

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original : **English**

No.: **ICC-01/04-01/06**  
Date: **27 October 2006**

**THE APPEALS CHAMBER**

**Before:** Judge Sang-Hyun Song, Presiding  
Judge Erkki Kourula  
Judge Philippe Kirsch  
Judge Navanethem Pillay  
Judge Georgios M. Pikis

**Registrar:** Mr Bruno Cathala

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

**Public Redacted Document**

**Prosecution's Response to "Defence Appeal Brief in Relation to Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81"**

**The Office of the Prosecutor**

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1. The Prosecution opposes the grounds of appeal raised by the Appellant and the relief sought.
  - On the first issue under appeal, the Prosecution opposes the appeal as the Single Judge did provide adequate factual reasons for those parts of the Decision which were determined pursuant to Rule 81(2);
  - On the second issue, the Prosecution opposes the appeal as the Statute and Rules do not preclude the Pre-Trial Chamber from allowing a party to rely on unredacted components of statements or documents that contain redactions elsewhere, in appropriate circumstances, for the purpose of the confirmation hearing;
  - On the third issue, the Prosecution opposes the appeal as the Single Judge made her determinations within the bounds of Rules 81(4) and 81(2), and the proper consideration of factors and determinations under these rules in no way created any form of extra-statutory “privilege”.

### **Procedural History**

2. In response to a series of applications by the Prosecution under Rule 81(2),<sup>1</sup> on 2 August 2006, the Single Judge issued the first “Decision on the Prosecution Amended Application pursuant to Rule 81(2)”.<sup>2</sup>
3. The Prosecution then filed a series of further applications and amended applications for redactions under both Rules 81(2) and 81(4),<sup>3</sup> and participated in a series of hearings with the Single Judge,<sup>4</sup> which also included the independent perspective of VWU.<sup>5</sup> As a result, on 15 September 2006, the Single Judge issued two decisions.<sup>6</sup>

<sup>1</sup> ICC-01/04-01/06-153-Conf (19 June 2006); ICC-01/04-01/06-198-Conf (13 July 2006); and, in response to Decision Inviting the Prosecution to Revise Proposed Redactions in relation to the Prosecution Amended Application pursuant to Rule 81 (2) of the Rules of Procedure and Evidence, ICC-01/04-01/06-222, 31 July 2006, a further amended application ICC-01/04-01/06-230-Conf-Exp (1 August 2006). The Prosecution also discussed these applications at a hearing on 28 June 2006.

<sup>2</sup> ICC-01/04-01/06-235, which authorized Rule 81(2) redactions on similar grounds to the impugned Decision.

<sup>3</sup> ICC-01/04-01/06-341-Conf (18 August 2006); ICC-01/04-01/06-347-Conf (23 August 2006); ICC-01/04-01/06-358 (28 August 2006); ICC-01/04-01/06-381-Conf (4 September 2006); ICC-01/04-01/06-392-Conf (4 September 2006); ICC-01/04-01/06-395-Conf (7 September 2006); ICC-01/04-01/06-411-Conf (11 September 2006); ICC-01/04-01/06-431-Conf (12 September 2006); ICC-01/04-01/06-434-Conf (13 September 2006).

<sup>4</sup> Hearings were held on 23 August 2006, 1 September 2006, 8 September 2006 and 12 September 2006

<sup>5</sup> See in particular the “The Submission of the Registrar on Assessments of the feasibility and availability of protective measures in terms of the order of Pre-Trial Chamber I on 5 September 2006”, ICC-01/04-01/06-411-Conf-Exp, 11 September 2006. The VWU explained its recommendations, and the Prosecution provided its response, in a hearing on 23 August 2006 (ICC-01/04-01/06-T-12-Conf-Exp).

<sup>6</sup> First Decision on the Prosecution Requests for Redactions under Rule 81, ICC-01/04-01/06-437; Decision Inviting the Prosecution to Revise Proposed Redactions under Rule 81, ICC-01/04-01/06-438

4. In response to the second of the decisions of 15 September, inviting certain changes, the Prosecution again filed a series of amended applications.<sup>7</sup>
5. In addition, on 25 August 2006 the Single Judge had issued a decision relating to certain documents that the Prosecution had already disclosed to the Defence with redactions, ordering the Prosecution to seek authorization from the Single Judge.<sup>8</sup> The Prosecution lodged a further series of applications regarding these further documents.<sup>9</sup>
6. On 20 September 2006, the Single Judge issued the “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” (the “impugned Decision”)<sup>10</sup>
7. On 27 September 2006, Counsel for Thomas Lubanga Dyilo filed a “Request for Leave to Appeal the Second Decision on the Prosecutions Requests and Amended Requests for redactions Under Rule 81”.<sup>11</sup>
8. On 3 October 2006, the Prosecution filed the “Prosecution’s Response to Thomas Lubanga Dyilo’s 27 September 2006 Request for Leave to Appeal the Second Decision on Prosecution Requests for Redaction”.<sup>12</sup>
9. On 4 October 2006, the Single Judge granted leave to appeal in respect of three issues.<sup>13</sup>
10. On 16 October 2006, the Appellant filed a “Defence Appeal Brief in Relation to Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”.<sup>14</sup> The Prosecution hereby files its response to the Appeal Brief.
11. The Prosecution notes that the Appellant has purported to incorporate by reference the entirety of its submissions in the Request for Leave to Appeal, and the previous Appeal Brief in Relation to Second Decision on the Prosecution Requests and Amended Requests

<sup>7</sup> ICC-01/04-01/06-441-Conf (18 September 2006); ICC-01/04-01/06-446-Conf (19 September 2006); ICC-01/04-01/06-451-Conf (20 September 2006).

<sup>8</sup> Decision on the Prosecution Practice to provide to the Defence redacted versions of evidence and materials without prior authorization by the Chamber, ICC-01/04-01/06-355, 25 August 2006 (“Decision on Unauthorised Redactions”).

<sup>9</sup> ICC-01/04-01/06-357-Conf-Exp (28 August 2006); ICC-01/04-01/06-365-Conf-Exp (30 August 2006); and after a hearing on 1 September 2006, ICC-01/04-01/06-384-Conf-Exp (4 September 2006); ICC-01/04-01/06-409-Conf-Exp (11 September 2006). Some of these applications covered documents in the same category but not previously disclosed to the Appellant.

<sup>10</sup> ICC-01/04-01/06-455 (“the Decision” or the “impugned Decision”). The Decision was notified on 21 September 2006.

<sup>11</sup> ICC-01/04-01/06-483 (“Request for Leave to Appeal”).

<sup>12</sup> ICC-01/04-01/06-497 (“Prosecution Response to Request for Leave”).

<sup>13</sup> Decision on Third Defence Motion for Leave to Appeal, ICC-01/04-01/06-514 (“Decision Granting Leave”).

<sup>14</sup> ICC-01/04-01/06-577 (“Appeal Brief”).

for Redactions under Rule 81.<sup>15</sup> The Prosecution objects to this approach,<sup>16</sup> however to the extent that the Appeals Chamber considers those prior submissions, the Prosecution incorporates its relevant submissions in response.<sup>17</sup>

## Background

12. The Prosecution submits that, like the prior appeal involving Rule 81(4), this appeal should be viewed in light of the broader disclosure situation for the purpose of the confirmation hearing.<sup>18</sup> The Prosecution has disclosed 553 items to the Appellant, including 358 incriminating items, 110 documents of a potentially exculpatory nature, and has provided inspection of a further 94 documents.<sup>19</sup> Of the 535 documents, the Single Judge has authorized redactions to 75,<sup>20</sup> less than 15% of the total number disclosed. The redactions authorized in the Decision do not affect any potentially exculpatory information.<sup>21</sup> In addition the Prosecution has disclosed an additional excerpts from 62 witness statements or summaries which are of potentially exculpatory nature.

13. One third of the statements addressed in the Decision were taken in the broader context of the investigation of the situation, not related to the crimes presently charged; the witness also made limited observations relevant to the charges in the present case. In the case of the other documents for which redactions are authorized, the Prosecution notes that in many cases the redacted information concerns only a facsimile header, a telephone number,<sup>22</sup> or the name of a person who passed a publicly available newspaper to the Prosecution.<sup>23</sup>

<sup>15</sup> Appeal Brief, para. 3.

<sup>16</sup> Many of the submissions are irrelevant to the issues in this appeal, and the Appellant has not identified which submissions relate to which ground of appeal, arguably violating to Regulation 64(2) (the document in support of the appeal "shall contain the legal and/or factual reasons in support of each ground of appeal", emphasis added).

<sup>17</sup> Prosecution Response to Request for Leave; Prosecution Response to "Defence Appeal Brief in Relation to Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", ICC-01/04-01/06-597-Conf, 20 October 2006 ("Prosecution's Previous Response to Appeal Brief").

<sup>18</sup> See e.g. Prosecution's Previous Response to Appeal Brief, paras. 13-14.

<sup>19</sup> In addition to 535 documents, the Prosecution has also disclosed 18 videos to the Appellant. Nine of the documents were disclosed under multiple categories. The disclosure totals 7,386 pages plus 18 videos. Some of these incriminating items also contain potentially exculpatory information, as the Appellant has been repeatedly made aware.

<sup>20</sup> In addition to these 75 documents which have been redacted by the Prosecution, a very small number of documents have also been redacted directly by the provider. Of the documents containing redactions, 48 were disclosed as incriminating, 13 were disclosed as potentially exculpatory, and the remaining 14 were subject to inspection under Rule 77. The Prosecution stresses, however, that the redactions themselves do not affect information of a potentially exculpatory nature.

<sup>21</sup> Decision, p. 10.

<sup>22</sup> ICC-01/04-01/06-T-11-EN, Transcript of 14 July 2006, p. 43.

<sup>23</sup> Decision, p. 13, para. (ii).

14. The Single Judge has made it clear that the Prosecution may not rely on any detail which is redacted.<sup>24</sup> Therefore any redacted information may not be relied upon by the Prosecution at the confirmation hearing. The Single Judge has also made it clear that the redactions do not cover potentially exculpatory material.<sup>25</sup>
15. The Prosecution submits, based on this background and the arguments advanced below, that the disclosure to the Appellant at this stage has been adequate. The Appellant has the material and information which he needs, and to which he is entitled, for the confirmation hearing.<sup>26</sup>

**The first ground – 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.**

*The parameters of the issue under appeal*

16. The first issue certified for appeal was limited to the factual reasoning in relation to “the part of the Decision based on rule 81(2)”, and was certified in light of the decision of the Single Judge “not [to] enter into the specific details of the further investigations covered by the Decision”.<sup>27</sup> The Prosecution therefore submits that the reasoning in respect of redactions made under other authorities, such as Rule 81(4), cannot be considered by the Appeals Chamber as part of this appeal.<sup>28</sup>
17. The first step in addressing Appellant’s arguments under the first ground of appeal is therefore to separate the redactions authorized under Rule 81(2) from Rule 81(4). The Single Judge first sets out the categories of information which she has determined warrant

<sup>24</sup> Decision concerning the Prosecution Proposed Summary Evidence, ICC-01/04-01/06-517, 4 October 2006 (“Decision on Summary Evidence”) p. 4. See further Prosecution’s Previous Response to Appeal Brief, para. 14. The Prosecution notes that its obligation under Article 61(3)(b) is to inform the defence of the evidence “on which [it] intends to rely at the [confirmation] hearing”.

<sup>25</sup> Decision, p. 10; see further Decision on Summary Evidence, p. 6-7.

<sup>26</sup> The Prosecution takes great care in the preparation of its filings. In this instance, the issues are extremely fact-intensive and time for responding to the Appellant’s submission was short. In the event that the Prosecution has overlooked any matter, or the Chamber has further questions, the Prosecution is of course ready to answer any inquiry.

<sup>27</sup> Decision Granting Leave, p. 9. The Appellant was also denied leave to appeal against a separate issue relating to the manner in which the Single Judge made her decision relating to the protection of witnesses. Decision Granting Leave, p. 8. As the Appeals Chamber has previously held, “the Pre-Trial or Trial Chamber is vested with the power to state, or more accurately still, to certify the existence of an appealable issue” – Judgment on Prosecutor’s Application for Extraordinary Review, ICC-01/04-01/06-168, 13 July 2006, para. 20. This was described as “the definitive element for the genesis of a right to appeal.”

<sup>28</sup> The Prosecution also submits that some arguments raised by the Appellant relate to matters outside the scope of the issue certified for appeal. In particular, the Prosecution submits that the submissions of the Appellant relating to the alleged failure of the Single Judge to particularize the protective measures (para. 10-13), especially with respect to witnesses (para. 10), and the alleged failure to establish the criteria in relation to Article 54(3)(e) (para. 13). The Prosecution does not concede that the submissions of the Appellant in relation to these issues are correct, and expressly reserves its position in relation to these issues.

redaction (p. 9). The Single Judge then makes determinations for the witness statements (pp. 11 to 12) and categories of documents (pp. 12 to 15) in which she authorized redactions, setting forward findings with respect to each category.

18. It is incontrovertible, as the Appellant points out,<sup>29</sup> that the impugned decision does not specify whether the Single Judge was applying Rule 81(2) or 81(4). Certainly to avoid any possible ambiguity, it would have been preferable to state clearly which rule was the basis for each category of redactions. The Prosecution nonetheless believes that it is too simplistic to assert that this failure to specify Rule 81(2) or 81(4), in those terms, warrants appellate intervention. By reading the Single Judge's findings, and viewing the proposals for redaction, it can be discerned whether Rule 81(2) or 81(4) served as the basis for the categories of approved redactions. In the following paragraphs, the Prosecution undertakes this exercise for the purposes of: (1) establishing that some of the findings are beyond the scope of the appealable issue; and (2) demonstrating that the rulings that are properly addressed in this appeal were supported by adequate factual findings.
19. The Single Judge sets forth the categories of information which she intends to redact at p. 9. In principle, only the first of the categories listed (category (i)), relates to Rule 81(2). This can be discerned because category (i) relates to redaction made so as "not to prejudice to further investigations", including through the non-disclosure of sources under certain circumstances. Likewise, categories (ii), (iii), and (iv) explicitly relate to the protection of victims and witnesses, and therefore relate to Rule 81(4). Accordingly categories (ii), (iii) and (iv) are not within the scope of this appeal.
20. Correspondingly, in the portion of the Decision (pp. 11-15) in which the Single Judge made her rulings and findings with respect to witness statements and documents, it is not difficult to identify which legal bases the Single Judge applied.
21. The documents addressed on pp. 11-12 are witness statements and documents associated with one of these statements. As a review of the Prosecution's submissions to the Single Judge shows, the Prosecution identified within these statements and associated documents, through electronic markings, whether it was seeking redaction under Rule 81(2) or 81(4). The nature of the information redacted and the fact that the Single Judge did not request the Prosecution to elaborate on the legal bases basis put forward by the Prosecution allows the conclusion that the redactions were granted on the bases they were sought.

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<sup>29</sup> See, in particular, Appeal Brief, paras. 11 and 18.

22. The documents addressed on pp. 12-15 are documentary evidence collected from third parties. With respect to the categories addressed on pp. 12-15, it is by reading the Single Judge's findings in each category, in conjunction with p. 9, that one may discern whether the basis for redaction was Rule 81(2) or 81(4). This exercise is undertaken below.

*Whether the factual reasoning of the Decision was adequate in respect of the redactions under Rule 81(2) to witness statements and associated documents (Decision, pp. 11-12)*

23. When one views the proposals made by the Prosecution, together with the Decision, it becomes apparent that most of these witness statements and associated documents contain redactions under both Rules 81(2) and 81(4).<sup>30</sup> Those redactions authorized under Rule 81(4) are not properly before the Appeals Chamber.

24. The findings supporting the redactions under Rule 81(2) were not deficient. The relevant rule requires that the Chamber find that disclosure of the material at issue "may prejudice further or ongoing investigations." Here, the Single Judge noted that she had "carefully examined the redactions proposed by the Prosecution",<sup>31</sup> and found that the investigations in question did not relate to the present case against the accused, nor did the redactions sought in any way impact on potentially exculpatory information.<sup>32</sup> The Single Judge also expressly concluded that the redactions authorized were necessary "so as (i) not to prejudice further investigations".<sup>33</sup>

25. In further investigations, particularly when the focus and content of those investigations remains confidential from anyone outside the Prosecution office,<sup>34</sup> it is not an abuse of the Pre-Trial Chamber's discretion to find it may prejudice those further investigations to disclosure to the defence of elements of the Prosecution's investigations *other than* the one which relates to the charges proposed for confirmation. The Pre-Trial Chamber need not necessarily find that the defence creates some "special" risk at this stage in proceedings.

26. This could be contrasted with restrictions under Rule 81(4) to protect the identity of witnesses who are to be relied upon the confirmation hearing in the present case against

<sup>30</sup> The document at para. (iii) also contains a small number of redactions relating to Rule 81(1); the two statements at paras. (v) and (vi) contain only redactions under Rule 81(2); the statement at para. (ix) contains only redaction relating to the identity of the witness under Rule 81(4). Most of the redactions under Rule 81(2) for four of the witnesses statements were initially authorized in the 2 August Redaction Decision.

<sup>31</sup> Decision, p. 7.

<sup>32</sup> Decision, pp. 7-8, 10.

<sup>33</sup> Decision, p. 9.

<sup>34</sup> And in appropriate circumstances possibly the Pre-Trial Chamber sitting in the situation.

Thomas Lubanga, which was the subject of the previous appeal.<sup>35</sup> In such circumstances, the Prosecution submits that there is greater force to the contention that the Pre-Trial Chamber should articulate some reasoning as to the risk foreseen particularly from disclosure to the defence.<sup>36</sup> However the Appellant's attempt to draw an analogy between such redactions of witness identities under Rule 81(4), which are closely linked with the present case, and redactions to protect other, further investigations<sup>37</sup> is flawed.

27. One rationale in relation to further investigations under Rule 81(2) is that disclosure to the defence creates at least the same potential for prejudice to the other, confidential investigations as disclosure to members of the public. Balanced against this potential prejudice, there is no compelling reason that the Appellant should have access to any information on investigations outside the present case – including the names and identities of sources in investigations of other armed groups and people other than himself,<sup>38</sup> or for other potential crimes which the accused may have committed – absent some reason to believe that the information was exonerating *vis-à-vis* the charges proposed for confirmation. Here the Single Judge safeguarded Lubanga's rights by examining the documents carefully, determining that the investigations in question did not relate to the present case against Lubanga, and that “none of the redactions authorized in the present decision seem to affect any potentially exculpatory information.”<sup>39</sup>
28. The Prosecution submits that this approach is entirely consistent with human rights jurisprudence. The ECHR has found that disclosure, even at trial, “is not an absolute right. In any criminal proceedings, there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed”.<sup>40</sup> National legal systems also widely recognize the importance of being able to protect ongoing investigations.<sup>41</sup> This is all the

<sup>35</sup> Defence Appeal Brief in Relation to First Decision on the Prosecution Requests Requests for Redactions under Rule 81, ICC-01/04-01/06-546, 10 October 2006; Prosecution's Previous Response to Appeal Brief.

<sup>36</sup> It was on this basis, and this basis only, that the Prosecution does not object to a remand in that appeal.

<sup>37</sup> Appeal Brief, para. 12. See also para. 27.

<sup>38</sup> Protecting investigation of other suspects is a common scenario in which Rule 66(C) has been used in the ICTR – see e.g. *Prosecutor v Nahimana*, ICTR-99-52-T, Decision on the Prosecutor's Application for Continued Temporary Redaction of One Portion of the Transcripts of Witness X Pursuant to Rule 66(C), 6 February 2002.

<sup>39</sup> Decision, p. 10.

<sup>40</sup> *Rowe & Davis v UK*, ECHR, Judgment, 16 February 2000, para. 61. See further Motion for Reconsideration and, in the alternative, Leave to Appeal, ICC-01/04-01/06-125, 24 May 2006, paras. 40-41 and authorities cited.

<sup>41</sup> Ibid, para. 40, and authorities cited in footnote 24.

more important in the ICC where, as recognized by the Appellant, it is important to encourage and facilitate the voluntary cooperation of a range of entities.<sup>42</sup>

29. On this basis, the Decision of the Single Judge in relation to redactions under Rule 81(2) was entirely reasonable at this stage.

*Whether the factual reasoning of the Decision was adequate in respect of redactions under Rule 81(2) to collected documents (Decision, pp. 12-15)*

30. The next set of redactions authorized by the Single Judge were to collected documents, set forth in pp. 12-15 of the Decision. The Prosecution submits, at the outset, that some of these documents were not in any way addressed by the Single Judge under Rule 81(2), and therefore fall outside the issue under appeal, specifically:

- The descriptions of the redactions authorized in the documents listed in paragraphs (iv) and (v) (pp. 13-14), make clear that the redactions relate to the identities of witnesses or victims, and therefore fall solely under Rule 81(4). The three documents listed at the bottom of p. 15, which are stated to authorize redactions of identifying information of “witnesses,” also clearly were redacted under Rule 81(4).
- The redactions to the two documents listed in paragraph (viii) (p. 15) were made under Rule 81(1) as they relate solely to internal work product (handwritten notes by a member of the Prosecution for purely organizational purposes).<sup>43</sup>

31. Either some or all of the documents listed in paragraphs (i), (ii) and (iii) (pp. 12-13) and in paragraphs (vi) and (vii) (pp. 14-15) come within the issue under appeal. The findings of the Single Judge for categories (i), (ii), and (iii) (pp. 12-13) do not make apparent whether Rule 81(2) or 81(4) was applied, as there is no reference to either further investigations or to the protection of witnesses or victims. Still, because those categories describe the redaction of “sources”,<sup>44</sup> and on page 9 the Single Judge had stated that the redaction of sources would be authorized “so as not to prejudice further investigations”, it is reasonable to conclude that the Decision based the redactions listed on pages 12 to 13 on Rule 81(2). In respect of categories (vi) and (vii) (pp. 14-15), the findings describe some redactions relating to “sources”, which again appear to have been based on Rule 81(2), *and* some

<sup>42</sup> Appeal Brief, para. 40.

<sup>43</sup> While the Prosecution does not concede in principle that authorization is formally required for such redactions, it sought authorization under the terms of Decision on Unauthorised Redactions. The Prosecution submits therefore that the factual reasoning in respect of these documents is also not part of the appeal. In any event, the Prosecution submits that the factual finding of the Single Judge was adequate in this respect, as the only factual finding required for withholding disclosure under Rule 81(1) is that the information is internal work product.

<sup>44</sup> Or, in the case of category (iii), persons irrelevant to the content of the document and who are not believed to have transmitted the document to the Prosecution, , which correlates with para. (i)(c) on p. 9.

redactions relating to “victims” or “witnesses” living in risk areas, which logically must have been based on Rule 81(4).

32. The Prosecution submits that the Single Judge set out sufficient factual reasoning to support the orders for non-disclosure made under Rule 81(2)<sup>45</sup> in respect of these documents. In relation to those documents referred to in paragraphs (i), (ii), and insofar as paragraphs (vi) and (vii) also describe redactions relating to “source” information,<sup>46</sup> the redactions cover the identity of a source who transmitted the information to the Prosecution. In this regard, the relevant factual findings have been reached.<sup>47</sup> As is discussed above, the protection of the identity of sources in an ongoing or further investigation is a well recognized and vital element of avoiding prejudice to ongoing and further investigations. In addition to the human rights jurisprudence cited above, the EHCR has consistently accepted that sources in an ongoing investigation may remain anonymous prior to the trial.<sup>48</sup> In the instant case, the protection of these sources was particularly important because, as the Single Judge found, they also relate to further investigation beyond the current case against Thomas Lubanga Dyilo.
33. Again in each instance, with respect to each redaction, the Single Judge also knew the content and nature of the information which was proposed for redaction, and thus could assess any potential prejudicial impact. In many cases, the content of the proposed redaction consisted of nothing more than the telephone or fax number of the source who had provided the document to the Prosecution.<sup>49</sup> Given the completely peripheral nature of these details to the content of the document, and for the purpose of the upcoming

<sup>45</sup> The Prosecution applied for the redactions in question under Rule 81(4), in conjunction with Article 54(3)(f) – see Prosecution Request for Authorisation of Redactions in Documents Previously Disclosed to the Defence, ICC-01/04-01/06-365-Conf-Exp-AnxA, 30 August 2006, para. 17-22. However the Prosecution submits that Rule 81(2) provides an equally valid legal authority for the Single Judge to authorize these redactions.

<sup>46</sup> Decision, pp. 12-15.

<sup>47</sup> See discussion at paras. 24-29, above. Indeed, as to the sources identified in paras. (i), (ii), (vi), and (vii), the Single Judge made more findings than were necessary to support redaction under Rule 81(2). For example, she found additional justification for these “further investigation” redactions based on, for example, the fact that the source is currently living in a risk area (Decision, p. 13, para (i) and (ii); p. 14, para (vi)(b); p. 15, para (vii)(a) & (b)) or that the relevant documents are newspaper articles within the public domain and that the redactions do not affect the content (Decision, p. 13, para (ii) documents ICC-01/04-01/06-409-Conf-Exp-Anx21 and Anx 22. The Prosecution submits that there is no reasonable basis on which the Appellant can claim to have been prejudiced by not knowing who sent the Prosecution a copy of a publicly available newspaper).

<sup>48</sup> The ECHR has regularly contrasted “reliance, at the investigation stage, on sources such as anonymous informants [whereas] the subsequent use of their statements by the trial court to found a conviction is another matter” (emphasis added) – *Kostovski v Netherlands*, ECtHR, Judgment [1989] ECHR 20, 20 November 1989, para. 444; *Windisch v Austria*, ECtHR, Judgment, 27 September 1990, para. 30; *Vanyan v Russia*, ECtHR, Judgment, 15 March 2006, para. 46. See also Emmerson & Ashworth, *Human Rights and Criminal Justice* (2001), p. 394. See also para.28, and footnote 40, above..

<sup>49</sup> ICC-01/04-01/06-T-11-EN, Transcript of 14 July 2006, p. 43. REDACTED

confirmation hearing, the Prosecution submits that Single Judge was entirely reasonable in authorizing the redactions in question under Rule 81(2).

34. The final set of documents within the scope of the appeal is in paragraph (iii) (p. 13). In this category, the redactions covers identifying information (names and telephone numbers) of persons who are *not* Prosecution sources, but who are referenced in collected documents. These are references to individuals who have no connection with the document: neither its content, nor the means by which the Prosecution came into possession of the document. Indeed, with respect to these details, the concern is that if the identities or contact details were disclosed, they might even wrongly be mistaken for Prosecution sources. In respect of these documents, again it appears that the Single Judge applied Rule 81(2), because non-sources are listed on page 9 as one of the categories redacted “so as not to prejudice further investigations.” This determination was not incorrect. To disclose the names and telephone numbers of individuals whom the Prosecution does not know, simply because that information appears on documents collected by the Prosecution, could prejudice ongoing investigations. Again, the point is not necessarily that Lubanga poses a special threat, but that the public – and potential sources – can logically be expected to be less cooperative in ongoing investigations when the institution conducting those investigations discloses such information, even in the absence of any relevance of that information to a current proceeding. In any event, the redaction of these details can also be justified under Rule 81(4),<sup>50</sup> because as the Single Judge found additionally, it is not possible to tell whether these identified individuals might be living in areas of risk, and therefore it is responsible to redact the information for the purpose of protecting the individuals.<sup>51</sup>

<sup>50</sup>Rule 81(4) cites Article 54 as one of the explicit bases on which redactions may be authorized. On the ability of the Single Judge to authorize redactions in order to protect the identity of persons other than victims and witnesses under Rule 81(4) and Article 54(3)(f), see further paras. 51-52, below. This combination of Article 54(3)(f) and Rule 81(4) was the basis on which the Prosecution sought authorization for the redactions (pursuant to the Decision on Unauthorised Redactions) – see footnote 48, above.

If the original Chamber applied the incorrect legal test or standard, then the Prosecution submits that the Appeals Chamber in reviewing the decision may legitimately apply the correct legal standard to the factual conclusions or findings of the original Chamber. If these factual conclusions are sufficient to sustain the decision under the correct legal test, then the Prosecution submits that the Appeals Chamber may uphold the decision: *Prosecutor v Stakić*, IT-97-24-A, Judgment, 22 March 2006, para. 63; see further *Prosecutor v Kordić & Cerkez*, IT-95-14/2-A, Separate Opinion of Judge Weinberg de Roca, 17 December 2004, paras. 7-8 and authorities cited therein.

<sup>51</sup> Especially when contrasted with the complete lack of any connection with the case against the accused. In such cases, the Prosecution submits that it is the duty of the Court not to inadvertently and unnecessarily risk exposing these individuals to any potential increased danger. The Prosecution submits that it had the authority to redact this information under Article 54(3)(f), in order “to ensure ... the protection of any person”; the Single

35. The Prosecution submits that the Single Judge has made sufficient factual findings in the Decision in support of all redactions which were indeed authorized under Rule 81(2). When the matter is reviewed in the manner the Single Judge conscientiously employed – considering each of the hundreds of documents together with the arguments and rationales advanced – it is clear that the Single Judge properly applied Rule 81(2) and adequately supported her decision making under that Rule. The level of factual detail which the Appellant seeks to compel, beyond the exercise undertaken by the Single Judge, would be both inappropriate and burdensome. Quite rationally, Judge Steiner chose to render decisions which cover a series of documents to which similar factual and legal considerations apply. This is not a “blanket approach to protective measures.”<sup>52</sup> The Pre-Trial Chamber may take suitable measures in the interests of judicial economy, and is not constrained to the inefficiency and burden of rendering decisions detailing the specific and individual characteristics of each document – or each redaction – when legal rationales and factual findings are in common.
36. The Appellant errs when he implies that there could be no harm in compelling the disclosure of the content or focus of ongoing investigations, even when that information is not related to any need for exonerating evidence or the charges at issue.<sup>53</sup> The Appellant’s reasons for requesting this information may be understandable, but the overall suggestion that a single, first, confirmation hearing may become the occasion for the rote disclosure of information about other investigations in the same situation, and the identities of sources in that investigation, has troubling implications. The confirmation hearing in the Rome Statute system affords unprecedented defence rights, and consistent with those rights, the Appellant here has received far more disclosure in advance of confirmation than in any other international criminal tribunal. The Rome Statute, however, also carefully safeguards the protection of ongoing investigations, as a “restriction” upon otherwise-required disclosure, because it recognizes, as do criminal justice systems universally, that maintaining cooperation is an essential need of criminal investigations. All interests were properly weighed here, using the procedures set forth in the Statute and the Rules, and the findings sufficiently articulated that the impugned Decision should be affirmed.

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Judge had the discretion to authorize that redaction under Rule 81(4); and the Single Judge further made the necessary factual findings to support the exercise of that discretion in the circumstances of this case.

<sup>52</sup> In particular, the insinuation of the Appellant that “the decision is arbitrary” is completely without foundation: Appeal Brief, para. 10.

<sup>53</sup> Appeal Brief, paras. 5-9.

**The second ground – whether the requirement of adequate prior disclosure in Rules 81(2) and (4) can be met in the context of the confirmation hearing by disclosing unredacted components of a redacted document, and whether the Prosecution can rely at the confirmation hearing on the unredacted parts of evidence that has been disclosed to the Defence in a redacted form.**

37. The second issue under appeal is whether the obligation to provide “adequate prior disclosure” under Rule 81(2)<sup>54</sup> can ever be satisfied, for the purposes of the confirmation hearing, by the disclosure of documents or statements containing some redactions. The Appellant challenges whether allowing a redaction to a document on which the Prosecution intends to rely at the confirmation hearing was an option available to the Single Judge, and whether such disclosure with any redactions can ever constitute “adequate prior disclosure”.
38. The Prosecution respectfully submits that the Appellant’s arguments are incorrect under the text of Rule 81(2) and also considered properly in the context of a confirmation hearing.
39. Most fundamentally, the Appellant continues to rely on a mistaken view that the disclosure which is “adequate” for the purposes of a confirmation hearing is equivalent to disclosure which is “adequate” for trial. The Appellant again seeks to rely of jurisprudence of the ICTY<sup>55</sup> under Rule 66(C)<sup>56</sup> in relation to disclosure in preparation for trial. That the other tribunals allow redaction of information which may prejudice further or ongoing investigations is beyond dispute. The Prosecution submits that these cases have limited relevance to confirmation proceedings, particularly when the other international criminal tribunals have no proceedings analogous to the confirmation hearings at the ICC.<sup>57</sup>

<sup>54</sup> Although the Single Judge authorized the Appellant to pursue this issue as it relates to Rule 81(2) and 81(4), the Appellant has chosen to argue in relation to Rule 81(2) only.

<sup>55</sup> And, to a lesser extent in this Appeal Brief, the ICTR: Appeal Brief, paras. 29-34.

<sup>56</sup> The Prosecution acknowledges that Rule 81(2) was based on elements of ICTR and ICTY Rule 66(C), however Rule 66(C) covers a range of issues, including non-disclosure to avoid “prejudice [to] further or ongoing investigations” and also where disclosure would “affect the security interests of any State.” The Prosecution submits that this latter rationale is the one based on the need to “facilitate acquisition of information from Governments and other sensitive sources” (Appeal Brief, para. 30), and that this rationale is served in the ICC system by Articles 54(3)(e) and 72 (and therefore also Rule 81(4)), not by Rule 81(2) which serves a broader purpose of protecting investigative efforts of the Prosecutor. Further, the Prosecution notes that in the ICC system, Rule 81(2) acts as an express exception to obligations to disclose (contrast Appeal Brief, para. 32)

<sup>57</sup> The Prosecution further notes that this jurisprudence also refers to the redactions being “authorised as long as such disclosure is prejudicial to its investigations”, and supports the disclosure of “unredacted parts” of the material - *Prosecutor v Nyiramasuhuko et al*, ICTR-98-42-T, Decision on the Prosecutor *ex parte* Motion pursuant to Rule 66(C) to be Relieved of Obligation to Disclose Certain Documents, 31 May 2002.

40. The Statute clearly establishes, contrary to the argument of the Appellant, that “adequate” disclosure does not require the Appellant to receive before the confirmation hearing the same disclosures that he would receive before trial. The Statute establishes different burdens of proof at the different stages, and recognizes that the lower burden of proof at confirmation permits reliance on information at the confirmation stage which would *not* ordinarily be permitted at trial. Article 61(5), for example, explicitly permits the Prosecution to rely on summary evidence,<sup>58</sup> or on statements without calling the witness to testify and be cross-examined. The same provision permits the Prosecution to rely upon written statements without calling the witness to testify and be cross-examined. Further, this Chamber has ruled that in limited circumstances, and when the protection of witnesses and victims so demands, the Pre-Trial Chamber may consider statements at the confirmation hearing although the identity of the witness has not been disclosed to the defence.<sup>59</sup>
41. These provisions and rulings demonstrate that the Appellant is misguided in equating adequate disclosure at the trial stage with adequate disclosure at the confirmation stage. It is a fundamental precept of the Rome system that the confirmation hearing does not entail a full-blown adversarial hearing.<sup>60</sup> At the confirmation stage, the reliance on summaries or written statements, or the non-disclosure of the identities of non-core witnesses, may deprive the Appellant of the ability to challenge the Prosecution’s evidence in precisely the same way, or to the same extent, that he might at trial. In exactly the same way, redactions of the documents at issue in this appeal might impair the Appellants ability to impugn the chain of custody, as the Appellant posits, or to fully appreciate ways in which a witness might be impugned. In none of these cases, however, does the inability of the defence to pursue *every* possible means of challenging the Prosecution’s evidence demonstrate, *per se*, an infirmity in the pre-confirmation disclosure. Rather, the question is whether the Pre-Trial Chamber abused its discretion in ordering the non-disclosure at

<sup>58</sup> The Prosecution notes that the use of summary evidence under a separate provision of the Statute, Article 68(5), is currently before the Appeals Chamber. While the Prosecution submits that the two statutory bases for the use of summary evidence are distinct, the Prosecution refers to its submissions in its Prosecution’s Previous Response to Appeal Brief, paras. 41-47.

<sup>59</sup> Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence”, ICC-01/04-01/06-568, 13 October 2006 (“13 October Appeal Judgment”), paras. 34-39

<sup>60</sup> See further, Prosecution’s Document in Support of Appeal”, ICC-01/04-01/06-183, 5 July 2006, paras. 8-10; The Prosecution acknowledges that the specific modalities of the confirmation hearing in this case were discussed at a hearing on 26 October 2006, and will soon be the subject of an order from the Pre-Trial Chamber.

the confirmation stage, after considering and balancing the interests which the Statute and Rules require the Chamber to balance.<sup>61</sup>

42. Rule 81(2), importantly, also does not require the pre-confirmation disclosure of every statement or document upon which the Prosecution intends to rely, in its entirety, as the Appellant argues. The text of the rule, which is set forth below,<sup>62</sup> by its terms exempts from disclosure any “material” or “information” which otherwise be subject to disclosure, if disclosure may prejudice ongoing investigations. “Material” or “information,” in the plain meanings of the words, can be contained in portions of documents or statements. The rule does not dictate, as the Appellant would argue, that the redactions and/or disclosure must be determined inflexibly by the unit of the entirety of a “statement” or “document,” such that the statement or document must either be disclosed in its entirety or not considered at confirmation at all. This is despite the fact that the drafters of the Rules specified “statements” and “documents” clearly in other provisions, including rules relating to pre-trial disclosure and the confirmation process.<sup>63</sup>
43. Nor would there be any logic in imposing a limitation – a Pre-Trial Chamber’s inability to rely upon a statement or document unless submitted in its entirety - that neither the Statute nor the Rules require. The Appellant concedes that the Statute and Rules establish a system which requires a constant balancing of sometimes countervailing interests – such as protection of victims, witnesses, the entitlements of the Defence, and the important interest in safeguarding ongoing investigations. It would be extremely arbitrary – and even impairing of the Pre-Trial Chamber’s ability to seek truth – to restrict the ability of the Pre-Trial Chamber to determine that portions of statements and documents, as well as the statement and documents in their entirety, are deserving either of redaction or consideration at confirmation.
44. In summary, the Appellant correctly identifies that the redactions at issue have to some degree limited the information that he would otherwise have available to use in his defence at the confirmation stage. By its terms, the very purpose of Rule 81(2) is to

<sup>61</sup> The Prosecution incorporates by reference its arguments from the Prosecution’s Previous Response to Appeal Brief, paras. 24 and 38 and the authorities cited therein (in particular footnotes 53, 54 and 79).

<sup>62</sup> “Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber . . . for a ruling as to whether the material or information must be disclosed to the defence . . . However the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.”

<sup>63</sup> From this argument it should be clear that the Appellant’s fear that Rule 81(2) will “permanently trump” disclosure is unfounded. Appeal Brief, para. 26. The Prosecution is not contending that the degree of disclosure which is adequate before confirmation will be adequate before trial.

exempt from disclosure material or information that otherwise would be subject to disclosure. The relevant question, however, is whether this limitation was authorized. Here, there was no error justifying appellate intervention. The Single Judge was careful to exclude exonerating information from her rulings; she considered “that none of the redactions authorised in the present decision seem to affect any potentially exculpatory information.”<sup>64</sup> For the reasons stated above, she correctly did not view Rule 82 to require that any level of disclosure “adequate” for trial must be the same degree of disclosure required at the confirmation stage. Finally, it was permissible, and entirely logical, for Judge Steiner to interpret “material” and “information” to include the possibility of considering portions of documents and statements.

**The third ground – 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.**

45. In the third ground of appeal, the Appellant raises two arguments: (1) that an improper “privilege” has been created by the Impugned Decision because people and entities were allowed to condition their cooperation with the OTP on the implementation of the protective measure of redaction of their identities; and (2) that sources and other people are never entitled to redaction of their identities under the Statute and Rules if they are not also either a victim or a witness.

46. The first argument about the creation of an extra-statutory “privilege” lacks merit because it is based on a mis-statement of fact. The Impugned Decision does not permit any source to “condition” cooperation upon non-disclosure of the source’s identity from the defence, nor is it premised upon such a “condition”.<sup>65</sup> To the contrary, the Single Judge took a measured approach to the documents in question considering the relevant factors for each. As part of this process, and in quite properly weighing the risk which might be created by the disclosure of identity against prejudice to the defence, the Single Judge considered amongst a range of factors both (1) whether the source “has expressly requested that its identity not be revealed at this stage in the proceedings” and (2) whether the person

<sup>64</sup> Decision, p. 10.

<sup>65</sup> As conditions on the provision of information and cooperation were not the basis for this Decision, the Prosecution takes no position on the proper role that any such conditions would, or could, play in relation to any determination of protective measures and expressly reserves its position.

supplying the document to such an organization or the contact person(s) of such organization in the DRC currently reside in a risk area,<sup>66</sup> an objective determination.

47. This approach belies any assertion that the Single Judge allowed sources to impose any condition on their cooperation – the Prosecution submits that it would be a grave error to confuse a request for non-disclosure of identity, which is considered as one factor, with the imposition or acceptance of absolute conditions which the Appellant seeks to mistakenly read into the Decision. The Single Judge entirely rationally considered as one factor a request by the source that its identity should not be revealed at this stage, because such a request is probative of whether the source itself perceives a risk arising from disclosure at the confirmation stage. Indeed, it is arguably the Single Judge's duty to consider a request for a protective measure made by a person or entity who has provided information during the investigation.<sup>67</sup> However the Single Judge never permitted a request for the protective measure to become a "condition" which automatically blocked disclosure of the source's identity to the defence – such requests were never the sole factor, they were never determinative in and of themselves. The Single Judge also carefully excluded exonerating information from the scope of what could permissibly be redacted,<sup>68</sup> rendering irrelevant the Appellant's assertion that somehow his rights under Art. 67(2) were impaired.

48. The Single Judge thus entirely correctly applied the Statute and the Rules by engaging in a discretionary review – on a document by document basis – while taking into account the interests of the source, the interests of the Appellant, and the nature and significance of the redactions. The mere fact that the Single Judge's exercise of discretion led her ultimately to conclude that the balance should be struck in favor of redaction does not demonstrate the creation of an improper privilege. In this case, the redactions were merely the result of the application of the statutorily-approved exercise of determining whether any protective

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<sup>66</sup> Decision, p. 9.

<sup>67</sup> It is for this reason and because of the OTP's own protection responsibilities, that the OTP often inquires into the views of witnesses and information providers about the risks that might arise from the disclosure of their identities. Contrary to the bare assertion of the Appellant, however, the fact of these inquiries demonstrates no impropriety on the part of the OTP. The OTP scrupulously informs witnesses and sources that it is the judges who will determine the scope of disclosure and whether any of the protective measures available under the Statute and Rules will be implemented in any given case.

<sup>68</sup> Decision, p. 10.

measure was necessary to ensure protection, while providing adequate disclosure to the defence.<sup>69</sup>

49. The Appellant's second argument also warrants no Appeals Chamber intervention. The contention that Rule 81(4) cannot encompass identities of sources who are neither victims nor witnesses should be rejected. These arguments appear to relate to the three specific set of persons specified in para (i) on page 9 of the Decision.<sup>70</sup>
50. The Prosecution submits at the outset that in relation to persons who are Prosecution sources, and who are assisting in further investigations, the Single Judge redacted their identity under Rule 81(2) after considering the relevant factors, as she was perfectly entitled to do under the Rules.<sup>71</sup> However the Prosecution submits that these persons could also have qualified for protection under Rule 81(4), had the Single Judge chosen to assess the applications under this Rule.<sup>72</sup>
51. The Appellant's argument about the scope of Rule 81(4) should be rejected on appeal because the Appellant simply mis-reads the Rule. Contrary to the Appellant's submission,<sup>73</sup> Rule 81(4) authorizes two categories of redactions:

“The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, take the necessary steps to ensure the confidentiality of information, under article 54, 72 and 93 *and*, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of trial.”

The key reference is the citation in the first half of Rule 81(4) to Article 54. Article 54(3)(f), in turn, permits the Prosecution to “request necessary measures be taken, to ensure the confidentiality of information, the protection *of any person* or the preservation of evidence.” Entities or individuals who are not victims or witnesses, but still are in need

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<sup>69</sup> The Appellant argues at length that the *Todorovic* case from the ICTY and Art. 54(3)(e) of the Rome Statute establish that no provider may condition cooperation on non-disclosure of identity. In addition to the repeated error of purporting to draw analogies from pre-trial disclosure jurisprudence to the confirmation hearing, these arguments are beside the point, since no such condition was accepted by the Single Judge in reaching her Decision. The Prosecution submits that the *Todorovic* case is inapplicable to the circumstances in the instant appeal. The argument based on Article 54(3)(e) is similarly misconceived as the Decision was not based on restrictions that the provider placed on disclosure of the document (para. 44-45), nor on the fear that sources might “dry up” (para. 47), but rather on the need to protect the identity of sources relevant to further investigations, and demonstrating both subjective and objective indicators of risk, at this early stage which investigations continue.

<sup>70</sup> These categories were the basis for the redactions of documents authorized under paras (i), (ii), (iii) (pp. 12-13), and some but not all of the redactions authorized under paras. (vi) and (vii) (pp. 14-15).

<sup>71</sup> See paras.32-35, above.

<sup>72</sup> Ibid.

<sup>73</sup> Appeal Brief, para. 50

of protection, thus are clearly within the ambit of the rule. It was indeed under Article 54(3)(f) and Rule 81(4) that the Prosecution sought the redactions at issue.<sup>74</sup>

52. The Appellant is thus mistaken insofar as he argues that Rule 81(4) does not permit the possibility of redacting information relating to non-victims and non-witnesses. The text of the rule fatally undermines the Appellant's argument because it permits the protection of information clearly unrelated to victims or witnesses: under Article 54, to ensure protection of any person; under Article 72, which relates to national secrets, and under Article 93, which relates to cooperation requests to States.

**The Appellant has suffered no unfair prejudice at this stage in proceedings**

53. In relation to each ground of appeal, the Appellant repeats arguments about the forms of prejudice which he believes that he may suffer. The question of prejudice must be holistically viewed in relation to the relevant stage of the proceedings and the nature and scope of the protected material. The Prosecution wishes to emphasise that the redacted material does not affect potentially exculpatory information. Furthermore, the measures ordered by the Single Judge are expressly provided for under the relevant Statute and Rules. So long as the Single Judge has exercised her discretionary power judiciously, there can be no justification for the intervention of the Appeals Chamber.
54. This argument on prejudice continues to be flawed both legally and factually. Legally, the argument is infirm because it wrongly assumes that the Appellant is entitled to a full-blown adversarial procedure at the confirmation hearing. The factual defect in the Appellant's argument is that the scenarios of possible prejudice about which he speculates are ones which the Single Judge considered and will continue to consider. The Single Judge had the full ability, by means of the unredacted documents, to weigh the likely significance – or lack of likely significance – of any given redaction to the defence at the confirmation stage. There is no reason to doubt that the Pre-Trial Chamber will continue to be vigilant in determining whether any redaction will affect the weight – or even the Chamber's ability to consider – redacted documents.<sup>75</sup> Finding a balance among

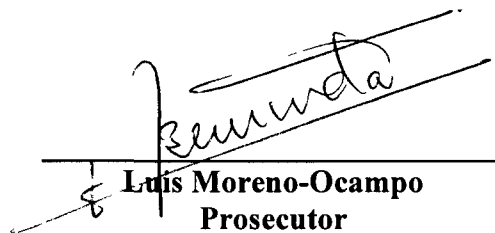
<sup>74</sup> See e.g. Prosecution Request for Authorisation of Redactions in Documents Previously Disclosed to the Defence, ICC-01/04-01/06-365-Conf-Exp-AnxA, 30 August 2006, para. 17-22; in relation to those documents for which authorization to redact was granted in paras. (i), (ii), (iii), (vi) and (vii), Decision pp. 12-15.

<sup>75</sup> The Appellant's argument in para. 59 that it is necessary for him to receive disclosure of NGO or IGO-related information sufficient to "be in a position to ascertain whether the Prosecution has complied with its disclosure obligations" has a similar character. The Single Judge obviously would have identified any potential violations of the Prosecution's disclosure obligations. The Appellant is entitled to the disclosure permitted by the Rules,

important objectives, including defence rights and the protection of interests of witnesses, victims, and sources may be delicate. The exercise is by Statute a discretionary one, and not one during which there was any reversible error here.

### **Conclusion**

55. For the above referred reasons, the Prosecution respectfully requests the Appeals Chamber to deny the Appeal.



**Luis Moreno-Ocampo**  
**Prosecutor**

Dated this 27<sup>th</sup> day of October 2006  
At The Hague, The Netherlands

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following application of Rule 81, entitled "Restrictions on Disclosure," not any extra measure of disclosure which permits him to adjudge the adequacy of the Prosecution's disclosure.