes that the Prosecution has not at any stage alleged that its

²¹ In this connection, in the case of the Prosecutor v. Juvénal Kajelijeli, the ICTR Trial Chamber rejected an application from the Prosecutor not to disclose to the defence a video tape which might identify persons from the Rwandan government who were assisting the Prosecution, on the grounds that disclosure would prejudice further investigations. The Chamber referred to the fact that the Rwandan government was obliged to cooperate with the Court, and as such, the question of their possible future non-cooperation was better addressed through the cooperation mechanisms of the Court rather than non-disclosure to the Defence. ‘Decision On The Motions Of The Parties Concerning The Inspection And Disclosure Of A Videotape’ 28 April 2003, <http://69.94.11.53/default.htm>

²² See Decision on Prosecution Motion to Utilize Redacted Statement and Order of Non-Disclosure’ issued in Prosecutor v. Milosevic, in which the Prosecution sought leave to rely on a redacted statement of a witness protected by Rule 70. The Trial Chamber concluded that whilst Rule 70 (the equivalent of article 54(3)(e)) provides an exception to the general rule mandating disclosure to the Defence of evidence, once consent to utilise the evidence as testimony has been given, in order to obtain further protection measures such as redactions, it is necessary to satisfy the requirements of exceptional measures under Rule 69, or the imposition of protective measures under Rule 75 of the ICTY Rules of Procedure and Evidence. 29 May 2002, <http://www.un.org/icty/milosevic/trialc/decision-e/020529.pdf>

sources are victims, related to victims, or witnesses.²³ Indeed, the Defence respectfully submits that the more pertinent provision is Rule 87(1), which refers to persons who may be “at risk on account of testimony given by a witness pursuant to article 68 paragraphs 1 and 2”.

51. However, protective measures under Rule 87 may only be requested on an *inter partes* basis,²⁴ and are directed against disclosure of the person’s identity to the public,²⁵ as opposed to the Defence. This therefore suggests that the drafters were of the opinion that an order for confidentiality would suffice to protect persons who - since they are neither victims nor witnesses – are less likely (if at all) to face any threat to their safety or security as a result of disclosure to a team of professional lawyers.
52. In light of the fact that Rule 87 expressly provides for the category of persons in question, the Defence strongly submits that it would be *ultra vires* the Statute and Rules to attempt to artificially contort the provisions of Rules 81 and 82 merely to achieve the desired result of withholding this information from the Defence.
53. The Defence also disputes the necessity of imposing such an extreme measure as non-disclosure to the Defence. The fact that several NGOs were operating and/or continue to operate in certain areas of the DRC and have cooperated with the ICC is not in itself a confidential matter, and could easily be ascertained by the Defence by simply reviewing the respective internet sites of these NGOs.²⁶ Indeed, in a recently filed amicus brief, the Womens’ Institute for Gender Justice broadcasted to the entire world the fact that it had conducted interviews in the DRC, and transmitted its findings to the ICC Prosecutor.²⁷
54. In this connection, the Defence refers to the findings of the ICTY Trial Chamber in the ‘Decision on Prosecution Motion for Protective Measures (Concerning a

²³ The defence submits that rationale for protection under rule 81(4) does not extend to persons who are neither victims nor witnesses. Thus, in the Prosecutor v. Brdjanin and Talic, the Chamber refused to extend the protective measure of non-disclosure to persons who provided witness statements to the Prosecution, but refused to testify as a witness in the case. The Chamber held that the “unwillingness of these five persons to give evidence is directly related to their identification to the accused as persons willing to give evidence against them, the implication being that they feared retaliation as a consequence of their willingness to do so. However, once the prosecution says that it will not call them, and concedes that it used their statements prepared for other purposes in this case without their authority, the suggested justification for their continuing fear of retaliation disappears. No other justification for a continuing fear has been suggested. On the material provided by the prosecution, it cannot be said that these five persons “may be in danger or at risk”, even if Rule 69 did apply to them.” Decision on Second Motion by the Prosecution for Protective Measures, 27 October 2000 at para 31 <http://www.un.org/icty/brdjanin/trialc/decision-e/01027PM213940.htm>.

²⁴ Rule 87(2)(a) of the ICC Rules of Procedure and Evidence.

²⁵ Rule 87(3) of the ICC Rules of Procedure and Evidence.

²⁶ As noted in the request for leave to appeal, Human Rights Watch and Human Rights First have both published manuals explaining how NGOs in the field can facilitate the work of the ICC Prosecutor.

²⁷ See Request submitted pursuant to Rule 103(1) of the Rules of Procedure and Evidence for Leave to Participate as Amicus Curiae in the Article 61 Confirmation Proceedings (with Confidential Annex2) ICC-01/04-01/06-403 7 September 2006

Humanitarian Organisation)', which was issued in the Prosecutor v. Milosevic.²⁸ The Prosecution had sought protective measures for three witnesses who were former employees of a humanitarian organisation, on the basis that the measures in question were a precondition for the humanitarian organisation's consent to allow the testimony pursuant to Rule 70(B) of the ICTY Rules of Procedure and Evidence (the mirror provision of article 54(3)(3) and Rule 82). In particular, the organisation was concerned for the security of current and future personnel of the organisation in the event that "its mandate is perceived to be compromised, such perception of compromise stemming from the public disclosure that a former staff member of the humanitarian organisation testified in this trial regarding information obtained during his employment for that organisation."

55. The Chamber referred to Rule 75 (the provision governing protective measures) and noted that the extension of protective measures to persons associated with a witness "must be sufficiently proximate to warrant protective measures, particularly the extraordinary protective measure of closed session testimony" (one could well imagine that a much higher degree of proximity would be required for the more extreme measure of non-disclosure to the Defence!). The Chamber therefore concluded that "whilst the Chamber acknowledges the work of the humanitarian organisation and protection of its current and future personnel are important interests which warrant consideration, and accepts that personnel of the humanitarian organisation have been the target of attacks and intimidation both in Bosnia and elsewhere, in respect of this witness, the interests sought to be protected are too remote and do not outweigh the accused's right to a fair and public hearing".
56. As repeatedly emphasised by the Defence in its filings, in order to justify the non-disclosure of information to the Defence, it is necessary to establish that disclosure to the Defence team (as opposed to members of the general public) would create a real and objective likelihood of risk to the person in question. Accordingly, for the reasons set out in the Defence appeal brief dated 10 October 2006, the vague reference to the fact that the persons in question resides in an 'area of risk' does not in itself qualify for protective measures.

2.3.3 *The prejudice caused to the Defence*

²⁸ 1 April 2003 <http://www.un.org/icty/milosevic/trialc/decision-e/030401.htm>

57. In terms of the potential prejudice faced by the Defence in light of these redactions, if the redactions form part of the content of the document, the effect is that the Defence might be unable to verify the source of a particular assertion or conclusion. For example, if a particular allegation or assertion is predicated on information obtained from a source who is not themselves a witness, the allegation/assertion is hearsay. If the identify of the source is redacted, then the allegation is affectively transformed into anonymous hearsay.
58. If the redactions pertain to the name of an organisation or a person who has transmitted a document to the Prosecution or referred a victim or witness to Prosecution investigators, then their identity is crucial to the ability of the Defence to analyse and challenge chain of custody issues, possible collusion and undue influence,²⁹ and the existence of prior statements. In this connection, the Defence submits that the Prosecution is obliged, under Rule 76, to disclose to the Defence any interviews with Prosecution witnesses which have been recorded by NGOs or IGOs.³⁰ It is thus particularly necessary for the Defence to be able to identify a Prosecution source which has transmitted witness statements to the Prosecution, or has referred certain persons to Prosecution investigators, in order to locate and verify the consistency of prior statements given by those persons.

²⁹ The defence admires and respects the work of NGOs in the field. Nonetheless, it observes that the mandates of various NGOs differ, and do not necessarily possess the quality of impartiality, which is required for a minister of justice such as the prosecution. Moreover, as noted by the defence in its request for leave to appeal, the privilege which has been extended by the ICTY to the ICRC was predicated on its history of neutrality and the unique role it plays in the development and enforcement of international humanitarian law (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>).

³⁰ The defence refers to the ‘Decision on Ojdanic Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii)’, issued in the Prosecutor v. Milutinovic et al, in which the Trial Chamber noted firstly, the prosecution’s obligation not only as an organ of the Tribunal, but as an organ of international justice to disclose all prior witness statements, and secondly, referred to the 26 September 2000 finding of the Appeals Chamber in the Blaskic case, to the effect that a witness statement under Rule 66(A)(ii) is to be interpreted as the “account of a person’s knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime”. The Chamber concluded that this interpretation of Rule 66(A)(ii), in light of the Prosecutor’s obligation as an organ of international justice, “is broad enough to include statements taken by humanitarian organisations for the purpose of recording allegations of human rights abuses, when these are passed to the Prosecution in order to assist it in identifying potential lines of inquiry which then result in the persons who have the original statements becoming witnesses in Tribunal proceedings”. (Decision of 29 September 2006 at para 14).

See also ‘Decision on Defence Motion for Disclosure of Documents and Objections Regarding the Legality of Procedures’ in Prosecutor v. Mpambara, in which the Chamber held that “once the Prosecutor decides to call some witnesses to testify, it goes without saying that she is bound, under Rule 66(A)(ii), to provide the Defence with all their statements in her custody or control regardless of whether such statements were obtained by her or from other sources.” (Decision of 28 February 2002 at para 22).

59. The Defence observes that it is the practice of several NGOs to produce reports, which cite allegations from witnesses who are identified by pseudonyms³¹. Accordingly, unless the Defence is informed that a particular Prosecution witness may have been previously interviewed by an NGO or IGO, and if so, which NGO/IGO, the Defence will not be in a position to ascertain whether the Prosecution has complied with its disclosure obligations.

3. Relief Sought:

60. For the reasons set out above, the Defence respectfully requests the Honourable Appeals Chamber to:

- request the Prosecution to consider submitting its response on an expedited basis in order to facilitate the resolution of this issue prior to the confirmation hearing; and
- reverse the impugned decision and order the Prosecution to disclose unredacted versions of the statements and documents which were the subject of the decision; or, in the alternative, direct the Pre-Trial Chamber to reconsider the Prosecutor's applications (on an expedited basis) in accordance with the principles set out by 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.

³¹ See for example, Ituri: Covered In Blood: Ethnically Targeted Violence in Northeastern DR Congo, DRC-OTP-0074-0797, at page DRC-OTP-0074-0815, footnote 52 refers to an interview conducted by Human Rights Watch in February 2003 to support an allegation against Thomas Lubanga.



Jean Flamme, Counsel for the Defence

Dated this 16th day of October, 2006

At The Hague, The Netherlands